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**Abstract:** This article deals with the reform of prostitution laws in India. It begins with an outline of the current legislative framework available in this regard and then critically evaluates the various alternatives to the framework that have been proposed through the 1990s by the Indian government, universities and research institutions, the Indian women's movement and sex-worker organizations. After undertaking an historical examination of prostitution laws in India from colonial times up to the present, the author recommends the decriminalization of prostitution with a strong emphasis on the protection of the civil rights of prostitute women as a matter of policy. More importantly, the author challenges the underlying assumptions of much Indian feminist theory and practice on the issue, critiques the politics of representation in the law reform process and seeks to highlight the agency of Indian prostitute women in the debate on prostitution laws.

## Preparing for Civil Disobedience: An Introduction

Scarlot, a prostitute woman<sup>2</sup> solicits a New York audience as part of her art performance:

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<sup>1</sup> \* S.J.D. Candidate, Harvard Law School. This article originates from an LL.M. paper written in 1996 under the supervision of Professor Martha Minow at Harvard Law School. The ground work for it commenced in 1993, when I was involved in a study undertaken by the National Law School of India University and commissioned by the Department of Women and Child Welfare, Government of India, to propose legislative reform in the area of prostitution and trafficking. Also, between 1991 and 1993, I was part of a group of law students that worked on prostitution as a form of labor for the purposes of the Second All-India Community-Based Law Reform Competition for law schools and submitted its report in 1993.

<sup>2</sup> I acknowledge at the very beginning the incessant dilemmas that one faces in describing the women who engage in prostitution. In a way, deciding what term to use is a microcosm of all the confusions that surround the policy debate on prostitution. The woman we know as the prostitute has many names in English: prostitute, prostituted woman, whore, sex worker, commercial sex worker, sex trade worker. In the several languages of India, one finds different names depending on the time period and the region in which they worked. Sanskrit literature describes them as *veshya* (prostitute), *sadharani* (public woman), *rupajiva* (one who earns a living by using her charms), *ganika* (enjoyed by one person or many persons living in a group), *rupadasi* (enslaved by her physical beauty) and so on. In colonial times, in Bengal for example, they were called *baijee* (dancer), *nautch girl* (dancer), *raanr* (widow or prostitute), *randi* (prostitute), *baishya* (prostitute—the Bengali version of a *veshya*) and so on. Until recently, women's groups in India shunned words like commercial sex worker or sex trade worker because these words imply the commercialization of sex. Most women's groups, however, insisted that in their conversations with prostitute women, the latter do not view themselves as sex workers. In acknowledgement of the fact that most Indian prostitutes are forced into prostitution, the term least objectionable is thought to be prostituted

[\*PG162] I would like to engage you in a little civil disobedience.

You all know that it is against the law, it is a crime to solicit for the act of prostitution.

I don't know if you know this but a few years ago they made law that it is illegal to agree to engage in prostitution.

First of all are there any cops in the audience?

You have to tell me, otherwise it is entrapment.

I am going to offer you my sexual services, you just say yes.

\$200 for intercourse, of course with a condom.

Now who agrees to engage in prostitution with me?

Great.

Thank you so much for engaging in this act of civil disobedience<sup>3</sup>.

If legal theory can ever engage in civil disobedience as perilously close to arrest and imprisonment as does Scarlot, then this article begins the search for such theory. In the process, the goal of this article is to make an effective contribution to the current national debate on prostitution in India today, while reflecting on some of the implications that this debate has for feminist legal theory in an Indian setting.

In attempting to arrive at a proposal for law reform, I undertake a brief historical study of the laws relating to prostitution in ancient and colonial India. I point to the ambivalent nature of laws relating to, and of societal attitudes toward, prostitution and prostitute women prior to colonial rule, and the use of law by the colonial state initially to regulate, and later to criminalize Indian prostitute women, thereby disenfranchizing them. Complicit in the decline in prostitute women's social status was a nationalist ideology that considered prostitute women to be a slur on its conception of Indian womanhood. I thus attempt to unravel how the prostitute woman's body became, in [\*PG163]colonial times, a battle ground on which the interests of Indian nationalists, the Indian orthodoxy and the British rulers played out, competing at times and colluding at other times, and how the law encrypted these contestations. More importantly, one could unearth numerous instances of the agency of Indian prostitute women and their understanding of, and resistance to, pre-colonial and colonial laws. This process of retrieving, however partially, the voices of these prostitute women, of the subalterns, assists in countering the

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*woman. For reasons evident in this article, I find this implication objectionable. Hence, I use the terms sex worker or prostitute woman.*

<sup>3</sup> Shannon Bell, *Reading, Writing and Rewriting the Prostitute Body 176* (1994) (quoting from the performance of prostitute performer Carol Leigh, who is known by the work name, Scarlot).

prevalent stereotypical images of Third World women (and Third World prostitute women in particular), as being mere victims of patriarchal oppression and no more than sex slaves.

The National Commission for Women (NCW) and the Indian feminist movement, with few exceptions, have consistently created and reinforced the idea of Indian prostitute women as 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. At the legislative level, this translates into the desire for stringent criminal laws that penalize all players except for prostitute women, despite the record of the state and the police in enforcing existing laws that similarly suffer from a lack of conceptual clarity. Proponents of this proposal use the rhetoric of human rights discourse to advance it, in opposition to decriminalization. In reality, this position only sustains the divide between prostitute women who are forced into prostitution and those who enter it voluntarily, because it suggests that those who are forced into it ought to have rights, while the latter do not deserve to be protected from institutionalized discrimination. Moreover, reliance on an imaginary divide between the West and Asia to explain why “Western” women can cope with legalization, whereas Asian women need to be rescued and rehabilitated, is contrary to the aspirations of many Indian prostitute women themselves, who demand the decriminalization of prostitution.

Disturbing as it may seem, the policy debate surrounding prostitution in India today has striking parallels to debates on the issue in colonial times. By denying the agency of prostitute women, the feminist movement and the NCW are reiterating the moralistic views of patriarchal nationalist leaders from colonial times. Thus, I find problematic the politics of representation of the Indian feminist movement in this area of law reform. In keeping with the hope of much feminist theory—to be related to the day-to-day struggles of the women’s movement—my article argues that any sincere attempt at ameliorating the conditions of prostitute women and avoiding state control of their bodies in the name of the Acquired Immune [\*PG164]Deficiency Syndrome (AIDS) epidemic is possible only if the post-colonial state and the women’s movement alike involve prostitute women in the policy making process, decriminalize prostitution and enact laws that prohibit any form of discrimination against prostitute women on account of their sex work. This would entail repealing any special legislation that makes criminal offenses of prostitution, trafficking and related activities, and instead, prosecuting such activities under general criminal laws that apply to all persons, irrespective of whether or not they are involved in the sex trade. In addition, such a generally applicable law would contain anti-discrimination provisions so that sex workers could not be deprived of their personal liberty or be subject to restrictions in the conduct of their lives solely on account of their status as sex workers. It would further contain provisions that protect sex workers against sexual abuse, require the creation of a welfare fund supported and administered by the government and prostitute women alike, and enable sex workers to form and register collectives under the law and to use it to increase their bargaining power in realizing these rights. Finally, it would contain guidelines to which both enforcement officials and the judiciary would be subject in their interpretations and enforcement of the law, in order to preserve the spirit of the law.

Part I of this article outlines the present legislative framework relating to prostitution in India, the pattern of its enforcement so far, the rise of prostitution in the 1990s as a matter worthy of public debate in light of the AIDS epidemic, and the Indian women's movement's engagement with prostitution and prostitute women. This article then elaborates on law reform initiatives that have been undertaken in the past decade at the insistence of the Indian state, while chronicling the positions of the various players in the debate, namely, the federal government, the governmental body which acts as a watchdog for women's rights (i.e., the NCW), feminist non-governmental organizations, Human Immunodeficiency Virus (HIV) prevention groups and prostitute women's organizations. Part II of this article offers a brief, and by no means exhaustive, description of prostitution in ancient India. Part III focuses on the impact of British rule on prostitution in India commencing with state sponsored prostitution and continuing to the state regulation of prostitution through the use of contagious diseases laws. Part IV deals with the feminist abolitionist intervention during this period of colonial rule, especially in the realm of law reform. Part V discusses the role of the nationalist movement in attempting to counter the moralistic superiority of the British rulers by improving the status of Indian women, and the resulting marginalization and stigmatization of Indian prostitute women who came to be construed as mere victims of sexual slavery. Part VI raises certain methodological issues that feminist researchers who seek a more nuanced and complex understanding of prostitution are likely to encounter in their research. Part VII concludes this article with an exploration of the underlying assumptions of much Indian feminist theory and practice in relation to prostitution, the politics of representation in the law reform process, and the need to pry open essentialist thought processes in feminism as they relate to Third World women (assuming such a category exists) and engage more fully with the emerging prostitute rights movement in India.

In articulating my arguments in this article, I draw from recent writings of North American feminist jurisprudence<sup>4</sup> that are immediately relevant to this article. Among the themes that I emphasize is the need to base feminist inquiry in the concrete experiences of women<sup>5</sup>, especially in the context of the critique of Enlightenment beliefs. Clare Dalton elaborates:

[T]he idea that a "self" can be singular or coherent; the idea that knowledge can be objective (or the real-world-out-there corresponds with the world-as-viewed-by-the-subject); the idea that certain minimal universal human needs or rights can be identified

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<sup>4</sup> I do not make a distinction between feminist legal theory and feminist jurisprudence for the purposes of this article. This is despite the fact that they seem to be distinct (but not necessarily exclusive) categories for many feminist legal scholars. For example, Kelley Weisberg observes that feminist legal theory has two parts. Kelley Weisberg, *Introduction to Feminist Legal Theory: Foundations* xv, xviii (Kelley Weisberg ed., 1993). The first is an "exploration and critique of theoretical issues about the interaction between law and gender," and the second is the "application of a feminist analysis and perspective to concrete areas of law." *Id.*

<sup>5</sup> See Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, in *Feminist Legal Theory: Foundations*, *supra* note 3, at 22, 25.

that are in no way contingent on the historical particulars of any given society, but for that very reason can be used to justify particular social and political structures<sup>6</sup>.

Dalton suggests that feminist theory, in addition to conceptualizing gender, should be cognizant of factors such as race, class, sexual orientation, religion, ethnicity, employment status, and physical and mental health. Several feminists, like Martha Minow, Kimberle Crenshaw and Angela Harris, who critique the tendency toward gender essentialism in many feminist legal writings echo Dalton's nonessentialist view.<sup>7</sup> In the Indian context, caste and a colonial history would be among the additions to this laundry list.

