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Policing Sex: the Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa

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ARTICLE

POLICING SEX: THE COLONIAL, APARTHEID, AND NEW DEMOCRACY POLICING OF SEX WORK IN SOUTH AFRICA

*I. India Geronimo Thusi**

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INTRODUCTION

The history of the policing of sex work¹ in South Africa reveals the surprisingly contradictory manners that legal regulations, police

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1. Carol Leigh coined the term "sex worker" in 1978 to "create an atmosphere of tolerance within and outside of the women's movement for women working in the industry." See JILL MCCracken, *STREET SEX WORKERS' DISCOURSE: REALIZING MATERIAL CHANGE THROUGH AGENTIAL CHOICE* 100 (2013). Similarly, I have adopted this term throughout this Article to recognize the employment activities of these individuals as a form of labor, not an identity. However, there are times when the word prostitute is used to represent the historical

action, and public discourses have all “policed”² sex work to meet competing goals. Sex work has generally been subject to formal state policing in the form of legal regulations and laws, which mostly focus on the public nuisance aspects of it. However, there has also been a more informal policing of sex work through public discourses in the media, medical community, and amongst activists. These various forms of policing are at times contradictory, and may result in various approaches toward sex work, which are at odds with each other. It is thus important that these various forms of policing be considered to ensure that the official policies on sex work match the actual practices of how sex work is policed. The actual criminalization of sex work is not as significant as the everyday policing practices, which often belie *de jure* criminalization, and are instead informed by these larger informal discourses.

These discourses are significant and reveal much about power relations relating to the policing of sex work. Foucault argues that “the essential thing is . . . the existence in our era of a discourse in which sex, the revelation of truth, the overturning of global laws, the proclamations of a new day to come, and the promise of a certain felicity are linked together” when discussing the policing of sexuality during the Victorian era.³ In other words, the “repression” of sexuality during the Victorian era was a means for the bourgeois to produce and maintain power and not merely a means for increasing productivity.⁴ There was power being exerted in the very act of engaging in discourse.⁵ Likewise, throughout South African history, the discourse around sex work and corresponding discussions about male and female sexuality empowered vocal discussants and was an assertion of power.

For example, sex work has a long history of being framed within public health discourses, and sex workers have often been treated as

situatedness of the term, as appropriate. While sex work is generally used to refer to a wide range of activities, I use the term to refer only to activities generally described as prostitution, or the exchange of currency for participation in sexual acts. Furthermore, I am primarily referring to the “female” sex worker in this piece although I acknowledge that there is a sizeable community of male and transgender sex workers in South Africa.

2. I am employing a Foucauldian definition of “policing,” which is expansive and includes all the methods of controlling the populace, gaining information about and access to the population, and strengthening a society. Here, this definition includes both policies and practices that intend to regulate the public and private activities around sex work.

3. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 11 (Robert Hurley trans., 1978).

4. *Id.* at 11–12.

5. *Id.*

possible sites of contagion.⁶ “In this specific and often segregated arena of public health, attempts to control venereal contagion rested largely on the control of female prostitution as the assumed concomitant, and indeed origin, of venereal affliction.”⁷ These public health discourses about sex workers have subjected them to increased policing, as evinced by the passage of the Contagious Diseases Act in 1868,⁸ and empowered those who claimed to be protecting them. Despite these discourses warning about the evils of sex work, sex work has been informally tolerated, even where formally criminalized.⁹ Today, sex work is policed in a relatively haphazard manner although it is criminal for both the sex worker and client to participate.¹⁰ This haphazard approach can be partially explained by the contradictions between the different discourses and lawmaking processes that comprise the formal and informal policing of sex work.

In Part I of this Article, I discuss the perception that sex work was a “necessary evil” under the Dutch East India Company. In Part II, I discuss British colonial rule and the influence of the Victorian era on the policing of sex work. In Part III, I discuss the Union of South Africa and the mass hysteria following the rise of the “black peril.” Part IV discusses the apartheid era and the impact of the Immorality Act on the policing of sex workers. Part V focuses on the new democratic era and the introduction of the human rights framework. Exploring this history of sex work provides insight on whether theories debating its decriminalization overemphasize the role of formal (de)criminalization in the policing of sex work. There are strong reasons why sex work should not be criminalized,¹¹ but there

6. See generally Philippa Levine, *Venereal Disease, Prostitution, and the Politics of Empire: The Case of British India*, 4 J. OF THE HIST. OF SEXUALITY 579, 580 (1994).

7. *Id.*

8. Act No. 25 of 1868 (S. Afr.).

9. See generally Elizabeth B. van Heyningen, *The Social Evil in the Cape Colony 1868-1902: Prostitution and the Contagious Diseases Acts*, 10 JOURNAL OF S. AFR. STUDIES 170 (1984). Sex work as performed by the sex worker was only explicitly criminalized in 1988 by the Immorality Amendment Act 2 of 1988 (S. Afr.): [1 JSRSA 2-200] (1995) (criminalizing sex work). More recently, the police have stated that sex work is not a policing priority. See generally Janet M. Wojcicki, *The Movement to Decriminalize Sex Work in Gauteng Province, South Africa, 1994-2002*, 46 AFR. STUD. REV. 83, 89 (2003) (quoting official statement indicating that sex work is not a policing priority).

10. *Id.*

11. For an overview of the various debates concerning the decriminalization of sex work, compare Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 328-29 (1995), and Carole S. Vance, *More Danger, More Pleasure: A Decade after the Barnard Sexuality Conference*, in PLEASURE AND DANGER: EXPLORING

should be a legal infrastructure in place that is going to guide police on how to interact with sex workers, circumventing the need for the informal rules that generally dictate police's approach to sex workers in the current state of *de facto* decriminalization. It is inadequate to merely state there should be decriminalization without specifying how decriminalization should look. The history of the policing of sex work in South Africa reveals that sex work has mostly been policed informally and treated as a public nuisance matter. Consequently, the public nuisance aspects of sex work and the public discourses around the treatment of sex work have in many respects been far more influential to its policing than its actual formal criminalization.

I. *DUTCH EAST INDIA COMPANY AND SLAVERY*

The Dutch East India Company occupied the Cape Colony in 1652.¹² The Cape Colony was established as a refreshment station for vessels traveling between the Netherlands and the Batavia.¹³ This small refreshment station eventually grew into a settler colony as company employees began to retire to the colony. Company employees could lease plots of land from the company, which could be used for labor-intensive farming.¹⁴ These settlers began to import slaves from Madagascar, Mozambique, and Asia, increasing the inhabitants of the colony.¹⁵

There was an influx of passing Company seamen through the Cape port, and sex work naturally evolved as a method for entertaining these temporary visitors near the port.¹⁶ “[T]housands of single Company soldiers and sailors disembarked each year at Cape Town for ten days to three weeks of recreation.”¹⁷ Sex workers catered to both the seamen who were temporary visitors as well as the

FEMALE SEXUALITY, xvii (1992) (critiquing radical feminist approaches to sex work that view women as victims), with KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 9 (1979), and ANDREA DWORKIN & CATHERINE MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 24 (1988) (treating sex work as inherently problematic and violent for women).

12. GEORGE M. THEAL, HISTORY OF SOUTH AFRICA UNDER ADMINISTRATION OF THE DUTCH EAST INDIA COMPANY 86 (1897).

13. *Id.* at 20, 28, 34.

14. *Id.* at 72.

15. *Id.* at 32, 264.

16. See Henry Trotter, *Dockside Prostitution in South African Ports*, 6 HIST. COMPASS 673 (2008).

17. *Id.* at 675.

settlers to the colony.¹⁸ There was a vibrant community of taverns and houses of ill fame near the dock, which catered specifically to the passing seamen that arrived at the Cape Colony's port.¹⁹

In fact, there are reports of opportunistic sex workers and madams lining the ports to welcome passing Company seamen upon their arrival at the Cape as to direct them to their respective establishments.²⁰ "After months at sea in an all-male environment, many seafarers desired female companionship when they reached Cape Town. For a long time, there were few women to provide this service. Only when the society stabilized and grew did a notable prostitution sector emerge. White women were initially scarce at the settlement, but some ended up prostituting themselves due to the loss or absence of their husbands."²¹

There were several factors that contributed to the vibrant sex trade in the Cape Colony. Firstly, there was a gross imbalance in the gender population of the South African colonies.²² Sex work provided an opportunity for enterprising women to capitalize on the lonely situation of the relocated men.²³ In many ways, sex work was viewed as a necessary evil. Sex work kept the morale of the seaman high after their long voyages.²⁴ In the Cape, "Cape Town was host to Dutch and, later, British troops, most of whom were without wives, and was a busy port of call for European fleets. The numerous canteens and 'houses of ill fame' near the waterfront and garrison (and elsewhere in The town)."²⁵ While there is scant information about Khoi Khoi women engaging in sex work, records clearly indicate that slave women routinely participated in sex work. The Company Slave Lodge, which was described as the "finest little whorehouse," employed slaves, who also worked as sex workers.²⁶ Company employee Otto Mentzel described the Company Slave Lodge:

Female slaves are always ready to offer their bodies for a trifle; and towards evening, one can see a string of soldiers and sailors entering the Lodge where they misspend their time until the clock

18. *See id.* at 676.

19. *See id.* at 677.

20. *See id.* at 678.

21. *Id.* at 675.

22. *See id.*

23. *See id.*

24. *See id.*

25. *Id.* at 677.

