

## **ILL-CONCEIVED LAWS AND EXPLOITATIVE STATE: TOWARD DECRIMINALIZING PROSTITUTION IN INDIA**

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## I. INTRODUCTION

The following is an excerpt from the debates in the Constituent Assembly of India in 1949.<sup>1</sup> The Assembly was vested with the task of creating the Constitution of India<sup>2</sup> and this debate discussed prostitution at length:

*Shri Brajeshwar Prasad: Mr. President, Sir, I feel that the gravity of the situation has not been realized . . . My Friend Shri Deshmukh spoke in the vein that probably it can be abolished or abrogated altogether. I do not agree with him on that point. Prostitution is a very old institution – as old as the hills and it cannot be abolished. The roots of this institution lie deep in our human nature. The only thing that we can do is to regulate it . . .*

*Shri R.K. Sidhva: Mr. President, I was rather surprised at the attitude of Shri Brajeshwar Prasad. He says this institution is centuries old and it cannot be abolished. Prostitution in India is a disgrace and shame to us and it is regrettable that Shri Brajeshwar Prasad should advocate its continuance . . . It is a disgrace and shame to society that this kind of thing should be allowed to continue . . .*

*Shri Brajeshwar Prasad: If you abolish, the whole thing will go underground.<sup>3</sup>*

Sixty-four years after this discussion, the same questions regarding prostitution remain unanswered. Studies by the Ministry of Women and Child Development in the government of India estimate that there are about three million prostitutes (of which 40 percent are estimated to be children),<sup>4</sup> and the increasing number of prostitutes in the country in the

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1. The Constituent Assembly was a body of elected representatives whose purpose was to draft the Constitution of India. The Assembly spent three years, beginning in December 1946, to draft the Constitution. See AUSTIN GRANVILLE, *THE INDIAN CONSTITUTION, CORNERSTONE OF A NATION* (1999).

2. The debate can be found at *Constitutional Debates*, INDIAN KANOON, <http://www.indiankanon.org/doc/63062/>.

3. See, GRANVILLE, *supra* note 1.

4. Ministry of Women and Child Development, *Indian Country Report: To Prevent and Combat Trafficking and Commercial Sexual Exploitation of Children and Women*, 4 (2008), available at <http://www.unodc.org/pdf/india/publications/India%20Country%20Report.pdf>. This figure has sometimes been inflated by other organizations and correct estimates are difficult. For instance, Human Rights Watch estimates the figure to reach around 15 million, as cited in Sudha Rani, *Prostitution: A Burning Issue in India Today*, MERINEWS (Apr. 7, 2012), <http://www.merineews.com/article/prostitution-a-burning-issue-in-india-today/131963.shtml>. Other reviewers have cited a smaller number of prostitutes in India – ranging between 300,000 to 700,000: see David Gisselquist & Mariette Correa, *How Much Does Heterosexual Commercial Sex Contribute to India's HIV Epidemic?*, 17 INT'L J. OF STD & AIDS 736 (2006).

last decade<sup>5</sup> shows a correlation between economic growth and prostitution.<sup>6</sup> Sex workers<sup>7</sup> have been subject to disempowering laws and coercive state institutions throughout post-independent India.<sup>8</sup> Issues related to gender, health, rights, and livelihood are at the heart of debates surrounding sex work in India. It is, therefore, no wonder that “emotive issues about which much has been written with more passion than objectivity because they touch the core of our beliefs about morality, justice, gender and human rights”<sup>9</sup> require a careful review.

At the global level, prostitution<sup>10</sup> – labeled “the oldest profession in the world” – is fraught with a tumultuous history.<sup>11</sup> Whether “actively prohibited, tacitly condoned, formally regulated, or a combination of these,”<sup>12</sup> prostitution remains a thriving industry regardless of its legal status. Some estimates suggest that global trade in prostitution earns revenue of \$186 billion annually<sup>13</sup> with prostitution in India comprising more than 8 percent of this figure.<sup>14</sup> Currently, many countries are considering amending their legal approaches toward prostitution, not only for the health and safety of the prostitutes and those who utilize their services, but also to profit from the revenue generated by the profession.<sup>15</sup>

The different legal approaches to prostitution can be broadly categorized into legalization, prohibition, and toleration. More than 100 countries have explicitly criminalized only some aspects of sex work.<sup>16</sup>

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5. Upasana Bhat, *Prostitution ‘Increases’ in India*, BBC NEWS DELHI (July 3, 2006 11:57 GMT), [http://news.bbc.co.uk/2/hi/south\\_asia/5140526.stm](http://news.bbc.co.uk/2/hi/south_asia/5140526.stm).

6. As countries become increasingly industrialized, many women are pushed toward prostitution. See, e.g., RUTH ROSEN, *THE LOST SISTERHOOD, PROSTITUTION IN AMERICA, 1900-1918* (1982).

7. Throughout the article, “prostitute” and “sex worker” are used interchangeably.

8. RAJESWARI SUNDER RAJAN, *THE SCANDAL OF THE STATE: WOMEN, LAW AND CITIZENSHIP IN POSTCOLONIAL INDIA* 336 (Duke University Press 2003).

9. A. George, U. Vindhya & S. Ray, *Sex Trafficking and Sex Work: Definitions, Debates and Dynamics—A Review of Literature*, 65 *ECONOMIC AND POLITICAL WEEKLY* 64 (2010).

10. Prostitution is generally defined as the exchange of money for sex. Eleanor M. Miller et al., *The United States, In Prostitution* 300, 303 (Nanette J. Davis ed., 1993). See subsequent paragraphs.

11. Jessica N. Drexler, *Governments’ Role in Turning Tricks: The World’s Oldest Profession in The Netherlands and the United States*, 15 *DICK. J. INT’L L.* 201, 201 (1996).

12. INE VANWESENBECK, *PROSTITUTES’ WELL-BEING AND RISK* 2 (1994).

13. See *Sex Trade: Prostitution Facts and Prostitution Statistics*, HAVOCSCOPE DATABASE, available at <http://www.havocscope.com/tag/prostitution/>.

14. Sankar Sen & P.M. Nair, *A Report on Trafficking in Women and Children in India 2002-2003*, NHRC-UNIFEM-ISS Project, Vol. 1, available at <http://nhrc.nic.in/Documents/ReportonTrafficking.pdf> (2004).

15. Drexler *supra* note 11, at 201.

16. 2010 Global Report, *Report on the Global AIDS Epidemic*, 120-43, UNAIDS (2010),

Other countries, like the United States (except the state of Nevada), Iran, China, Cuba, Vietnam, and South Africa, have outlawed it completely.<sup>17</sup> Legalization accepts the institution of prostitution and gives full legal rights to sex workers, often accompanied by registration, licensing, and compulsory medical check-ups. This is practiced in West Germany and the state of Nevada in the United States.

An interesting legal approach to regulating the sex trade, practiced in most Scandinavian countries, comes in the form of criminalizing the purchase of sex but not the sale of it (hence clients are prosecuted and not prostitutes).<sup>18</sup> This is popularly known as the “Swedish” model.<sup>19</sup> This approach has seen grave consequences for sex workers when applied in other countries.<sup>20</sup> Other common legal responses cast the net on anti-trafficking laws so wide that they capture elements of consensual sex for money within their purview.<sup>21</sup> Many municipalities attempt to thrust commercial sex into statutory categories of “public decency,” “morality,” zoning/health regulations, and “nuisance” laws, thereby

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[http://www.unaids.org/documents/20101123\\_GlobalReport\\_Chap5\\_em.pdf](http://www.unaids.org/documents/20101123_GlobalReport_Chap5_em.pdf); United Nations General Assembly, *Report of the Secretary-General – United to End AIDS: Achieving the Targets of the 2011 Political Declaration, A/66/757*, available at [http://www.unaids.org/en/media/unaids/contentassets/documents/document/2012/20120402\\_UNGA\\_A-66-757\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/document/2012/20120402_UNGA_A-66-757_en.pdf).

17. ProCon.org, *100 Countries and Their Prostitution Policies*, (2009), available at <http://prostitution.procon.org/view.resource.php?resourceID=000772>; For Vietnam see Asian Pacific Resource and Research Centre for Women (ARROW), *MGD 3 in Vietnam*, available at [http://www.mdg5watch.org/index.php?option=com\\_content&view=article&id=96&Itemid=164](http://www.mdg5watch.org/index.php?option=com_content&view=article&id=96&Itemid=164) (201).

18. A. Gould, *The Criminalisation of Buying Sex: The Politics of Prostitution in Sweden*, *JOURNAL OF SOCIAL POLICY*, Aug. 6, 2001, 30 & 437-57; Gunilla Ekberg, *The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings*, *VIOLENCE AGAINST WOMEN* 1187, 1188 (Oct. 2004).

19. Gould, *supra* note 18, at 30 & 437-57.

20. See Don Kulick, *Sex in the New Europe: The Criminalization of Clients and Swedish Fear of Penetration*, in *ANTHROPOLOGICAL THEORY* 199–218 (2003); see also Jay Levy, *Impacts of the Swedish Criminalisation of the Purchase of Sex on Sex Workers*, Presentation at the British Society of Criminology Annual Conference, Northumbria University (July 4, 2011), available at <http://cybersolidaires.typepad.com/files/jaylevy-impacts-of-swedish-criminalisation-on-sexworkers.pdf>; Susanne Dodillet & Petra Östergren, *The Swedish Sex Purchase Act: Claimed Success and Documented Effect*, Presentation at Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges, The Hague (2011), available at [http://www.plri.org/sites/plri.org/files/Impact%20of%20Swedish%20law\\_0.pdf](http://www.plri.org/sites/plri.org/files/Impact%20of%20Swedish%20law_0.pdf). Ann Jordan, *The Swedish Law to Criminalize Clients: A Failed Experiment in Social Engineering*, Issue Paper 4 at Program on Human Trafficking and Forced Labor, Center for Human Rights & Humanitarian Law, American University, Washington College of Law (April 2004), <http://rightswork.org/wp-content/uploads/2012/04/Issue-Paper-4.pdf>.

21. Lisa Diane Schreter, Mariellen Malloy Jewers & Stephan Sastrawidjaja, *The Danger of Conflating Trafficking and Sex Work*, URBAN JUSTICE CENTER, <http://www.sexworkersproject.org/media-toolkit/downloads/20070330-BriefingPaperOnConflationOfTraffickingAndSexWork.pdf>.

giving wide latitude to policemen to coerce and harass sex workers in the name of the law.<sup>22</sup> The United Nations Convention in 1949, to which India is a signatory, condemned all forms of prostitution.<sup>23</sup>

Around the world, the laws governing prostitution have been drafted so that the institution of prostitution is *de facto* criminalized in most countries.<sup>24</sup> Over the years, these laws have gained colossal support from nineteenth century and subsequent feminist debates, which have extensively argued that prostitution is morally undesirable and have defined this profession as the most striking example of male dominance over women.<sup>25</sup> More recently, this common understanding of prostitution has been increasingly challenged, giving rise to both national and international debates.<sup>26</sup> The feminist school of thought has received severe criticism from the liberal contractarians, who have argued for decriminalization and for prostitutes to be given same rights as anyone engaged in any other work.<sup>27</sup> Some have also argued that

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22. See Scott Burris, Cheryl Overs & Matthew Weait, *Laws and Practices that Effectively Criminalise People Living with HIV and Vulnerable to HIV* (First Meeting of the Global Commission on HIV and the Law, Working Paper, 2010).

23. As of 2009, ninety-five countries have ratified the Convention but ninety-seven have not.

24. The Washington Times reports that prostitution is legal in fifty percent of countries, illegal in thirty-nine percent, and 'limited legal' in eleven percent (which includes India). *Worldwide Diversity*, WASH. TIMES, <http://www.washingtontimes.com/multimedia/image/prostitutionjpg/>.

25. Feminist views see prostitution as the quintessential form of male domination over women. It is also referred to as essentialist perspective and in this perspective prostitution involves not only specific acts of violence but is a form of violence by definition. Furthermore the following studies have perceived "prostitution as violence against women." KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* (New York University Press 1995); KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (New York University Press 1979); ANDREA DWORKIN, *LIFE AND DEATH* (New York Free Press 1991).

26. American laws define prostitution as an illegal activity, and it is pertinent to note that there is no such state where prostitution is allowed as intended by liberal contractarians. Decriminalization policies have just started entering the policy debates and call for decriminalization to allow prostitutes to operate as any other independently licensed business. These policies have acquired little public support across the globe. However, there exists some legalized prostitution with government regulation. Germany has legalized prostitution with mandatory health checks. Turkey licenses brothels but with huge restrictions. See A. SION ABRAHAM, *PROSTITUTION AND THE LAW* (Faber and Faber Publications 1977); see also Yondorf Barbara, *Prostitution as a Legal Activity: The West German Experience*, 5 *POLICY ANALYSIS* 427 (The Regents of the University of California 1979). (In 1999, the Netherlands legalized brothels and further aims to control child prostitution and also guarantees cleaner and safe working conditions for its thirty thousand prostitutes. In the Netherlands, the "vast majority" of workers in brothels, clubs, and window units report that they "often or always feel safe." It could be said that the Netherlands is one of the countries that has come close to a decriminalized or quasi-decriminalized form of prostitution.); see, A.L. Daalder, *Lifting the Ban on Brothels*, THE HAGUE: NETHERLANDS MINISTRY OF JUSTICE (2004).

27. See Prabha Kotiswaran, *Preparing for Civil Disobedience: Indian Sex-Workers and the*

there is something “right” about prostitution, which the law violates by criminalizing this activity.<sup>28</sup> The feminist school supporting criminalization and the liberal contractarians seeking decriminalization form the two extremes for the ongoing debate on the institution of prostitution.

The remainder of this paper is divided into six parts. Part II describes the history of prostitution in India and shows how the skeletons of morality were reconstructed during colonial rule. It also discusses the lack of strong evidence that prostitute women were treated in the same deplorable way in ancient India as they are today. In Part III, we explore the legal landscape in India concerning prostitution and describe how, even though prostitution is not illegal *per se*, the associated legislative and enforcement apparatus in India has, in effect, rendered it criminal activity in the eyes of the law. Part IV discusses the forms and players involved in exploitation, violence, and harassment directed at sex workers. This behavior is the very tendency that our proposal seeks to suppress. Part V forms the main body of the paper where we systematically argue in favor of decriminalizing prostitution, drawing our responses from (a) feminist theories, (b) contract theory and economic rationales, (c) social norms perspective, (d) public health view, and (e) game theoretic analysis. The discussion in Part VI helps identify the mistaken importance given to viewing prostitution as an institution. We contend that one of the reasons why prostitution is criminalized, and, therefore, why it is viewed in such an unfavorable light, is because of an illogical obsession with institutionalizing the practice of prostitution, which, in reality, is an extremely heterogeneous practice. Shedding the institutional view of prostitution is important to appreciate the value of freedom and agency that decriminalization of prostitution is expected to bring. Part VII offers our conclusions.<sup>29</sup>

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*Law*, 21 BOSTON COLLEGE THIRD WORLD L.J. 161, 163 (2001).

28. See LAURIE SHRAGE, *MORAL DILEMMAS OF FEMINISM: PROSTITUTION, ADULTERY AND ABORTION* (New York Routledge Publications 1994); see also Martha C. Nussbaum, *Whether from Reason or Prejudice: Taking Money for Bodily Services*, 27 J. LEGAL STUDIES 693, 702 (1998).

29. Three quick notes on the cosmetics of the paper. First, throughout the text, we use the term prostitutes and sex workers interchangeably. This follows from our preference of recognizing the agency of sex workers. Second, without diluting the importance of heterogeneity of sexuality (male or transgender prostitutes), we will use the references of a “female sex worker” and a “male client.” This is not only statistically more pronounced, but also helps lend an easier tone to the argument, without risking the generality of our conclusions. Third, and perhaps most importantly, we do not dwell on trafficking in this paper – a major oversight as some would say. This is not to deny the associative tendency the two markets have, nor to ignore the implications of such association, but this restricted view is taken for two reasons. Number one, an unalloyed view of prostitution helps us analyze it in its insulated form, which could aid to a simplistic understanding of

## II. HISTORICAL ANTECEDENTS OF PROSTITUTION IN INDIA

To locate the debate in contemporary context before considering historical antecedents yields a foundationless narrative. The strength of studying the historic roots of an activity lies in its power to deconstruct the prevailing notions of moral perceptions regarding the activity embedded in society. It dissolves the crystallized mode of thinking about an event, person, or activity and supports alternative viewpoints through a process of emotionless contextualization.