In attempting such contextual and post-essentialist research, I have also been influenced by the writings of Indian historians who, as part of the subaltern studies movement in Indian historiography, have demonstrated how attention to the stories of ordinary men and women is useful in making sense of the nationalist movements in many colonized countries. For example, stories of resistance by women against the grain of both colonial and nationalist discourse could rid Indian and Western feminists alike of the patronizing attitude that they tend to adopt toward Third World women as victims and victims alone. Since subaltern studies scholars tend to adopt a critical posture toward British administrative and legal documents, their methodology is full of possibilities that will enrich our understandings of the exigencies of colonial rule under which the Indian court system, the legal profession and the laws themselves were institutionalized.<sup>8</sup>

## **I. Sad Laws, Bad Laws, They Make Me Mad Laws . . . All They Do . . . Is Add Laws<sup>9</sup>**

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<sup>6</sup> Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, in *Feminist Legal Theory: Foundations*, supra note 3, at 32, 34.

<sup>7</sup> See Kimberle Crenshaw, *Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in *Feminist Legal Theory: Foundations*, supra note 3, at 383, 395; Angela Harris, *Race and Essentialism In Feminist Legal Theory*, in *Feminist Legal Theory: Readings in Law and Gender* 235 (Katherine T. Bartlett & Rosanne Keneddy eds., 1991); Martha Minow, *Feminist Reason: Getting It and Losing It*, in *Feminist Legal Theory: Foundations*, supra note 3, at 339, 347

<sup>8</sup> By this, I do not mean that Indian law academics are insensitive to the colonial origins of present Indian law. Indeed, there have been some attempts, though sporadic and dispersed, to expose the colonial bases of several laws. For instance, in the area of constitutional law theory, it has been argued that the Indian Constitution envisages a presidential form of government rather than the Westminster parliamentary form of government that India has. There is, however, no body of legal research that critically examines the colonial legal system.

<sup>9</sup> Bell, supra note 2, at 179 (quoting a prostitute performance by Scarlot)

## ***A. Present Constitutional and Legislative Framework Affecting Prostitution***

An outline of the relevant constitutional and legislative frameworks is necessary in order to appreciate the debate on prostitution laws in India today. Apart from the equality provisions of the Indian [\*PG167]Constitution<sup>10</sup>, Article 23 prohibits traffic in human beings and all forms of forced labor. In addition, Article 39 provides that the state should direct its policy toward securing, among other things, a right to adequate means of livelihood for men and women equally and equal pay for equal work for both men and women, so that citizens are not forced by economic necessity to enter vocations unsuited to their age or strength<sup>11</sup>. Further, Article 42 requires that the state make provisions for securing just and humane working conditions as well as provide for maternity benefits<sup>12</sup>.

The legislative framework consists mainly of The Immoral Traffic in Persons Prevention Act, 1986 (ITPA)<sup>13</sup> as well as an entire range of laws that, in reality, tend to be utilized more often in tackling prostitution than the ITPA itself. These laws include the Indian Penal Code, 1860<sup>14</sup> (which has provisions against trafficking and slavery of women and children) and the state-level police, railways, beggary, health and public order statutes. Apart from these laws, state governments are permitted to frame rules under the ITPA, as regards the licensing and running of protective homes.

The underlying philosophy of the ITPA is a carry over from that of The Suppression of Immoral Traffic in Women and Girls Act, 1956<sup>15</sup> (SITA), which was originally passed as a result of the United [\*PG168]Nations International Convention for the Suppression of Traffic in Persons and of the Exploitation of Women, New York, 1950, to which India is

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<sup>10</sup> *The equality provisions are Articles 14, 15 and 16. India Const. pt. III, arts. 14–16. Article 14 provides for equality before the law and equal protection of the laws; Article 15 prohibits the state from discriminating on the grounds of religion, race, caste, sex or place of birth, though it can make special provisions for women, children, “socially and educationally backward” classes, scheduled castes and scheduled tribes; Article 16 provides for equality in matters of public employment with a few exceptions, including reservations for backward classes of citizens. Id.*

<sup>11</sup> *Id. at pt. IV, art. 39.*

<sup>12</sup> *Id. at art. 42. Articles 39 and 42 form a key part of Part IV of the Indian Constitution and are not justiciable in a court of law; they are however, meant to be fundamental in the governance of the country. Id. at arts. 39, 42.*

<sup>13</sup> *27 India A.I.R. Manual 496.*

<sup>14</sup> *Id. at 1. Laws against trafficking include section 365: kidnapping or abducting with the intent to secretly or wrongfully confine person; section 366A: procurement of minor girl; section 366B: importation of girl from foreign country; section 367: kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.; section 370: buying or disposing of any person as a slave; section 371: habitual dealing in slaves; section 372: selling a minor for the purposes of prostitution; section 373: buying a minor for purposes of prostitution; section 374: unlawful compulsory labour. 28 India A.I.R. Manual 561–85. Except for an offense committed under section 374, all the offenses carry a punishment of seven to ten years of imprisonment and fines. Id.*

<sup>15</sup> *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 (with State Rules) 1 (Devinder Singh ed., 1981).*

a signatory. The fundamental approach of the SITA was that it tolerated prostitution, thus acknowledging that prostitution was a necessary social evil<sup>16</sup>. The Act was amended twice. It was first amended in 1978, and then amended and renamed as the ITPA in 1986.

As amended, the ITPA merely extends the SITA's application to both women and men and increases the punishment for certain offenses. During the amendment process, there was no rethinking or reformulation of the SITA's underlying policy. Hence, in legal terms, the act of sexual intercourse per se is not illegal. Instead, every other act required to carry out prostitution is a crime under the ITPA. The aim of the legislation, as made abundantly clear from the Preamble to the 1956 version of the Act, is "to inhibit or abolish commercialised vice namely, the traffic in women and girls for the purpose of prostitution as an organised means of living."<sup>17</sup> In other words, a woman can carry out prostitution on her own within her own premises without it being considered a criminal act. However, the Act punishes anyone maintaining a brothel (section 3) or living off the earnings of a prostitute (section 4) or procuring or detaining a woman for the sake of prostitution (sections 5 and 6).<sup>18</sup> Moreover, section 15 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>19</sup> The Act also punishes any person who solicits or seduces for the purpose of prostitution (section 8) or who carries on prostitution in the vicinity of public places (section 7).<sup>20</sup> As such, under section 20 of the ITPA, which is vaguely worded, a Magistrate can order the removal of a prostitute from any place within his jurisdiction, if he deems it necessary to the general interest of the public.<sup>21</sup> In addition, the Act provides for the establishment of corrective institutions in which female offenders are detained and reformed and envisages the appointment of Special Police Officers to enforce these provisions. Interestingly, there is no punishment whatsoever for the client.<sup>22</sup>

[\*PG169] The history of the enforcement of prostitution laws in India is not very different from that of countries the world over. At the outset, the SITA embodied a mix of the policies of suppression of promiscuous sexual activity on one hand and the toleration of prostitution on the other.<sup>23</sup> In effect, the Act tended to disadvantage street prostitutes more than it did prostitutes who work off the street. In addition, prominent sociologist Jean D'Cunha's study of prostitution during the years 1980 to 1987 in the city of Mumbai, previously known as Bombay, found that under the SITA, as well as the relevant police statutes, the number of prostitute women arrested was disproportionately greater than the number of pimps, procurers and brothel-keepers arrested under the same laws.<sup>24</sup> Furthermore, the penalties imposed on prostitutes were far greater than the

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<sup>16</sup> This is referred to in this article as the "tolerationist" approach toward prostitution.

<sup>17</sup> *Beotra*, *supra* note 14, at 10.

<sup>18</sup> *See id.* at 30–61.

<sup>19</sup> *See id.* at 101–10.

<sup>20</sup> *See id.* at 62–72.

<sup>21</sup> *See id.* at 129–38.

<sup>22</sup> *See Beotra*, *supra* note 14, at 90–91.

<sup>23</sup> Jean D'Cunha, *The Legalization of Prostitution: A Sociological Inquiry into the Laws Relating to Prostitution in India and the West* 43 (1991).

<sup>24</sup> *Id.* at 55.

penalties imposed on the brothel-keepers or pimps. Thus, it is clear that the Act is enforced discriminatorily against prostitute women.

This disproportionate enforcement of the ITPA against prostitute women can be attributed to various causes. First, there is a strong nexus between politicians, police and the brothel-keepers that prevents the law from being enforced stringently against brothel-keepers. Corruption in the police rank and file is common. Also, there is a tendency for Indian politicians to view red-light areas as potential vote-banks, and they regularly require the services of prostitutes during their political conventions.<sup>25</sup> A second, recurrent problem with the enforcement of the ITPA that was discovered during field-work<sup>26</sup> and that D’Cunha’s study confirms is the difficulty of gathering sufficient proof to sustain convictions against offenders.<sup>27</sup>

[\*PG170] Furthermore, a third problem with the enforcement of the ITPA is that the rehabilitation homes set up under the Act are, on the whole, a failure. The homes are ill-equipped to deal with the number of women who are convicted under the ITPA.<sup>28</sup> Moreover, women in the homes live in sub-human conditions with severe restrictions on their freedom. For example, they cannot wear certain kinds of clothes and are prohibited from wearing any form of make-up or jewelry. In addition, the women are not allowed to

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<sup>25</sup> Cf. *Too Much Heat, Not Enough Light—Our Experiences with Sex Workers in Karnataka, Memorandum from the National Law School of India University, to the Second All-India Community-Based Law Reform Competition 87 (1993)* [hereinafter *Too Much Heat, Not Enough Light*] (on file with author).

<sup>26</sup> See *id.* at 86–88.

<sup>27</sup> See D’Cunha, *supra* note 22, at 62–65. D’Cunha observes that enforcement officials prefer to use local legislation such as the Bombay Police Act, 1951 (particularly section 110 B which penalizes indecent behavior in public) under which the rate of conviction is much higher as compared to that of the SITA. *Id.* at 48–49. This may be due to the fact that offenses under local laws are meant to be disposed of in a manner less stringent than they would be under the ITPA, which requires that the regular trial procedure be followed. Our interviews with lawyers in Bangalore reinforced this finding. Bangalore police tend to use the Railways Act or the Police Act rather than the ITPA. *Too Much Heat, Not Enough Light, supra* note 24, at 35. Also, it appears that the police find it more expedient to arrest street walkers rather than to raid brothels and arrest brothel keepers, pimps and traffickers. Hence, the number of street-walking prostitute women prosecuted is disproportionately higher than the other parties involved in prostitution. See *id.* at 123. However, when enforcement officials do use the ITPA, there are certain loop-holes specific to it that make it difficult to gather the proof necessary to sustain a conviction. D’Cunha notes that often times, the owner of the brothel does not live on the premises. Instead, one of the prostitute women is in charge. D’Cunha, *supra* note 22, at 60. When there is a raid, this woman claims that all of the women present are operating independently. Since the Act penalizes only sex for profit, neither the woman in charge nor the owner can be arrested. Also, in situations in which the brothel-keeper sends a prostitute woman with the client to a hotel, which are routine, it is nearly impossible for the prosecution to prove that the hotel was being used for commercial prostitution. D’Cunha also observes that the lack of reliable witnesses who will corroborate the police version of events, the impersonation by pimps as parents of the girls to whom they are handed over after release on bail, and the use of false age certificates contribute to the low conviction rate under the Act. *Id.* at 62, 64.