26. *Id.* at 676.

strikes 9. After that hour no strangers are allowed to remain in the Lodge. The Company does nothing to prevent this promiscuous intercourse, since, for one thing, it tends to multiply the slave population, and does away with the necessity of importing slaves.²⁷

Mentzel claimed that the motto of the slave sex worker was “‘Kammene Kas, Kammene Kunte’, or ‘No cash, No cunt.’”²⁸ Sex work became a means for some of these sex workers to purchase their freedom.²⁹

II. *BRITISH COLONIAL RULE*

In 1795, the British took control of the Cape Colony and abolished slavery in 1834. Soon thereafter the British annexed Natal and the “ports of Cape Town, Port Elizabeth, and Durban were then all under imperial control. During this time . . . ‘prostitution remained a casual profession. It had become an offence, but was relatively rarely prosecuted’.”³⁰

A. *Colony of Cape of Good Hope*

The majority of known sex workers were local women who were mixed race, although there were also some English, Dutch, Irish, Scottish, and German women who were registered sex workers.³¹ In her seminal piece on prostitution in the Cape Colony, historian Elizabeth B. van Heyningen argues that government officials viewed sex work as “‘inevitable in a seaport town [and it] provided a form of controlled release for the antisocial energies of unruly sailors.’”³²

In Gombong, an officer warned about the potential for unrestrained homosexuality where there were restrictions on male seamen’s sexual interactions stating, “‘far more than half of the young men quartered [in a barrack that banned concubinage] were guilty of

27. ROBERT ROSS, *STATUS AND RESPECTABILITY IN THE CAPE COLONY, 1750-1870: A TRAGEDY OF MANNERS*, 128 (1999).

28. *Id.*

29. See Trotter, *supra* note 16, at 677.

30. *Id.*

31. van Heyningen, *supra* note 9, at 173-74.

32. *Id.*

practising unnatural vices [including male-male sex].”³³ Accordingly, “[t]he dangers of a homosexual European rank and file were implicitly weighed against the medical hazards of rampant heterosexual prostitution: both were condemned as morally pernicious and a direct threat to racial survival.”³⁴

Sex work was in this way encouraged, although feared, because colonial authorities did not want men to resort to homosexuality because they were not provided with an alternate form of sexual release. Sex work thus was considered necessary and was largely tolerated. Engaging sex workers ensured that men would not lose all their “sensibilities” by delving into homosexual behaviors due to their prolonged absence from Europe.³⁵ The irony in this tolerance of sex work is that the very act of engaging in sex work was viewed by many as the very loss of “sensibilities” that was so highly prized in the colonial state.

B. *Victorian Era*

The years of British colonial rule were heavily influenced by the Victorian Era, which occurred during Queen Victoria’s rule from 1837 until 1901.³⁶ The Victorian Era has been widely discussed as an era marked with sexual repression and sexual purification.³⁷ “Victoria’s sixty-four-year incumbency would see the elevation of ‘moral regulation’ as a social policy in Britain and its (erratic) emulation at the Cape of Good Hope. From its foundation by the Dutch East India Company as a place of European occupation and, soon afterwards, settlement in 1652, Cape Town experienced spasms of official outrage against the sexual transgressions”

33. Ann Stoler, *Educating Desire in Colonial South-East Asia: Foucault, Freud, and Imperial Sexualities*, in *SITES OF DESIRE, ECONOMICS OF PLEASURE: SEXUALITIES IN ASIA AND THE PACIFIC* 36 (Lenore Manderson & Margaret Jolly eds., 1997).

34. Linda Bryder, *Sex, Race, and Colonialism: An Historiographical Review*, 20 *INT’L HIST. REV.* 806, 814 (1998).

35. *Id.* (“[T]he provision of prostitutes was thought necessary because sexual passions were heightened in the tropical heat: denied prostitutes, soldiers could turn to rape or, worse, one another: ‘The constant haunting fear of homosexuality, the presence of which would undermine the manly adventure of imperial conquest, underscores the whole debate on prostitution throughout this era In the politics of empire, there was no room for even a hint of the effeminacy assumed to exist among subject men.’”).

36. N. G. HALE, *FREUD AND THE AMERICANS: THE BEGINNING OF PSYCHOANALYSIS IN THE UNITED STATES, 1876-1917* 42 (1971).

37. *Id.*

The Victorian Era did allow spaces for deviant sexual behavior in what Foucault describes as the “other Victorians.”³⁸ The “other Victorians” were those who expressed sexuality, outside the confines of the traditional Victorian standards limited to the marital relationship, by engaging in sexual discourses with psychiatrists or prostitutes.³⁹ These “other Victorians” include sex workers and those who frequent them.⁴⁰ The discourses around sex work at the time do not necessarily highlight the sexual repressiveness of the Victorian Era; they demonstrate the desire to highlight these sexualities to the State and may even indicate that there was an obsession with the policing of sexual deviants.⁴¹ In this way, the act of policing sex occurs in the very existence of the discourse around it and zeal to discuss it.⁴² The discourse socially marginalizes the sex worker and of course rarely included her voice.

Male and female sexualities were treated disparately during this time.⁴³ Women were expected to remain pure bastions of chastity that required protection from the male sexual appetite.⁴⁴ This approach to sexuality encouraged women to suppress their sexual desires, and in some situations even encouraged women to be asexual.⁴⁵ By contrast, while men were encouraged to remain sexually chaste, it was entirely expected for them to have larger sexual appetites than women.⁴⁶ They were the more primal and sexual of the sexes and thus sexual unevenness presumably occurred in marriage.⁴⁷

38. See FOUCAULT, *supra* note 3.

39. STEVEN MARCUS, *THE OTHER VICTORIANS: A STUDY OF SEXUALITY AND PORNOGRAPHY IN MID-NINETEENTH-CENTURY ENGLAND* (2008).

40. *Id.*

41. *Id.*

42. *Id.* at 5-7.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. See, e.g., Beth Maina Ahlberg, *Is There a Distinct African Sexuality? A Critical Response to Caldwell*, 64 *AFR.: JOURNAL OF THE INT’L AFR. INST.* 220, 224 (1994) (discussing the double standard in understanding male and female sexuality during the Victorian Era:

The period is characterised by the strong belief that man’s sexual urge is biologically natural while a virtuous woman should be asexual. This rationalised the double standard whereby unchastity was excusable and understandable in men, but unnatural and unforgivable in women. If the man was not sexually satisfied by his virtuous asexual wife, he could use prostitutes.).

Consequently, it was hardly unusual, and even encouraged, for men to turn to “less moral” women or sex workers to meet their unfulfilled sexual needs.⁴⁸ Turning to sex workers was viewed as a necessary aspect of the social order.⁴⁹ Men were expected to have unsavory sexual desires that were beyond the reproach of a respectable lady.⁵⁰ Sex workers were viewed as an acceptable release for these desires that would otherwise go unmet by their wives. This tolerance of sex work in Victorian society also protected the wives from the unsavory desires of their husbands. The *Cape Argus*, a prominent newspaper from the Cape Colony, warned its readership of the necessity of sex work:

Harlotry, as an institution, with all its fearful evils to mind and body, is of so ancient an origin, that we can hardly now hope to put it down entirely; and perhaps, too, it is not quite desirable, while society is constituted as it is, that it should be driven into secret places; for experience teaches us that even where it is not openly allowed by law, as in the Roman states, its evil effects are aggravated. In a measure it must, perhaps, be regarded almost as an institution necessarily attendant on the present state of society; as, in a degree, a safety-valve for public morality, and as some protection to the chastity and purity of our virgins and matrons, guarding them partially from temptations only too seductive!⁵¹

Accordingly, sex work became a brand of immorality for lower class women and a tool for protecting the morality of respectable women.⁵² This discourse around sex work emphasized sex work as a necessity to protect women from the insatiable male sexual appetite. The sex workers themselves were merely incidental participants in the preservation of the purity of respectable women.

However, this gender inequality was not universally accepted. During the Victorian Era, women’s groups began to launch broad-reaching campaigns against the male sexual immorality.⁵³ Sex work was targeted as a form of male sexual immorality, and sex workers

48. *Id.*

49. *Id.* (“If the man was not sexually satisfied by his virtuous asexual wife, he could use prostitutes.”).

50. *Id.*

51. van Heyningen, *supra* note 9, at 173-74.

52. *Id.*

53. See generally Keith Shear, “Not Welfare or Uplift Work”: *White Women, Masculinity and Policing in South Africa*, 8 *GEND. & HIST.* 393-415 (1996).

were portrayed as victims of circumstance.⁵⁴ Women's groups such as the Cape Women's Christian Temperance Union ("WCTU") in Cape Town aimed to save sex workers from a damned life while also ensuring that men would stop frequenting them to have their desires met.

The South African movement for women police began in wartime Cape Town in worried response to the 'khaki fever' occasioned by the passage of large numbers of troops through the city. Alarmed by police reports of increases in prostitution and in 'contraventions of the morality laws generally', the Cape Women's Christian Temperance Union (WCTU), which had long pioneered reformist causes, called for policewomen

Before the war, the WCTU had been particularly concerned with issues of "Social Purity" and the enforcement of local "Morality" legislation regarding prostitution and inter-racial sex. In this the WCTU was representative of the many middle-class white women's reformist organizations that actively participated in producing the pervasive post-1910 anxiety over South Africa's urban social environment. Central to all were concerns about racial purity and separation, expressed in campaigns to rescue destitute white children, monitor inter-racial sexual contact, and combat prostitution and liquor consumption.⁵⁵

Women's groups frequently portrayed sex workers as victims with no agency in their station in life. The men were portrayed as opportunistic, immoral actors violating the proper social order. The male sexual appetite was a site for disdain and suspicion.⁵⁶ There were increased efforts to police male sexuality and bring it in line with the more acceptable expectations of society.⁵⁷ There were protests about the prevalence of brothels and visible street prostitution. While there was very little formal policing of sex workers at the time, sex work was being morally policed by civil society groups during the Victorian Era. Sex work remained an

54. *Id.*

55. *Id.* at 395; see Antoinette M. Burton, *The White Woman's Burden: British Feminists and the Indian Woman, 1865-1915*, 13 *WOMEN'S STUD. INT'L FORUM* 295, 296 (1990) ("Rather than overturning the Victorian feminine ideal, early feminist theorists used it to justify female involvement in the public sphere by claiming that the exercise of woman's moral attributes was crucial to social improvement The maintenance of racial hegemony was a collective cultural aspiration which feminists tried to use for their own ends.").