Even though a detailed formal account is difficult to lay hands on,<sup>30</sup> there is considerable evidence that sex workers in ancient India enjoyed a high degree of agency – as evinced by significant efforts in the direction of rediscovering the past from the narratives of colonial and nationalist authors.<sup>31</sup> In fact, S.M. Edward's writings on crime in India show how surprisingly tolerant Indian society was toward prostitution.<sup>32</sup> In one of the passages, he says, "[I]t is hardly an exaggeration to say that the great majority of India's inhabitants, representing orthodox and conservative opinion, still regard the profession, and those who follow it, with tolerance, and sometimes even with respect and approval. . . . [I]t result[s] in social anachronisms, which strangers view with amazement and are unable to understand."<sup>33</sup> Indeed, ancient Indian epics like *Ramayana* and *Mahabharata* (and even Buddhist scriptures like *Jatakas*<sup>34</sup>) contain several references to existing prostitutes who formed guilds and had recourse to civil and domestic rights.<sup>35</sup>

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a complex practice and paves the way for further study in this area by adding layers that are more complicated. We hope to see such an effort. Number two, there is no reason to believe that all sex workers in India are trafficked. Indeed, we despise trafficking in all forms and recognize that there are legislative tools in place to tackle it which need strengthening, but incorporating trafficking in this detailed inquiry will make the project too ambitious.

30. Disparate sources include reports on crime in British India, travelogues of western travelers and British feminists who had argued for abolishing prostitution, nationalists who sourced 'commercial sex' in India in British rule, or British officials who viewed prostitution as a result of intense demand for a male progeny amongst Indian families. See S.N. SINHA & N.K. BASU, *THE HISTORY OF MARRIAGE AND PROSTITUTION* 22 (Rita D. Sil ed., 1992).

31. For excellent post-colonial works in this regard, see Sumanta Banerjee, *Marginalization of Women's Popular Culture in Nineteenth Century Bengal*, in *RECASTING WOMEN: ESSAYS IN COLONIAL HISTORY* 127 (Kumkum Sangari & Sudesh Vaid eds., 1989); Janaki Nair, *From Devadasi Reform to SITA: Reforming Sex Work in Mysore State, 1892–1937*, 5 *N.L.S.J.* 82 (1993).

32. S.M. EDWARDES, *CRIME IN INDIA: A BRIEF REVIEW OF THE MORE IMPORTANT OFFENCES INCLUDED IN THE ANNUAL CRIMINAL RETURNS WITH CHAPTERS ON PROSTITUTION & MISCELLANEOUS MATTERS* 71 (1924).

33. *Id.*

34. SINHA & BASU, *supra* note 30, at 171-72.

35. Several authors have noticed this. See, e.g., Kotiswaran *supra* note 27, at 161. This section is based on Kotiswaran's work.

Gradually, prostitution came to be regulated, and prostitutes were categorized into *Kumbhadasi* (a lower class of prostitute women who would be housemaids and would sexually please the houselord), *Rupajiva* (higher in the hierarchy, ranging from head housemaid to professional dancers), and *Ganikas* (a high seat of honor attained through beauty and intellectual attainment. *Ganikas* were versed in several arts, educated, and held in high esteem by the King and other 'appreciate people').<sup>36</sup> References to *Ganika* help us understand the legal and social position of prostitute women in ancient India: she was treated like a government servant, was free to form associations, received a fixed salary from the King, which was considerable (she, therefore, transferred her proceeds from customers to the treasury),<sup>37</sup> was under charge of a Minister, and was provided for by the state in old age, since she would not marry, even though her property would be inherited by daughters or sisters.<sup>38</sup> There were rules for clients as well, who were not allowed to ill-treat prostitute women and could not renege on their payment.<sup>39</sup> Even though there were some rules that acted against prostitute women (for instance, *Ganikas* could not purchase their freedom from the profession because the price of doing so was too high) and it is difficult to draw wide-ranging conclusions about their social position, there is little doubt that their conditions were better than those for sex workers now.<sup>40</sup>

Social perception of prostitution, morality, and the conditions of the trade shifted during the colonial period, as colonial discourse on subalterns amply demonstrates this.<sup>41</sup> The British amazement regarding the toleration of prostitution in India (which was considered an

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36. SINHA & BASU, *supra* note 30, at 196-97. Note that in South India, a different institution of prostitution was in place, with prostitute women called *devadasis*. The tradition was to dedicate many beautiful young girls to the deity who were considered to be married to Gods. They would do temple chores, perform rituals, and dance and sing every day to please Gods. Several accounts also suggest that their appeasement to Gods was a proxy for pleasing temple priests, even sexually. This system exists even today and many girls from villages labeled such are trafficked to red-light districts as well. For a historical overview, see K.C. TARACHAND, *DEVADASI CUSTOM* (1991). For an earlier study, see generally S. Anandhi, *Representing Delladasis : 'Dasigal Mosallalai' as a Radical Text*, 26 *ECONOMIC AND POLITICAL WEEKLY* 739 (1991) (reviewing MOOVALUR R. AMMAIYAR, *DASIGAL MASAVALAI ALLATHU MATHI PETRA MINOR: THE TREACHEROUS NET OF DEVADASIS OR THE MINOR BROWN WISE* (1936)).

37. SINHA & BASU, *supra* note 30, at 207 (mentioning this in Kautilya's *Arthashastra*).

38. *Id.* at 200 (citing in Prabha Kotiswaran).

39. *Id.*

40. *Id.*

41. One can infer subalterns to be oppositely situated against elites or dominants. See Edward W. Said, *Foreword to SELECTED SUBALTERN STUDIES* v-vi (Ranajit Guha & Gayatri Chakravorty Spivak eds., 1988).



occupation just like blacksmithing and carpentry)<sup>42</sup> emerged from their own conception of how appallingly prostitute women lived and how degrading their profession was considered to be in Britain.<sup>43</sup> Instead of attempting to understand the structure of prostitution in India, the British exploited prostitute women to satisfy the “natural sexual desires” of the British troops.<sup>44</sup> In order to gain access to women’s bodies, however, they had to push forth the colonial project of superiority of their race, made possible by denigration of Indian prostitutes.<sup>45</sup> This required institutionalization of prostitution through the machinery of the state, and it was achieved by sponsoring and opening several state-run brothels, particularly in the Cantonment areas where they were called *chaklas*.<sup>46</sup> In the *chaklas*, prostitute women were treated as though incarcerated; they were physically and sexually abused by soldiers, fined, imprisoned, and starved.<sup>47</sup> Public perception is usually determined by what one experiences or observes. Once the risks (physical and mental) associated with prostitution as a profession increased, society developed an aversion to it.

Denigrating prostitutes through the Contagious Disease Act in 1868, gave the British sweeping control of Indian minds to invoke morality with respect to women’s sexuality.<sup>48</sup> The legislation gave powers to the state to identify and register prostitutes in the region and examine them for venereal diseases.<sup>49</sup> It led to arrests, compulsory and

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42. SINHA & BASU, *supra* note 30, at 203.

43. *Id.*

44. *Id.*

45. *Id.* at 204 (citing M. Jacqui Alexander from *Redrafting Morality: The Postcolonial State and the Sexual Offenses Bill of Trinidad and Tobago*, to emphasize that attempts to moralize sexuality were offshoots of colonial and authoritative projects that the British engaged in, in several countries).

46. ELIZABETH W. ANDREW, *THE QUEEN’S DAUGHTERS IN INDIA* 15 (1899). There were also many government orders that reflected state-sponsored trafficking in India during the time. For instance, an 1886 order of the Commander-in-Chief of British Army stated, “in the regimental bazaars it is necessary to have a sufficient number of women, to take care that they are sufficiently attractive, to provide them with proper houses, and, above all, to insist upon means of ablation being always available.” *Id.* at 42; see also Mridula Ramanna, *Control and Resistance: The Working of the Contagious Diseases Acts in Bombay City*, *ECONOMIC AND POLITICAL WEEKLY* 1470, 1475 (2000).

47. ANDREW, *supra* note 46, at 34-42.

48. One of the most illustrative accounts of prostitution in India and regulations thereof (including the Contagious Diseases Act, 1864), narrated through personal visits and interviews in India during late nineteenth century across ten cities of British India is recorded in *The Queens Daughter in India*. ANDREW, *supra* note 46.

49. The Contagious Diseases Act was a controversial enactment of Victorian England, both at home and overseas. It met with great resistance even in England and was also one of the first legislative acts to attract open confrontation of women and men at a political level, where women

humiliating checks, and forced confinement of “native” prostitutes until “cured” in locked hospitals for months in a row.<sup>50</sup> Even though the Act was repealed in 1888 in India due to increasing resistance to it in many English colonies,<sup>51</sup> it left two indelible impressions that scar the face of women’s rights in India even today. Firstly, it created and reinforced the consciousness of prostitution as an abhorrent profession in the Indian social and political fabric through sustained identification and portraying practices as degraded against Indian prostitute women.<sup>52</sup> Secondly, it left executive remnants on the Indian Penal Code and local police legislation.<sup>53</sup> Both lay the foundation for criminality of prostitution that was seeded in both social psychology and legal instruments. By treating certain acts of prostitute women as criminal, the Contagious Disease Act was a precursor to the collective conscious that marked everything to do with prostitution – except the act of sex – as criminal.<sup>54</sup> It was then that the urban legal space began to distinguish between cantonment areas and non-cantonment areas, and red light districts, which never existed before colonization, developed in Indian cities.<sup>55</sup> Interestingly, the nationalists – in their eagerness to resist the British – wrongly developed the same British sense of moral superiority, and many of them – educated in Victorian England – colluded with the British in degrading their own women.<sup>56</sup> Colonial experience, therefore, gradually subverted the old social designs of prostitution in India and replaced them with different informal and formal regimes that were reinforced even after the independence of India from Britain.<sup>57</sup>

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actively campaigned for their rights in the West. See JUDITH R. WALKOWITZ, *PROSTITUTION AND VICTORIAN SOCIETY: WOMEN, CLASS, AND THE STATE* (Cambridge University Press 1982).

50. SINHA & BASU, *supra* note 30, at 208.

51. For an analysis of gender relevant legislative changes in Muslim and non-Muslim countries, see Varsha Chitnis & Danaya Wright, *Gender Relevant Legislative Changes In Muslim and Non-Muslim Countries: The Legacy of Colonialism: Law and Women’s Rights In India*, 64 WASH & LEE L. REV. 1315 (2007).

52. Ramanna, *supra* note 46, at 1470-76.

53. SINHA & BASU, *supra* note 30, at 208.

54. *Id.* at 216.

55. *Id.*

56. SINHA & BASU, *supra* note 30, at 201. Kotiswaran cites Chatterjee to mention that this anxiety compelled nationalists to find spheres where Indians could show their superiority over British generally. Since material and public spheres displayed greatness of British culture and civilization, the only recourse they thought they had was in the realm of private and spiritual. English-educated Indian men carved out a binary role for women, inspired by Victorian England, where the ‘new woman’ would exhibit manners of the private sphere and ‘bad woman’ would be devoid of moral superior sense, coarse, vulgar sexually promiscuous and expressive of their sexuality. *Id.* at 215-16.

57. SINHA & BASU, *supra* note 30, at 201.

### III. INDIAN LEGAL LANDSCAPE ON PROSTITUTION

Inspired by the colonial institutions, it was natural for the Indian state to have a deprecatory view of prostitution as a starting point.<sup>58</sup> However, the debates in the Constituent Assembly invoked at the beginning of the article reflect the understanding of the practical situation of prostitution in India.<sup>59</sup> Nevertheless, the general distaste for the profession resulted in classifying the ancient, legalized institution as criminal activity. Soon after independence, India became a signatory to the UN International Convention for the Suppression of Traffic in Persons and of the Exploitation of Women, New York, 1950.<sup>60</sup> This led to the enactment of the Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA).<sup>61</sup> The Act had a tolerant approach toward prostitution<sup>62</sup> yet clearly showed signs of lawmakers grudgingly accepting prostitution as a necessary social evil. The Act underwent an amendment in 1978 and then, due to changing scenarios and debates in the international context, was further amended in 1986, entitled to the Immoral Traffic in Persons Prevention Act, 1986 (“ITPA”).<sup>63</sup>

The ITPA is only a cosmetic surgery over SITA. The change in the

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58. However, compare the debates in the Constituent Assembly of India, which discussed the possibility of leaving the subject to the provincial level. Regardless, the prevailing perception at the principle level was that of contempt towards the profession of sex work.

59. See GRANVILLE, *supra* note 1.

60. *Ministry of Women and Child Development, Government of India and UN Office on Drugs and Crime, India Country Report, 4, (2007), available at <http://www.unodc.org/pdf/india/publications/India%20Country%20Report.pdf>.*

61. See the *Law Commission of India's Sixty-Fourth Report on the Suppression of Immoral Traffic in Women and Girls, 1856, 1975, available at <http://lawcommissionofindia.nic.in/51-100/Report64.pdf>*. The Report maps a historical background and describes the scope of the Act in detail.

62. In *State v. Gaya*, AIR 1960 BOM 289, the Bombay High Court examined the provisions of SITA. The High Court laid down that the object of enacting SITA was the suppression of immoral traffic in women and girls. Furthermore the court also observed that the Act was passed in pursuance of the International Convention signed at New York and was never intended that the women or girls used for such traffic should be liable to punishment. See *RE RATNAMALA AND ANOTHER*, AIR 1962 MAD 31, in this case the Madras High Court held that the purpose of the SITA was to abolish commercialized vice, namely, the traffic in women and girls for the purpose of prostitution as an organized means of living. The idea was not to render prostitution per se a criminal offence or to punish a woman merely because she prostitutes herself. The court further examined the last part of the definition of “brothel” in Section 2(a) of the Act, to demonstrate that prostitution per se was legal. Accordingly, a single woman who practices prostitution for her own livelihood, without another prostitute, or some other person being involved in the maintenance of such premises, her residence will not amount to “brothel”; See also *Gaurav Jain vs. Union of India*, AIR 1997 SC 3021, Justice K. Ramaswamy held that the “women found in the flesh trade, should be viewed more as victims of adverse socio-economic conditions rather than as offenders in our society.”

63. *Ministry of Women and Child Development, supra* note 60.

title and scope signifies two important aspects, namely (a) the drive to ‘suppress’ traffic has been replaced by the need to “prevent” it and (b) the words “Women and Girls” have been replaced by the term “Persons,” recognizing that individuals of both sexes, including eunuchs, are trafficked in for prostitution.<sup>64</sup> Nonetheless, the substantial aspect of the Act, the criminalized view of prostitution, remains. While the act of prostitution *per se* is not criminal,<sup>65</sup> every other act associated with prostitution is criminal. Specifically, it prohibits anyone from maintaining a brothel<sup>66</sup> and living off the earnings of a prostitute.<sup>67</sup> Procuring or inducing<sup>68</sup> and detaining<sup>69</sup> a woman for prostitution are criminal activities, as well. There is a geographical restriction, as the activity cannot take place in a public place or a notified area,<sup>70</sup> in addition a ban on soliciting or seduction for prostitution.<sup>71</sup> In fact, Section 8, which deals with soliciting, is hugely criticized by activists.<sup>72</sup> Like its previous avatar, SITA, there is no punishment for the client of the prostitute.<sup>73</sup> A contentious clause, which violates the fundamental right to privacy,<sup>74</sup> vests power in the Magistrate to order removal of a prostitute from any place within his jurisdiction if s/he deems it necessary.<sup>75</sup>

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64. JEAN D’CUNHA, LEGALIZATION OF PROSTITUTION: A SOCIOLOGICAL INQUIRY INTO THE LAWS RELATING TO PROSTITUTION IN INDIA AND THE WEST (Workmakers 1991).

65. Section 2 (f) of the Immoral Traffic (Prevention) Act defines the term “prostitution” as “the sexual exploitation or abuse of persons for commercial purposes and the expression ‘Prostitute’ shall be construed accordingly.” Thus, the definition itself makes prostitution illegal as any kind of exploitation or abuse of any persons for a commercial purpose. THE IMMORAL TRAFFIC (PREVENTION) ACT, 1986. *available at* <http://www.childlineindia.org.in/CP-CR-Downloads/Immoral%20Traffic%20Prevention%20act%201956.pdf>.

66. *Id.* at § 3.

67. *Id.* at § 4.

68. *Id.*

69. *Id.* at § 6.

70. *Id.* at § 7.

71. *Id.* at § 8. In the judgment of Kerala High Court in *T. Jacob v. State of Kerala*, AIR 1971 KER 166, the court held that the prostitution in itself was no offence except in the manner covered under Sections 7 and 8. Section 8 of the act makes outward manifestation of women in sex work such as ‘soliciting and seducing for the purpose of prostitution’ illegal.

72. SINHA & BASU, *supra* note 30, at 230.

72. Rohini Sahni, V. Kalyan Shankar & Hemant Apte, *Prostitution and Beyond, An Analysis of Sex Work in India*, SAGE PUBLICATIONS: NEW DELHI 90 (2008) (citing Harshad Barde, *(Mis)reading through the lines*).

73. SINHA & BASU, *supra* note 30, at 168.

74. In *Maharashtra v. Madhukar Narain Mardikar*, AIR 1991 SC 207, the Court held that right to privacy is paramount and Section 20 cannot be misused against women of easy virtue. But in practice, private residences of sex workers are frequently raided by corrupt police officers. See Sahni et al., *supra* note 72, at 90.