The enforcement of the Act is also affected by factors attendant to the enforcement of criminal laws all over India. For example, the prosecution department tends to be separate from the investigation wing of the police. As a result, this mismatch, combined with poor monetary incentives, excessive workload, corruption and low morale, leads to large-scale corruption and low rates of conviction.

<sup>28</sup> D’Cunha, *supra* note 22, at 65–67. D’Cunha notes that officials at these homes are over-worked and under-paid and that state funding for these institutions is meager. *Id.* at 66–67.

talk to each other.<sup>29</sup> Furthermore, in order to rid them of their supposed immorality, women are taught devotional songs and are offered vocational training. However, the training is largely inadequate; it fails to equip them with any marketable skills for when they leave the homes. The failure of this training and the absence of any follow-up services, when combined with the ostracism these women face, even from their families, makes it a small wonder that these women leave the government homes only to return to prostitution.

Women also commonly encounter physical and sexual abuse in the homes. On our visit to a reception home, our group of law students learned that the previous warden stole from the food and supplies allocated to the women at the home. When the women began starving, they had to request police intervention and confront the [\*PG171]warden. At times, officials in charge of these homes coerce the women into prostituting themselves in return for favors or for money.<sup>30</sup> Thus, the broad consensus that those working in this area of law have reached, including the government, is that the ITPA, in its present form, simply is not effective.<sup>31</sup>

Although prostitution was the subject of many sociological works after the initial enactment of the SITA, it never emerged as a social issue attracting national debate. As such, the tolerationist approach of this prostitution law remained problematically unchanged. This is starkly represented by the government of India's ban, on February 17, 1966, of a play about the prostitute women of Kamathipura, the red-light district of Mumbai, entitled "A Touch of Brightness."<sup>32</sup> The government banned the play on the basis that "it is set in one of the most infamous localities of Bombay city" and deals with "matters which are highly undesirable to show on the stage."<sup>33</sup> The play originally was selected to be presented at the Commonwealth Arts Festival; however, on September 10, 1965, passports of the members of the troupe performing in the play were impounded

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<sup>29</sup> *Too Much Heat, Not Enough Light*, *supra* note 24, at 28.

<sup>30</sup> *These conditions at an Agra home instigated two public interest petitions in the Supreme Court of India namely, Upendra Baxi (I) v. Uttar Pradesh and Upendra Baxi (II) v. Uttar Pradesh. See (1986) 4 S.C.C. 106; (1983) 2 S.C.C. 308. The petitioners contended that while section 21 of the 1956 Act requires that these protective homes be run effectively, the Agra home could not be run so at the expense of the human rights of its inmates. Many of the female inmates suffered from mental retardation and serious contagious diseases, but did not receive appropriate medical care. In response, the Supreme Court ordered proper medical care for the prostitute women who were in need of medical attention. It also ordered those in charge of the homes to discharge their statutory duties satisfactorily while respecting the dignity and human rights of the women in the home. In addition, the Court ordered the creation of a Board of Visitors and laid down broad guidelines for their administration of the homes established under the Act*

<sup>31</sup> *Women and Children in Prostitution: Human Rights Perspectives (Report of the National Workshop) 7 (Madhu D. Joshi ed., 1997) [hereinafter Women and Children in Prostitution] (quoting Krishna Sahi, Honorable Minister of State for Food and Civil Supplies).*

<sup>32</sup> *Playbill, Partap Sharma's A Touch of Brightness, directed by Geeta Citygirl Chopra, presented by The City College of New York Theater Program, 1999, at 4 (quoting the author's note from the Grove Press Edition of the play) [hereinafter A Touch of Brightness] (on file with author).*

<sup>33</sup> *Id.* *The play was recently performed at the Aaron Davis Hall in New York as part of The City College of New York Theater Program. It is a fictional account of the lives of prostitute women in a brothel in Kamathipura. However, it is not exactly clear why the content of the play may have been viewed as objectionable even in the 1960s.*

without reason by governmental orders. The script writer inferred from newspaper articles that protested the inclusion of the play in the festival that the government did not want international audiences to associate the social problems portrayed in the play with India, because such associations would denigrate national prestige by allowing Londoners to “know the heartening fact of the existence of brothels in [India].”<sup>34</sup> The script writer articulated the hypocrisy of the Indian state beautifully:

For a long time I was bewildered by what I took to be an odd discrepancy—that of the censors who banned the play, the prudes who denounced it, and the chauvinists who dubbed it as damaging to the “image” of my country, none of them denies the existence of the conditions depicted and yet all were resolutely against permitting a production of the play. I had thought that these attitudes stemmed from bureaucratic insensibility, from a peculiarly obtuse morality . . . but I realize now that that the antagonism arose not from any misjudgment of the play but from a very human fear of the truth. That is why I find it possible to apologize and feel genuinely sorry that I cannot rework reality to suit the required standard of complacency. I feel even more sorry that complacency cannot rework reality.<sup>35</sup>

## ***B. The Indian Women’s Movement’s Engagement with Prostitution***

Despite the government’s actions regarding prostitution, the issue not only failed to emerge as a social issue inspiring national debate, but also the Indian women’s movement failed to include it among the principal legal struggles, including domestic violence, dowry deaths and *sati* (widow self-immolation), among others, in which it was extensively engaged. Although, the movement campaigned for increased penalties under the existing tolerationist laws in the 1980s, it never undertook a fundamental examination of the tolerationist approach itself. In fact, the movement has only recently begun to examine and debate the issue of prostitution, despite the fact that there has been extensive law reform in the limited areas of domestic violence, *sati* and dowry deaths. Some introspection on this front led to the following conclusion in 1992:

Prostitution is an area largely ignored by the women’s movement and the NGO [Non-Governmental Organization] sector alike. The movement has not studied and discussed [\*PG173]the issue as it has development or employment. The NGO sector, for its part, has generally not considered commercial sex workers whether urban or rural, as a constituency deserving its attention. The few instances of NGO interventions among sex workers have tended to be moralistic in approach. . . . On the whole, the attitudes of both the women’s movement and the NGO sector, which in other contexts would be

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

considered to represent the progressive element in society, tend to reflect the negative perceptions of prostitution common to the general public.<sup>36</sup>[35](#)

In this regard, I disagree with a more recent observation made by Janaki Nair and Mary E. John in their book on the sexual economies of modern India. Nair and John observe:

Narratives of the historical “independence” of courtesans or devadasis notwithstanding, contemporary feminist politics alone has enabled the sex-worker to claim political rights and security at work. And once more, it is feminist scholars and activists who caution against too easy an identification of sex work as wage labour, given the difficulties of separating “sex” from the bodies and personalities of women.<sup>37</sup>

This statement implies that it is the Indian feminist movement that has all along been the progressive spokesperson for the rights of Indian sex workers. As numerous examples in this article indicate, the Indian feminist movement belatedly—only since the late 1980s—examined and debated the issue. Moreover, no feminist NGO has sought to mobilize prostitute women and work with them on issues of law reform. Any mobilization that NGOs have been responsible for has tended to be tied solely to HIV prevention efforts initiated in the early 1990s, not to the prostitution issue itself. In addition, the diversity among Indian feminists, and consequently, the different approaches they adopt, creates problems for advancing a single agenda. Hence, it is inaccurate to suggest that the feminist movement is the torchbearer of prostitute women’s rights.

### ***C. HIV and the Rethinking of Policy on Prostitution***

Prostitution emerged on the scene of public debate only after the detection of the first Indian case of HIV infection in sex workers from Chennai, earlier known as Madras, in 1986. The AIDS epidemic, and consequently, the supposed vectors of the disease, i.e., prostitute women, suddenly captured the imagination of the press, researchers and NGOs. One does not have to scratch too deeply beneath the surface to realize that the AIDS

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<sup>36</sup> *Ctr. for Women and Dev. Studies (New Delhi) & Humanistic Inst. for Co-operation with Developing Countries (Bangalore), Women in India: Reflecting on Our History Shaping Our Future*, 22–23 (Jamuna Ramakrishna ed., June 24–26, 1993) (proceedings of a Consultation on Gender and Development jointly organized by the Center for Women and Development Studies, New Delhi and the Humanistic Institute for Co-operation with Developing Countries, Bangalore) [hereinafter *Women in India*]. The neglect of the women’s movement of issues of sexuality in general is probably reflective of “the conspiracy of silence regarding sexuality in India, whether within political and social movements or in scholarship, [which] blinds us to the multiple sites where ‘sexuality’ has long been embedded.” Janaki Nair & Mary E. John, *Introduction: A Question of Silence? The Sexual Economies of Modern India*, in *A Question of Silence? The Sexual Economies of Modern India I* (Janaki Nair & Mary E. John eds., 1998) [hereinafter *A Question of Silence?*]. They note, however, that “in the spheres of law, demography or medicine, for instance, sexuality enjoys a massive and indisputable presence that is far from prohibited.” *Id.* The conspiracy of silence surrounding sexuality is only heightened in the context of the debate on prostitution since law has an overwhelming presence on a day-to-day basis in the lives of prostitute women in India today.

<sup>37</sup> Nair & John, *supra* note 35, at 15.

epidemic is the main, and probably the sole reason, for this renewed interest in prostitution.

For the first few years after reports of HIV in the Indian population poured in, the Government of India took an extremist approach on both legislative and policy fronts. In so doing, it nearly passed the loathsome AIDS Prevention Bill in 1989, which was patently unconstitutional and had the potential for discriminating against large sectors of society.<sup>38</sup> In essence, the AIDS Prevention Bill provided health authorities with invasive policing powers in the form of forcible testing and isolation of members of so-called “high-risk groups,” which would have included prostitute women. In addition, the Bill required that registered medical practitioners report to the government the identity of any person whom they knew to be HIV-positive, provided for coercive tracing and placed the responsibility for blood safety on citizens rather than on hospitals and other medical institutions.<sup>39</sup> It was only after a sustained campaign against this potentially discriminatory law that the government withdrew it from Parliament.

[\*PG175] In 1997, the National AIDS Control Organisation (NACO) drafted a National AIDS Policy that reflected a more progressive response by the government to the AIDS epidemic.<sup>40</sup> The proposed policy is clear that with respect to HIV testing, no individual should be forced to undergo mandatory HIV testing, no mandatory HIV testing should be imposed as a precondition for employment or for providing health care facilities during employment, and adequate voluntary testing facilities with pre-test and post-test counseling should be made available throughout the country in a phased manner.<sup>41</sup> Moreover, the policy recommends that the results of any such testing be kept strictly confidential and be released only to the person tested and, with his consent, to members of his family<sup>42</sup>. Even disclosure of a person’s HIV status to his spouse should depend entirely on the person’s willingness to share the information.