56. *Id.*

57. *Id.*

offense, but the historical account reflects that sex workers were very infrequently prosecuted.⁵⁸

The morality discourse was unable to motivate formal state action against sex work, and at times, provided the rationalization for the inevitable sex work. However, public health discourses eventually motivated the passage of legislation that efficiently regulated the sex worker body. Efforts to suppress sex work were bolstered by a syphilis pandemic that resulted in the deaths of thousands of people in England and its colonies.⁵⁹ It created paranoia around the treatment of venereal diseases.⁶⁰ Within this social context, sex workers were quickly construed as carriers of contagion and largely blamed for the spread of venereal diseases.⁶¹ They were perceived as outcasts in society and made easy targets.⁶² “Polite society now worried that their laundry women and domestic servants might be moonlighting as prostitutes, polluting their hearths with diseases.”⁶³

Sex workers were blamed for infecting wives with contagion by sleeping with their husbands.⁶⁴ Their bodies represented a threat to the quality of life and thus there was an urgent need to regulate them more thoroughly to prevent the spread of contagion.⁶⁵ Meanwhile, their clients were not similarly viewed as carriers of disease.⁶⁶ Men were treated like accidental victims in the public health discourses, coerced by the temptations that sex workers presented.⁶⁷ In this way, the sex worker embodied fears about female sexuality, which was primarily being expressed for the benefit of female commercial empowerment during the sex work transaction.

There was increasing fear surrounding the spread of venereal diseases, particularly syphilis, and the sex worker bore the brunt of

58. See Trotter, *supra* note 16, at 677.

59. Karen Jochelson, *Sexually Transmitted Diseases in Nineteenth- and Twentieth-Century South Africa*, in HISTORIES OF SEXUALLY TRANSMITTED DISEASES AND HIV/AIDS IN SUB-SAHARAN AFRICA 217, 218-19 (P. Setel et al. eds., 1999).

60. van Heyningen, *supra* note 9, at 177, 179, 182.

61. *Id.* at 179.

62. *Id.*

63. See Trotter, *supra* note 16, at 678.

64. See Jeremy C. Martens, ‘Almost a Public Calamity’: Prostitutes, ‘Nurseboys’, and Attempts to Control Venereal Diseases in Colonial Natal, 1886–1890, 45 S. AFR. HIST. J. 27, 32 (2001).

65. *Id.*

66. *Id.*

67. *Id.*

these fears.⁶⁸ There was very little knowledge about the spread of syphilis, and it was incredibly difficult to treat. The only treatment for syphilis at the time was the use of mercury, which involved a very painful and arduous process that victims often would not survive.⁶⁹

C. *Contagious Diseases Acts*

The spread of venereal diseases in England and the colonies created fervor to regulate the body of the sex worker, which was seen as the site of contagion.⁷⁰ The Contagious Diseases Act was passed in England in 1864.⁷¹ “Enacted principally in the 1860s, at the same time as the British acts, almost every British colony acquired regulations governing the behavior of prostitute women as a measure against the encroachment of syphilis and gonorrhea.”⁷² The preamble of the English Act states, “[W]ith the peculiar conditions of the naval and military services, and the *temptations to which the men are exposed*, justifies *special precautions for the protection of their health* and their maintenance in a state of physical efficiency”⁷³

Sex workers found to be infected with disease were confined to Lock hospitals and subject to involuntary venereal disease treatment and examinations.⁷⁴ Women’s reputations were challenged by allegations of immorality, as the Act required the registration of women suspected of being a “common prostitute.”⁷⁵ In India, the Act was enacted in 1868,⁷⁶ and similar acts had been adopted in other colonies, including Malta, Hong Kong, Australia, and Gibraltar.⁷⁷ Most versions of the Act had language that was nearly identical to that of the English version of the Act.

68. *Id.*

69. *Id.* (“[I]n 1889 39 ‘Native women’ presented themselves for treatment for syphilis and seven for gonorrhea. However, in seeking treatment these women unwittingly risked further ill health. In the nineteenth century, the principal treatment for syphilis was mercury, and the dose required to eradicate the disease was close to being fatal.”).

70. Levine, *supra* note 6, at 580.

71. Contagious Diseases Acts, 1864, 27 Eliz. (Eng.).

72. Levine, *supra* note 6, at 581.

73. Contagious Diseases Acts, 1864 (emphasis added).

74. Levine, *supra* note 6, at 583 (discussing the conditions of Lock hospitals in India).

75. *Id.*

76. *Id.* at 581 (“[T]he Indian Contagious Diseases Act (Act XIV of 1868) enacted similar provisions for the supervision, registration, and inspection of prostitute women in major Indian cities and seaports.”).

77. *Id.* at 580.

In South Africa, the Contagious Diseases Act was enacted in 1868 in the Cape Colony.⁷⁸ This Act mandated the registration and regulation of sex workers. “A common prostitute was described as maladjusted, an unbalanced personality and a menace to society. Included in the category of common prostitute were also latent homosexuals, women who cheat on their husbands and gold diggers.”⁷⁹ Registered “common prostitutes” were subjected to routine physical, vaginal examinations with a speculum for venereal diseases. This Act demonstrates how the public health discourses around sex workers as a site of contagion resulted in their heavy policing and surveillance through formal state intervention.

On its face, this Act was discriminatory against the sex worker and made no efforts to mask its discriminatory nature by suggesting that seamen needed to be protected from the “temptation” of the sex worker in its very preamble.⁸⁰ While the Act subjected sex workers to mandatory, invasive physical examinations, there were no such requirements for men suspected to frequent sex workers.⁸¹ The Contagious Diseases Act focused on regulating the spread of disease by treating the sex worker as the host of disease.⁸² The client was also susceptible to disease and may have introduced the sex worker to various venereal diseases.

Consequently, there was a tremendous movement to repeal the Act in England and in those colonies where the legislation had been adopted.⁸³ In England, women’s groups organized around the repeal of the Contagious Diseases Act because it assumed that sex work was a necessary evil necessitating regulation of the sex worker body.⁸⁴ English feminist Josephine Butler famously opposed the legislation:

I never myself viewed this question as fundamentally any more a woman’s question than it is a man’s. The Legislation we opposed

78. See Jillian Gardner, *Criminalising the Act of Sex: Attitudes to Adult Commercial Sex Work in South Africa*, in *THE PRIZE AND THE PRICE: SHAPING SEXUALITIES IN SOUTH AFRICA* 329, 330-31 (Melissa Steyn & Mikki van Zyl eds., 2009).

79. *Id.* at 331 (citations omitted) (internal quotation marks omitted).

80. Contagious Diseases Acts, 1864, 27 Eliz. (Eng.).

81. van Heyningen, *supra* note 9, at 172, 178.

82. *Id.*

83. Bryder, *supra* note 34, at 818 (citing Antoinette M. Burton, *The White Woman’s Burden: British Feminists and the Indian Woman, 1865-1915*, in *WESTERN WOMEN AND IMPERIALISM: COMPLICITY AND RESISTANCE* 14 (Nupur Chaudhuri & Margaret Strobel eds., 1992).

84. *Id.*

secured the enslavement of women and the increased immorality of men; and history and experience alike teach us that these two results are never separated.⁸⁵

Butler and other opponents argued against the unfairness of an Act that only focused on the sex worker, whom they viewed as a victim of her circumstance. Moreover, efforts to repeal the Act coalesced well with the campaigns intended to police male sexuality. Women's groups were strictly opposed to sex work and argued against the morality of men engaging in sexual transactions outside of their marriages. Sex workers, themselves, were also involved in the campaigns against the Act. Sex workers in the Cape Colony rioted against the Act,⁸⁶ refused to subject themselves to the required examination, and generally protested against its invasive requirement of vaginal examinations for syphilis using a speculum.⁸⁷

The police were initially the primary enforcers of the Act, creating a tense relationship between sex workers and the police.⁸⁸ The initial opposition against the Contagious Diseases Act in the Cape Colony was led by Saul Solomon following reports of "a series of incidents towards the end of 1870 involving illegal police action against prostitutes, incidents which were publicized by the Cape Argus of which he was proprietor."⁸⁹ Another version of the Act passed in the Cape in 1885, appointing lay inspectors to avoid the harassment that occurred when police were involved.⁹⁰

As a result of overwhelming opposition, the Act was eventually repealed in England in 1886.⁹¹ The Act had earned a reputation that was irreparably tarnished. However, efforts to repeal the Act in the Cape Colony were not as effective: "Members of the Women's Christian Temperance Union were roused to campaign against 'the indignity done to women' by the Contagious Diseases Act of 1885

85. PATRICIA HOLLIS, *WOMEN IN PUBLIC, 1850-1900: DOCUMENTS OF THE VICTORIAN WOMEN'S MOVEMENT* 209 (Routledge rev. ed. 2013) (quoting JOSEPHINE BUTLER, *PERSONAL REMINISCENCES OF A GREAT CRUSADE* (1896) 73 (2008)).

86. van Heyningen, *supra* note 9, at 185 ("Under this Act these girls had mutinied, and they stated that they had done so to get out of the Lock Hospital before their confinement.").

87. *Id.* at 195 ("The use of the speculum as a diagnostic instrument was still crude and the most usual treatment for syphilis, with heroic dosages of mercury, did more to kill the patients than to cure them.").

88. *Id.* at 174

89. *Id.*

90. *Id.* at 178.

91. Bryder, *supra* note 34, at 818.

but they failed to sway the lawmakers: the offending Act was only repealed in 1919.”⁹²

D. *Colony of Natal*

The Colony of Natal, which includes Durban and Pietermaritzberg, was proclaimed a British colony on May 4, 1843. Despite the general unpopularity of the Contagious Diseases Act globally, there were increased efforts to enact a similar act in the Natal Colony starting in 1885.⁹³ Medical professionals were the dominant voice in advocating for the enactment of a Contagious Diseases Act in Natal.⁹⁴ The social conditions of the Natal colony further fed into the fear surrounding the spread of contagion.

Prostitution was a feature of Natal town life from the early nineteenth century. A report on the first sitting of the Pietermaritzburg Magistrate’s Court in 1846 condemned ‘immorality’ and the ‘contaminating vices of the canteen’. In the late 1860s Pietermaritzburg citizens witnessed scenes of ‘female infamy’, and ‘the throngs of children in the streets’ told ‘what share white men have in the vice that elicits no remark’. . . . In 1890, police estimated that there were almost 70 prostitutes working in Pietermaritzburg, just over 50 prostitutes in Durban, over 50 prostitutes in Newcastle and 12 prostitutes in Ladysmith. Most of these sex workers were African women, although there were smaller numbers of white, Indian and ‘coloured’ prostitutes (the latter were usually referred to as ‘St. Helenas’, ‘Cape women’, or ‘Hottentots’).⁹⁵

There were differing approaches to the regulation of sex work in the Natal.