75. THE IMMORAL TRAFFIC (PREVENTION) ACT, *supra* note 65, at § 20.

Therefore, even though a strictly legal understanding of the relevant statutes leads us to believe that prostitution in India is legal *per se*, this is a misleading thought. While a consensual exchange of sex for money is not criminal, everything associated with the activity is illegal. Since the activity itself cannot be insulated from other transactions that will come along with it, it is impossible to engage consensual sex for money without attracting criminality. The travesty of the written law in India in general, and of ITPA in particular, is that it has resulted in wide disparity between how law is crafted and how it is followed in practice. In effect, prostitution attracts the same treatment of sex workers as it would if it were deemed illegal. The state's entire enforcement apparatus exploits sex workers, pushing them underground just as any other illegal activity. This generates middlemen who negotiate the trade with state agencies and, in turn, feed on sex workers' earnings.<sup>76</sup>

A close reading of the ITPA enables us to observe how the law has effectively rendered prostitution a criminal activity. The ITPA defines prostitution as "the sexual exploitation or abuse of persons for commercial purposes . . ."<sup>77</sup> Hence, by its very definition, since any kind of exploitation or abuse is illegal, prostitution becomes illegal.<sup>78</sup> More importantly, restricting prostitution to sexual exploitation and abuse keeps "prostitution by choice" and "forced prostitution" outside the criminal space.<sup>79</sup> Since anti-trafficking laws handle "forced prostitution," the law remains silent on "prostitution by choice." Public perception and popular imagination fill the vacuum of indeterminacy in this regard, which only reinforces the unfavorable mental constructs of prostitution in India.

At statutory levels, this is captured through local legislation and discretionary arrests premised on public morality and criminality drawn from other associative acts, rendering "prostitution by choice" a legally infeasible alternative.<sup>80</sup> The ITPA is only one of the legislative tools invoked in cases of prostitution by enforcement officials, and a range of vaguely worded laws is more frequently used in convicting sex workers.

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76. We discuss this in detail in sections that follow.

77. THE IMMORAL TRAFFIC (PREVENTION) ACT, *supra* note 65, at § 2(f).

78. Indian Constitution, Article 23, offers a right against exploitation.

79. *Id.*

80. For laws against trafficking, see THE INDIAN PENAL CODE, 1860, [http://mha.nic.in/sites/upload\\_files/mha/files/pdf/IPC1860.pdf](http://mha.nic.in/sites/upload_files/mha/files/pdf/IPC1860.pdf). Laws against trafficking include section 365, 366A, 366B, 367, 370-374; see also ITPA; see also D'cunha, *Too Much Heat, Not Enough Light-Our Experiences with Sex Workers in Karnataka*, 87 MEMORANDUM FROM THE NATIONAL LAW SCHOOL OF INDIA UNIVERSITY TO THE SECOND ALL-INDIA COMMUNITY-BASED LAW REFORM COMPETITION 62-65 (1993).

The Indian Penal Code 1860 itself has provisions for trafficking and slavery of women and children.<sup>81</sup> It also has several clauses that deal with offenses that restrict sex workers.<sup>82</sup> For instance, Section 268 (Chapter XIV) deals with offenses related to public health, safety, convenience, decency, morals, and public nuisance.<sup>83</sup> These are vaguely designed laws that empower police against sex workers when the former want to exploit or extort money from the sex workers.<sup>84</sup> Sections 269 and 270 deal with spreading of infectious disease, which brings a sex worker under its purview if she could have transferred a sexually transmitted disease.<sup>85</sup> In addition, there are many state-level police laws and municipal laws and statutes related to beggary, railways, public decency, health, and nuisance that are used more often than the ITPA to harass the sex workers.<sup>86</sup> Therefore, without any deliberation or strategic operation, the legal enforcement apparatus has discovered many ways in which it is able to exercise discretion in methods of policing sex workers.

#### IV. VIOLENCE AGAINST SEX WORKERS IN INDIA

This section shows that the ill-conceived legal framework described above has given rise to (a) the middlemen and brothel owners in this trade, called pimps (we will use the term “pimp” to denote brothel owners as well) and (b) corrupt police officers. Both of these players impose heavy violence on sex workers, and we contend that, by decriminalizing prostitution, we would essentially eliminate these two players from the market. At multiple levels, this is exactly what is needed.

The above section demonstrates that, although prostitution is not

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81. See THE INDIAN PENAL CODE, 1860, *supra* note 80.

82. See Sahni, *supra* note 72 (citing Manoj Wad and Sharayu Jadhav from *The Legal Framework of Prostitution in India*).

83. See THE INDIAN PENAL CODE, 1860, *supra* note 80.

84. See Sahni, *supra* note 72 (citing Puja Yadav from *Ground Realities of the Legal Framework*). The author shows how police uses its discretionary powers to incarcerate sex workers, even without invoking ITPA. In our own interviews with NGOs that work in the area, we realize that police does not necessarily need specific provisions of ITPA to indict sex workers. The vague provisions of TPA grant sufficient leeway to the state enforcement authority to exercise their extortion.

85. *Id.* Note that this resonates with the Contagious Disease Act 1868 and has colonial imprint in practice.

86. See D’cunha, *supra* note 80. The study noted that in Mumbai (then Bombay), the police prefer to use local legislations like Bombay Act 1951 (one of the sections penalizes indecent behavior in public), under which rate of conviction is much higher. In Bangalore, police tend to act upon Railway Act or Police Act, rather than ITPA.

illegal *per se*, evidence shows that sex workers are highly vulnerable due to the existing legal framework and that they face unbearable levels of harassment by state (police) and private individuals (clients and pimps).<sup>87</sup> There is little doubt that clients of sex workers repeatedly abuse them during, and even outside of, their sexual engagements.<sup>88</sup> Street-level prostitution particularly attracts high risk of violence.<sup>89</sup> Police extortion is an equal threat and sometimes a worse one.<sup>90</sup> The number of prostitute women arrested is disproportionately greater than the number of pimps, procurers, and brothel keepers arrested under the same laws, while the penalties imposed on prostitutes were far greater than those imposed on brothel keepers or pimps.<sup>91</sup> This discriminatory treatment of those whom the law seeks to “rehabilitate” stems from collusion between police and pimps who use the law’s design to brutally exploit sex workers.

Unlike the ITPA, municipal laws and provisions in the Indian Penal Code are institutionally thin: they give discretion to the police to adopt a detailed procedure for conviction, obviating the need for stringently and scrupulously following ITPA trial procedure and resulting in violent police action. This is also the reason why the number of convictions of street prostitutes is perceived as higher than those of brothel keepers, pimps, and traffickers.<sup>92</sup> Even when the police want to use the ITPA, usually lack of proof and existing loopholes make it difficult to convict the pimps.<sup>93</sup> Over time, it makes more sense for police to collude with the brothel owners. This collusion is only part of the nexus of brothel keepers, politicians, and police who protect brothel keepers from the clutches of the law. Police corruption is common, but an interesting political factor is that the red light areas are considered important vote banks by politicians, who receive many favors from brothels during

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87. *Id.*

88. M. Barnard, *Violence and Vulnerability: Conditions of Work for Street Working Prostitutes*, 15 *SOCIOLOGY OF HEALTH AND ILLNESS* 683-705 (1993). See J. Miller & M. D. Schwartz, *Rape Myths and Violence Against Street Prostitutes*, *DEVIANT BEHAVIOR* 16 (1995); see also *Indian Sex Workers Learn Karate*, *BBC NEWS* (June 9, 2009), <http://news.bbc.co.uk/2/hi/8093946.stm>.

89. Barnard, *supra* note 88.

90. See D’Cunha, *supra* note 80; see also See Human Rights Watch, *Epidemic Of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India* (2002), available at <http://www.refworld.org/docid/3d4fc51f4.html>; see also Jean D’Cunha, *The Legalization of Prostitution: A Sociological Inquiry into the Laws Relating to Prostitution in India and the West* 43, 55 (1991), (hereinafter D’Cunha, *The Legalization of Prostitution*).

91. D’Cunha, *The Legalization of Prostitution*, *supra* note 90.

92. *Id.* at 123.

93. D’Cunha, *supra* note 80, at 60.

political campaigns.<sup>94</sup> When elected, the politician has incentive to ensure that brothel keepers are given sufficient latitude in running their shows, and that, when it comes to prosecution, only the sex workers are caught. They are released upon payment of hefty bribe by pimps and brothel owners who need the prostitutes back. This payment is recovered from the sex workers, exacerbating their financial burden. Sex worker vulnerability is also high because they lack a voice in the cacophony of socially degrading perceptions that they have acquired in the contemporary context. They are forced to give favors to police and also to bribe them. Section 15 of the ITPA allows the police to conduct raids on brothels without a warrant based on the mere belief that an offense under the ITPA is being committed on the premises.<sup>95</sup> This primarily harasses the sex workers, since brothel keepers are usually not in the brothels.<sup>96</sup> Overall, police harassment exacerbates the poor working environment of prostitutes.<sup>97</sup>

Some studies have attempted to map the exploitation of sex workers by police in India empirically. Puja Yadav, based on her research fieldwork with sex workers in Pune, notes that police visit the red light area of the town three times each day and take ten to twelve sex workers to the police station every day,<sup>98</sup> misusing the powers vested in them (whether a girl is soliciting or not could hardly be ascertained by an objective eye, and police use their naked discretion in this regard).<sup>99</sup> The brothel manager begins negotiations when police can agree to free the girls if paid, where “the sum could begin at Rs. 300 and go up to Rs. 2000.”<sup>100</sup> <sup>101</sup> In real, terms, adjusted for inflation, this range is approximately equivalent to nine to sixty-two U.S. dollars. If freed, this amount is recovered from sex workers’ earnings. If negotiations fail, the girls are taken by the police and produced in court the next day, where they are fined Rs. 50-100 (\$1.50-\$3.00) per person and released, having an additional lawyer’s fee of Rs. 100. All this is usually paid by the sex

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94. D’Cunha, *supra* note 80, at 197 (citing Kotiswaran).

95. The Suppression of Immoral Traffic In Women and Girls Act, 1956, *reprinted in* B.R. BEOTRA, THE SUPPRESSION OF IMMORAL TRAFFIC IN WOMEN AND GIRLS ACT 1956, 101-10 (Devinder Singh ed., 1981).

96. D’Cunha, *supra* note 80.

97. See R. Debabrata, *When Police Act as Pimps: Glimpses into Child Prostitution in India*, 105 MANUSHI 27-31 (1998).

98. They usually catch good-looking girls whose demand in the market would be higher and hence they would be able to extort more money for her release. See Sahni, *supra* note 72, at 84 (citing Puja Yadav).

99. Sahni, *supra* note 72, at 229.

100. *Id.*

101. *Id.*



workers themselves.<sup>102</sup> In addition, every brothel pays a monthly fee to the police station under the jurisdiction of which the brothel falls.<sup>103</sup> In Pune, this ranges from Rs. 2000 to Rs. 5000 (\$62.00-\$155.00), and the amount is again extracted from the sex workers as monthly payment.<sup>104</sup>

Due to multiple layers of law enforcement agencies with confusingly overlapping roles, the story does not end here. The raids in Pune by the Commissioner's Office, Social Security Section, and Crime Branch appropriate around Rs. 30,000 to Rs. 50,000 (\$620-\$1550) to dilute the seriousness of the crime, which is usually keeping minors. Although these minors are rescued and sent to remand homes, they return to brothels eventually, but that is a separate inquiry.<sup>105</sup> In Surat's red light area, over a period of three months in 2003, police arrested 547 women and extorted Rs. 1000 to Rs. 1500 per sex worker by threatening imprisonment, without informing them of the relevant laws under which they were being convicted.<sup>106</sup> The court also showed disturbing signs of insensitivity when it upheld the corrupt actions of police.<sup>107</sup> One's morality disapproval of prostitution is shaken when such incidences of police brutality are seen, and it is hard not to feel compassion for prostitutes. The state cannot provide them with adequate living conditions and livelihood opportunities, and, when they resort to sex work, the state penalizes them, further adding to their woes. State agencies have an attitude that is despicable to say the least. An investigation of police complicity, ordered in 1997 by the National Commission for Women revealed that the number of cases against police complicity coming to the courts was very low, even when empirical studies showed the opposite.<sup>108</sup> Perhaps the low record of cases against police is itself an indicator of complicity.<sup>109</sup> Little doubt remains then

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102. *Id.*

103. It has been noted that police officers pay a handsome bribe to be transferred to the police station that covers a red light district since it becomes a significant source of earnings for the policemen. *Id.* at 230.

104. *Id.*

105. *Id.*

106. *Id.* at 225-26 (citing *Harshad Barde*).

107. *Sahyog Mahila Mandal & Another v. State of Gujarat & Others*, Special Civil Application No. 15195 and No. 4594 (Gujarat H.C.) (2003).

108. Sahni, *supra* note 72, at 223 (citing Zara Kaushik from *Legal Interpretations of Prostitution*).

109. *Nirmala Rani v. State of Tamil Nadu*, 2003 Cri. LJ. 3108, was one of the cases filed against police complicity with a brothel-owner, in forcing two girls into prostitution. Soon after filing the case, a false case was registered against the petitioner by the police. The petitioner suffered serious mental agony by constant threat calls from the police. See Sahni, *supra* note 72, at 92 (citing Zara Kaushik).

that police extortion depraves sex work.

A player studied less often is the pimp, whose violent means of subduing a sex worker have only recently begun to attract the attention of scholars in the area.<sup>110</sup> Hence, to understand another layer of the pervasive negative impact of criminalizing prostitution on sex workers, it is important to examine the institution of procurers (as they are formally called) or pimps (as they are informally called, usually males – females are called madams).<sup>111</sup> Pimps are the agents for street prostitutes or brothel keepers/owners. Even though there is a rise in independent prostitution around the world in the age of telecommunication,<sup>112</sup> research indicates that pimps' services are frequently utilized by prostitutes, usually out of necessity.<sup>113</sup> It has been estimated that ninety percent of global prostitution is pimp controlled.<sup>114</sup> Pimps are the villainous entrepreneurs of the sex trade, who are involved in trafficking as well. They are the link between the client and the sex worker. They solicit clients, and they ensure payment. They are necessary middlemen who run the affairs of the sex worker, who (a) is disenfranchised both economically and socially, (b) runs the risk of getting clients who are violent or may not pay after the services, and (c) is politically weak in cases of prosecution and abuse.

For their own service of facilitating the trade, pimps take part of prostitutes' earnings. Pimps use threats, intimidation, and violent tactics to control prostitutes.<sup>115</sup> In fact, pimps' behavior, in the form of enforced social isolation, threats, intimidation, ownership attitudes, and

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110. See, e.g., D'Cunha *The Legalization of Prostitution*, *supra* note 90 (citing Giobbe); C. Williamson, *Entrance, Maintenance, and Exit: The Socio-Economic Influences and Cumulative Burdens of Female Street Prostitution*, Dissertation Abstracts International 61(02), UMI No. 9962789, (2000).

111. A pimp is someone who manages street-level prostitutes, and here, they also mean brothel-keepers. Pimps are actively involved in promoting the prostitution of others and benefiting materially from that association. See Ronald Weitzer, *New Directions in Research on Prostitution*, 43 CRIME, LAW & SOCIAL CHANGE 22 (2005).

112. See, e.g., Gardiner Harris, *Cellphone Reshape Prostitution in India, and Complicate Efforts to Prevent AIDS*, N.Y. TIMES (Nov. 24, 2012), [http://www.nytimes.com/2012/11/25/world/asia/indian-prostitutes-new-autonomy-imperils-aids-fight.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/11/25/world/asia/indian-prostitutes-new-autonomy-imperils-aids-fight.html?pagewanted=all&_r=0).

113. Williamson, *supra* note 111. Giobbe notes in a study that 53 percent of prostitutes started with a pimp and 80 percent admit to have become involved with pimps over time. See D'Cunha, *The Legalization of Prostitution*, *supra* note 90 (citing Giobbe).

114. See BARRY, *THE PROSTITUTION OF SEXUALITY* *supra* note 5; see also D'Cunha, *The Legalization of Prostitution*, *supra* note 90 (citing Giobbe).

115. See A. BROMFIELD & D. JUAN, *FROM PIMP STICK TO PULPIT* (New York Vantage 1994); see also, I. SLIM, *PIMP: THE STORY OF MY LIFE* (Holloway House 1969). For a study that touches the subject, see *Female Juvenile Prostitution: Problem and Response*, National Center for Missing and Exploited Children, Arlington, VA (1992).

physical violence, is extremely similar to that of the common batterer.<sup>116</sup> Outlawing prostitution discourages sex workers from reporting abuse by clients to the police, for fear of self-incrimination. This increases their motivation to seek protection from a pimp, who has muscle power against abusive clients and influential connections in the police stations to protect sex workers.