In proposing this policy, the NACO characterizes the issue as more than a simple public health measure affecting only a segment of the population; rather, the organization notes that the government of India should look at HIV/AIDS prevention and control programs as a socio-economic issue affecting all sections of the population irrespective of their regional, economic or social status.<sup>43</sup> However, although generally progressive, the NACO’s stance places prostitute women in a precarious position in the national debate on AIDS policy. In its description of the progression of the HIV epidemic in India, the NACO observes that in the early 1990s, the second phase of the HIV epidemic in India was characterized by the spread of the epidemic to the general population, specifically

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<sup>38</sup> See Siddhartha Gautam, *The AIDS Prevention Bill, 1989: Protection or Prosecution?*, *The Lawyers*, Oct. 1989, at 7 (providing details of the Bill). See generally Bachi Karkaria, *Sex Workers of the World, Unionise*, *Times of India (Mumbai)*, Aug. 21, 1994.

<sup>39</sup> See Abha Bhैया & Ratna Kapur, *Report of the National Workshop on Women STDs, HIV and AIDS*, Rishikesh 32–33 (1994).

<sup>40</sup> See *Draft National AIDS Control Policy*, at <http://www.naco.nic.in/vsnaco/nacp/ctrlpol.htm> (last visited Mar. 12, 2001).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

women who were infected by their spouses, who had contracted the infection from commercial sex workers or other high risk groups. Interestingly, this observation runs counter to the fact that transmission from women to men is less efficient than vice versa.<sup>44</sup> Yet, given the perspective of the state, being responsible for transmitting HIV to the general population, and especially to innocent housewives, places prostitute women in a precarious position with regard to any proposed AIDS policies or laws. However, to date, there is no specific legislation on AIDS that addresses, let alone aims at the prevention of discrimination against HIV-positive individuals. Hence, it is critical to remain attentive with respect to any future legislation that may develop in this area because of its potential for harm to the rights of prostitute women.

It is probably too early to assess the impact of the AIDS epidemic on prostitute women, whether empowering or otherwise. It certainly appears however, that the funding made available for HIV prevention efforts has spawned several new NGOs that are trying to reach sex workers even in remote parts of the country in an attempt to educate them about AIDS. These NGOs have had the positive effect of building a body of knowledge on the nature and existence of prostitution throughout India, including in rural and remote parts of the country, in place of the sporadic studies that academic institutions or interested sociologists have undertaken and that focus only on prostitution in the brothels of major cities. Also, in some instances, HIV prevention programs have been able to move beyond their initial goal to truly empower prostitute women, despite the fact that HIV prevention efforts tend to have narrow agendas which do not facilitate dialogue with sex workers to address their most pressing needs.<sup>45</sup> In turn, such efforts have reported high success rates.<sup>46</sup> For instance, a government initiative run by the All-India Institute of Hygiene and Public Health that commenced in 1992 in the red-light area of Sonagachi, Kolkata, with a sex worker population of 5,000, focusing primarily on HIV/AIDS awareness and prevention among sex workers, increased condom usage and contained the spread of HIV infection among prostitute women.<sup>47</sup> The initiative employs a peer educator system of sex workers that promotes the use of condoms in the community. Soon after this prevention program started, a health clinic was set up to meet the various medical needs of sex workers. Later, peer educators started literacy classes.<sup>48</sup> In addition, prostitute women set up a Women's Collaborative Committee which organized and registered a financial

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<sup>44</sup> Priscilla Alexander, *Feminism, Sex Workers, and Human Rights, in Whores and Other Feminists* 83, 89 (Jill Nagle ed., 1997).

<sup>45</sup> See, e.g., Carolyn Sleightholme & Indrani Sinha, *Guilty Without Trial: Women in the Sex Trade in Calcutta* 136 (1996). For instance, Sleightholme and Sinha point out that health programs in Kolkata must broaden their goals to include the empowerment (financial, social and health-wise) of prostitute women to ensure the long term success of their programs. *Id.*; see also *Too Much Heat, Not Enough Light*, *supra* note 24, at 111.

<sup>46</sup> Celia W. Dugger, *Calcutta's Prostitutes Lead the Fight on AIDS*, *N.Y. Times*, Jan. 4, 1999, at A1.

<sup>47</sup> *Id.*; see also Sleightholme & Sinha, *supra* note 44, at 131 (containing more information about the project). The condom usage rate is reported to have gone up from three percent in 1992, when a prevention project in Sonagachi began, to ninety percent in 1998. Dugger, *supra* note 45, at A1. Also, HIV infection rates among prostitute women in Sonagachi have been contained at five percent; conversely, the Kamathipura red-light district of Mumbai, an area with less effective prevention efforts, has reported a fifty percent HIV infection rate among prostitute women. *Id.*

<sup>48</sup> Dugger, *supra* note 45, at A1.

cooperative to lend money to prostitute women at a reasonable rate.<sup>49</sup> Sex workers in the area have also protested police harassment, forced the police to take action against abusive clients and have, on occasion, prevented the trafficking of young girls into prostitution.<sup>50</sup>

Before the advent of the AIDS epidemic, the only state presence in Sonagachi was likely that of a reportedly corrupt police force. However, the government's HIV prevention initiative has led to a dialogue between the state and sex workers that has allowed sex workers to articulate their real needs, thereby making possible the government's support of sex workers in meeting these needs and serving as a model for red-light areas in other cities. Nonetheless, the fact that this heightened interest by the government and NGOs in sex workers' problems has been spurred only by the HIV epidemic is not lost on the prostitute women themselves. A sex workers' organization, funded specifically by sex workers, commented upon the presence of NGOs in their midst:

Nowadays, in response to the AIDS disease, lots and lots of organizations are jumping into the prohibited gully and will not leave without "serving us." How they take swipes at each other-unless you saw it with your own eyes, you would not believe it. One says, "I will serve you more," while another says, "no, I will." We all got very scared. What is it this time? How people change!<sup>51</sup>

In conclusion, the emergence of a debate on prostitution in light of the AIDS epidemic is both fortunate and unsettling. On the one hand, this debate presents feminists and prostitute women alike with an opportunity to influence the legislative approach toward prostitution.<sup>52</sup> At the same time, given the government's attempt to pass the [\*PG178]highly flawed and unconstitutional AIDS Prevention Bill in 1989, future legislative attempts hold the continued possibility of violating the rights of prostitute women in the name of public health.

## ***D. The Emergence of Prostitute Women's Groups***

It is unclear how many prostitute women's organizations exist in India. Time and again, newspapers report on the mobilization of prostitute women in larger cities such as Kolkata, Mumbai and New Delhi. The more vocal of these organizations appears to be the Bharatiya Patita Uddhar Sabha, founded in Delhi in 1984 by a social worker named Khairati Lal Bhola.<sup>53</sup> The main functionaries of the organization appear to be female brothel-keepers, many of whom contested the parliamentary elections representing the

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Sleightholme & Sinha, supra note 44, at 141-42.*

<sup>52</sup> *It may also enable feminists to view prostitute women in a new light. For instance, even a few years ago, NGOs working with sex workers were more reluctant to use the term "sex worker" for prostitute women than they are now. This newfound willingness could be attributed to the almost clinical use by AIDS experts of the term "CSW" or "commercial sex worker."*

<sup>53</sup> *D'Cunha, supra note 22, at 110.*

Congress (I), the then ruling party at the federal level in India.<sup>54</sup> A second prostitute organization is the Pune Devadasi Sanghatana founded in Pune, Maharashtra in 1981 by brothel-keepers and pimps.<sup>55</sup> This organization is distinct from the Mumbai-based Asahaya Nari Tiruskrit Sangh,<sup>56</sup> one of whose founding members is Dr. Gilada, a venereal diseases expert at the International Health Organisation.<sup>57</sup> The Asahaya Nari Tiruskrit Sangh is a prostitute women's organization that was formed in the red-light area of Mumbai by 300 brothel-keepers and is headed by an influential "madam" of the area.<sup>58</sup>

[\*PG179]The standard agenda of these groups seems to be (i) to curb police harassment of prostitutes; (ii) to legalize, license and levy taxes on prostitutes so as to monitor their health and to prevent the spread of HIV/AIDS; (iii) to abolish both forced and child prostitution; (iv) to provide child care facilities and boarding schools for the children of prostitutes; (v) to make available bank loans for older prostitutes in order to set up small businesses; and (vi) to form co-operative credit societies to protect prostitute women from money-lenders who charge exorbitant interest rates on loans.<sup>59</sup> Jean D'Cunha, a prominent scholar opposed to the complete legalization or decriminalization of prostitution, and thus, the agendas of these groups, further dismisses the efforts and demands of these groups by casting a legitimate doubt on their membership, a membership that consists predominantly of brothel-keepers and pimps.<sup>60</sup> D'Cunha also notes that these organizations are well-connected with political parties that seek to appease the large prostitute population which they view as a potential vote bank.<sup>61</sup> As such, she correctly observes that these same organizations do not address issues that actually better the living conditions of prostitute women, such as the number of working

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<sup>54</sup> See *Too Much Heat, Not Enough Light*, *supra* note 24, at Annexure 14. Congress (I) is a break-away faction of the Indian National Congress led by the late Indian Prime Minister, Mrs. Indira Gandhi. At the time of its break-away in 1969, it was called Congress-R (for Requisition). In 1980, it was renamed Congress (I).

<sup>55</sup> D'Chuna, *supra* note 22, at 112.

<sup>56</sup> When literally translated, it means the Helpless, Ridiculed Women's Organization.

<sup>57</sup> Dr. Gilada has advocated the need for sexual liberation in a sexually repressed society like India, the need to use condoms and the need for regulation of prostitutes to curb the spread of HIV/AIDS. It is rumored that his organization suffers from a lack of credibility among the prostitute women in Kamathipura. It is also rumored that the peer program Saheli (Hindi for friend) that he started in Kamathipura with some prostitute women working as peer educators has been a complete failure and that the women's NGO in Kamathipura would not miss an opportunity to drive him out of their area if he appeared there. This may be due to the fear that prostitute women have of voicing their complaints against the leader of the organization, Rukminibai Bansode, who is politically well-connected. Also, social workers in Mumbai are known to view Dr. Gilada as being well connected politically and using the issue of licensing and welfare of prostitutes for long term political gains. See D'Cunha, *supra* note 22, at 112. Prostitute women are also cynical about the organization. *Id.*

<sup>58</sup> D'Chuna, *supra* note 22, at 111.

<sup>59</sup> *Id.* at 110–16.

<sup>60</sup> *Id.* at 113–14.