Pietermaritzburg authorities had the most pragmatic approach. Superintendent Fraser had ‘no desire to suppress brothels’ and so seldom enforced the by-law prohibiting the keeping of brothels in the borough. There were in 1890 ‘about thirty houses of ill-fame known to the police’ in Pietermaritzburg, 10 of which housed white women. Women operated most of these houses and Fraser did not know of a single brothel ‘with a bully inside’. Moreover, a significant number of the city’s prostitutes lived and worked

92. Vertrees C. Malherbe, *Family Law and ‘The Great Moral Public Interests’ in Victorian Cape Town, c.1850-1902*, 36 KRONOS: J. CAPE HIST. 7, 13-14 (2010).

93. See Martens, *supra* note 64, at 34.

94. *Id.*

95. *Id.* at 30-31.

alone. Superintendent Alexander was far more punitive in his policing of Durban sex workers and he claimed that prostitution and soliciting were prohibited. He reported that there were no brothels in Durban, although there were ‘a number of huts occupied by Coolies on the Eastern Vlei, which are here and there let to Kafir girls who carry on prostitution.’⁹⁶

The medical community led the discourse regarding the need to police sex workers’ bodies. Medical professionals warned of the dire repercussions that would ensue if immediate measures were not adopted to curtail the risks of further venereal disease infections by regulating the health of sex workers, galvanizing the State into action.⁹⁷ They warned that syphilis would reach endemic levels in Natal if the Contagious Diseases Act were not passed there.⁹⁸ In 1885, the Pietermaritzburg Medical Officer urged the Governor on the need for a Contagious Diseases Act in Natal. Despite the overwhelming support of the medical community, the Natal Act was met with tremendous opposition. It was proposed during the height of the controversies surrounding similar versions of the Contagious Diseases Act in England and its colonies.⁹⁹

A group of sixty-five prominent male citizens argued against the gender inequality represented in the Natal version of the Act and argued that it would allow “unscrupulous persons . . . to cause injury shame and indignity to poor but respectable females.”¹⁰⁰ Opponents also cited that the Act would be largely ineffective because it again focused only on the sex workers and ignored the conduct of the sex workers’ clients.¹⁰¹ In 1886, the Natal version of the Act failed to pass in light of the overwhelming pressure against it.¹⁰² Medical professionals persisted in their insistence that the Contagious Diseases Act or a similar version thereof was necessary for the public health of the colony.¹⁰³

While many black women were visibly engaging in sex work in the Natal, black men were dominant features of the domestic domain

96. *Id.* at 32.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 36.

101. *Id.*

102. *Id.* at 27.

103. *Id.*

in the Natal colony.¹⁰⁴ There were a large number of black male servants called houseboys used within the white household.¹⁰⁵ Paranoia around the presence of houseboys fueled a second campaign for the Contagious Diseases Act in the Natal colony.¹⁰⁶ There was an increasing fear around what was known as “innocent infection” of syphilis.¹⁰⁷ Medical professionals mistakenly believed that syphilis and other venereal diseases could be spread “innocently.”¹⁰⁸ Thus, having black houseboys who might engage in morally corrupt behaviors, such as frequenting brothels, posed a direct threat to the white family’s health.¹⁰⁹ While the houseboy may have no mal-intent when spreading the disease, he could nevertheless be the carrier.¹¹⁰ And, by gently grazing a child’s forehead, or holding hands with a baby, he was an undeniable threat to the household if he had syphilis.¹¹¹

With the strong support of the medical community, the Act moved forward through the legislature with little opposition.¹¹² Eventually, in 1890, the Contagious Diseases Act was passed in the Natal Colony legislature.¹¹³ It was primarily the result of strong lobbying by the medical community and increasing fears around the spread of contagion by sex workers and houseboys.¹¹⁴ The passed legislation was forwarded to Lord Knutsford, Secretary of State for the Colonies. Lord Knutsford admonished the colonial authorities because they “practically led the official members of the Legislature to vote for a measure which in other Colonies gentlemen holding similar positions had been directed by the Secretary of State to oppose.”¹¹⁵ Thus, the legislation was blocked in light of the global

104. *Id.*

105. *Id.* at 30. (“The employment of African ‘houseboys’ who performed ‘women’s work’ in settler homes, as well as African female prostitutes who worked publicly in Natal towns unsettled whites because they subverted settler notions of appropriate domestic behaviour.”).

106. *Id.* at 39-40.

107. *Id.* at 41.

108. *Id.* at 42.

109. *Id.* at 33, 34, 42.

110. *Id.*

111. *Id.* at 41-42.

112. *Id.* at 50.

113. *Id.*

114. *Id.* at 49.

115. *Id.* at 52.

political pressure to repeal similar legislation in England and its colonies.¹¹⁶

Accordingly, sex work was never regulated through the Contagious Diseases Act in the Natal colony.¹¹⁷ In general, sex work was treated as a public nuisance violation, and was punishable where there was a public annoyance.¹¹⁸ These public health discourses did, however, empower the medical community as arbiters of morality and protectors of both health and civility. As Foucault argues, the power emanated from the very engagement in discourse. Although the Natal community failed to pass the Contagious Diseases Act, they managed to galvanize the legislature on several separate occasions to create legislation that would be facially harmful and discriminatory toward sex workers.

The movement to regulate the sex worker body as a site of contagion in both the Cape and Natal colonies reflects a form of power that Foucault refers to as bio-power. “Bio-power is a peculiarly effective mechanism for normalization that focuses upon the human body as the centrepiece of important struggles between various different power formations. This claim that the body is the locus of important power struggles has also been dominant throughout the history of feminist theorizing.”¹¹⁹ The sex worker’s body was a site for the exercise of bio-power and sexual normalization during public health discourses because it embodied a threat to heterosexual norms that viewed marriage as the sole site for sexual expression and sex. Sex work also threatened patriarchal economic systems that deprived women from independent economic activities. The spread of disease merely created a moral panic that legitimized the targeting of the sex worker’s body as the site of social evil.

By 1882, the Police Offences Act¹²⁰ penalized any “prostitute who loiters or is in any public place for purposes of solicitation or prostitution to the annoyance of the public” as guilty of an offence.¹²¹ The original punishment was a fine of GB£2 with the alternative of thirty days’ imprisonment with hard labor, but by 1898 the fine was

116. *Id.*

117. *Id.*

118. *See, e.g.*, Polices Offences Act, Act No. 27 of 1882 (S. Afr.).

119. Vanessa Munro, *Legal Feminism and Foucault – A Critique of the Expulsion of Law*, 28 *J.L. Soc’y* 546, 550 (2001).

120. Polices Offences Act, Act No. 27 of 1882 (S. Afr.).

121. Act No. 44 of 1898 (S. Afr.).

increased to GB£5.¹²² As was typical of the time, the legislation only penalized the public nuisance aspect of sex work.

E. *The Transvaal and the Mineral Gold Rush*

The South African Republic, also commonly referred to as the Transvaal or the ZAR Republic, was an independent country in Southern Africa from 1852 to 1902. It occupied the area that is currently the Gauteng province in South Africa and was made into the Transvaal Colony from 1902 until 1910.

In 1886, gold was discovered in the Witwatersrand in the Transvaal attracting mining companies and workers.¹²³ During the ten years following the discovery of gold, there was very little regulation of sex work in the Witwatersrand.¹²⁴ Johannesburg was at the center of the fifty miles consisting of mines and had a population that was eighty percent male, two thirds single, and primarily young adults between the ages of twenty and forty.¹²⁵ Black men migrated there to work on gold mines and as domestic workers in white households because black women were considered to be unreliable and immoral.¹²⁶ Consequently, black women had limited economic options and frequently employed sex work and the sale of liquor to the black mine workers as a form of income generation.¹²⁷ Historian Charles van Onselen argues that these economic choices reinforced those negative views that whites had toward black women.¹²⁸ The disproportionate number of men, who were mostly single, and their youthfulness contributed to the persistence of sex work in the Transvaal.¹²⁹ The Transvaal quickly earned a reputation for prostitution, illicit liquor trade, and crime.¹³⁰

122. *Id.*

123. Charles van Onselen, *Who Killed Meyer Hasenfus?: Organized Crime, Policing and Informing on the Witwatersrand, 1902–8*, 67 *HIST. WORKSHOP J.* 1, 1 (2009).

124. *Id.*

125. DIANA ROSE CAMMAC, *THE RAND AT WAR, 1899-1902: THE WITWATERSRAND AND THE ANGLO-BOER WAR* 4 (1990).

126. van Onselen, *supra* note 123, at 1.

127. *Id.*

128. *Id.*

129. CAMMAC, *supra* note 125, at 4.

130. Charles Dugmore, *From Pro-Boer to Jingo: An Analysis of Small Town English-Language Newspapers on the Rand before the Outbreak of War in 1899*, 41 *S. AFR. HIST. J.* 246 (1999).