A study by Eileen Mcleod reveals that a complex relationship exists between a prostitute and her pimp.<sup>117</sup> While literature does mention the ability of pimps to satisfy the emotional and psychological “wants” of sex workers,<sup>118</sup> pimps are able to maintain their supremacy largely through physical violence and financial control.<sup>119</sup> For young and juvenile prostitutes, pimps have been known to extort most of their earnings with the constant threat of violence against *their* prostitutes.<sup>120</sup> They create a system whereby prostitutes’ sustenance relies entirely on obeying the pimp who provides them with everything and abuses them for disobeying.<sup>121</sup>

Pimps, therefore, emerge in the market because the law facilitates a disproportionately disenfranchising status for prostitutes. In the absence of state protection, and, in fact, in the presence of state coercion, the market provides alternative mechanisms for protection of its players. Pimps emerge in the market for sex. Yet, even though pimps supposedly offer protection, empirical studies have shown that pimp-controlled prostitutes are more likely to be victims of client violence and have extra pressure to make money, thereby increasing their health risk.<sup>122</sup> Clients who have special relationships with pimps (politicians, policemen, or

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116. E. Giobbe, *A Comparison of Pimps and Batterers*, 1(1) MICHIGAN JOURNAL OF GENDER AND LAW 33-57 (1993).

117. Prostitutes often relate to their pounces as boyfriends, cohabitees, or husbands, ‘simply sharing the proceeds of prostitution on egalitarian basis.’ EILEEN MCLEOD, *WOMEN WORKING: PROSTITUTION NOW* 177 (Croom & Helm 1982).

118. BROMFIELD & JUAN, *supra* note 115. Also, read how the bond between sex workers and their pimps could be emotionally exploited by pimps in Nicholas Kristof’s *The Pimps’ Slaves*, N.Y. TIMES (Mar. 16, 2008), <http://www.nytimes.com/2008/03/16/opinion/16kristof.html>. Williamson, *supra* note 110, mentions, “Women take abuses from pimps in stride. They learn to cope with this relationship by not focusing on the abusive aspects for what they are but by instead encapsulating those aspects of their pimp that serve their needs for security and protection. Therefore, a pimp-prostitute relationship often lacks cognitive and behavioral consistency.”

119. Celia Williamson & Terry Cluse-Tolar, *Pimp-Controlled Prostitution Still an Integral Part of Street Life*, VIOLENCE AGAINST WOMEN 1074-92 (Sep. 8, 2002); *see also* United States v. Pipkins, 378 F.3d 1281 (11th Cir. 2004).

120. Williamson & Cluse-Tolar, *supra* note 1119, at 29.

121. Williamson & Cluse-Tolar, *supra* note 1119, at 4.

122. Maureen Norton-Hawk, *A Comparison of Pimp-and Non-Pimp-Controlled Women*, VIOLENCE AGAINST WOMEN 189-94 (Feb. 10, 2004).

frequent visitors) may abuse sex workers without fear of reprisal. Pimps treat sex workers as their property, which is temporarily offered to pimps' customers, who may treat the object any way they like and who, with sufficient payment, will never be checked for violent tendencies. Escaping a pimp's control is extremely difficult both physically and mentally.<sup>123</sup> Not only there is tight control over the physical movement of prostitutes whose whereabouts are known, a psychological barrier blocks a woman's escape: she has been indoctrinated with a belief that she is acceptable *only* in this profession, resulting in mental resignation to her ill-fate. Once escaped, it will be difficult for her to find another living in a society where stigmas of history, caste, and professions are starkly posed.

Even though the preceding description is general, this situation is no less dismal in the Indian context. Empirical studies have insightful descriptions to offer. A general estimate in Pune's red light district is that a sex worker gets only fifty percent of her total earnings and the remainder goes to the brothel keeper.<sup>124</sup> Other studies have shown that a sex worker is able to retain an even smaller portion of her earnings. Gangoli estimates (through an assumption of 20,000 sex workers in Kolkata charging Rs. 100 on an average in 2001) a daily turnover of Rs. 2 million (\$86,000), of which only a small part goes to sex workers themselves, while most goes to recruiters, middlemen, agents, pimps, brothel keepers, live-in partners, liquor sellers, and the police.<sup>125</sup> Sex workers are also dependent on the brothel owner/keeper and/or pimp because they owe them a debt (prostitutes often take loans from pimps and brothel owners).<sup>126</sup> In fact, criminalizing prostitution has pushed sex workers outside the reach of the formal market of credit and bank loans, forcing them to approach the pimps to secure their expenses.<sup>127</sup> The pimps charge exorbitant interest rates, thus depleting their income further. Prostitutes, therefore, in a way, sell their future off to the pimps.

We build our analysis in the light of the exploitation that sex

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123. For an extensive review and conceptual frameworks, see Lynda M. Baker, Rochelle L. Dalla & Celia Williamson, *Exiting Prostitution: An Integrated Model*, 16 VIOLENCE AGAINST WOMEN 579 (2010).

124. Rohini Sahni & Shankar V. Kalyan, *Markets, Histories and Grass-Root Evidences: Economics of Sex Work in India*, in PROSTITUTION AND BEYOND, AN ANALYSIS OF SEX WORK IN INDIA 187 (2008) [hereinafter Sahni & Kalyan, *Economics of Sex Work*].

125. Geetanjali Gangoli, *Prostitution as Livelihood: Work or Crime* (2001), available at [http://www.anthrobase.com/Txt/G/Gangoli\\_G\\_01.htm](http://www.anthrobase.com/Txt/G/Gangoli_G_01.htm).

126. Sahni & Kalyan, *Economics of Sex Work*, *supra* note 124, at 189.

127. *But see, India Sex Workers Get Life Cover*, BBC NEWS (May 1, 2008), [http://news.bbc.co.uk/2/hi/south\\_asia/7376762.stm](http://news.bbc.co.uk/2/hi/south_asia/7376762.stm). These instances are few, and, mostly, the financial matters of sex workers are handled by cooperatives that their collectives build in time.

workers face. In the remainder of this article, we will show how decriminalizing prostitution in India will knock out violence against sex workers by clients, police, and pimps. Exploring diverse perspectives, we build our arguments in favor of decriminalizing prostitution by proceeding through contract theory, feminist theory, the social norms perspective, the public health view, and the game theory framework. In all these discursive discourses, we arrive at the same conclusion: decriminalizing prostitution helps sex workers by enhancing their rights and allowing them to live without fear of violence.

## V. WHY DECRIMINALIZE PROSTITUTION?

### A. Feminist Theory Perspective

Two self-proclaimed feminist groups dominate the debates on prostitution: the radical and the liberal.<sup>128</sup> The radical, anti-prostitution<sup>129</sup> feminists (also called neo-abolitionists) derive their logic from (a) the poverty-driven forced nature of the occupation that leads to exploitation and (b) prostitution's characteristic of reinforcing male dominance over women.<sup>130</sup> The logic is indeed compelling. If we assume that there is violence and exploitation in prostitution, then even the consent of a prostitute should not matter because it defies the basic human rights principle that violation of one's rights cannot be consented to, and therefore, the consent is not free.<sup>131</sup> Indeed, women with the fewest choices available resort to prostitution,<sup>132</sup> and there is no doubt that prostitution is characterized by violence against sex workers.<sup>133</sup> As

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128. There are many forms of feminism, but five in particular have especially opined on the issues of prostitution: In *The Sexual Contract*, Marxism, which recognizes prostitution as a form of wage labor, is therefore a specific expression of prostitution of labor. The thoughts of Simone de Beauvoir and encapsulated most illustratively in the words of Pateman, "The man may think he 'has' her, but his sexual possession is an illusion; it is she who has him . . . she will not be 'taken,' since she is being paid." See ALISON M. JAGGAR, APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES 191 (1983). Also, socialists, who view prostitution more rooted in sociological and psychological designs rather than economic ones like Marxists', are considered radical and liberal.

129. Scholarly literature that supports abolishing prostitution can be extensively explored in several seminal works of Kathleen Barry, Julie Bindel, Catherine MacKinnon, Laura Lederer, Melissa Farley, and Sheila Jeffreys.

130. *Id.*

131. See BARRY, THE PROSTITUTION OF SEXUALITY, *supra* note 5.

132. Catherine Mackinnon, *Prostitution and Civil Rights*, 1 MICHIGAN JOURNAL OF GENDER AND LAW 13 (1993).

133. In an extensive survey conducted in 2003, Farley et al. found that almost three-quarters of prostitutes have been physically assaulted, two-thirds have been raped, and around ninety percent of them wished to leave the trade but could not due to lack of adequate financial means. See Melissa

a “harmful cultural practice,”<sup>134</sup> prostitution has been rightly considered an activity that involves significant exploitation, both psychological and physical.<sup>135</sup> The exercise is also a symbol of males’ dominance over women in our patriarchal system. The sex worker, whose sexual pleasures are irrelevant, is reduced to a mere instrument to fulfill the sexual desires of her client, at great psychological effort on her part. In a way, one can view prostitution as slavery – perhaps given the extent to which prostitution attracts trafficking – this is an apt description.<sup>136</sup>

Liberal feminist groups (sometimes called neo-regulationists) challenge such views and argue that women may make the independent decision to engage in prostitution and that their choice must be respected.<sup>137</sup> According to their scholarship, there is a need to recognize that engaging in sex for money may not necessarily be repressive and efforts to abolish this trade only worsen the exploitative tendency of the market.<sup>138</sup> The notions of sexuality, they say, are outdated and hinge on a construction of sexuality that is a product of patriarchy,<sup>139</sup> and there is a need to remove the parallax from the view that prostitution is a large monolith of women’s exploitation. Rather, an alternative understanding looks at elements that make sex for money abusive to women. Prostitution, therefore, liberal groups maintain, is consensual sex for money, and anything non-consensual should be deemed criminal. One must focus not on prostitution as an institution in itself but observe it under the bigger lens of sociological practices, which emanate from existing laws and manifestations of misogyny. Therefore, for them, the

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Farley, Ann Cotton, Jacqueline Lynne, Sybille Zumbeck, Frida Spiwak, Maria E. Reyes, Dinorah Alvarez & Ufuk Sezgin, *Prostitution and Trafficking in Nine Countries: Update on Violence and Post-Traumatic Stress Disorder*, 2 JOURNAL OF TRAUMA PRACTICE 33 (2003); see also Melissa Farley, Jacqueline Lynne & Ann Cotton, *Prostitution in Vancouver: Violence and Colonization of First Nations Women*, TRANSCULTURAL PSYCHIATRY 242 (2005) (authors show striking resemblance between prostitution and battery).

134. Sheila Jeffreys, *Prostitution as a Harmful Cultural Practice*, in NOT FOR SALE: FEMINISTS RESISTING PROSTITUTION AND PORNOGRAPHY 386 (2004).

135. *Id.*

136. Laura Lederer, *Human Trafficking and the Law*, Speech at the Library of Congress (May 1, 2001) (discussing the speech at [http://www.loc.gov/loc/lcib/0106/legal\\_eagles.html](http://www.loc.gov/loc/lcib/0106/legal_eagles.html)).

137. Many times, radical feminists fail to acknowledge experiences of women who are themselves engaged in sex work, for it is highly possible that it was their own choice. See, e.g. JILL NAGLE, *WHORES AND OTHER FEMINISTS* 21 (Routledge New York 2001).

138. The liberal feminists contend that trafficking is different from prostitution, where the former is coerced (and therefore need to be criminally dealt with) but the latter may not necessarily be forced and based on women’s use of their bodies as labour. See Penelope Saunders, *Traffic Violations: Determining the Meaning of Violence in Sexual Trafficking Versus Sex Work*, 20 JOURNAL OF INTERPERSONAL VIOLENCE 343, 346 (2005).

139. See, e.g., JULIA O’CONNELL DAVIDSON, *PROSTITUTION, POWER AND FREEDOM* 127 (Polity Press Cambridge 1998).

right approach is the rights-based approach. If self-determination is a pivot of feminist politics, then decriminalization will enable sex workers to engage in their work, just like any other employment. Instead of abolishing sex work, society needs to check the unsafe working environment for sex workers. Criminalizing prostitution does more harm because it increases their chances of being exploited.<sup>140</sup>

There is value in the view of neo-abolitionists, but the incomplete picture painted by their viewpoints will lead us to overlook how over verbalized and overemphasized their arguments are, which are suggested to have been informed by misleading statistics.<sup>141</sup> The problem, as we have indicated above, is that radical feminists assume that prostitution is an institution in itself and each constitutive element of the institution reflects the moral stature that they themselves construct from androcentric notions. Sweeping and simplistic statements used to define sex workers' oppressed lives are insensitive to the 'agency' of the women.<sup>142</sup> Social and legal dynamics that include a myriad of connotations (like economically disenfranchised women performing an activity for their livelihood, termed illegal by the state thereby attracting violence against them by men who have been raised in patriarchal set ups) cannot be reduced to sexual oppression alone. In fact, the problem is not prostitution as an institution, but as several institutions that have mushroomed around women who engage in sex for money, due to the social and legal status of their work. Shaping our abstract understanding of prostitution as a singular institution with consistent structures and regimes tends to knock out differentiable, varied experiences and a heterogeneous view of sex work. Such sweeping generalizations run the risk of suggesting experiences that may not exist or corrupting those that do. Prostitution, in fact, should be viewed in a larger sociological and economic context. The attempt, therefore, should not be to look at prostitution but to observe what kind of institutions create an unsafe working environment for the prostitutes and complicate their choice to earn a livelihood with psychological and physical coercion.

Both camps agree that the women involved in sex work need rights and that the exploitative conditions prevalent in the trade should cease,

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140. See, e.g., NORMA JEAN ALMODOVAR, *FROM COP TO CALL GIRL* (Simon & Schuster 1993) (which poignantly mentions, how she turned into a call girl after serving the Los Angeles Police Department because she wanted to make a statement about the moral hypocrisy of our society, which included police officers extorting money from sex workers.)

141. See, e.g., GAIL PHETERSON, *THE PROSTITUTION PRISM* 30-36 (Amsterdam University Press 1996).

142. Several scholarly works have noted the absence of agency in radicals' viewpoints. For a literature survey, see George et al., *supra* note 9, at 67.

yet neo-abolitionists may be too hasty in supporting the criminalization of prostitution. If we assume that women can have agency and choice (certainly a valid assumption), we know that what remains is to ensure that the agency is respected. Jayasree's extensive reports on the experiences of sex workers in India suggest that sex workers do not accept victimization or criminalization as an option and indeed have agency.<sup>143</sup> It is important for sex workers to be viewed as active human agents, who are fighting to gain control of their lives,<sup>144</sup> while the illegality of their profession threatens such control. Radicals worry about compelled choice and male domination resulting in exploitation of sex workers. Alternatively, if institutions are developed that safeguard women's agency, then both radical and liberal feminists may come together to construct a better environment for all types of work, including sex work.

Decriminalization of sex work will help rationalize the apprehensions of radical feminists. Let us shed the normative attire for a moment and look at the two strongest arguments of radicals from a positive standpoint. Firstly, the choice to engage in prostitution is always a forced one because of economically disenfranchised women. Assuming that this is true, this is also the case for the majority of developing countries' workers who toil in hazardous industries or for child laborers and beggars. They would not do it if they had a choice, but, given the state of the world, society is unable to provide them with alternative choices. We know that hunger is the strongest economic impetus. Prohibiting an act of livelihood without making alternative choices available will simply push the act underground,<sup>145</sup> where legal recourse for those who want to exit or exercise alternative choices later in time will be absent (not to mention the adverse consequences of hunger and depravation). There will be an information asymmetry, and a whole apparatus of informal economy will begin operating, luring associated illegal activity, including trafficking.<sup>146</sup> Instead of offering more choices, prohibition of an activity that has substantial demand and supply due to financial compulsions will introduce difficulties for established workers and increase the likelihood of exploitation.<sup>147</sup> Note

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143. A K Jayasree, *Searching for Justice for Body and Self in a Coercive Environment: Sex Work in Kerala, India*, REPRODUCTIVE HEALTH MATTERS 58 (Dec. 23, 2004).

144. Smarajit Jana, Nandinee Bandyopadhyay, Mrinal Kanti Dutta & Amitrajit Saha, *Gender, Trafficking, and Slavery: A Tale of Two Cities: Shifting the Paradigm of Anti-Trafficking Programmes*, GENDER AND DEVELOPMENT 69-79 (Oct. 1, 2002).

145. This argument was made during the Constituent Assembly debates as well. *Supra* note 1.

146. Weitzer *supra* note 111, at 27.

147. Neil Howard & Mumtaz Lalani, *Editorial Introduction: The Politics of Human*



that no legitimate exit is possible without first facing the penalty for exercising that choice; therefore, sex workers who want to break free are deterred from exiting. Hence, *until* society finds “acceptable” alternatives, it is more heinous to prohibit people from exercising “unacceptable” alternatives that help them live.

The second argument of radicals rests on the brutal exploitation of women involved in prostitution. Let us deconstruct the exploiters here. When an activity heavily driven by economics is prohibited, it gives rise to informal institutional responses. In the case of prostitution, an entire body of pimps, corrupt police officers, and abusive clients emerges. Legal prohibition generates a wide range of illegal entrepreneurs. As shown above, studies have noted that violence against prostitutes is committed not only by clients, but also by pimps and police officers.<sup>148</sup> Note that pimps and police officers can exploit sex workers only when their profession is banned by the law. In fact, going a step further, in a legal environment, the oppressed have a louder voice than in an illegal environment. A sex worker can invoke her legal rights if her clients are abusive, while, if her act is itself illegal, she will have to resort to other players in the market, who contribute to her further exploitation. Hence, if gender-based violence and women’s human rights are in question, then, even if decriminalization lacks potential to marry both radicals’ and liberals’ views, it will definitely bring them together in securing rights for sex workers.