<sup>61</sup> *Id.* at 114; *cf.* *Women and Children in Prostitution*, *supra* note 30, at 104–05 (explaining that some participants at the workshop indicated that because voter identity cards are not issued to prostitute women in their regions, prostitute women are not able to vote in elections).

hours, the number of clients per day, the minimum remuneration they should receive for their work or a code of rights and responsibilities for brothel owners and pimps.<sup>62</sup>

However, even recognizing that these groups may not represent the actual interests of prostitute women, the reality is that, as between the Indian women's movement and the prostitute women's groups, it is the latter that are actively engaged in achieving their ends through the law. In some instances, the litigation pursued by these prostitute women's groups has in fact proved more beneficial to ordinary prostitute women in their day-to-day lives than the numerous conferences that the Indian women's movement sponsors that simply attempt to articulate the Asian prostitute woman's voice in her absence.<sup>63</sup> As an [\*PG180]illustration, on the basis of a petition that the Bharatiya Patita Udhar Sabha filed, the Supreme Court of India held that it would no longer be possible for school authorities to insist on the disclosure of the father's name when it comes to the admission of the child of a prostitute.<sup>64</sup> Also, in *Gaurav Jain v. Union of India*,<sup>65</sup> the Sabha argued for the provision of separate schools with vocational training and boarding facilities for the children of prostitute women.<sup>66</sup> The Supreme Court of India ultimately rejected this contention but not without observing that children of prostitute women should be kept away from the harmful surroundings of the brothel and should, therefore, be lodged in separate reformatory homes while their mothers live in government homes.<sup>67</sup> In addition, the Bharatiya Patita Udhar Sabha recently threatened to go to court unless the Indian Census Commission reversed its decision to include prostitute women in the same category as beggars, vagabonds and street children instead of the general list of productive members of society.<sup>68</sup>

It is important to note, however, that not all of the suits that the Sabha filed may prove beneficial for prostitute women. Indeed, a more recent petition filed in August 1993<sup>69</sup> was ill-informed, imprecise and shabbily drafted. It prayed that the Supreme Court issue directions to the central and state governments to carry out blood tests on every Indian citizen and foreign citizen residents in India for the purpose of detecting the HIV virus. In addition, it requested that the government isolate HIV-positive persons, arrange for their treatment and ensure their livelihood. One can glean from an annexure to the petition that the methods that the Sabha thinks useful in arresting the spread of AIDS include testing

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<sup>62</sup> *D'Cunha, supra note 22, at 115.*

<sup>63</sup> *See Too Much Heat, Not Enough Light, supra note 24, at Annexure 13. This is also reflected in the demands of prostitute women's groups that, if realized, would be of practical use. For example, the Sabha demands that the government help prostitute women to obtain ration cards (for use in government fair-priced shops to buy basic grains, sugar and fuel), provide a monthly pension of Rs. 1500 (about thirty-five U.S. Dollars) and ensure their proper representation in Parliament. Id.*

<sup>64</sup> *Pradyat Lal, Red-light Kids Are Nobody's Children, Amrita Bazar Patrika (Kolkata), Jan. 20, 1994 (on file with author). It is an unreported case; thus, further details are not available.*

<sup>65</sup> *A.I.R. 1990 S.C. 292.*

<sup>66</sup> *See id. at 293.*

<sup>67</sup> *Id.*

<sup>68</sup> *Gita Pandey, Indian Prostitutes Reject 'Beggar' Status, BBC News Online, at [http://news.bbc.co.uk/low/english/world/asia-pacific/newsid\\_1135000/1135628.stm](http://news.bbc.co.uk/low/english/world/asia-pacific/newsid_1135000/1135628.stm) (Jan. 25, 2001).*

<sup>69</sup> *Bharatiya Patita Udhar Sabha v. Union of India, reprinted in Too Much Heat, Not Enough Light, supra note 24, at Annexure 13. (writ petition filed before the Supreme Court of India under Article 32 of the Indian Constitution).*

all call-girls every week, testing prostitute women, transvestites, homosexuals and slum-dwellers all over India every month, testing all blood donors every three months and [\*PG181]testing the general public every six months. Thus, one can only imagine how much harm such an organization that claims to speak for prostitute women can do.

There is, however, also the category of prostitute women's groups that were formed by prostitute women themselves. These groups include the Kolkata-based Mahila Sangha, Nari Kalyan Samiti and Abahelita Mahila Samiti. Their initial purpose tends to be to rally around a specific issue, such as demanding reservations in education and employment for their children or fighting harassment from local criminals.<sup>70</sup> In many instances, they have remained organized beyond their initial purpose, and it is due to their continued presence that NGOs and government initiatives for HIV prevention are as successful as they are.<sup>71</sup> For example, a women's group known as Mahila Samanyaya Committee, has organized all-India sex worker's conferences since April, 1996. Twelve-hundred sex workers attended the conference, held in Kolkata, in 1996. In March, 1998, prostitute women from all over India and representatives from the network of Asian-Pacific sex workers attended this conference in Kolkata and called for the repeal of the ITPA and the legalization of prostitution.<sup>72</sup> In March, 2001, the same conference was attended by approximately 30,000 sex workers who proposed to set up a network to prevent the trafficking of vulnerable women from India and other Asian countries, such as Nepal, Bangladesh, Cambodia, Thailand and Vietnam.<sup>73</sup> Sex workers at the conference also demanded the legalization of prostitution.<sup>74</sup>

However, it is not the case that all of this self-organization on the part of sex workers is a recent phenomenon. If reports of initiatives by sex workers in Kolkata are anything to go by, the agency of prostitute women manifested itself at individual and collective levels in post-independent India even before the feminist critiques of prostitution [\*PG182]laws. For instance, Carolyn Sleightholme and Indrani Sinha describe a community organization set up in 1972 consisting of both sex workers and former sex workers in a red-light area in Kolkata. The organization's major achievements included mobilizing against and eliminating the influence of a local Congress party leader who repeatedly abused and terrorized sex workers.<sup>75</sup> Some of the leaders of this organization then went on to form the Abahelita Mahila Samiti (AMS) in 1992, which has campaigned for the reservation of seats for children of sex workers in schools and in employment.<sup>76</sup> Sinha and Sleightholme also enumerate many more instances of organizing and self-help that sex workers

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<sup>70</sup> Sleightholme & Sinha, *supra* note 44, at 139, 141.

<sup>71</sup> *Id.* at 125. These groups include the Kolkata-based Mahila Sangha, Nari Kalyan Samiti and Abahelita Mahila Samiti. *Id.*

<sup>72</sup> *Prostitutes in India Set Up a Network*, BBC News Online, at [http://news6.thdo.bbc.co.uk/hi/english/world/s/w\\_asia/newsid\\_71000/71808.stm](http://news6.thdo.bbc.co.uk/hi/english/world/s/w_asia/newsid_71000/71808.stm) (Mar. 31, 1998).

<sup>73</sup> *Sex Workers Want Anti-Trafficking Measures*, BBC News Online, at [http://news.bbc.co.uk/low/english/world/south\\_asia/newsid\\_1199000/1199988.stm](http://news.bbc.co.uk/low/english/world/south_asia/newsid_1199000/1199988.stm) (Mar. 6, 2001); *Sex Workers To Combat Trafficking*, BBC News Online, at [http://news.bbc.co.uk/hi/english/world/south\\_asia/newsid\\_1205000/1205098.stm](http://news.bbc.co.uk/hi/english/world/south_asia/newsid_1205000/1205098.stm) (Mar. 6, 2001).

<sup>74</sup> Subir Bhaumik, *Demanding the Legalisation of the Sex Trade*, BBC News Online, at [http://news.bbc.co.uk/bi/english/world/south\\_asia/newsid\\_1200000/1200344.stm](http://news.bbc.co.uk/bi/english/world/south_asia/newsid_1200000/1200344.stm) (Mar. 3, 2001).

<sup>75</sup> Sleightholme & Sinha, *supra* note 44, at 138–39.

<sup>76</sup> *Id.*

engaged in through the mid-1980s. In connection with these organizing and self-help efforts, Sleightholme and Sinha observe:

Clearly linked with this [reservation] demand is the need for legalization. Reservations would have to be preceded by legal changes that would decriminalize sex-work totally and have a system of registration. What is striking about this issue is the way that it has sprung up from local residents, and has become a framework within which sex-workers are articulating their demands and raising their voices against their status and the discrimination faced by them and their children.<sup>77</sup>

Thus, it is clear that many of the objectives of these sex worker organizations overlap with those articulated by organizations in red-light areas that are led by brothel-keepers and pimps.

## ***E. Recent Proposals for Prostitution Law Reform***

The participants in the debate on prostitution currently include feminist groups, prostitute women's associations, the Indian government, the NCW and its counterparts in certain states, research institutions, universities and NGOs involved in HIV prevention work. However, these participants have very different visions of what the law governing prostitution should be. The proceedings of the Conference on Women and the Law held in January 1994 illustrates well their competing goals in this regard.

[\*PG183] In 1992, the Department of Women and Child Welfare commissioned The National Law School of India University, Bangalore (NLS) to draft legislative proposals on the subject of prostitution.<sup>78</sup> NLS drafted the proposals in conjunction with task forces set up at other academic institutions in Kolkata, Mumbai, Bangalore, Lucknow and Chennai. Before submitting the proposals to the government, NLS sponsored a consultative meeting in January 1994 to discuss them. This became the Conference on Women and the Law.

Assisting this effort in Bangalore, but arriving at a different conclusion and therefore a different legislative proposal, was a group of law students and one faculty member from NLS.<sup>79</sup> Independent of the institutional effort, another group of law students at the same law school decided to work on issues surrounding prostitution as a form of labor for a competition of South Asian law schools; the competition required the competitors to draft law reform proposals over an eighteen month period on the broad theme of labor,

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<sup>77</sup> *Id.* at 140.

<sup>78</sup> This was made available at the conference in the form of a revised draft bill entitled, *The Prevention of Immoral Traffic and the Rehabilitation of Prostituted Persons Bill, 1993 with Explanatory Notes* (on file with author). In addition, NLS was commissioned to study the laws relating to the indecent representation of women. These proposals were also discussed at the conference.

<sup>79</sup> This proposal, entitled *the Prohibition of Immoral Traffic and Empowerment of Sexual Workers Bill, 1993*, was made available at the conference (on file with author).

workers and the right to work.<sup>80</sup> Thus, at one point in time, within NLS, there were three distinct initiatives addressing the issue of prostitution. However, only the institutional proposals were discussed at the Conference on Women and the Law.<sup>81</sup>

At the conference, Jean D’Cunha, a lecturer in Sociology at the St. Xavier’s College in Mumbai, and Donna Fernandes of Vimochana, a feminist NGO in Bangalore that works primarily in the area of domestic violence, represented one feminist<sup>82</sup> position.<sup>83</sup> At the Conference, D’Cunha reiterated her opposition to the complete decriminalization of prostitution, instead calling for the decriminalization of the prostitute’s actions only. As such, D’Cunha proposed punishing the customer and stringently enforcing the existing criminal law on trafficking. The group of law students participating in the law reform competition articulated another feminist position that supported decriminalization and legalization. Conversely, Donna Fernandes, who has attended several feminist meetings held in South-East Asia on sexual slavery, consistently maintained that the prostitution of women amounts to sexual slavery.