At the same time, the face of sex work was beginning to whiten with the influx of European sex workers. Henry Trotter has noted the following:

In the 1880s, the Mineral Revolution ignited a global migration to the Transvaal gold fields. Diggers, pimps and prostitutes passed through the coastal ports, some never going any further. To cater to this boom, European Jewish pimps trafficked thousands of ‘Continental women’ (poor European Jews) to southern Africa. When the Boer government tightened its laws against prostitution, many retreated to the coast. ‘From about 1896 there was an influx into Cape Town of “continental” women which resulted in a professionalization of the trade and ousted many of the local girls’. A brothel explosion ensued.¹³¹

During the Anglo Boer, there was an influx of European women into the Transvaal and the coasts for organized sex work. Organized crime cartels took root in the region, and white women from Europe migrated into the area as sex workers.¹³² There were reports of police corruption, and the South African Republic Police colluded with prostitution syndicates.¹³³ Charles van Onselen provides a detailed account of the collusion between organized prostitution rings and the Morality Squad of the Transvaal Town Police.¹³⁴ Police corruption was pervasive as the officers also sought to benefit from the substantial revenues of sex work. The police often worked cooperatively with sex workers although the official policy opposed all “organized vice.”¹³⁵

Officially, the administration was implacably opposed to ‘organized vice’ and, more especially, to large and visible, brothels controlled by gangsters and pimps. Unofficially, this publicly-stated policy would be implemented only after due consideration had been given to ‘local conditions’ that permitted individual prostitutes—practising their craft in private, with some discretion—to offer sexual relief to ‘single’ working men.¹³⁶

This inconsistent approach to policing sex work reflects the tensions in the conflicting discourses about it. On the one hand, sex

131. See Trotter, *supra* note 16, at 679.

132. *Id.*

133. CAMMAC, *supra* note 125, at 4.

134. van Onselen, *supra* note 123, at 1 (2009).

135. *Id.* at 3.

136. *Id.*

work was viewed as a moral vice. On the other hand, it was treated like a necessary evil.

This era ushered in the rise of brothels that primarily featured European women. Many of the women were lower income ladies looking to capitalize on the income that would become available to them in the colony.¹³⁷ Initially, these European women would cater to the Cape settlers and black patrons, and eventually they migrated to the Transvaal.¹³⁸ Such practices were openly contradictory to the colonial agenda of maintaining the biological superiority of the European race.

The mining companies were soon reticent about the absenteeism that the flexible laws and easy access to sex workers and liquor presumably encouraged.¹³⁹ They eventually succeeded in pressuring the local government into passing strict laws restricting the movement of blacks and promoting racial segregation. The Transvaal mining companies also succeeded in outlawing the sale of liquor within the mines.¹⁴⁰ There were additional regulations eventually promulgated to police sex work more generally. The 1902 Transvaal legislation stated that “Every *male person* who (a) knowingly lives wholly or in part on the earnings of prostitution . . . shall be guilty of an offence.”¹⁴¹ The corresponding pre-Union legislation in the Cape, Orange Free State and Natal colonies had nearly identical language, except the Natal legislation was not limited to every male person and included females.¹⁴²

It is important to highlight that in all the colonies except for in the Natal, this legislation only penalized the activities of males involved in prostitution. It did not penalize sex workers, which is critical in understanding the regulation of sex work in South Africa. Sex work itself was more or less tolerated although men involved in the sex industry were subjected to harsher punishment relating to it than the ordinarily female sex worker.¹⁴³ However, where there was a

137. See CAMMAC, *supra* note 125, at 4.

138. *Id.*

139. See Patrick Harries, *Symbols and Sexuality: Culture and Identity on the Early Witwatersrand Gold Mines*, 2 GENDER & HIST. 318, 323 (1990).

140. *Id.*

141. Ordinance 46 of 1903 § 21(1)(a) (Transvaal) (emphasis added).

142. Act 36 of 1902 §33(1)(a) (Cape); Ordinance 11 of 1903 § 13(1)(a) (Orange Free State); Act 31 of 1903 § 15(1)(a) (Natal).

143. See *infra* notes 148-82 and accompanying text.

danger of interracial mingling, men and women were equally regulated.¹⁴⁴

III. *UNION OF SOUTH AFRICA*

A. *Black Peril*

By the end of the Anglo Boer War in 1902, after which the Transvaal became a British colony, there was hysteria concerning black male sexuality and the threat it posed to white male masculinity. Sexual relationships between whites and blacks were considered to be incredibly immoral, even where consensual: “The myth of the black rapist who through overexposure to civilization came to desire white women also embodied a more generalized anxiety and ambivalence about the appropriate limits of the civilizing mission.”¹⁴⁵ The racial dimension of the transactions between European sex workers and black mine workers created a panic that would result in the 1902 Morality Act that criminalized relationships between black men and white women: “What turned their worries into panic, however, was the knowledge that some of these white women slept with African men. In response, the legislature quickly passed a series of bills to curb prostitution, even organizing a special ‘Morality Police’ to fight the scourge.”¹⁴⁶

In 1902, the Morality Act criminalized relationships between black males and white female prostitutes in the Cape Colony.¹⁴⁷ This legislation was also passed in the three remaining colonies. In 1910, the four colonies unionized to form one republic.¹⁴⁸ The ever-present threat of the Native man’s sexuality and his presumed attraction to the virtuous white woman created a “black peril” that resulted in the creation of several committee and task forces aimed at addressing the issue.¹⁴⁹ There was the fear that a black male was a physical threat to the white woman in the form of a potential rapist or aggressor.

144. *Id.*

145. Pamela Scully, *Rape, Race, and Colonial Culture: The Sexual Politics of Identity in the Nineteenth-Century Cape Colony, South Africa*, 100 *AM. HIST. REV.* 335, 338 (1995).

146. See Trotter, *supra* note 16, at 679.

147. Morality Act 36 of 1902 (S. Afr.).

148. Jeremy Martens, *Citizenship, ‘Civilisation’ and the Creation of South Africa’s Immorality Act, 1927*, 59 *S. AFR. HIST. J.* 223, 228 (2007).

149. See generally Shear, *supra* note 53, at 396.

A white women's movement coalesced in these years around opportunities to mobilize against the 'black peril'. Not only did Leagues for the Protection of Women and Children emerge specifically in response to urban racial scares, but 'black peril' issues attracted the range of existing women's societies into alliances such as Johannesburg's Standing Committee of Women's Organizations, which brought nineteen associations together 'first of all as a Black Peril Committee' early in 1911.¹⁵⁰

The "black peril" refers to the hysteric fear that black men's sexual attraction to white women posed a threat to them.

There were reports of taverns where black men could easily fraternize with white sex workers, subverting all the social rules of the time and perverting what was deemed to be acceptable.¹⁵¹ This phenomenon must have been doubly troubling because the white women's willingness to engage with black clientele was in some forms a resistance against the dominant white male patriarchal order. Sex workers already were using their bodies for their own personal benefit with little regard for the dominant ethos regarding respectability and morality. On top of this subversion, they were openly entertaining men of a race deemed to be inferior. This was the ultimate violation of the prevailing sexual mores. In some senses this subversion defied a possibility of future redemption or compliance with white male hegemony.

The black man was frequently viewed as a threatening perpetrator who would be unable to resist his savage urges to ravish the white woman. This was exceptionally clear from reports from the time.¹⁵² "In white imaginations, respectable white women were bound to become the sacrificial prey of the black beast unleashed by the breaching of racial boundaries."¹⁵³ White women were prominent voices in the discourse against the threat of European sex workers engaging black clients during the black peril. A white Afrikaans woman wrote an article describing the threat of the black man in 1912:

'[T]he veld girls know exactly where is the place of a black brute. They do not allow a Kaffir any further in their houses than

150. *Id.*

151. Trotter, *supra* note 16, at 679.

152. Timothy Keegan, *Gender, Degeneration and Sexual Danger: Imagining Race and Class in South Africa, ca. 1912*, 27 *J. S. AFR. STUD.* 459, 464 (2001).

153. *Id.*

in the kitchen. To their modest minds it is the greatest disgrace to allow a Kaffir to enter their bedrooms to bring in early coffee or to attend to the tidying up of their houses inside. If they haven't a black woman to do it, they do it themselves. Neither would they dream of carrying on a conversation with a Kaffir.¹⁵⁴

Rape perpetrated by black men against white women was punishable by death.¹⁵⁵ The black man was a moral threat to the white woman vis-à-vis his presumed ability to corrupt her delicate sensibilities. This threat extended to white sex workers and the 1913 Commission on Assaults on Women shared this fear:

[F]oreign professional prostitutes allowed, and indeed often invited, intercourse between themselves and natives. Amongst their companions such natives gloried in the fact of having had intercourse with white women, and on their return home the fact was repeated and spread abroad. So desire was stimulated in minds previously innocent of such an idea, and individuals unable to discriminate between one class of women and another were inclined to gauge the standard of morality of white women by the examples presented under such circumstances, and to fancy that they need only make advances to be accepted by white women generally.¹⁵⁶

The interracial dynamic of relationships between foreign, European sex workers and black natives was a perceived threat to the survival of the white race.¹⁵⁷ It also threatened white male sexuality by treating black men as potential sexual partners. Interracial sexual liaisons were treated as morally repugnant and a threat to the purity of the white race.¹⁵⁸ Because of this, the thought of white sex workers who willfully engaged with black clients created a moral outrage:

[T]he arrival from the late 1890s in South Africa's urban centres of large numbers of European prostitutes, who, it was feared, were very indiscriminate in the disposal of their favours. After the South African War, a spate of laws was introduced criminalising their entertaining black clients. In the Cape, the law was limited to punishing white prostitutes who accepted 'aboriginal natives' as clients, leaving the clients themselves unscathed. In the Transvaal, Natal and Rhodesia, however,

154. *Id.* at 476 (internal citation omitted).

155. Scully, *supra* note 145, at 336, 346.

156. Keegan, *supra* note 152, at 465.

157. *Id.* at 465-66.

158. *Id.*

legislation was much more stringent, prohibiting all sexual contact between black men (including 'coloureds') and white women, whether for gain or not, and imposing heavy penalties on both black men and white women in such relationships.¹⁵⁹

Several legislative measures were adopted to address the issue of non-discriminate sex work. In an effort to curtail the migration of European women for the purposes of sex work, Union Bill 350, No. 553 of 1913 prohibited the immigration of "any prostitute, or any person, male or female, who lives or has lived on . . . any part of the earnings of prostitution or who procures or has procured women for immoral purposes."¹⁶⁰

In 1926, the representative for Barberton of the Afrikaans Party, W.H. Rood, argued that white men who openly slept with black women should be divested of the right to vote, reasoning that if the white man wants "to become a native, then give him the same rights as the natives in the Transvaal."¹⁶¹ This paranoia around the risk of the contamination of the white race eventually led to the promulgation of strict miscegenation laws. But even before this time, the dynamic forces around race and gender that shaped the passing of those laws were in place at a very early stage in the colonial state. "Particular standards of behaviour were as important as physical appearance in defining race and nationhood, and that poverty and 'moral malaise' in the white population threatened to breach racial boundaries and undermine racial hierarchy, respect and dominance."¹⁶² Miscegenation was considered to be the ultimate violation of the social order, and thus, even the most casual interracial relationships were met with suspicion.¹⁶³

B. *Sex Worker: The Unreliable Public Nuisance*

Several legislative measures were passed to police the public nuisance aspect of sex work in the early twentieth century. Act No. 2 of 1911 of the newly formed South Africa required a fine from "[a]ny common prostitute or night walker loitering or being in any thoroughfare or public place for the purpose of prostitution or

159. *Id.*

160. Union Bill 350, No. 553 of 1913 (S. Afr.).

161. See Martens, *supra* note 148, at 224 ("take away the vote from the man who makes himself guilty of such things . . .").