### *B. View from Contract Theory*

Prostitution must be understood within a complex context, which has two important dimensions: (a) structural aspects rooted in gender relations that cause prostitution in most societies and (b) institutional aspects resulting from certain state policies, adopted at particular historical junctures, that exacerbate the phenomenon. Therefore, prostitution and its various forms cannot be understood as originating solely from the contradictions of a moral system.<sup>149</sup> It has a definitive economic base, which interacts with and is intrinsically related to the rest of the economic system, making it a crucial part of the labor transformation process. The degree of interaction between prostitution and the economy determines the extent to which vested interests become

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*Trafficking*, ST. ANTHONY’S INTERNATIONAL REVIEW 5-15 (Apr. 1, 2008).

148. BARRY, *THE PROSTITUTION OF SEXUALITY*, *supra* note 5.

149. Martha C. Nussbaum, *Whether from Reason Or Prejudice: Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693 (Jan. 1998).

entrenched and consolidated within the system.<sup>150</sup> It also determines the extent of challenge facing policy makers who intend to address the problems within,<sup>151</sup> whether or not institutionalized. In this context, policies aimed at transforming the situation must be primarily geared towards restructuring socio-economic conditions – work conditions of women and men in general and prostitutes in particular – tackling vested interest in the sex industry and rethinking our patriarchal value system.<sup>152</sup> In a commodity-oriented social system, prostitution is considered very lucrative; the “merchandise” involved is physical intimacy with women.<sup>153</sup>

Contracts against the law are void.<sup>154</sup> The Indian Contract Act of 1872 prohibits agreements to offer sexual services, and hence the corresponding sales contract entered into by the prostitute is void by law. The court will, therefore, reject any claim brought by the prostitute and also report the illegal deal to the police. The prostitutes, therefore, have a twofold incentive refrain from suing a client who is violent or has reneged on his promise to pay. They have no chance to recover any loss from breach of contract; in fact, they might be punished under criminal law in the first place. Therefore, in India, prostitutes have no recourse under the law.

If prostitution is decriminalized, it is likely that sex workers and their collectives will effectuate self-governance of their profession, thus pushing pimps outside the market. Prostitutes could implicitly contract, and, if enforced, prostitutes who were tortured by pimps or forced into acts by their clients or pimps would have the same legal recourse as any individual whose rights have been violated. Unionization of prostitutes against police harassment and provisions of welfare measures for prostitutes and their children would become possible.<sup>155</sup>

Contract theory sheds light on how the previously unseen sexual transaction suddenly become visible, eschewing the possibility of violence, which occurs when the transaction is held underground. The intellectual inauguration of twentieth century contract doctrine is

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150. D’Cunha *Legalization of Prostitution*, *supra* note 90, at 13.

151. Truong Than-Dam, *The Dynamics Of Sex Tourism: The Case Of South East Asia* 14 DEVELOPMENT AND CHANGE (1985).

152. D’Cunha *Legalization of Prostitution*, *supra* note 90, at 13.

153. Kathleen Barry, Charlotte Bunch & Shirley Castle, eds., *International Feminism; Networking Against Female Sexual Slavery*, REPORT OF THE GLOBAL FEMINIST WORKSHOP TO ORGANIZE AGAINST TRAFFIC IN WOMEN (Apr. 6-15, 1932).

154. For instance, an agreement to offer sexual services will violate section 23 of the Indian Contract Act, 1872, which renders agreements against public policy void.

155. D’Cunha *Legalization of Prostitution*, *supra* note 90, at 13.

sometimes credited to Fuller's 1936 article, 'The Reliance Interest in Contract Damages,'<sup>156</sup> which awards contract damages for expectation, reliance, and restitution and explains why damages bring corrective and distributive justice. This view, echoed in many scholarly writings,<sup>157</sup> allows parties to understand that reliance and restitution are the normative goals of damages. Hence, even informal transactions invoke the moral sense of distributive justice. When an activity is decriminalized, it can embrace these conceptions even if there is no need of a third party (court) to enforce it. Sex workers can themselves claim reliance damages when the implicit contract of safe sex for money is breached. Even the economic theory of contract<sup>158</sup> that focuses on efficiency provides similar results as contract law's goal of efficiency dispels fear that sex workers' rights will be subjugated. The theory's unflinching faith that voluntary transactions move resources to their most valuable uses develops a social structure, which gives ample importance to freedom of contract.<sup>159</sup> This freedom is badly needed by sex workers, and it is in realizing this freedom that the need for pimps (and police) is eliminated. This necessarily requires state agencies to move in their support, something achieved through first decriminalizing their profession.

The centrality of reliance and restitution encourages the normative foundation for contractual liability to lie in a sense of obligation. This has been theoretically developed in the rich work of Patrick Atiyah.<sup>160</sup> Obligation invokes a sense of performance in both sex workers and their clients. As a corollary, it also invokes the sense of not performing activities not covered in the contract, thereby restricting clients' use of violence. If contractual obligations are justiciable, sex workers can

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156. LL Fuller & William R Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936). Of course there were previous telling works on contracts in common law, particularly by Pollock, Holmes, Langdell, Willistone, Ames, Holdsworth, Salmond, and Leake, illustrated in Samuel Williston's *Selected Readings on the Law of Contracts* (Macmillan 1931). But most of the works of these authors were not theoretically sound unlike Fuller's. Also, even though Fuller's article was co-authored by his research assistant, William Perdue, Jr., scholars take Fuller to be the writer of its theoretical parts.

157. See Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

158. The inception of economic approach could be credited to publication of A. Kronman & R. Posner, *The Economics of Contract Law*, 80 COLUMBIA L. REV. 867-77 (May 1980).

159. See, e.g., F.H. BUCKLEY, *THE FALL AND RISE OF FREEDOM OF CONTRACT* (Duke University Press 1999).

160. See Patrick Atiyah, *Contracts, Promises, and the Law of Obligations*, 94 LAW Q.R. 193 (1978), *reprinted with revisions and additions* in P. ATIYAH, *ESSAYS ON CONTRACT* 10-56 (Oxford Clarendon Press 1986) & P. ATIYAH, *PROMISES, MORALS, AND LAW* (Oxford Clarendon Press 1981).

move the court to demand that their contractual partners not harass their rights. Alternatively, they may demand recognition of their rights to claim contractual obligations, which would specify that trade be conducted without harassment. Decriminalization enables sex workers to move the court when a harmful action that is not criminal is committed in breach of a contract. Because there is an element of morality in such cases, Charles Fried's celebrated "contract as promise" approach,<sup>161</sup> further supports the idea of decriminalizing prostitution by enabling contracts, which are normally seen as promises. Fried's work employs Kantian moral autonomy principles and solidifies the contract as promissory obligation. In relationship contracts, this theory assumes special importance and, therefore, is apt for prostitutes' repeat clientele.

However, a close reading of Fried's work calls for rejection of the doctrine of consideration, which is central to common law jurisdiction. This gap (and others) can be filled by adopting tenets of Craswell's influential work,<sup>162</sup> which emphasizes the importance of incorporating into contract law the substantive values of distributive justice and efficiency and those of Barnett's work,<sup>163</sup> who opined that an autonomy-based approach links contractual obligation with a rights-based analysis of contracts as the voluntary transfer of entitlements (rather than with moral duty to keep one's promises). The latter study builds a strong case for developing a rights-based contract framework in prostitution. Its decriminalizing will aid the development of such informed judgment. Even the prevailing dichotomy between major strands of contract theory – autonomy and economic approach – could be married using a pluralistic conception of contracts, as espoused by Gordley<sup>164</sup> (and to some extent by Trebilcock<sup>165</sup>), who plants the theoretical roots of contract theory in an Aristotelian soil of liberality, commutative justice, and distributive justice. Such a conception helps carve out a social order that is more respectful of contract rights for any activity that is not criminal in nature, since illegal activity is nonjusticiable. Note that there is no specific need to draft an explicitly written contract, but the fact that the activity is not illegal will notify players in the trade that any transaction will adhere to the same principles as any written contract.

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161. C. FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

162. Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989).

163. Randy Barnett, *A Consent Theory of Contract*, 86 COL. L. REV. 269, 285-86 (1986).

164. JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (Oxford Clarendon Press 1991).

165. MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (Harvard University Press 1993).

The state may not necessarily provide enforcement, but the action of sex workers in case of non-performance (or violence during the contractual performance) could be easily ascertained *ex ante*. To avoid the repercussions of not paying sex workers' fees, committing violence, or forcing them to provide unprotected sex, the client is expected to respect the rights of the sex worker.

The ability to bind clients in contract also disposes of the need for pimps in the transaction. Once the basic tenets of contract theory are realized in practice, the sex worker will be able to transact with clients on her own. Decriminalization will realize this possibility, and clients will be deterred from committing violence because they are bound by contractual duty to practice safe sex with the sex worker. Finally, the police will stop harassing sex workers because they are not engaging in a criminal activity. This will not happen at once. It is not our aim to compel such a notion. Gradual change, however, will be triggered by changing the law. The first step to realize this social order is to decriminalize prostitution.

One theoretical construction of a "prostitution contract" is found in Carole Pateman's celebrated work, *Sexual Contract*.<sup>166</sup> Pateman opines that the sexual contract is constructed from the mastery subjection dyad manifesting in dominance and subordination, thus establishing patriarchy and the male sex-right, the right of individual men to command individual women, both in labor and sex. This expansive idea is reflected in Pateman's unified view of modern society as contractual patriarchies. In our view, however, such blanket universalization actually weakens her argument, for painting all late-capitalist contractual relationships as master-subject relationships would be myopic, particularly when cultural contest and historical change are powerful forces that define the inherent complexity of the terms.<sup>167</sup> Nevertheless, prostitution, when criminalized, takes on Pateman's particular formulation. In a world where prostitution is criminal, the contract itself is invalid, and the gaps between dominance and subordination become visible. The law does not come to the rescue but rather leaves the social order (or rather, disorder) to prevail unabated, exacerbating the gender divide and master-slave dynamics between men who buy services of the sex workers not through contract but through their superior bargaining power in the social order. The decriminalization of prostitution could

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166. CAROLE PATEMAN, *THE SEXUAL CONTRACT* (Stanford University Press 1990).

167. See, e.g., Nancy Fraser, *Beyond the Master/Subject Model: Reflections on Carole Pateman's Sexual Contract*, 37 *SOCIAL TEXT* 173-81 (1993).

usher in this much generalized state of sexual contract decriminalization. When contractualized, prostitution, as a transaction of simultaneous exchange (unlike marriage or employment contracts which have some elements of master/subject dyad but happen over time), need not pivot on the sex worker's dependence on the client. In fact, this transaction will be governed by prior negotiations over specific "services,"<sup>168</sup> giving sufficient power to sex workers to bargain over the scope of their services. Like a dancer at a party or in a movie, specifying what bodily services are offered becomes feasible when such offers are not criminal. These contracts will implicitly foreclose on the possibility of violence or explicitly forbid it. Once such contracts assume a standard form or template, the harassment of sex workers will decline significantly.

From an economic perspective, such a move makes perfect sense because it enables sex workers to keep their earnings. They may still require pimps' services for securing a place to offer their services and perhaps for soliciting clients, but they will not be forced to tie themselves to the same pimp. Decriminalization will create the framework for an exit procedure. The contract between pimp and prostitute will be like any other wage contract, stipulating financial and other conditions. Prostitutes will be able to sue pimps if the latter renege on their contractual obligations and will also have freedom to request a different pimp's services at any point. While this may generate competition for pimps, sex workers' share of the revenues will increase. In addition, harassment from police officers and law enforcement agencies will quickly subside. Realizing cultural change requires time (see section below), but police actions currently authorized by law will cease. A solidarity movement of sex workers' collectives will be able to reclaim their rights, only this time, backed by law. This will increase sex workers' earnings, and they could hope to exit the profession entirely at a later point, sending their children to better schools and generally increasing quality of life.

### *C. The Social Norms Perspective*

#### 1. Stereotypes as Bodies of Social Norms

Prostitution as a transaction involves at least two people. In the most basic sense, one is the service provider, the female, who charges a fee to the other, who is male. However, unlike most other transactions

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168. *Id.*

in the service industry, prostitution is characterized by the manner in which the two parties are differentiated not only by society but also by the parties themselves.<sup>169</sup> Society has many names for women who engage in prostitution – whores, sluts, disposable trash – and these names invite us to single out these individuals for ridicule and scorn.<sup>170</sup> These norms have been crystallized in regulations that declare prostitution illegal. These regulations outlaw such transactions, and, when the transactions occur outside the purview of the law, the difference between the players' bargaining power is exacerbated.

Tong maintains that the "law's desire to punish bad girls has often been moderated by its wish to save nice boys from harm, inconvenience, or embarrassment."<sup>171</sup> This stereotype prevails not only among particular classes, but also among the judicial elements of society, which we believe to be imparting judgment with the utmost rectitude and evenness. Even transmission of sexual diseases is attributed largely to prostitutes.<sup>172</sup> Most importantly, even judges are not immune to failure of perception. For instance, Kandel shows that, in the Boston Municipal Court, criminal sentences imposed on prostitutes were based mainly on the defendant's sexual history rather than the crime.<sup>173</sup> The male clients, however, were released without even proper interrogation; in fact, sometimes they would not even appear in the courtroom.<sup>174</sup>

India presents an even worse picture. India, unlike England and the United States, does not have sentencing guidelines, which gives huge discretion to judges, thereby making sentencing a judge-centric approach. This is glaringly visible in rape sentencing. Mrinal Satish's research demonstrates that, in instances where a rape victim is a sex worker, the defendant usually receives a far lesser sentence than if the raped woman was "modest."<sup>175</sup> Even though the Indian Evidence Act was amended in 2003 to prohibit impeachment of the rape victim's testimony based on her sexual history, the infamous "two finger test," which acts as proxy for assessing the sexual history of the victim,

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169. Julie Lefler, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11 (1999).

170. D'Cunha *Legalization of Prostitution*, *supra* note 90, at 11.

171. ROSE MARIE TONG, *WOMEN, SEX AND THE LAW* 39 (1984).

172. See Ann M. Lucas, *Race, Class, Gender and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN'S L.J. 47, 59 (1995); see also Minouche Kandel, *Whores in Court: Judicial Processing of Prostitutes in Boston Municipal Court in 1990*, 4 YALE JOURNAL OF LAW AND FEMINISM 329, 342 (1992).

173. Kandel, *supra* note 172, at 330.

174. Kandel, *supra* note 172, at 333.

175. Mrinal Satish, *The Role of the Victim in the Indian Criminal*, in SUPPORT FOR VICTIMS OF CRIME IN ASIA (Chan Wing Cheong ed., 2007).

permits stereotypes to continue and focuses on the marital status of the victim and the presence of bodily injuries.<sup>176</sup> In all these cases, courts reinforce existing stereotypes and disempower sex workers at multiple levels. These antiquated stereotypes fossilized in social norms emerged from several baseless sources, like the widely held belief that prostitution is a deviant sexual act, symbolizing a female's criminal potential,<sup>177</sup> the traditional (Victorian) myth that male sexuality is a natural drive but female sexuality hardly exists and thus is against the laws of nature,<sup>178</sup> or the fact that prostitution, interpreted as independence, symbolizes a threat to existing structures of patriarchy.<sup>179</sup> The illogical nature of these stereotype sources leads us to believe that the crooked system has assumed its shape in favor of males. Social norms dictate the attitude society assumes towards an activity, and it is necessary to recognize the importance of these norms in forming the normative judgments of a society.

## 2. Diluting Stereotypes Through Law

The question that emerges is, if the social norm of treating sex workers as "fallen" women is deeply ingrained in society, how can decriminalizing prostitution change people's attitudes towards sex workers. This needs detailed analysis, which mainly hinges on an expressive theory of law. Many theorists have claimed that law has an expressive function in addition to a sanctioning function.<sup>180</sup> The expressive theory argues that courts play an important role in expression of social values.<sup>181</sup> Social values, as manifested in social norms,<sup>182</sup> arise

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176. , *Dignity on Trial: India's Need for Sound Standards of Conducting and Interpreting Examinations of Rape Survivors*, HUMAN RIGHTS WATCH (2010), [http:// www.hrw.org](http://www.hrw.org).

177. Lucas, *supra* at 172.

178. ROSEN, *supra* note 6.

179. Lucas, *supra* note 172.

180. See, e.g., Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2183 (1996); see also Jason Mazzone, *When Courts Speak: Social Capital and Law's Expressive Function*, 49 SYRACUSE L. REV. 1039 (1999).