In addition, the South India AIDS Action Program (SIAAP), Chennai, and the IHO, Mumbai, headed by venereal diseases specialist Dr. Gilada, represented the HIV prevention NGOs. These groups, such as the SIAAP, tend to target prostitute women, as well as other “high risk-groups” like truck-drivers, drug-users and other supposedly promiscuous individuals, for their HIV prevention programs, a process that is, in and of itself, objectionable.<sup>84</sup> Once in these communities, these groups focus exclusively on HIV prevention, rather than strategically using HIV as a health issue with which to mobilize prostitute women in an attempt to address their more immediate concerns.<sup>85</sup> Of course,

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<sup>80</sup> See generally *Too Much Heat, Not Enough Light*, supra note 24. The Community-Based Law Reform Competition is an eighteen-month long competition held for South Asian law universities. The Competition deserves mention because it requires at least three months of compulsory community interaction on the part of the a team before the team arrives at a proposal for law reform. The NLS team worked on prostitution in this context. The resultant legislative proposal, called the Sex Worker-Legalization for Empowerment Bill, 1993, is seemingly the only one that has explored, in detail, the option of legalizing prostitution in India for the purposes of empowerment. See *id.* at 102–27.

<sup>81</sup> Only a one page synopsis of the proposal relating to the Sex Worker-Legalization for Empowerment Bill was circulated, as our memorandum was being judged for the Community-based Law Reform Competition at that time. These law students were supported by Professor Brenda Cossman (then at Osgoode Hall Law School) and Ratna Kapur, feminist lawyer and founder of the Center for Feminist Legal Research.

<sup>82</sup> By “feminist,” I do not intend to imply any particular definition of what it means to be a feminist, nor do I intend to reiterate the offensive divide between good feminists and bad prostitutes. However, I do wish to point out that in India, D’Cunha and Fernandes would be considered feminist voices.

<sup>83</sup> Jean D’Cunha is considered a pioneer in the field of research on the policies regarding prostitution. To her credit, her 1989 book on the legalization of prostitution is the first Indian book, in my opinion, that steered away from the mere sociological descriptions of prostitution that typically characterized Indian literature on the issue. It was the first book that seriously dealt with the various policy and legal approaches to prostitution and discussed at some length their implementation in an international context.

<sup>84</sup> Their feeble justification appears to be that such “high-risk groups” are easier to work with because they offer less resistance to the idea and are less inhibited when talking about sex. Bhaiya & Kapur, supra note 38, at 9.

<sup>85</sup> Indeed, time and again, prostitute women reiterate that in their scheme of priorities, HIV prevention is neither the first nor the most immediate. Rather, they usually articulate their immediate need for boarding schools in which their children can live and attend school instead of living in red-light areas, being

this is not to belittle the need for HIV prevention all over India.<sup>86</sup> The point is simply that sincere HIV prevention programs would be undertaken in all sectors of society, and would not be used to discriminate against an already stigmatized population under the illusion that HIV can actually be prevented from spreading when the sectors targeted for prevention efforts do not encompass the universe of populations actually affected by HIV. This is especially poignant considering that there is little reliable information that prostitute women with HIV are primary vectors of the infection or that they form such a significant percentage of the total number of HIV-positive Indians as to warrant discriminatory intervention.<sup>87</sup> In addition, as indicated earlier, HIV prevention efforts tend to be more successful when they address issues of empowerment of prostitute women.<sup>88</sup> Most importantly, while various groups and viewpoints were represented at the conference, no prostitute women's groups were even [\*PG186]invited. While notable, this is not surprising given their invisibility in discourses, academic or popular, feminist or otherwise, in both North America and in Asia.

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*exposed to sexual abuse by pimps and brothel owners and potentially becoming prostitutes or pimps themselves. See D'Cunha, supra note 22, at 111.*

<sup>86</sup> *There are 3.5 million HIV-positive people living in India. Kalpana Jain, 3.5 Million Indians Carry AIDS Virus, Times of India (Mumbai), Nov. 10, 1999, available at 1999 WL 29459823. Moreover, on the basis of surveillance reports as of April, 1993, the NACO reported that HIV prevalence rates among the prostitute women of Vellore, Tamil Nadu rose from 0.5% in 1986 to about 34.5% of the total prostitute population in 1990. The Nat'l AIDS Control Organisation, Ministry of Health and Family Welfare, Gov't of India, National AIDS Control Programme India-Country Scenario: An Update, 8 (Apr. 1993). Similarly, as of 1999, NACO indicates that infection among prostitute women in Mumbai rose from one percent to fifty-one percent in five years. See National AIDS Control Program—NACO Programmes, at <http://www.naco.nic.in> (last visited Mar. 10, 2001). In addition, a joint study conducted by the AIDS Research and Control Centre, the International Institute for Population Sciences and the Mumbai Municipal Corporation reported that of the 85,200 HIV-positive persons in Mumbai in 1997, 27,000 were sex workers. Sameera Khan, New Study Questions a Few Myths about AIDS in India, Times of India (Mumbai), Nov. 11, 1999, available at 1999 WL 29459823.*

<sup>87</sup> *Currently, heterosexual contact accounts for 80.86% of the instances of HIV transmission in India. See HIV-AIDS Indian Scenario—Current Status and Trend of HIV/AIDS Epidemic in India, at <http://www.naco.nic.in> (last visited Mar. 10, 2001). Yet, the percentage of the HIV-positive population in India who are prostitute women is unknown. In early 1995, newspaper reports quoted studies finding the concern over high-risk groups exaggerated. These studies instead found that about half the HIV-positive people in Mumbai came from the lower middle-income classes, not low-income classes such as sex workers, migrant laborers and truck drivers. See generally Rupa Chinai, HIV Terror Haunts Housewives, Times of India (Mumbai), Feb. 11, 1995; Rupa Chinai, 48% of AIDS-Hit in Organised Sector, Times of India (Mumbai), Feb. 2, 1995; Kalpana Jain, HIV Not Confined to High-Risk Groups, Times of India (Mumbai), Feb. 9, 1995.*

<sup>88</sup> *As noted earlier, this has largely begun to change at the insistence of the sex workers themselves in Kolkata. However, both the government and NGOs contend that the experience of prostitute women in Kolkata is not necessarily replicable in cities like Mumbai and Chennai for varying reasons. For instance, NACO observes that Chennai's lack of identifiable red-light areas restrict NACO's HIV prevention efforts there. See NACO Programmes—S.T.D. Surveillance, available at <http://www.naco.nic.in> (Nov. 18, 1999) (on file with author). Also, in Mumbai, the perception is that the structure of prostitution in the red-light district is far more oppressive and brutal than that of Kolkata. As a result, prostitute women are less likely to talk openly about turning away customers for their refusal to use condoms or other empowerment issues. See Dugger, supra note 45. This may likely account for the dramatically higher rate of HIV infection in Mumbai's red-light district. Reportedly, fifty percent of the prostitute women in Mumbai are HIV-positive. Id.*

The legislative proposals presented at the January 1994 consultation overlapped to some extent, but varied in terms of their underlying philosophy, their method and their ultimate goal. The proposals comprise the following:

## **1. The Prevention of Immoral Traffic and the Rehabilitation of Prostituted Persons Bill, 1993**

The main aims of this proposal were:

- (i) To prohibit immoral trafficking in women and children;
- (ii) To prohibit the sexual exploitation and abuse of women and children through a compensatory scheme in which they can seek legal recourse against brothel-keepers, pimps and customers alike and can demand special damages for injury from sexual abuse, the transmission of diseases knowingly and the refusal to practice safe sex; and
- (iii) To mitigate the suffering of the victims of prostitution through community-based rehabilitation, vocational training and health schemes, including the mandatory testing of prostitute women for HIV.<sup>89</sup>

Thus, the Bill aims to prevent women from being forced into prostitution while seeking to reduce the exploitation that occurs in the prostitution world. At the same time, the Bill provides rehabilitation for those who wish to stop working as prostitutes. In addition, it envisages special investigative and dispute resolution machinery to enforce its provisions. It also creates a welfare fund to collect fines and grants from the government and other bodies, with the aim of financing rehabilitation, HIV prevention programs and the educational and medical expenses of children of prostitute women.

The approach of the Bill is decidedly a confused one, seeking to incorporate both decriminalization and mere toleration. However, the Bill has little hope of achieving either end completely. As regards decriminalization, the Bill removes penalties on solicitation or the maintenance of a brothel. However, at the same time, it actually creates new penalties for trafficking and forced prostitution instead of [\*PG187]relying on the general penal laws, such as the Indian Penal Code, 1860, to tackle force, fraud and negligence against women. By creating new offenses, the Bill nullifies any sincere commitment to decriminalization. Meanwhile, as regards the Bill's tolerationist perspective, it again takes a failed route, that of rehabilitation. Moreover, it opts for continued state regulation of women's bodies, creating constitutionality concerns.

In sum, the Bill is quite unsatisfactory to all parties. To the abolitionists, the Bill does not go far enough in prohibiting prostitution. To those who seek decriminalization, it does not decriminalize all aspects of the activity. Finally, to those who seek legalization, the Bill makes no mention of how other aspects of prostitution will be regulated. Thus, the

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<sup>89</sup> *The Prevention of Immoral Traffic and the Rehabilitation of Prostituted Persons Bill, in Preamble and Statement of Objects and Reasons (1993) (on file with author).*

proposed Bill has little chance of being accepted by all of these groups. Prostitute women themselves perceive the Bill's requirement of compulsory HIV testing as a violation of their rights.