162. *Id.* at 226.

163. See Martens, *supra* note 148, at 228.

solicitation *to the annoyance of the inhabitants or passengers.*"¹⁶⁴ Act No. 41 of 1911 criminalized the activities of brothel keepers: "Any person who, being the keeper or having the management of any place of public resort, shall (1) knowingly permit pimps or prostitutes to frequent such place; or (2) knowingly suffer prostitution, or procuration for the purposes of prostitution, to be carried on, in or about such place . . . shall be liable on conviction . . ." ¹⁶⁵ The sex worker was problematic to the extent she posed a public nuisance.

While sex work was often treated as inevitable, sex workers themselves were generally perceived with suspicion and treated as unreliable characters by the legal system as a matter of course. The 1913 decision by the Orange Free State Provincial Division court in *Rex v. Weinberg*¹⁶⁶ noted that "[e]very Court that tries this kind of case ought to be very careful not to convict a man upon the uncorroborated evidence of a prostitute." The same court further held in 1917 in *Rex v. Christo*, "Therefore before the Court accepts testimony of this kind [by a prostitute] it must be amply corroborated."¹⁶⁷ This finding was later affirmed in 1948 in *Rex v. Dikant*.¹⁶⁸ These legal decisions deemed the sex worker as inherently unreliable, encouraging the marginalization of sex workers in public discourses. The law both constituted and constructed discourses pertaining to the sex worker as untrustworthy.

In Cape Town, volunteer patrols comprised of women were formed to deal with the sex work issue "to save foolish women and silly girls from moral danger, to lessen the social evils of [the] streets and other public places and to raise the moral tone of the community, particularly the female portion of it" in 1915.¹⁶⁹ Johannesburg women attempted to enact a similar program in the Witwatersrand but failed, and eventually the Cape Town program was repealed in 1919. In 1919, the Union Public Health Act repealed the Cape Colony's Contagious Diseases Act,¹⁷⁰ creating a uniform method for regulating sex workers' bodies for contagion in the newly created South African union.¹⁷¹

164. No. 2 of 1911 (S. Afr.) (emphasis added).

165. Act No. 41 of 1911 (S. Afr.).

166. 1916 OPD at 653.

167. 1917 OPD at 420.

168. 1948 (1) SA 693 (OPD).

169. Shear, *supra* note 53, at 398.

170. *Id.*

171. Union Public Health Act of 1919 (S. Afr.).

At the same time, there was a continued pattern of black migration from rural areas to urban mines in the 1920s to 1930s, which contributed to an increase of sex work in these areas.

During the 1920s and 1930s, as conditions deteriorated in many rural areas and male migrants increasingly ‘disappeared’, black women flooded into the cities. A large portion were involved in domestic beer brewing and many turned to prostitution in order to survive. Most eventually attached themselves to urban men and, with sex ratios beginning to approach normality, the black urban population gradually stabilised. Urban administrators and welfare workers became alarmed by what they perceived to be a high rate of promiscuity among urban women.¹⁷²

By 1927, relationships between blacks and whites were completely prohibited. The Immorality Act of 1927 prohibited “carnal relationships” between blacks and whites.¹⁷³ Despite the influx of women into urban spaces, sex workers were only subject to civil penalties under Section 27 of South African Act No. 31 of 1928, which provided that “loitering or being in any street or public place for the purpose of prostitution or solicitation *to the annoyance* of the inhabitants or passengers” was an offence punishable by fine.¹⁷⁴ However, running a brothel was subject to six months of hard labor. Again, sex work was only policed where a public nuisance occurred.

The public health of sex workers at the time remained a curiosity. A research report by the University of Pretoria conducted from 1939 and 1941 on European sex workers in Johannesburg found that “[t]he great majority of all prostitutes in Johannesburg are infected with one or other of the venereal diseases.”¹⁷⁵ In explaining the political economy of sex work for white women in Johannesburg, it stated:

71.4 per cent of convicted prostitutes originate from the rural areas. The economic retrogression of many rural towns and areas on the one hand, due largely to depressed agricultural conditions, and the continuous industrial development in cities like Johannesburg The problem of prostitution in Johannesburg

172. Peter Delius & Clive Glaser, *Sexual Socialisation in South Africa: A Historical Perspective*, 61 AFR. STUD. 27, 40 (2002).

173. The Immorality Act 5 of 1927 (S. Afr.).

174. Act No. 31 of 1928 (S. Afr.) (emphasis added).

175. Louis F. Freed, *The Summarised Findings of a Medico-Sociological Investigation into the Problem of Prostitution in Johannesburg*, 22 S. AFR. MED. J. 52, 53 (1948).

cannot be dissociated from the modern phenomenon of industrialisation and urbanization.¹⁷⁶

As was the norm, the sex worker as a vessel of contagion was highlighted: “Prostitutes are the principal disseminator of venereal disease in the community. The percentage of infected men in Johannesburg who contract their venereal infection—from prostitute is approximately 64.6 per cent. Over the 19-year period, 1920-1939, approximately 30,000 men in Johannesburg contracted one or other of the venereal diseases.”¹⁷⁷ This report strongly favored an approach that was not criminal in nature, highlighting that even in the years of increasingly totalitarian rule there were those advocating for a lenient approach to the policing sex work.¹⁷⁸ However, the discourse continued to treat the sex worker as a host for contagion.

IV. APARTHEID

In 1948, the Nationalist Party won the election, beginning the apartheid regime in South Africa.¹⁷⁹ The courts at the time began to question the discrepancy in the enforcement of laws relating to sex work, noting that clients should not be treated more harshly than sex workers. In the 1951 decision *Rex v. V*,¹⁸⁰ the Eastern Districts Local Division court noted that South African law should not be lenient in its treatment of sex workers when compared to that of the clients:

[A] prostitute herself whose act in soliciting is not less immoral than that of the accused, and who makes money out of immorality in the ordinary course, is only liable to the £5 fine and not even that if the soliciting by her occurred in a quiet public street where no member of the public is annoyed. That . . . seems a glaring injustice.

The court then reversed a conviction of a man who solicited a coloured sex worker, arguing that the solicitation law was intended to regulate the actions of “pimps” and “touts.”¹⁸¹

The Immorality Act of 1950—later the Sexual Offences Act of 1957—repealed the 1927 Immorality Act and was the dominant

176. *Id.*

177. *Id.* at 53-54.

178. *Id.*

179. Carol E. Kaufman, *Reproductive Control in Apartheid South Africa*, 54 *POPULATION STUD.* 105, 106 (2000).

180. *Rex v. V*, 1951 (2) SA 178 (EPD).

181. *Id.*

legislation that regulated South African sex lives during the apartheid era.¹⁸² The Immorality Act prohibited all forms of miscegenation between all races, aspects of sex work, and the creation and management of brothels.¹⁸³ It was a great interference into the sex lives of South Africans and represented a brand of morality that was consistent with the beliefs of the Dutch Reform Church.¹⁸⁴ This brand of morality in many respects perceived women as the property of men and less culpable in the sexual act. For example, the penalties for “sexual deviance” varied between men and women in the 1957 version of the Immorality Act, which penalized women with four years’ imprisonment and men with five years.¹⁸⁵ This supports a belief system of women’s sexual innocence and subjugated their sexuality to that of men.

Section 10 of the Immorality Act, 1957¹⁸⁶ criminalizes the actions of brothel keepers:

Any person who (a) procures or attempts to procure any female to have unlawful carnal intercourse with any person other than the procurer . . . or (b) inveigles or entices any female to a brothel for the purpose of unlawful carnal intercourse or prostitution or (c) procures or attempts to procure any female to become a common prostitute . . . shall be guilty of an offence.

Section 19 of the Act appears to target the client and criminalizes the actions of a person who “entices, *solicits*, or importunes in any public place for immoral purposes.”¹⁸⁷ Section 20 of the Act criminalizes the activities of persons living off the proceeds of sex work:

(1) Any person who knowingly lives wholly or in part on the earnings of prostitution; or in public commits any act of indecency with another person; or in public or in private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person, shall be guilty of an offence.¹⁸⁸

182. See Trotter, *supra* note 16, at 680.

183. The Immorality Act 23 of 1957.

184. See generally Susan Ritner, *The Dutch Reformed Church and Apartheid*, 2 J. CONTEMP. HIST. 17 (1967).

185. The Immorality Act 23 of 1957 (S. Afr.).

186. *Id.*

187. *Id.* (emphasis added).

188. *Id.*

Section 22¹⁸⁹ provides the penalties for the crimes and states that those convicted of living off the proceeds of sex work—presumably mostly female—were subject to “imprisonment with compulsory labour for a period not exceeding three years.” Those who attempted to procure prostitutes—presumably mostly men—were subject to “compulsory labour for a period not exceeding two years” and a whipping not exceeding ten strokes.¹⁹⁰ However, regardless of gender, “where it is proved that the person convicted kept a brothel and that unlawful carnal intercourse took place in such brothel to his knowledge between a white female and a coloured male or between a coloured female and a white male, for a period not exceeding seven years.”¹⁹¹ This highlights the shift toward imposing stricter penalties on sex workers, especially where there was a racial element in their alleged sexual deviance.