181. H. L. A. Hart, in *Punishment and Responsibility* (Oxford University Press 1968), argues that altering behavior is one of the uses of criminal law. See also H.L.A. HART, *THE CONCEPT OF LAW* 38-39 (Oxford 1961), where he says, "There are many techniques by which society may be controlled, but the characteristic technique of the criminal law is to designate by rules certain types of behavior as standards for the guidance either of the members of society as a whole or of special classes within it. Only when the law is broken, and this primary function of the law fails, are officials concerned to identify the fact of breach and impose the threatened sanctions." See also DAVID GARLAND, *PUNISHMENT IN MODERN SOCIETY: A STUDY IN SOCIAL THEORY* (1993), where the author suggests that Durkheim believed expression of social values is the *most* important function of law.



from in multiple sources.<sup>183</sup> Law functions to coordinate these sources by creating a focal point and discovering a new equilibrium.<sup>184</sup> Sometimes, instead of merely discovering the equilibrium, law can create it. In doing so, law attempts to change social norms without changing social values, making focal point creation the first expressive use of law.<sup>185</sup> Law can also change individual preferences by expressing new values for rational people to adopt, if such an adoption conveys an advantage to them, thus making alteration of individual values the second expressive use of the law.<sup>186</sup>

Legal entrepreneurship<sup>187</sup> creates internal, as well as external, motivation to follow the law. The internal element emerges from individual enforcement, where people simply choose to follow the law, as social psychology literature indicates.<sup>188</sup> Moralists themselves have long noted that sanctions for wrongdoing create incentives for self-improvement.<sup>189</sup> By corollary, law's expressive function incentivizes people to internalize the dictated norm. Once the law creates a focal point of coordination for various confused subjects, secondary enforcement becomes possible. Parties can attempt reprisals and provide legitimacy for self-help mechanisms earned through solidarity. If, as a doctor, I know that the law punishes honking a car horn near a hospital, I will be able to put up a sign outside my clinic asking people not to honk, lest they invite prosecution. The final level of enforcement comes from

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182. Social norms, as generally understood by social scientists, mean 'average behavior'. Norm lends a sense of regularity, defined by philosophers as what people *ought* to do. In this sense, norm could be understood as obligation. See GEORG HENRIK VON WRIGHT, *NORM AND ACTION* (1963).

183. See JACK HIRSHLEIFER, *ECONOMIC BEHAVIOR IN ADVERSITY* (1987); JACK HIRSHLEIFER, *EVOLUTIONARY MODELS IN ECONOMICS AND LAW: COOPERATION VERSUS CONFLICT STRATEGIES* (1980); see also Jack Hirshleifer & Juan Carlos Martinez Coll, *What Strategies Can Support the Evolutionary Emergence of Cooperation?, The Dark Side of the Force: Economic Foundations of Conflict Theory* 32 *J. CONFLICT RESOL.* 367 (2001).

184. See Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 *VA. L. REV.* 1649 (2000); see also Richard McAdams, *The Expressive Power of Adjudication*, 5 *U. ILL. L. REV.* 1043, 1047 (2005); Richard McAdams, *The Origin, Development and Regulation of Norms*, 96 *MICH. L. REV.* 338, 362 (1997).

185. Robert Cooter, *Expressive Law and Economics*, 27 *JOURNAL OF LEGAL STUDIES* 586 (1998); see also Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 *VA. L. REV.* 1577 (2000).

186. Cooter, *Expressive Law and Economics*, *supra* note 185.

187. Cass Sunstein defines norm entrepreneur as law maker, referred to here as a legal entrepreneur. See Cass Sunstein, *Social Norms and Social Roles*, 96 *COLUM. L. REV.* 903, 909 (1996).

188. Tom R. Tyler, *Why People Obey the Law*, as cited in Cooter, *Expressive Law and Economics*, *supra* note 185.

189. Cooter, *Expressive Law and Economics*, *supra* note 185.

enforcing the legal institution and sanctioning enforcement agencies that fail to perform their duties. Hence, policemen who do not follow requirements could be penalized upon complaint. Three levels of enforcement, therefore, ensure compliance as long as at least one level is working fine.

### 3. Bridging the Gap Between New Law and Old Norms

A challenging view comes from social response theories, which contend that new law may meet with resistance if it departs too visibly from established social values.<sup>190</sup> Such reactions have the potential to weaken the effect of legal intervention to the extent that it is inconsistent with society's moral, ethical, or cultural values. Legal innovation may thus result in backlash if "sticky" social norms are eroded.<sup>191</sup> Gradual movement of legal institutions and piecemeal legal intervention, however, could be the key<sup>192</sup> (hence our recommendation for decriminalizing and not legalizing prostitution at this juncture).

In the context of Indian prostitution, however, the possibility of social resistance may be overstated, perhaps for two reasons. Firstly, relevant literature suggests that people may not necessarily reveal their true preferences.<sup>193</sup> This means that, even though people may prefer a certain design of a social function, they may not express it, fearing the repercussions of nonconformity with the "perceived" social preference. If the majority believes that its preferred design is inconsistent with social preference, the perceived social preference will actually become the real preference, a self-fulfilling prophecy. In a situation like this, the law's responsibility to create coordinating focal points assumes a far greater importance. Prostitution is *perceived* to be inconsistent with the social values that Indian society claims to cherish, yet, just between

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190. Weber mentioned the normative basis of public reactions to authority (Max Weber, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (G. Roth & C. Wittich eds., 1978)). For more formal treatment, see Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *LAW & SOC'Y REV.* 513, 524 (2003) (an extension of the research from Tom Tyler, *supra* note 188). Also, in Tyler's *Why People Obey the Law*, he showed how the public's perception of the illegitimacy of laws undermines compliance with the law and police orders.

191. Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 *U. CHI. L. REV.* 607 (2000).

192. See Emanuela Carbonara, Parisi Francesco & Georg Von Wangenheim, *Lawmakers as Norm Entrepreneurs*, *REV. OF LAW & ECON.* 779 (2008).

193. See TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* (Harvard University Press 1995).

1997 and 2004, the number of prostitutes increased by fifty percent.<sup>194</sup> Calling for the abolition of an activity so actively utilized exhibits the hypocrisy eroding the social sanction of sex work. More importantly, the social sanction has evolved over time, and there is no reason to believe that the perceived preference is unchangeable. The historical account of prostitution in India clearly indicates the disparity between the social functions pre-colonization and post-independence. The religious and moral connotations suffer from distorted meanings, and it has been shown how the British reconfigured the frameworks of thought and experience in India.<sup>195</sup> There is no historical precedent indicating that Indians need to subscribe to the issue of prostitution, nor is there one in historical ethic.

The second argument comes in the form of an empirical observation. The infamous Article 377 of the Indian Penal Code, 1860 prohibited “carnal intercourse against the order of nature”<sup>196</sup> and thereby criminalized homosexuality, even in private. Responding to a writ petition filed by the Naz Foundation (an NGO in India) in 2009, the Delhi High Court, in a landmark judgment,<sup>197</sup> struck down Article 377 insofar as it criminalizes the consensual sexual acts of adults in private, as it violated a number of fundamental rights guaranteed by the Constitution.<sup>198</sup> Although the Supreme Court of India recently struck down the High Court’s judgment,<sup>199</sup> it does not affect the central argument here. Public sentiment against homosexuality in India has always been strong. Even though India’s religious history portrays acts of homosexuality and references suggest that homosexuality was socially acceptable in pre-British India, the change in social values took place over the last two-hundred years.<sup>200</sup> Until recently, homosexuals

194. Bhat, *supra* note 5.

195. See NEELADRI BHATTACHARYA, *REMAKING CUSTOM: THE DISCOURSE AND PRACTICE OF COLONIAL CODIFICATION* (Oxford University Press 1996); see also Lati Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (Univ. of California Press, 1998).

196. Section 377 of the Indian Penal Code states, “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

197. *Naz Foundation v. Government of NCT and Ors.*, 160 DLT 277 (2009) [hereinafter *Naz Foundation case/judgment*].

198. The Court opined that right to privacy and dignity (Article 21), right to equality (Article 14) and prohibition of discrimination on grounds of sex (Article 15). See *id.*

199. *Koushal v. Naz Foundation*, Civil Appeal No. 10972 (India 2013). The judgment however, has been severely criticized even at doctrinal level. See Rehan Abeyratne & Nilesch Sinha, *Insular and Inconsistent: India’s Naz Foundation Judgment in Comparative Perspectives*, YALE J. INT’L L. (forthcoming 2014).

200. *Pre-Colonial India Embraced Homosexuality – Govt. Tells SC*, PNS NEW DELHI (2012),

led depressing and private lives out of fear of social ostracizing and harassment by law enforcement officers.<sup>201</sup> Even patriarchal filial constructs discouraged homosexuals from leading a free life.<sup>202</sup> Explicit references to homosexuality were brutally crushed, even in film.<sup>203</sup> Indian public perception of homosexuality was no better than that of prostitution. It would be difficult to imagine that a legal innovation that *seemed* to diverge from a *perceived* social value could create a new social preference.<sup>204</sup> In fact, the evidence produced in courts showed how homosexuals suffered violence and discrimination from “goondas, blackmailers, the medical fraternity, parents and other parties . . . .”<sup>205</sup> Nevertheless, anecdotal evidence demonstrates how public perception of homosexuality changed after the High Court ruling. Major companies like Goldman Sachs, IBM, and Google developed a guide titled “Creating Inclusive Workplaces for LGBT Employees in India,” which encourages similar practices in other companies.<sup>206</sup> A local court recognized a marriage between two lesbians even though same-sex marriages were not legally recognizable.<sup>207</sup> Asia’s first Genderqueer Parade and Alan Turing Rainbow Festival were organized in Madurai, India, in 2012.<sup>208</sup> The Naz Foundation judgment was followed by publication of the magazine “Pink Pages,” dedicated to the LGBT community in 2009,<sup>209</sup> and the launch of India’s first queer radio station

<http://www.dailypioneer.com/nation/51899-pre-colonial-india-embraced-homosexuality-govt-tells-sc.html>.

201. See *Fear and Loathing in Gay India*, BBC NEWS (May 17, 2005), [http://news.bbc.co.uk/2/hi/south\\_asia/4304081.stm](http://news.bbc.co.uk/2/hi/south_asia/4304081.stm).

202. *Id.*

203. The 1996 Bollywood film, *Fire*, attracted violent street protests around the country by political and religious groups, inflating tensions around cinema halls that showed the movie. See Madhu Jain & Sheela Raval, *Ire Over Fire*, INDIA TODAY, Dec. 21, 1998.

204. For earlier history of gay rights in India, see Vimal Banasubhramanyam, *Gay Rights in India*, ECONOMIC AND POLITICAL WEEKLY (1996).

205. See Siddharth Narrain, *Celebrating Naz: Reflections on a Verdict about All of Us*, OS Open Space, available at [http://openspaceindia.org/index.php?option=com\\_k2&view=item&id=680&itemid=149](http://openspaceindia.org/index.php?option=com_k2&view=item&id=680&itemid=149); see also Siddharth Narrain, *Crystallising Queer Politics: the Naz Foundation Case and Its Implications for India’s Transgender Communities*, 2 NUJS L. REV. 455 (2009).

206. Jayashree Nandi, *Lesbian, Gay, Bisexual and Transgender Resource Guide for Employers*, TIMES OF INDIA (Oct. 9, 2012), [http://articles.timesofindia.indiatimes.com/2012-10-09/india/34342194\\_1\\_lgbt-employees-lgbt-community-lgbt-issues](http://articles.timesofindia.indiatimes.com/2012-10-09/india/34342194_1_lgbt-employees-lgbt-community-lgbt-issues) (last visited Sep. 18, 2013).

207. Dipak Kumar Dash & Sanjay Yadav, *In a First, Gurgaon Court Recognizes Lesbian Marriage*, TIMES OF INDIA (July 29, 2011), [http://articles.timesofindia.indiatimes.com/2011-07-29/gurgaon/29828761\\_1\\_gurgaon-court-lesbian-marriage-legal-marriage](http://articles.timesofindia.indiatimes.com/2011-07-29/gurgaon/29828761_1_gurgaon-court-lesbian-marriage-legal-marriage).

208. D. Karthikeyan, *Madurai Comes Out of the Closet*, THE HINDU (July 30, 2012), <http://www.thehindu.com/news/cities/Madurai/article3702689.ece>

209. Piyasree Dasgupta, *Rainbow Chronicles*, INDIAN EXPRESS (Aug. 31, 2009), <http://www.indianexpress.com/news/rainbow-chronicles/509187/0>.

called “Qradio,”<sup>210</sup> which occurred days before this article was finished. Scholarly work investigating the impact of the Naz Foundation case has revealed that the lesbian, gay, bisexual, and transgendered community experienced greater self-acceptance and confidence.<sup>211</sup> Although the empirical study discovered mixed opinions, there was a noticeable impression that the LGBT community experienced reduced police harassment and improved societal acceptance after the judgment.<sup>212</sup>

This has not been sudden a shift, but the Naz Foundation judgment gave the movement a legitimacy that expedited social acceptance and created a new focal point for the norm. Moreover, the judgment reflected, at some levels, an intrinsic desire of a large section of the population that was previously suppressed. Interestingly, the Naz Foundation judgment heavily criticized *communal policing*,<sup>213</sup> when a self-appointed group of patriarchs announce what “culture” is and set out rules for how to entertain, what to eat, how to dress, and how to act.<sup>214</sup> These religious or political groups hijack cultural definitions to suit their own conceptions and influence society to adopt the offered intrinsic motivations. This group aims to attack any effort to decriminalize prostitution despite the fact that it has little understanding of morality. The judgment also disassociates constitutional morality from popular morality,<sup>215</sup> invoking Ambedkar’s<sup>216</sup> speeches in the Constituent Assembly. Constitutional morality stems from the Founding Fathers’ ideals of democracy, equality, inclusiveness, and secularism, thus nudging social values to arrive at a liberal optimum. Given such a view of judiciary and its assimilation in popular opinion in India, there is a genuine hope that decriminalizing prostitution will also offer much needed freedom to sex workers, help reclaim the social value system from communal policing, and build an ethos of constitutional morality in Indian society.

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210. See *Indian Queers Soon to Have Their Own Radio Channel*, PINK PAGES (Sep. 6, 2013), <http://pink-pages.co.in/features/metro-life/indian-queers-soon-radio-channel/>.

211. Jain Dipika, *The Impact of Naz Foundation Judgment on the Gay, Bisexual and Transgender People in Delhi: an Empirical Investigation*, REPORT OF CENTRE FOR HEALTH LAW, ETHICS AND TECHNOLOGY, JINDAL GLOBAL LAW SCHOOL (2012), available at [http://www.jgls.edu.in/UploadedDocuments/Report\\_ImpactoftheNazFoundationJudgment.pdf](http://www.jgls.edu.in/UploadedDocuments/Report_ImpactoftheNazFoundationJudgment.pdf).

212. *Id.*

213. Narrain, *Crystallising Queer Politics*, *supra* note 205

214. *Id.*

215. *Naz Foundation*, *supra* note 197, at 79-82.

216. Dr. B.R. Ambedkar was the Chairman of the Constituent Assembly.

#### D. Public Health Concerns

Perhaps one of the strongest arguments in favor of the legalization, let alone decriminalization, of prostitution comes from public health concerns, because combating AIDS/HIV is easier if prevention and treatment programs target female sex workers.<sup>217</sup> Statistics show that female sex workers in developing nations are fourteen times more likely to be infected with HIV than other women of reproductive age.<sup>218</sup> As a result, prostitution in Asia in general,<sup>219</sup> and in India in particular,<sup>220</sup> has contributed significantly to the spread of sexually transmitted diseases, including HIV/AIDS.<sup>221</sup> Indeed, India's success in curbing the outbreak of AIDS (which appeared in 1986<sup>222</sup> and, in 2002, was expected to rise to 25 million cases by 2010 but only reached about 1.5 million) is credited to awareness campaigns strategically focused near red light districts in major cities.<sup>223</sup> In fact, sex worker collectives have been instrumental in raising awareness regarding the use of condoms, with positive result.<sup>224</sup> This is another sign to heed the collectives' demands,

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217. For extensive review and analysis from Indian standpoint, see Sahni & Kalyan, *Economics of Sex Work*, *supra* note 124, at 239-60 (citing Vikrant Sahasrabudhe & Sanjay Mehendale's 2008, article *Female Sex Workers and the HIV/AIDS Epidemic in India*).

218. S. Baral, C. Beyrer et al., *Burden of HIV Among Female Sex Workers in Low-Income and Middle-Income Countries: A Systematic Review and Meta-Analysis*, THE LANCET (2012).

219. Wiwat Rojanapithayakorn, *The 100% Condom Use Programme in Asia*, 14 REPRODUCTIVE HEALTH MATTERS 41 (2006).

220. Gisselquist & Correa, *supra* note 4, at 738-39.

221. K. Ruxrungtham, T. Brown, P. Phanuphak, *HIV/AIDS in Asia*, 364, THE LANCET (2004) (this paper shows specifically how spread of HIV in India depends on size of female sex worker and client populations and rate of their unprotected sexual contact); see also C.B. Venkataramana & P.V. Sarada, *Extent and Speed of Spread of HIV Infection in India Through the Commercial Sex Networks: A Perspective*, TROP. MED. INT. HEALTH, June 12, 2001, 1040-61. For a specific client group's (long-distance truck drivers) contribution, see Devinder Mohan Thappa, Nidhi Singh & Sowmya Kaimal, *Prostitution in India and Its role in the Spread of HIV Infection*, INDIAN J. OF SEXUALLY TRANSMITTED DISEASES & AIDS 69-75 (2007).