## 2. Amending the ITPA to Achieve Partial Decriminalization

Another of the conference's proposals, the first and most common feminist proposal, roughly termed as that of "partial decriminalization," was articulated by Jean D'Cunha. D'Cunha's approach follows from her opposition to what appears to be the liberal feminist argument of equality of violence.<sup>90</sup> In addition, she is opposed to the position that claims that "the right to prostitution is a fundamental human right and prostitution must be a legitimate, valid, acceptable form of labour. This is an expression of a woman's human right."<sup>91</sup> She argues that "this free-forced dichotomy is largely a western construction which seeks to normalise prostitution in society really ignoring the reality of our halves of the globe where large masses of women [\*PG188]are lugged into the poverty-trafficking nexus because of ignorance and poverty."<sup>92</sup> She also advocates Kathleen Barry's view, namely that it is a mistake to differentiate between trafficking and the actual activity of prostitution, only decriminalizing the latter.<sup>93</sup> According to D'Cunha, the flaw in collapsing the distinction between the individual in prostitution and the institution of prostitution in this way is that it negates any effort to comprehend the systemic nature of sexual exploitation. Her legislative proposal is to amend the ITPA so as to alleviate the oppression of prostitute women. She suggests the decriminalization of all activities that prostitute women perform so that they are no longer subject to police regulation and harassment.<sup>94</sup> Concomitantly, she suggests that laws against brothel-

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<sup>90</sup> *The equality of violence argument is a view that exposes the hypocrisy that surrounds current state regulation of prostitution and likens the experiences of prostitute women to more familiar day-to-day experiences of all women, be it in terms of their sexual exploitation by customers (which they compare with the high rates of sexual abuse of women in general) or their pimps (which they compare with other women who are in relationships with men or are married). This approach, according to Margaret Baldwin, presents an intense articulation of the idea of a woman's right to sexual expression in the manner that she wishes. Margaret A. Baldwin, Split at the Root: Prostitution and Feminist Discourses of Law Reform, 5 Yale J.L. & Feminism 47, 95 (1992). However, note that D'Cunha's articulation of the equality of violence argument as one in which "the division between the wives and women in prostitution is an artificial construction because all women in a patriarchal society are sexually objectified" is misleading in that it comes across as a radical feminist view. Women and Children in Prostitution, supra note 30, at 31.*

<sup>91</sup> *Women and Children in Prostitution, supra note 30, at 32.*

<sup>92</sup> *Id.*

<sup>93</sup> *I am aware that the fact that my decision not to dwell on the trafficking in and the forced prostitution of women and children could be the most severe criticism of my article. I acknowledge the seriousness of the problem, especially in light of the New Economic Policy the present government is advocating, that has, on previous occasions, economically disenfranchised women in other countries, forcing them to resort to prostitution. Also, the variety of forms that this trafficking takes, from mail order bride businesses to the marriage of girls to wealthy men from the Middle East to sex tourism, is cause for alarm. I do not suggest for a moment that we neglect the provisions meant to deal with trafficking or the circumstances which make women vulnerable to organized criminals. All I seek to highlight is the futility of trying to achieve these ends by imposing special criminal provisions on prostitution that wind up being enforced solely against prostitute women. Prostitute women bear the brunt of the criminalizing process, the costs of which far outweigh any tangible benefits.*

<sup>94</sup> *D'Cunha, supra note 22, at 201.*

keepers, pimps, traffickers, landlords of premises used to conduct prostitution and clients be made more stringent. However, I would argue that this approach of criminalizing everyone but the prostitute woman works against her interests.

In addition, D’Cunha makes suggestions as to the administration of rehabilitation homes, calling for penalizing enforcement officials such as the police and judges who are corrupt and who demand sexual favors from prostitutes.<sup>95</sup> Finally, she recommends the formation of citizen’s committees in order to oversee the enforcement of the legislation. Feminist activists like Donna Fernandes support D’Cunha’s opposition to complete decriminalization. Fernandes argues against the legalization of prostitution on the grounds that it would legitimize man’s utter contempt for women and normalize the severest form of gender discrimination and human rights violations in [\*PG189]the form of economic discrimination.<sup>96</sup> Legalizing prostitution would, according to her, be akin to legalizing child labor.<sup>97</sup> This critique of legalization is firmly rooted in an imagined divide between the conditions of women in the West and in Asia.<sup>98</sup> This basis for Fernandes’ critique tends to originate in reports by human rights organizations on trafficking across international borders, especially between Asian countries, and is, to say the least, an oft-repeated yet misleading perspective.<sup>99</sup>

### **3. Prohibition of Immoral Traffic and Empowerment of Sexual Workers Bill, 1993**

At the conference, this proposal embodied an alternate feminist position to D’Cunha’s, but it is one that is not very well developed in the Indian context. It reconceptualizes prostitution as a legitimate means of work and conceives of legal intervention in the nature of labor laws. The broad features of the Bill included:

(i) The right to safe conditions of work enforceable against the brothel-keeper and the customer;

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<sup>95</sup> *Id.* at 202.

<sup>96</sup> Donna Fernandes, *Prostitution: Beyond Legal Solutions* (Apr. 1992) (extracts from a paper presented at the Conference on the Trafficking in Asian Women at Manila) (on file with author).

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* According to Fernandes, the individual is the main reference point in constructing social relations in the West. In Western societies, the market determines morality, and institutions take care of inconveniences such as the elderly. In contrast, in Asia, the community is the main reference point despite increasing economic liberalization and consequent consumerism. Hence, for Western women who pursue prostitution as an occupation, legalization is a plausible policy option. On the other hand, for Asian women, most of whom are compelled into prostitution by poverty and deception in the form of marriage or promises of finding her employment, legalization could only mean endorsing and normalizing this exploitation. *Id.*

<sup>99</sup> *See generally* Kathleen Barry, *Female Sexual Slavery* (1979); Human Rights Watch/Asia, *Rape for Profit: Trafficking of Nepali Girls and Women to Indian Brothels* (1995); Human Rights Watch/Asia, *Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand* (1993); Int’l Campaign to End Child Prostitution in Asian Tourism, *The Ecumenical Coalition on Third World Tourism, Caught in Modern Slavery: Tourism and Child Prostitution in Asia* (1991).

(ii) The right to refuse to engage in sexual activity on grounds of safety, health or hygiene;

(iii) The right to medical assistance, the right to refuse sexual activity during pregnancy and the right to get reimbursed for reasonable medical expenses incurred during delivery and three months thereafter; and

(iv) The right to claim damages for injury caused by the violation of the prostitute woman's rights under the Act, enforceable against the brothel-keeper and the customer.

The Bill envisages an enforcement machinery along the lines of the Consumer Redressal Forum under the Consumer Protection Act, 1986.<sup>100</sup> Moreover, it provides for a welfare fund for the rehabilitation of prostitute women who want to leave prostitution, as well as for the education of their children. Finally, the Bill prohibits the trafficking of women and children.

#### **4. Sex Worker (Legalization for Empowerment) Bill, 1993**

A third feminist proposal at the conference aimed for the legalization of prostitution.<sup>101</sup> The Sex Worker (Legalization for Empowerment) Bill, 1993 proposes the complete repeal of the ITPA. In its place, it proposes a legislative framework whereby the acts of procuring, trafficking, child prostitution, abduction and forced prostitution would be prosecuted and penalized under the Indian Penal Code, 1860.<sup>102</sup> However, the Bill does not adopt the common scheme of state-regulated, legalized prostitution, since this scheme does not have the welfare of prostituted women as its guiding principle.

The Bill is divisible into three parts. At the outset, the Bill declares sexual services to be lawful and states that it shall not, *ipso facto*, be interpreted to defeat the provisions of any other law. For instance, an agreement to offer sexual services would not violate section 23 of the Indian Contract Act, 1872, which renders agreements against public policy void. This provision is meant to ensure that the enforcement machinery of the state, such as the police and the judiciary, interpret and implement the law in a manner that will not defeat the spirit of the law. The Bill further states that sex work is a legitimate exercise of [\*PG191]the right to work, and that the right to work must therefore include the right to solicit. The Bill protects this right by limiting the restrictions that can be placed on a sex worker's right to restrictions of a general nature that do not target sex workers exclusively.

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<sup>100</sup> *The Consumer Protection Act, 1986 envisages a three-tier enforcement mechanism: the Consumer Disputes Redressal Forum at the local level, the Consumer Disputes Redressal Commission at the state level, and the National Consumer Dispute Redressal Commission at the national level. See B.K. Das & S.S. Rao, Consumer Protection Act, 1986, 322–25 (2nd ed., 1998). The Act provides for inexpensive and speedy redressal of consumer grievances by way of an alternative to the regular process of instituting actions before the civil courts. The process is designed to be more efficient from the standpoint of both time and cost. See id.*

<sup>101</sup> *Too Much Heat, Not Enough Light, supra note 24, at 102–09.*

<sup>102</sup> *See Indian Penal Code, 1860, 37 India A.I.R. Manual 1.*

The second part of the Bill provides for a series of non-discrimination measures.<sup>103</sup> For example, anyone who prevents a prostitute woman from exercising her right to health in any manner would be guilty of criminal intimidation under section 503 of the Indian Penal Code, 1860. Similarly, a prostitute woman could not be deprived of her personal liberty—no quarantine by virtue of being a sex worker; no forcible medical check-ups or forcible removal to a hospital for treatment; no denial of access to a hospital or differential treatment therein solely on account of being engaged in sex work—nor be denied the right to retain custody of her child merely because she is a prostitute.

The Bill's third section contains detailed provisions prohibiting the sexual abuse of prostitute women and providing for criminal sanctions as well as civil liability for violating these provisions.<sup>104</sup> Also, it [\*PG192]mandates the fixation and payment of minimum remuneration for sexual services rendered by prostitute women.<sup>105</sup> It also envisages the creation of a welfare fund that the government, private individuals, private institutions, and prostitute women are responsible for jointly financing, as well as requiring that a portion of any compensation awarded or fines levied under the Bill be

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<sup>103</sup> *The need for these measures is evident from the experiences of prostitute women in places where prostitution is legalized. As such, these measures are meant to address the injustices that have arisen as a result of the prevalent form of legalized prostitution. See Alexander, supra note 43, at 92. Priscilla Alexander, a scholar on feminist issues and prostitution, points out how in the United States, in Nevada, prostitute women cannot legally live outside of the brothels in which they work, nor can they travel to and from the brothels without permission. See id. Additionally, Alexander notes that, in Germany, prostitute women are forbidden from obtaining health insurance even though they are required to take STD examinations regularly. See id. Also, German judges refuse to enforce contracts on behalf of prostitute women on grounds that the contracts are immoral, whereas they do enforce contracts on behalf of clients. See id.*

*Moreover, these anti-discrimination measures can have an immediate impact on the lives of prostitute women. For instance, prostitute women in Kolkata, who recently wanted to form a cooperative, had to convince the law minister to exempt them from the provision of the relevant societies registration law that required the founders of the cooperative be of good moral character. There are many similar provisions that are used to discriminate against prostitute women that also need to be challenged.*

<sup>104</sup> *Too Much Heat, Not Enough Light, supra note 24, at 103. Any person who causes, is likely to cause, or threatens to cause harm to a sex worker that might result in physical or mental injury, including sexual assault, sexual battery, sexual intercourse after the fifth month of pregnancy, sexual penetration with an inanimate object or sexual intercourse with either a mentally disabled or drugged sex worker, could be fined and imprisoned for up to seven years. Consent in all the above cases is immaterial provided that the sex worker consented only on the understanding that the customer or client would use a condom and subsequently refused to do so. Id. The Bill also contains provisions prohibiting aggravated abuse, such as the maiming or disfiguring of a prostitute woman or the endangerment of the prostitute woman's life, providing for up to ten years' imprisonment and a fine in the event of a violation of these provisions. In addition, damages for aggravated abuse must be exemplary. Id. at 104. Similar provisions prohibit the sexual exploitation of children. Id. at 105.*

<sup>105</sup> *The Bill uses minimum wage laws for this purpose and allows for the input of prostitute women's collectives that are already organized. Too Much Heat, Not Enough Light, supra note 24, at 106. The Bill also provides that if a brothel-keeper, pimp or another person pays the remuneration, notwithstanding the fact that this remuneration exceeds the minimum remuneration, such person must hold this money in trust for the sex worker and turn it over to the sex worker as soon as possible, notwithstanding any agreement for the management of funds of the sex worker or any liability of the sex worker to any such person. Id. Any violation of the right of the sex worker in receiving and/or retaining the remuneration would constitute "abuse" as provided for in the Bill. Id.*

paid to the Fund. The state commission for women, in association with the representatives of the various prostitute women's collectives provided for under the Bill would manage this welfare fund. The fund is intended to cover medical expenses and pensions in cases of death, old age or ill-health, including contraction of HIV.