Despite this, there were previous reports that suggested that criminalization might not be the best mode for regulating sex work. As previously mentioned, a 1948 study found: “The penal measures operated by our Criminal Law in respect of both adult and juvenile prostitutes have not reduced the volume of prostitution in the progress of time, nor have they, in the majority of instance, served as a deterrent to prostitutes with previous convictions.”¹⁹² There were even reports of open defiance of prostitution regulations:

[I]n the 1950s, anthropologist Sheila Patterson noted that, ‘visiting ships’ crews were said to frequent night-clubs and dives in the more unsavoury streets of the Coloured ‘District Six’ in the centre of Cape Town. So the authorities tried to dissuade the seamen from such ‘immorality’ by handing out notices to the officers of incoming ships which warned: Premises, particularly in the Coloured and Indian quarters of this city, to which contact men, pimps or taxi-drivers, hansom-cabs and rickshas may take you for liquor or women are to be avoided; you are liable to be drugged, assaulted and robbed in these places. SEXUAL INTERCOURSE between white and nonwhites is a serious criminal offence in South Africa. MARRIAGE between whites and non-whites is prohibited by law.¹⁹³

189. *Id.*

190. *Id.*

191. *Id.*

192. See Freed, *supra* note 175, at 53.

193. See Trotter, *supra* note 16, at 681.

The legal system continued to view sex workers with suspicion. In recognizing that there were instances where the uncorroborated testimony of a sex worker may be relied upon, the Appellate Division ironically further marginalized sex workers in its dicta in *R v. Sibande*:

Rape upon a prostitute, for example, though it is the crime of rape, would not ordinarily call for a penalty of equal severity to that imposed for rape upon a woman of refinement and good character. *Prostitutes are not respected members of the community and, generally speaking, one does not expect them to be truthful.* But that is not to say that no prostitute ever speaks the truth; and the question you have to decide here is, was this woman speaking the truth? If you are dealing with a reputable person, that person's evidence is something which you will more readily accept as being that of a truthful witness than if you are dealing with a disreputable person. *Prostitutes are disreputable people, undeniably.*¹⁹⁴

This court decision normalized the view that sex workers were disreputable and should be viewed with suspicion by the legal system. It further normalized rape against sex workers in its flippant remarks that the rape of a prostitute is somehow less problematic than that of “a woman of refinement.”¹⁹⁵

Despite these legal decisions and the provisions of the Immorality Act that prohibited miscegenation, there were still reports of white men engaging black female sex workers during apartheid. One newspaper account details this:

Hundreds of prostitutes are in action in Johannesburg day and night. On the streets, the ladies of pleasure are almost exclusively black . . . and their customers almost totally white A doctor with consulting rooms in Hillbrow and Berea said, ‘Nearly all my patients who come to me for treatment for venereal disease have contracted the illness from crossing the sexual colour line.’¹⁹⁶

This report both exoticized and medicalized sex with black sex workers: it was against the racial hegemony and exposed one to a host of diseases. Some of these acts of racial defiance were quite open as demonstrated by dockside clubs in Cape Town, where black and white patrons would mix and mingle:

194. 1958 (3) SA 1 (A) at B (emphasis added).

195. *Id.*

196. Wojcicki, *supra* note 9, at 93.

[A]t least since the 1960s, relations between sailors and prostitutes have been initiated in rough-and-tumble downtown nightclubs: Although these clubs were often violent places, where sex and drugs were sold, they were some of the few institutions in Cape Town that ignored apartheid legislation. The men and women of all ‘races’ who went there, just by drinking and dancing together, were breaking the law, and the clubs were frequently raided by the police. Again, we see that dockside prostitution was highly social in its solicitation phase. It was also beyond the law’s concern. Though clubs were raided, they were not closed, despite the ceaseless law-breaking. And even with the high levels of violence right in the heart of the city, the clubs were not targets of moral campaigns or police clamp-downs.¹⁹⁷

These incidents highlight there has always been some degree of resistance against the sexual hegemony even during the apartheid era. In fact, there were even efforts to work toward the decriminalization of sex work. In 1975, the Transvaal Provincial Division began to poke holes in the Immorality Act of 1957 and found that it did not apply to the acts of sex workers themselves in *S v. F*:

The prostitute who earns money from the man with whom she has had intercourse in the brothel, or the woman who accepts money from the man upon whom she has performed some lewd or indecent act, such as pelvic massage, does not receive ‘moneys taken in a brothel’ in the sense contemplated [by the Immorality Act]¹⁹⁸

The court held that the Act does not apply to the actions of the sex worker.

In 1977, the Cape Town Medical Officer of Health, Reg Coogan, supported the decriminalization of sex work stating “prostitution will always be with us. If it is legalized it will be brought into the open, and allow the authorities to more effectively combat not only the occurrence and spread of VD, but other associated evils like pimping and blackmail.”¹⁹⁹ In the same year, Professor Hilton Watts, Head of the University of Natal Department of Sociology, argued, “No advanced society has managed to stamp out prostitution and it is unrealistic to pretend it does not exist.”²⁰⁰

197. See Trotter, *supra* note 16, at 682.

198. *S v. F*, 1975 (3) SA 167 (TBD).

199. See Wojcicki, *supra* note 9, at 94.

200. *Id.* at 93.

In 1988 there was a parliamentary debate concerning the decriminalization of sex work:

When one talks of immorality, of sex, of soliciting, of prostitution and the like, apart from everyone pricking their ears up there is always the argument that the law should not be tightened up at all, but that it should be relaxed, if not abolished completely. This view is bolstered by the fact that worldwide, over a period of hundreds and hundreds of years, no laws have ever succeeded in stamping out prostitution. This argument maintains, therefore, that the unequal struggle should be abandoned. It maintains that prostitution, far from being criminalised, should be legalised and controlled, thus at least ensuring standards of health and so helping the fight against venereal diseases and against AIDS. (Parliamentary Assembly Debates, Feb. 15, 1988, 891)²⁰¹

In *State v. Horn*, South Africa's highest court, the Appellate Division, held that the "proper interpretation of sec 20(1)(a) [confirms that it] was not intended that criminal liability should attach to the prostitute involved . . ." ²⁰² This 1988 decision thereby confirmed that the activities of sex workers were not to be treated as criminal under the Immorality Act, the only moment in South Africa's most recent history when sex work was unambiguously, fully decriminalized.

Despite what appeared to be a wave of support toward decriminalization, the legislature responded to the Appellate Division decision by amending the Act²⁰³ to clearly criminalize the actions of sex workers and any person who "has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward."²⁰⁴ Thus, the practice of sex work was only firmly criminalized in South Africa by the inclusion of Section 20(1)(aA) in 1988.²⁰⁵

V. DEMOCRACY

Following the new political dispensation in 1994, there were tremendous efforts to decriminalize sex work. The discourse around sex work focused on the question of decriminalization. Nonetheless,

201. *Id.* at 95 (quoting D.J. Dalling, *House of Assembly Hansard*, Feb. 15, 1998 Col 14768 (S. Afr.).

202. *S v. Horn*, 1988 SA 46 (AD) at 59 (S. Afr.).

203. Immorality Amendment Act 2 of 1988, *supra* note 9.

204. *Id.*

205. *Id.* at § 20(1)(aA).

sex work still remains criminalized in South Africa under the 1957 Sexual Offences Act through the 1988 Amendment.²⁰⁶ This legislation criminalizes the act of both the sex worker and the client²⁰⁷ who employs him or her. However, sex workers are rarely prosecuted under the Sexual Offences Act. This legislation is rather difficult to enforce and rarely results in prosecution. Rather, sex workers are more frequently prosecuted under various municipal ordinances and legislation, such as loitering and public disturbance regulations. Police use loitering regulations and other highly discretionary public disorder ordinances to detain sex workers. This practice is consistent with how sex work has historically been policed in South Africa—as a public nuisance violation.²⁰⁸

The Sexual Offences Act may nonetheless legitimize the regulation of sex workers by providing police officers with a moral bargaining chip for explaining why this population should be subject to special surveillance. In this way, even where legislation is unable to directly achieve its aims by resulting in more of a particular type of prosecution, it is able to do so indirectly by providing moral currency through de-legitimizing the activities of a particular group. The mere existence of the legislation may influence how sex workers are policed through other regulations.

A 2002 Law Commission Discussion Paper called for revisions of the Sexual Offences Act and included the possibility of decriminalization or legalization of sex work.²⁰⁹ There have been several efforts to decriminalize sex work in South Africa, yet none have resulted in the repeal of the offending provisions of the Sexual Offences Act.²¹⁰ However, this political climate of openly discussing

206. *Id.* at § 12A(1). “Any person who, with intent or while he reasonably ought to have foreseen the possibility that any person, who is 18 years or older, may have unlawful carnal intercourse, or commit an act of indecency, with any other person for reward, performs for reward any act which is calculated to enable such other person to communicate with any such person, who is 18 years or older, shall be guilty of an offence.” *Id.*

207. In Amendment Act 32 of 2007, the Act was amended to more explicitly indicate that it was referring to the activities of the contractor. *See* Amendment Act 32 of 2007 (S. Afr.).

208. The Author has spent over a year conducting ethnographic fieldwork in Johannesburg, exploring the nature of the relationship between police and sex workers in South Africa. Several of the conclusions from this Section concerning contemporary police practices are drawn from the ethnographic data gleaned from that research.

209. SA Law Commission Issue, Paper 19, *Sexual Offences: Adult Prostitution* (Oct. 2002) (S. Afr.).

210. *See generally* Wojcicki, *supra* note 9, at 91.

the possibility of decriminalizing sex work has in some manners resulted in *de facto* decriminalization. The regulation of sex work does not appear to be a police priority:

[T]he Department of Justice has presently not announced policy with regard to the decriminalisation of prostitution or sex work. What has become clear, however is a general move towards the decriminalisation of less serious offences. If one looks at the attorneys-general, it is clear that the decriminalisation of acts around sex work has already started.²¹¹

During this time period, some courts displayed flexibility in considering how sex work should be policed. In 2002, the Supreme Court of Appeal rejected the government's attempt to prosecute a brothel under the Sexual Offences Act by stating that there was a lack of evidence in *National Director of Public Prosecutions v. R O Cook Properties (Pty) Ltd.*²¹² The alleged brothel owner stated that any acts of indecency that occurred on the property were acts of private indecency, and the court indicated, "[w]e in contemporary South Africa do not seek windows into other persons' souls," implicitly recognizing the importance of allowing privacy within the "private" sphere even where sex work is involved.²¹³

In *S v. Jordan*, the constitutionality of the Sexual Offences Act was challenged.²¹⁴ The Constitutional Court of South Africa rejected the challenge to the legislation, reasoning that the legislature was within its powers in criminalizing the act of prostitution because it was associated with social ills, such as violence, child trafficking, and drug abuse.²¹⁵ An amendment to the legislation was subsequently passed to explicitly criminalize the actions of the sex workers' clients.