222. AIDS was spotted first in India, in sex workers in Chennai in 1986. D'Cunha, *supra* note 80, at 174 (citing Kotiswaran).

223. Harris, *supra* note 112.

224. See, e.g., S. Jana, L. Khodakevich, C. Larivee, L. Bey & N. Sardar, *Changes in Sexual Behavior of Prostitutes in Calcutta*, in PROCEEDINGS OF THE 10TH INTERNATIONAL CONFERENCE ON AIDS, YOKOHAMA, Abstract No. 364D (1994) presented in *Global Challenge of AIDS: Ten years of HIV/AIDS Research: Proceedings of the Tenth International Conference on AIDS/International Conference on STD*, Yokohama, Aug. 7-12, 1994.

For another study on collectives (SANGRAM and VAMPS) in Maharashtra's red light area's progressive efforts is illustrated in Rohini Sahni, *supra* note 72, at 261-67 (citing Meena Shivdas's 2008, *In the Interest of Business and Health*).

For an illustrative account of public health awareness efforts by Population Service International (USA based NGO) in Kamathipura, Mumbai, see *id.* at 342-47 (citing Svati P. Shah's 2008, *Producing the Spectacle of Kamathipura*).

which include, *inter alia*, the decriminalization of prostitution.

The reason for the high occurrence of AIDS among sex workers is that female prostitutes rarely use condoms,<sup>225</sup> increasing the vulnerability of sex workers and, consequently, their clients to AIDS. Why are clients adverse to using condoms, and why prostitutes do not force their clients to use them? The answer to the first question lies in a male tendency to believe that using condoms reduces penile sensation and the feeling of manliness, that ejaculating inside a vagina is more pleasurable, and that a request to use a condom indicates mistrust.<sup>226</sup> This unsurprising, given the patriarchal environment by which most of the developing world is characterized. It is, however, more important to investigate why sex workers do not insist that their clients wear a condom. This is primarily due to prostitutes' powerlessness.<sup>227</sup> This powerlessness is largely a result of financial insecurity, because customers threaten to leave if they are not provided with condom-free sex. While their dire need for money may cause sex workers to agree, more often they agree because the pimps and brothel owners do not want their business to suffer because the worker refuses to have sex without a condom. In a transaction where middlemen have taken charge of the market, the bargaining power of the service provider is low. Owing to her legal, financial, and social weakness, a sex worker is forced into having sex without a condom.

With little doubt that sex work encourages incidences of HIV/AIDS and that unsafe prostitution will not decline even if criminalized, social policy needs to create safe conditions for commercial sexual pleasure. The first step is to remove the criminal label from prostitution. The UN's Global Commission on HIV and the Law released a report last year that vehemently called for decriminalization of sex work (and also adult homosexual activity and individual drug use) as a means to combat the HIV epidemic.<sup>228</sup> The report was the result of extensive efforts to interview sex workers, public health advocates, and activists in 140 countries. It states,

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225. M. Nag, *Sexual Behavior in India with Risk of HIV/AIDS Transmission*, 5 HEALTH TRANSITION REV. 293-305 (1995).

226. See Reynaldo Pareja, *Why Clients of Sex Workers Don't Use Condoms*, AIDSCOM PROJECT (1991), available at [http://pdf.usaid.gov/pdf\\_docs/PNABL865.pdf](http://pdf.usaid.gov/pdf_docs/PNABL865.pdf); see also Trevor Solomon Baleke, *Sex Workers: Clients Reject Condom Use*, THE OBSERVER (Apr. 19, 2013), [http://observer.ug/index.php?option=com\\_content&view=article&id=24831:feature-sex-workers-clients-reject-condom-use](http://observer.ug/index.php?option=com_content&view=article&id=24831:feature-sex-workers-clients-reject-condom-use).

227. Thappa, *supra* note 221.

228. *Risks, Rights and Health*, GLOBAL COMMISSION ON HIV AND THE LAW (2012) available at <http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf>.

In many countries, the law (either on the books or on the streets) de-humanizes many of those at highest risk for HIV: sex workers, transgender people, men who have sex with men (MSM), people who use drugs, prisoners and migrants. Rather than providing protection, the law renders these “key populations” all the more vulnerable to HIV. The criminalization of sex work, drug use and harm reduction measures creates climates in which civilian and police violence is rife and legal redress for victims impossible. Fear of arrest drives key populations underground, away from HIV and harm reduction programs.<sup>229</sup>

The report criticized “punitive” laws that stifle efforts to prevent HIV transmission.<sup>230</sup> There are indications that Australia’s successful efforts to combat AIDS in the 1980s resulted from legalizing sex work to combat HIV prevalence.<sup>231</sup>

Criminalizing prostitution exacerbates discrimination against sex workers, who already face social stigma, and forces them to live with a higher risk of contracting HIV.<sup>232</sup> Criminal laws push workers underground, where they are then not in a position to negotiate better working conditions,<sup>233</sup> use of condoms,<sup>234</sup> or access to state assistance (for instance, access to programs for HIV prevention<sup>235</sup>). Sexual violence, which goes unchecked in a world where prostitution is criminalized, increases exposure to HIV.<sup>236</sup> The law has empowered police to detain sex workers, which deters the latter from approaching police to report sexual abuse. Effectively treated as criminals, sex workers do not qualify for government programs aimed at the general population and organized sector.<sup>237</sup> Also, the clandestine nature of the

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229. *Id.* at 8.

230. *Id.* at 7.

231. Michael Kirby & Michael Wong, *Decriminalisation Integral to Fight Against HIV*, DRUM TV (2012), <http://www.abc.net.au/unleashed/4128420.html>.

232. World Health Organization, *Violence Against Women and HIV/AIDS: Critical Intersections, Violence Against Sex Workers and HIV Prevention*, INFORMATION BULLETIN SERIES, NO 3., 2005 at 3, available at <http://www.who.int/gender/documents/sexworkers.pdf>; see J. Csete & J. Cohen, *Health Benefits of Legal Services for Criminalized Populations: The Case of People Who Use Drugs, Sex Workers and Sexual and Gender Minorities*, 38 J.L. MED. & ETHICS 816 (2010).

233. John O’Neil et al., *Dhanda, Dharma and Disease: Traditional Sex Work and HIV/AIDS in Rural India*, 59 SOC. SCI. & MED. 851, 851-60 (2004).

234. J. Csete & K. Shannon, *Violence, Condom Negotiation, and HIV/STI Risk Among Sex Workers*, 304 J. AM. MED. ASS’N 573-74 (2010).

235. A. Sukthankar, *Sex Work, HIV and the Law* 12 (Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law, Working Paper, 2011).

236. *Id.* at 11.

237. Sahni & Kalyan, *Economics of Sex Work*, *supra* note 124, at 198 (citing Vikrant Sahasrabudde and Sanjay Mehendale’s 2008 article *Female Sex Workers and the HIV/AIDS*



work discourages sex workers from approaching health care providers.<sup>238</sup> Incidences of HIV amongst sex workers could be reduced significantly by changing police attitude: police could work alongside sex workers to encourage widespread use of safe-sex practices. In India, HIV prevalence in the community fell from 11 percent in 2001 to 4 percent by 2004 after condom use among sex workers rose to 85 percent.<sup>239</sup> Nevertheless, such instances have been far too low to make a significant impact.

The idea that the criminalizing sex work discourages use of both preventive care and treatment services and exacerbates the spread of disease is not new and has been corroborated by the United Nations Office on Drugs and Crime's voluminous research.<sup>240</sup> In fact, in 2009, the Secretary General of the UN, Ban Ki-moon emphasized, "In addition to criminalizing HIV transmission, many countries impose criminal sanctions for same-sex sex, commercial sex, and drug injection. Such laws constitute major barriers to reaching key populations with HIV services. Those behaviors should be decriminalized, and people addicted to drugs should receive health services for the treatment of their addiction."<sup>241</sup>

Even the International Labor Office ("ILO") has indicated that sex work should be recognized as an occupation,<sup>242</sup> for instance, when it adopted labor standards on HIV/AIDS in 2010, which included occupational safety for sex workers.<sup>243</sup> In addition, studies have shown that decriminalizing prostitution in the Netherlands helped lower the rates of crime and sexually transmitted disease.<sup>244</sup> Further, the decriminalization of prostitution has provided prostitutes with guaranteed labor and social benefits such as adequate working

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*Epidemic in India*).

238. *Id.*

239. UNAIDS, *AIDS Epidemic Update*, Dec. 2005 at 34; *see also* I. Basu et al., *HIV Prevention Among Sex Workers in India*, 36 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 845-52 (2004).

240. Kirby & Wong, *supra* note 231, at 211.

241. *Id.*

242. International Labour Office, *Recommendation Concerning HIV and AIDS and the World of Work (No. 200)* (2010), available at [http://www.ilo.org/aids/lang—en/docName—WCMS\\_142706/index.htm](http://www.ilo.org/aids/lang—en/docName—WCMS_142706/index.htm).

243. This also includes empowerment to insist on safe and protected paid sex in their workplaces. *See id.*

244. *See* Fred Haesker, *Tolerance and Pragmatism Constant Themes*, CALGARY HERALD, July 26, 1995, at B7 (reviewing Jonathan Blank's movie, *Sex, Drugs And Democracy*); Renee Ordway, *Councilors Appear Set to Give Spas Cold Shower*, BANGOR DAILY NEWS, Sep. 8, 1995; Linda M. Rio, *Psychological and Sociological Research and the Decriminalization or Legalization Of Prostitution*, 20 ARCHIVES SEXUAL BEHAV. 205, 207-08 (1991).

conditions, a safer work environment, and medical care.<sup>245</sup> Countries such as Australia and the Netherlands<sup>246</sup> have moved away from criminalizing the selling and purchase of sex. Many countries have adopted “tolerance zones” for sex workers to market their services.<sup>247</sup> The governments argue that legalized brothels would provide safe working conditions.<sup>248</sup> Furthermore, mandatory health checks protect all parties involved.<sup>249</sup>

### *E. The Game Theory Framework*

Game theory helps us model the strategic behavior of entities when their decisions depend on their expectation of how other players in the game will behave.<sup>250</sup> It is a powerful analytical tool for decision sciences and makes a grounded case that certain behavioral patterns can be expected in a rational player. Here, we make simple models and show how we arrive at the same results even through game theoretic approach: decriminalizing will empower prostitutes, increase their residual incomes, and reduce their harassment.

#### 1. Demand-Side Dynamics

Consider two clients, A and B, who are on the demand side of prostitution. In this basic model, assume that clients have an option of paying or not paying the sex worker after using her services. The concept of not paying primarily symbolizes harassment or physical violence but can also represent actually refusing to pay. The clients can consider not paying because prostitution is criminal and, therefore, the supplier (sex worker) is unable to seek third-party (government) enforcement. Players (clients) have two options: to pay (behave and be kind) or not to pay (be violent and/or avoid promised payment). Further,

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245. Claire Sterk-Elifson & Carole A. Campbell, *The Netherlands*, in PROSTITUTION: AN INTERNATIONAL HANDBOOK ON TRENDS, PROBLEMS, AND POLICIES 191 (Nanette J. Davis ed., 1993).

246. Julie Bindel & Liz Kelly, *A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden, for the Routes Out Partnership Board, Child and Woman Abuse Studies Unit*, 12-13 (London Metropolitan University 2003) available at [http://www.popcenter.org/problems/street\\_prostitution/PDFs/Bindel&Kelly\\_2003.pdf](http://www.popcenter.org/problems/street_prostitution/PDFs/Bindel&Kelly_2003.pdf).

247. Dominic Casciani, *Prostitution: International Answers*, BBC NEWS (July 16, 2004), [http://news.bbc.co.uk/2/hi/uk\\_news/3900361.stm](http://news.bbc.co.uk/2/hi/uk_news/3900361.stm).

248. *Id.*

249. *Id.*

250. PRAJIT K. DUTTA, STRATEGIES AND GAMES – THEORY AND PRACTICE 4 (Cambridge MIT Press 1999).

to generate competitive behavior, we assume that a player believes that his utility increases if the other player pays but he does not. Consequently, his utility decreases if he pays but the other does not. This is reasonable given that relative payoffs of two players are reflected in the fact that they perceive others' profits as their losses and are thus encouraged to change their strategies to appropriate that profit. The game under the given situation imitates a prisoner's dilemma,<sup>251</sup> which is a one shot symmetric<sup>252</sup> and a non-zero game.<sup>253</sup> The game theoretic matrix is shown in Figure 1.

		<b>B</b>	
		<b>Pays</b>	<b>Doesn't pay</b>
<b>A</b>	<b>Pays</b>	-1, -1	-1, 1
	<b>Doesn't pay</b>	1, -1	1, 1

*Fig 1: Payoffs of two clients when prostitution is criminalized*

Figure 1 demonstrates that players' payoffs are lower when they pay and higher when they do not pay. The cost of payment is reflected by "-1," and gains of not paying are captured by "1." The table shows that the dominant strategy of clients will be to not pay. This bears a close resemblance to reality. Consequently, prostitutes, fearing non-payment and abuse by customers, depend on pimps to provide protection from abusive and defaulting clients. Given the legal system, the prostitutes tend to avoid civil courts, because their contracts will be declared void and they can actually expect state prosecution instead of conflict resolution.

This problem is also intensified by the number of customers who deliberately seek out prostitutes to victimize due to reduced likelihood of

251. WILLIAM POUNDSTONE, PRISONER'S DILEMMA: JOHN VON NEUMANN, GAME THEORY, AND THE PUZZLE OF THE BOMB (Doubleday 1992).

252. A symmetric game is a game where the payoffs for playing a particular strategy depend only on the other strategies employed, not on who is playing them. If the identities of the players can be changed without changing the payoff to the strategies, then a game is symmetric. See AVINASH DIXIT & SUSAN SKEATH, GAMES OF STRATEGY (Norton 1999).

253. Non-zero-games are situations where participants can all gain or suffer together. Non-zero-sum is an important part of economic activity due to production, marginal utility and value-subjectivity. Most economic solutions are non-zero-sum, since valuable goods and services can be created, destroyed or badly allocated and any of these will create a net gain or loss. See JAMES W. FRIEDMAN, GAME THEORY WITH APPLICATION TO ECONOMICS (Oxford University Press 1990).

arrest or legal action.<sup>254</sup> Imagine now, however, that prostitution has been decriminalized. This enables prostitutes not only to enter into a contractual relationship with the client but also to drag the client to the court if he reneges on his obligation or – in our terminology – does not pay. The new game is shown in Figure 2.

		<b>B</b>	
		<b>Pays</b>	<b>Doesn't pay</b>
<b>A</b>	<b>Pays</b>	-1, -1	-1, -2
	<b>Doesn't pay</b>	-2, -1	-2, -2

Fig 2: Payoffs of two clients when prostitution is decriminalized

Figure 2 first shows that the cost of not paying will exceed the cost of paying, because restitution damages will be more costly. This is because there is an additional cost if a third party resolution is invoked. Second, clients will suffer a loss of reputation in the sex worker community, which will not entertain the client in future. Third, the client could experience reprisal from a sex worker's collective on account of non-payment. Suddenly we see that the dominant strategy is to pay. Decriminalization helps achieve this behavioral change.

## 2. Interaction Between the Sex Worker and Her Client

Let us consider a simple model to illustrate how decriminalization changes the relative payoffs of the players in a game. The transaction involves a prostitute providing services at a charge, which we assume she is free to offer or refuse to offer. The client enters into the deal, and, while the transaction is taking place, he may choose to behave properly or violently. Here, a client is conceptually synonymous with any actor who may have violent tendencies towards a prostitute, while violence could be physical or monetary. For instance, consider a client who refuses to wear a condom, pays less than promised, or physically abuses the sex worker. The game is constructed in two states: state one, where prostitution is criminalized, and state two, where it is not.

254. See S.R. Maxwell & C.D. Maxwell, *Examining the Criminal Careers of Prostitutes Within the Nexus of Drug Use, Drug Selling and Other Illicit Activities*, 38 CRIMINOLOGY 787-809 (2000).

		Client	
		Non-violent	Violent
Prostitute	Deal	3, 2	1, 4
	Refuse	0, 0	0, 0

Figure 3: Payoffs of sex worker and the client, when prostitution is criminalized.

Figure 3 is illustrative. The payoffs are nil when the prostitute refuses to deal. She gets a higher payoff when client is not violent than when he is. The client, however, earns higher utility when he is violent (the whole point of being violent is that it affords higher utility to the client), for instance, when he reneges on his promised payment. Having no legal recourse, the prostitute cannot stop his violent tendencies and engages into the trade with a decreased payoff.

However, notice that the payoffs change when prostitution is decriminalized. In this case, the violent client will face reprisals from the sex worker because the latter is not engaging into a criminal activity. The contract, in theory, will be enforced. This will significantly reduce the client's payoffs, thereby altering his incentives. The dominant strategy is for the client to be non-violent and to engage in the trade with the sex worker.

		Client	
		Non-violent	Violent
Prostitute	Deal	3, 2	1, -2
	Refuse	0, 0	0, 0

Figure 4: Payoffs of sex worker and the client, when prostitution is decriminalized.

Therefore, one can observe how decriminalizing prostitution changes relative economic payoffs of clients and sex worker, transferring power from clients to sex workers.

## VI. DE-INSTITUTIONALIZING PROSTITUTION

Feminist groups in India have rested the issue of prostitution on three pillars: (a) deliberate silence on the issue in a cultural context of

heterosexual monogamous marriage, (b) violent victimhood, depriving the label of labor from sex-work, and (c) invocation of sex-work collectives' lens of choice and identity.<sup>255</sup> There is a massive solidarity movement concerning sex work in India,<sup>256</sup> but many of the existing efforts focus on reforming the trade and occupation rather than on questioning the underlying structures that give rise to the trade.<sup>257</sup> This is not necessarily disappointing, given how badly the entire issue needs positive solutions rather than normative conclusions. Reform cannot be sought through vitally important questions but rather through specific answers, given the plight facing voiceless sex workers, particularly in India. Nonetheless, there is little substantial difference between prostitution as it exists in India and prostitution as it exists throughout the world. In fact, there is seldom a distinction between prostitutes and the institution of prostitution. The individual woman has been perceived as an institution and a commodity, while the pimps have been seen as the market. The practices of procuring, "seasoning," and prostituting have thus become invisible.<sup>258</sup> With no distinction between the individual and the institution, all prostitutes are seen as victims or criminals; the hierarchy in the sex industry is blurred, and the heterogeneity within the prostitute population is concealed.

Feminist theories, in addition to conceptualizing gender, should be mindful of myriads of interconnected realities, governed by class, race, ethnicity, economic and educational background, and physical and mental health, *inter alia*.<sup>259</sup> Once scholarly discourses concerning prostitution assimilate this view, it will be easy to disassociate "prostitution as individual" from "prostitution as institution." In India,

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255. Geetanjali Gangoli, *Immorality, Hurt or Choice: Indian Feminists and Prostitution*, 9 INT'L FEMINIST J. POLITICS 1 (2007).

256. The real policy focus shifted towards sex workers due to spreading of HIV/AIDS in India. Flora Cornish & Riddhi Ghosh, *The Necessary Contradictions of 'Community-Led' Health Promotion: A Case Study of HIV Prevention in an Indian Red Light District*, 64 SOC. SCI. & MED. 496 (2007). This led to a heavier stand of the state to eliminate prostitution. Resistance to this wave galvanized development of peer-education and outreach activities through organizing sex workers into collectives, notably the DMSK in Kolkata, BIRDS in Karnataka and SANGRAM in Maharashtra. See O'Neil et al., *supra* note 233, at 851.

257. C. Sathyamala & Ritu Priya, *Sex as Work: A Changing Discourse*, 1 J. CREATIVE COMMUNICATIONS 203-08 (2006).

258. Kathleen Barry, Charlotte Bunch & Shirley Castley, eds., *International Feminism; Networking Against Female Sexual Slavery*, REPORT OF THE GLOBAL FEMINIST WORKSHOP TO ORGANIZE AGAINST TRAFFIC IN WOMEN, ROTTERDAM, THE NETHERLANDS, Apr. 6-15, 1983.

259. This critique of gender essentialism has been criticized by Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, in FEMINIST LEGAL THEORY: FOUNDATIONS (2013); see also Angela Harris, *Race and Essentialism*, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 235 (1991).

the feminist movement (manifested in the National Commission for Women for example) has echoed the gender essential voices, reinforcing the idea that Indian prostitutes are “mere sex slaves who are invariably trafficked into prostitution and who, as victims, do not have the ability to speak for themselves or their communities.”<sup>260</sup> Such a view adds ill-founded logic to the view that sex workers lack agency, which has been central to the creation of criminalizing attitudes towards prostitution.<sup>261</sup> In India, colonial heritage and caste systems add more layers to the so-called institution of prostitution, lending even more complexity to the heterogeneity. When stripped of its sweeping generalizations, prostitution becomes a context specific activity, best understood through a bottom-up approach. This further calls for decentralizing its governance, best achieved by decriminalizing it.

The deinstitutionalized view of prostitution renders most of the Indian government’s alternative policies redundant. The government has initiated various programs to combat trafficking and prostitution,<sup>262</sup> beyond the statutory response (which we have criticized).<sup>263</sup> Emigration rules in India prohibit women less than thirty years of age from migrating to other countries for household services.<sup>264</sup> This, however, helps little because much of India’s sex trafficking is internal<sup>265</sup> and driven by large-scale rural displacement (of landless labor, small farmers or people of a lower caste) as a result of globalization.<sup>266</sup> Further, these restrictive laws in societies where women begin working at early ages increase women’s vulnerability to trafficking because women, lacking

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260. Prabha Kotiswaran, *Preparing for Civil Disobedience: Indian Sex-Workers and the Law*, BOSTON COLLEGE THIRD WORLD L.J. 163 (2001), available at <http://lawdigitalcommons.bc.edu/lwlj/vol21/iss2/1>.

261. *But see* Janaki Nair & Mary E. John, *Introduction to A QUESTION OF SILENCE? THE SEXUAL ECONOMIES OF MODERN INDIA I* (1998). The authors have attempted to imply that Indian feminist movement has had progressive elements to it and has vigorously worked for rights of sex workers. Many others disagree with this view. *See* D’Cunha, *supra* note 80, at 173-74 (citing Kotiswaran).

262. India Country Report, *supra* note 60.

263. Even though the government claims to have invested resources in anti-trafficking programmes, U.S. Office to Combat and Monitor Trafficking in Persons has placed India in a tier 2 watch list “for failure to provide evidence of increasing efforts to combat trafficking.” *See* George, *supra* note 9, at 71.

264. *Id.* at 242.

265. Ratna Kapur, *Tricks and the Law: Legal Regulation of Trafficking, Sex Work and Migration*, Technical Consultative Meeting on Anti- trafficking Programmes in South Asia, 45 (2001) (summarized in *Anti-Trafficking Programs in South Asia: Appropriate Activities, Indicators and Evaluation Methodologies: Summary Report of a Technical Consultative Meeting*).

266. Svati P. Shah, *Producing the Spectacle of Kamathipura: The Politics of Red Light Visibility in Mumbai*, 18 CULTURAL DYNAMICS 269-92 (2006).

legal recourse, depend on illicit options offered by traffickers.<sup>267</sup>

The government runs “Swaadhar” homes and “short-stay” homes for women in difficult circumstances. They, however, have been criticized as centers of corruption and victimization where distraught inmates are considered “impure” with little regard to their privacy or bodily integrity.<sup>268</sup> In another program, called “Ujjwala,” the government attempted to drive the anti-trafficking measure through community vigilance in addition to rescue and rehabilitation. Nevertheless, scholars have noted that most programs relating to rescue and rehabilitation lead to further criminalization of prostitution and victimization of sex workers.<sup>269</sup>

The monolith of prostitution must be viewed in its micro-constituents. Issues facing prostitution at the village level are different from those at urban level. For instance, Kotiswaran’s survey of rural Karnataka found that, because police stations are miles away, state enforcement machinery rarely harasses sex workers.<sup>270</sup> Sex workers in rural areas have regular clients with whom they have children and who give them a monthly allowance, and sexually abusive clients receive a severe community response, unlike in more urban regions.<sup>271</sup> There are numerous accounts of community and caste-based prostitution in India.<sup>272</sup> Indian law provides a single response to these problems with little thought given as to how it will produce different implications for subjects who are not similarly situated. An approach that removes sex work from the clutches of the law will go a long way to enable different communities to develop their own practices. For this to happen, prostitution cannot not viewed as an institution.

It should be noted, however, that even heterogeneous approaches could have institutional responses, and decriminalization is one such institutionalized solution. Such a response may be connected to empowering frameworks, attracting institutional structures. But decriminalization itself will strip prostitution of its institutional view, which has already harmed sex workers. This view encouraged New Zealand to successfully experiment with decriminalization in its

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267. See Jana et al., *supra* note 224; see also Christine Joffres, Edward Mills, Michel Joffres, Tinku Khanna, Harleen Walia & Darrin Grund, *Sexual Slavery Without Borders: Trafficking for Commercial Sexual Exploitation in India*, 7 INT’L J. FOR EQUITY IN HEALTH 22 (2008).

268. See Mandeep Dhaliwal, *Rescued” Sex Workers: From Here to Nowhere*, THE LAWYERS COLLECTIVE 12 (1997); George, *supra* note 10.

269. See, e.g., Jana et al., *supra* note 224; Jayasree, *supra* note 206.

270. D’Cunha, *supra* note 80, at 219 (citing Kotiswaran).

271. *Id.* at 220.

272. *Id.*



Prostitution Reform Act (2003).<sup>273</sup> New Zealand had previously followed a model similar to that of India, where prostitution was not illegal *per se* but activities surrounding it were. New Zealand policy makers, however, noticed that criminalizing the activity was undermining efforts to encourage a safe environment, while police harassment on the rise.<sup>274</sup> The Act, in decriminalizing prostitution, created a framework to safeguard sex workers' human rights, protect them from exploitation, and promote occupational health and safety. This enabled sex workers to operate in safety, both for themselves and for public health. The New Zealand Prostitutes' Collective, brothel operators, and the Labour Inspectorate collaborated to implement the safety standards, while the Human Rights Commission and Mediation Service on Employment adjudicate disputes.<sup>275</sup> These are institutional responses, and their success depends entirely on political will and society's judicial activism. For instance, in July 2005, a district court in New Zealand fined a man for removing his condom during intercourse without the sex worker's knowledge.<sup>276</sup> Other institutional responses could invoke participatory review. In New Zealand, the Prostitution Law Review Committee was established to assess and review the new Act, and three of the Committee's eleven members come from the New Zealand Prostitutes Collective.<sup>277</sup>

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273. New Zealand Prostitution Reform Act 2003, Part 2 Commercial Sexual Services, Sections 8 and 9. See Section 8(1)(a): "(1)Every operator of a business of prostitution must – (a) take all reasonable steps to ensure that no commercial sexual services are provided by a sex worker unless a prophylactic sheath or other appropriate barrier is used if those services involve vaginal, anal, or oral penetration or another activity with a similar or greater risk of acquiring or transmitting sexually transmissible infections"; and see Section 9(1): "(1)A person must not provide or receive commercial sexual services unless he or she has taken all reasonable steps to ensure a prophylactic sheath or other appropriate barrier is used if those services involve vaginal, anal, or oral penetration or another activity with a similar or greater risk of acquiring or transmitting sexually transmissible infections," available at <http://www.legislation.govt.nz/act/public/2003/0028/latest/DLM197815.html>.

274. See Canadian HIV/AIDS Legal Network, *New Zealand and Sweden: Two Models of Reform*, SEX, WORK, RIGHTS: REFORMING CANADIAN CRIMINAL LAW ON PROSTITUTION, available at [http://www.bayswan.org/swed/Canada\\_law\\_reform\\_models.pdf](http://www.bayswan.org/swed/Canada_law_reform_models.pdf).

275. See Global Commission, *supra* note 228, at 40–41.

276. See Canadian HIV/AIDS Legal Network, *supra* note 274. Judiciary's approach could be very important in setting up of the political and public opinion in this regard. For instance, in Bangladesh, a Court halted the forced eviction of sex workers from a brothel by policemen, arguing that curtailment of their livelihood was violation of sex-workers' right to life. See *Bangladesh Society for the Enforcement of Human Rights v. Government of Bangladesh and Ors*, 53 D.L.R. 1 (2000). Similarly, the South African Labour Appeal Court held that regardless of the law on prostitution, sex workers cannot be treated unfairly and discriminately by their employers. *Kylie v. Commission for Conciliation Mediation and Arbitration and Others*, (CA10/08) [2010] ZALAC 8; 2010 (4) SA383 (LAC); 2010 (10) BCLR 1029 (LAC) (May 26, 2010).

277. Canadian HIV/AIDS Legal Network, *supra* note 274.

## VII. CONCLUSION

According to the International Committee for Prostitutes' Rights ("ICPR"), some prostitutes report job satisfaction, others, job repulsion; some consciously choose prostitution as the best option available; others are compelled to enter prostitution by male force or deceit. Many prostitutes abhor the conditions and the social stigma surrounding their work but not the work itself. The ICPR, therefore, affirms the right of women to a full range of education and employment opportunities and due respect and compensation in every occupation, including prostitution.<sup>278</sup> Indeed, a woman's choice of livelihood should be respected, and the goal need not be to eradicate her choice. A better goal is protecting sex workers' rights to "bodily integrity, pleasure, livelihood, self-determination and a safe working environment."<sup>279</sup> A recent pan-India survey of sex workers conducted by the Centre for Advocacy on Stigma and Marginalisation ("CASAM") found that poverty and limited education push women to enter into sex work.<sup>280</sup> Thus, an even worthier goal is to provide education and alternative employment opportunities for women. Criminalizing an activity impossible to eradicate only worsens the lives of the actors. Social power should be transferred from the clients/pimps/police to sex workers. With decriminalization, sex workers can aid the state in checking criminal activities associated with prostitution, like trafficking. The Darbar Mahila Samanwaya Committee ("DMSC"), based in Kolkata, established a regional board for self-regulation 1998 to stop trafficking women because sex workers were better suited to identify outsiders who had been forced into sex work.<sup>281</sup> The real power needs to flow from bottom to top. Decriminalizing prostitution is the first step toward state solidarity with sex workers (and their collectives), who are

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278. Draft statement on Prostitution and Feminism, ICPR (1986) (recorded in *Vindication of the Rights of Whores*, edited by Gail Pheterson (1989), which features full transcripts of the First and Second World Whores' Congress.

279. Jayasree, *supra* note 206.

280. See Rohini Sahni & Shankar V. Kalyan Shankar, *The first pan-India Survey of Sex Workers* (2011), available at [http://www.sangram.org/resources/Pan\\_India\\_Survey\\_of\\_Sex\\_workers.pdf](http://www.sangram.org/resources/Pan_India_Survey_of_Sex_workers.pdf).

281. George, *supra* note 9, at 72. However, there is a need to locate this in the politics of 'NGOisation' of sex work. Even the sex workers collectives depend upon development professionals and funding agencies, making it hard to insulate their interests with non-sex workers' interest groups. Cornish & Ghosh, *supra* note 256. More importantly, prevalent ideologies and fears of domestic and international NGOs, which would go redundant if collectives develop intervention strategies independently, is an important source of challenge. See Jana et al., *supra* note 224; see also Nandinee Bandyopadhyay, *Streetwalkers Show the Way: Reframing the Global Debate on Trafficking* (Institute of Development Studies, Working Paper No. 309, 2008).

citizens first and sex workers second. If environmental factors are preventing a choice from being “free,” then the solution lies not in erasing the choice but in changing the environmental factors so that the choice becomes free.<sup>282</sup>

Decriminalization leads to the decentralization of trade. It helps to free prostitutes and sex workers from the ghettos and red light districts where violations of rights, including physical abuse and psychological torture, are rampant.<sup>283</sup> Technology has helped somewhat. Cellular phones, for example, put sex workers directly in touch with their clients, obviating the need for a pimp, if sex workers trust clients. The red light districts of G.B. Road in Delhi and Kamathipura in Mumbai have shrunk unimaginably since the cell phone boom in India: ninety percent of sex workers who have moved out of Kamathipura since the 1990s.<sup>284</sup> Freedom has its own methods of management. It is freedom that emancipates people from the shackles of power and hunger. It is the desire for freedom that captures most of us, but policies are designed without any thought regarding how they will affect the people’s basic freedoms.<sup>285</sup>

Sixty-six years after India’s independence, freedom still eludes sex workers. The first Prime Minister of India, J.L. Nehru, gave the Constituent Assembly of India, which debated prostitution (referred in the introduction), its first task as a representative body “to free India through a new constitution, to feed the starving people, and to cloth the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity.”<sup>286</sup> For sex workers (and many others), this task remains unfulfilled. Reclaiming the task requires reclaiming the rights, which can be achieved by reclaiming freedom from the state.

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282. J.O. Davidson, *The Anatomy of ‘Free Choice’ Prostitution*, 2 GENDER, WORK & ORGANIZATION 1 (1995).

283. Den Tek Kllaas, *Crusading Against Amsterdam’s Red Lights*, RADIO NETHERLANDS WORLDWIDE, available at <http://www.rnw.nl/english/article/crusading-against-amsterdams-red-lights>.

284. Gardiner, *supra* note 112.

285. Amartya Sen in the introduction of his celebrated work *Development as Freedom* mentions, “Development can be seen . . . as a process of expanding the real freedoms that people enjoy . . . Development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states.” See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (Oxford University Press 1999).

286. See GRANVILLE, *supra* note 1.