Courts have also been critical in ensuring that sex workers' rights are protected despite the illegality of their work. In 2008, the Supreme Court of Appeal confirmed a brothel owner's convictions for the rape of sex workers working under his employ, rejecting the argument that a sex worker's "willingness to dress in lingerie and take part in training was proof of her consent for him to have sexual

211. *Id.* at 89.

212. *Nat'l Dir. of Pub. Prosecutions v. R O Cook Props. (Pty) Ltd.*, 2004 (03) SA 260 (CC) at para. 39.

213. *Id.*

214. *S v. Jordan*, 2002 (6) SA 642 (CC).

215. *Id.* at paras. 24-25.

intercourse with her.”²¹⁶ The court further noted that even though the sex workers “voluntarily went to the [brothel], this did not mean that this was a license for their dignity and integrity to be violated at will by the appellant.”²¹⁷ This decision illustrates that despite the illegality of sex work, employers must respect sex workers’ rights.

In *Kylie v. Commission for Conciliation, Mediation, and Arbitration*, the Labour Appeal Court of South Africa held that the Labor Relations Act applies to sex workers.²¹⁸ The court reasoned that,

The fact that prostitution is rendered illegal does not, for the reasons advanced in this judgment, destroy all the constitutional protection which may be enjoyed by someone as appellant, were they not to be a sex worker By extension from section 23(1), the LRA [Labor Relations Act] ensures that an employer respects these rights within the context of an employment relationship. Expressed differently, public policy based on the foundational values of the Constitution does not deem it necessary that these rights be taken away from appellant for the purposes of the Act to be properly implemented.²¹⁹

Nonetheless, the contemporary policing of sex workers in South Africa is in some respects very individualized and particular, with some police stations foregoing the policing of sex work entirely while others continue to strictly police it.

Some courts have adopted a more conservative analysis when evaluating the enforcement of the Sexual Offences Act. In *National Director of Public Prosecutions v. Lorna M. B.*, a Durban court forfeited property that was used as a brothel.²²⁰ The prosecution coaxed a sex worker into accepting money from a detective posing as a client and then used the presence of condoms as proof of sex work.²²¹ The court proclaimed: “I hope that the message will go out to other brothel-keepers and also to the respondent, that their conduct would not be tolerated by courts.”²²²

216. *Egglestone v. The State*, 2008 ZASCA 77 (A) at para. 23.

217. *Id.* at para. 27.

218. *Kylie v. Comm’n for Conciliation, Mediation and Arbitration and Others*, 2010 (4) SA 383 (Labour Appeal Court of South Africa).

219. *Id.* at paras. 54-55.

220. 2009 (2) SACR 547 (Durban and Coast Local Division).

221. *Id.* at para. 4.

222. *Id.* at para. 43.

In 2008, the High Court in Pretoria confirmed the government's request to forfeit property determined to be a brothel, proclaiming its views on brothel keeping and prostitution in *National Director of Public Prosecution v. Geysers*:

And there can be little doubt, to my mind, that brothel-keeping would be seen by a majority in society, if not society as a whole, as morally more reprehensible than operating unregistered gaming machines. Brothel-keepers, as mentioned, commit their own offence and aid in the commission of the prostitutes' offence. In doing so, they themselves earn an income from prostitution.²²³

In these decisions, the judges have acted as the moral arbiters of contemporary times, asserting as “fact” the morally reprehensible nature of sex work. Even the Constitutional Court in its decision in *S v. Jordan*, appears to assume that the current dangers in the working conditions for some sex workers is inherent in the nature of sex work itself.²²⁴ This conflict between the “morality” of sex work—inherent victimization and righteousness of it—and desire to promote human rights—preventing rights violations and respecting individual agency—appears to be at the heart of current debates on sex work. This tension has resulted in unevenness in the manner in which sex work is policed. Sex work is primarily treated as a public nuisance violation, which has generally always been the case in South Africa. However, the Sexual Offences Act explicitly provides a moral basis for perceiving the very act of sex work as legally wrong, rather than a necessary evil that can be tolerated where there is no annoyance to the public. This legislation has empowered the policing of sex work to be aggressive at times even if sex work continues to be primarily regarded as a public nuisance matter.

Despite public declarations stating that the policing of sex work is not a priority, some police departments continue to police sex workers aggressively. Sex workers have complained of unlawful detentions and allege that some police officers ask for sexual favors in exchange for release from detention.²²⁵ Some sex workers complain

223. 2008 ZASCA 15 (CC) at para. 25.

224. *S v. Jordan and Others*, *supra* note 214.

225. See NICOLÉ FICK, SEX WORKER EDUCATION & ADVOCACY TASKFORCE, COPING WITH STIGMA, DISCRIMINATION AND VIOLENCE: SEX WORKERS TALK ABOUT THEIR EXPERIENCES 12 (2005) (noting that “sex workers are vulnerable to violence and that they have to deal with tremendous stigma and discrimination . . .”).

that police officers frequently ask for bribes, and many have been raped and physically assaulted by police officers.²²⁶ Despite the creation of a human rights regime following democracy, many sex workers complain of a pattern of human rights abuses against them.²²⁷ This pattern is a reflection of societal values toward female sexuality and male patriarchy that moves far beyond the policing institution. “[F]emale prostitution issues a challenge to masculinist capital economies who resist women’s attempts to generate and control their own labour and earning.”²²⁸

Even within the same jurisdictions where there are reports of police abuse of sex workers, sex workers have indicated that police are at times tolerant of their activities and permissive. In some jurisdictions, police work cooperatively with sex workers, benefit from licensing agreements with sex workers and brothel owners, and act as ready protectors when sex workers have conflicts with clients. In this way, the policing of sex work is pulled by opposing forces that call for both a heavy handed approach driven by a moral imperative of promoting law abiding citizens versus acceptance of its inevitable existence.

In the human rights paradigm, there appears to be a universal acceptance that the rights of sex workers should be protected and respected. However, traditional values that view sex workers as unreliable and victims of circumstance are so embedded into the fabric of society, that there are only a few political actors willing to

226. *Id.*

227. These practices are very much at odds with the very notion of constitutionalism which is concerned with:

[A] government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule, but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limits. In other words, constitutionalism combines the idea of a government limited in its action and accountable to its citizens for its actions.

Charles M. Fombad, *The Constitution as a Source of Accountability: the Role of Constitutionalism*, 2 *SPECULUM JURIS* 41, 44 (2010). Some commentators express deep cynicism about the extent of reform by government bodies:

These institutions will need to deal with the pervasive and perennial abuses of discretionary powers involving unjustified discrimination and extortion of money which many Africans are subjected to on a daily basis. This includes, for example, the extraction of bribes by police officers at road blocks and the bribes extracted by civil servants in order to process official documents. Third, these institutions will be more effective if they are made easily accessible to the poor and marginalised in society. *Id.* at 61.

228. Rachel Holmes, *Selling Sex for a Living*, in 10 *AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY* 36, 36, 38, n.23 (1994).

risk advocating for the complete tolerance of sex work as a matter of moral imperative. Furthermore, the Sexual Offences Act appears to provide the moral authority for viewing sex workers as morally reprehensible in South Africa and may be a continuation of legal decisions that have formally recognized sex workers with suspicion. In this way, the conflicting modern discourses around sex work demonstrate the continued conflict between the official policies relating to the policing of sex work and the actual practices on the ground.

CONCLUSION

The history of policing sex work in South Africa has been complex and multidimensional, driven by discourses around female sexuality and sex work, public health discourses centered on the sex worker as a site of contagion, and the formal laws that respond to these conflicting discourses and frequently construct and constitute them. Cultural norms about female sexual morality have undeniably been a part of the discourses around the policing of sex work in South Africa. Before the new democracy much of the debate involved the infusion of public health concerns and terminology, whereas now it is shaped by a human rights agenda. Nonetheless, the content of the discussion is arguably very much the same. Since the 1800s, there have been discussions centered on women's agency over their bodies and the prevention of state intrusion into that realm. At any given moment, the treatment of sex workers has been subject to the political and economic whims of the time. It is clear, though, that sex workers have generally been stigmatized and treated as victims, sometimes at the risk of depriving them of self-determination. Today, they continue to be viewed with some suspicion and are morally regulated by the dictates of the Sexual Offences Act.

As Foucault has observed a "policing of sex" occurs in public and private discourses.²²⁹ Power emanates not from the repression of sex but from the discursive technologies of sexuality. The discourses around sexuality serve not to repress it but rather to place the State's gaze upon it. Accordingly, both radical feminists who pioneer against the false consciousness of sex workers and well-intentioned public health officials, who focus on sex workers as hosts for disease while

229. *Id.*

ignoring the sex workers' clients, are empowered by their discourses around sex.

These actors are exercising power over the seemingly voiceless sex workers by engaging in discourses around the policing of sex work while disregarding the perspective of the sex worker as told by the sex worker. Ultimately, the overemphasis on pushing for or against decriminalization fails to appreciate how these discourses indirectly police sex workers' bodies while empowering the discussants rather than the sex workers. The continuous tension between policy and practice indicates that policies have been unsuccessful in responding to the lived reality of sex work. In this sense, broad pronouncements about the decriminalization of sex work require additional nuance that appreciates the historical conditions that inform sex work as well as localization to address the particular concerns of the relevant community. Accordingly, calls for decriminalization must be accompanied by proposals for a legal infrastructure that provides police with clear guidelines regarding how to police sex workers to prevent *ad hoc* rules that may prejudice sex workers.