The Bill additionally suggests guidelines for the formation of collectives of prostitutes. Hence, collectives are not mandatory under the legislative framework, but the option is available to a community of sex workers interested in organizing one. The Bill suggests that these collectives determine amongst themselves their conditions of work, such as the maximum number of customers with which each woman will engage, or the minimum remuneration that a prostitute woman should receive. The Bill also allows for collectives to have funds of their own to which the women contribute earnings. These funds could be used to set up a nursery for their children, to purchase prophylactics, to educate their children or for any other purpose that they find beneficial. Finally, the Bill enumerates guidelines for the judiciary and the executive in their efforts to interpret and enforce the law.<sup>106</sup>

The Indian government did not immediately respond to any of the three proposals. However, in 1996, the NCW began to take an interest in the issue. It commissioned studies in states like Andhra Pradesh and Karnataka that NGOs or the counterparts of the NCW at [\*PG193]the state level conducted.<sup>107</sup> Also, in May 1996, the National Human Rights Commission held a meeting to discuss ways to put an end to child prostitution, including the stringent enforcement of prostitution laws, the punishment of traffickers and brothel-keepers, and the creation of a central body that would coordinate the work of the several agencies involved in achieving this goal.<sup>108</sup> In April 1997, the NCW called on the member nations of The South Asian Association for Regional Cooperation (SAARC or "the Association")<sup>109</sup> to enact special legislation that would tackle the increased trafficking in prostitute women and children across the countries' borders.<sup>110</sup> In 1998, the Department of Women and Child Development, under the auspices of the Union Ministry of Human Resource Development, prepared the first draft of such a regional convention on the trafficking of women and children across the borders of SAARC member nations, with input from the NCW. The convention envisaged "[m]ultilateral mechanisms like creating joint vigilance bureaus along the borders, constant monitoring and better enforcement of laws, appointing special trafficking officers and more enforcement and custodial officers and orienting and sensitizing them to the problem, allowing the highest

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<sup>106</sup> *Too Much Heat, Not Enough Light*, *supra* note 24, at 126–27.

<sup>107</sup> *Broken Lives*, *The Week*, Nov. 16, 1997, available at <http://www.theweek.com> (on file with author); S. Seethalakshmi, *Karnataka Girls Being Sold to Goa Brothels*, *Times of India* (Mumbai), May 28, 1998, available at <http://www.timesofindia.com>. (on file with author).

<sup>108</sup> Shalini SCN & Lalitha SA, *Women Soliciting Change* 89 (1996).

<sup>109</sup> SAARC consists of Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka. The aim of the Association is to promote economic and social development in member states through joint action in areas of converging interests.

<sup>110</sup> Sandesh Prabhudesai, *Special Legislation Against Child Prostitution Sought, Rediff on the Net*, at <http://www.rediff.com/news/jul/31goa.htm> (Apr. 8, 1997).

investigating agencies of the country like the Central Bureau of Investigation to handle interstate, intra-regional and international trafficking.”<sup>111</sup>

In addition to this increase in attention to the issues of prostitution, in 1997, the NCW and the Joint Women’s Programme, an NGO working in the area of women’s rights, organized in New Delhi a consultative workshop with many of the participants from the January 1994 conference.<sup>112</sup> The report from the workshop presented, for the first time in the 1990s, the approach of a governmental organization [\*PG194] on the issue of prostitution.<sup>113</sup> The objective of the workshop was to view prostitution from a human rights perspective. The editor of the workshop’s report observed that since Indian women and children are forced into prostitution via coercion, poverty and abuse, they must not bear the sole blame for the evils of prostitution. Society, societal attitudes, pimps, clients and traffickers are causes as well. Moreover, the police and politicians who reinforce prostitution are equally to blame.<sup>114</sup> Hence, the report proposed that “[o]ur action, therefore, needs to be not only in the realm of rescue and rehabilitative services, but also in preventive measures. It needs to consider prostitution as a violation of human rights, a hindrance to women’s freedom, equality and struggle against exploitation and oppression.”<sup>115</sup>

As regards the law reform, the workshop did not address NLS’ proposals in detail. However, D’Cunha and Ratna Kapur made presentations of recommended legislative frameworks involving partial decriminalization and complete decriminalization, respectively. The workshop resolved that “[w]e are against the legalisation of prostitution in the Indian context, where women and children are forced into the profession due to poverty and other causes and thereafter remain in the clutches of pimps for the rest of their life.”<sup>116</sup> To implement this resolution, the workshop concluded that the ITPA should not be repealed, but that Jean D’Cunha’s recommended amendments to the ITPA should be made. In particular, these recommended amendments include changes to sections 7(1)<sup>117</sup> and 8(b)<sup>118</sup> of the ITPA, prohibiting prostitution in public places, and section 20(1) of the ITPA, presently conferring on the magistrate the discretionary powers to ask a sex worker to vacate her premises if a complaint arises

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<sup>111</sup> Soma Basu, *India Plan to Combat Trafficking in Women*, *The Hindu* (New Delhi), Apr. 25, 1998, available at 1998 WL 11568144.

<sup>112</sup> See generally *Women and Children in Prostitution*, supra note 30 (describing the proceedings of the workshop).

<sup>113</sup> The Secretary of the Department of Women and Child Welfare was present on behalf of the government at the meeting. Hence, the resolutions of the workshop reflect the views of the government on the issue. Moreover, though the opinions of the National Commission for Women, which co-sponsored the workshop are not binding on the government of India, it is fair to assume that since the government appoints the commission and since the commission works mostly on women’s issues, the government of India will look to the commission’s findings for direction in proposing legislation on this front.

<sup>114</sup> Jyotsna Chatterji, *Introduction to the Workshop*, in *Women and Children in Prostitution*, supra note 30, at vi.

<sup>115</sup> *Id.* at vi–vii.

<sup>116</sup> *Women and Children in Prostitution*, supra note 30, at 114.

<sup>117</sup> *Beotra*, supra note 14, at 53.

<sup>118</sup> *Id.* at 61.

against her.<sup>119</sup> The workshop also recommended the increased punishment of clients, the compulsory registration of marriages, the provision of legal education to all women and the police on the relevant laws, the supervision of juvenile homes by advisory committees consisting of NGOs, stringent action against foreign tourists who are pedophiles and child molesters, and an amendment to the Juvenile Justice Act prohibiting police harassment of children of prostitute women.<sup>120</sup>

In addition to these amendments, the workshop further resolved that no law should be used to conduct forcible HIV/AIDS tests, that the orientation of rehabilitation programs must change from one of correction and reform to one that treats prostitute women and children as victims and survivors of exploitation, that prostitute women should receive ration and voter identification cards, and that children of prostitutes in educational institutions should not be discriminated against. Finally, the workshop concluded with the organization of a National Networking Committee with the Joint Women's Programme as the convenor, and with the recommendation that a central statutory body be created to monitor the enforcement of prostitution laws and rehabilitation programs, to take preventive action and to establish a data bank with names and details of traffickers and pimps.

Thus, in Part I, I have introduced the present constitutional and legislative framework in India relating to prostitution, the relationship between the Indian women's movement and prostitution, the emergence of prostitute women's groups and the relationship between the AIDS epidemic and the government's interest in regulating prostitution. I have also described the various initiatives for law reform that were deliberated upon throughout the 1990s, which I discuss in greater detail in Part VII. I have also reported on the constituencies that have an interest in and are involved in (except, ironically, for the prostitute women's groups that have been excluded from official proceedings), the reform process and their respective positions in relation to governmental policy on prostitution. I have made brief mention of the repeated demands for the legalization of prostitution made by prostitute women's groups in the past five years.<sup>121</sup>

## II. The Vedic Ganika: Sex Slave, Sex Worker and Sex Healer All at Once

A brief description of prostitution in ancient India is necessary to place the above debate in perspective, and add a much needed history of the present day debate on prostitution in India.<sup>122</sup> My aim in this section is to demonstrate that the status of the

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<sup>119</sup> *Id.* at 111.

<sup>120</sup> *Women and Children in Prostitution, supra note 30, at 114–15.*

<sup>121</sup> *See supra notes 70–72 and accompanying text.*

<sup>122</sup> *To read about prostitution in India's past is to invite incessant despair. Relevant works consist of either obscure reports of British officials writing on crime in India, little-studied travelogues of British abolitionists who visited India in the late 1890s, or the works of nationalist historians who blame all foreigners and, later, the British for introducing commercialized sex in India. See B.M. Barua, Introduction to S.N. Sinha & N.K. Basu, The History of Marriage and Prostitution xiii, xv (Rita D. Sil ed., 1992). See*

Indian prostitute woman was not always one of victim and victim alone, and that, at the very least, her status in ancient India was riddled with ambivalence. I will demonstrate this by drawing attention to the various forms of prostitution that existed and the several means of regulation of prostitution that were available to the state at different points in time. To track the status of Indian prostitute women during colonial times, one has to retrieve their narratives from those of the colonizers and nationalists.<sup>123</sup> In view of the above, there is an urgent need to uncover, document and rescue from patriarchal and colonial discourses, the successes and struggles of prostitute women in India over the ages, as contained in tales and epics. To quote Honor Ford-Smith:

The tales are one of the places where the most subversive elements of our history can be safely lodged, for over the years the tale-tellers convert fact into images which are funny, vulgar, amazing or magically real. These tales encode what is overtly threatening to the powerful into covert images of resistance so that they can live on in times when overt struggles are impossible or build courage in moments when it is. To create such tales is a collective process accomplished within a community bound by a particular historical purpose. . . . They suggest an altering or re-defining of the parameters of political process and action. They bring to the [\*PG197]surface factors which would otherwise disappear or at least go very far underground.<sup>124</sup>

This contextualization thus expands the bounds of our imagination in responding to the hurdles of policy making on prostitution.

It appears that Vedic literature and Vedic hymns do not provide enough information to arrive at a conclusion about the existence of prostitution in India.<sup>125</sup> As for the Brahminical period, epics such as the *Ramayana* and the *Mahabharatha* contain numerous references to prostitutes who appear to have been an integral part of Indian society.<sup>126</sup> During this period, prostitution seems to have existed alongside practices such

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generally Elizabeth W. Andrew, *The Queen's Daughters in India* (1899); 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* (1924). In contrast, British reports held that the premium to produce male progeny in India was so high that Brahminical propaganda would go to any extent to endorse sexual aberrations, including prostitution, so long as a male child was the result of such relations. Sinha & Basu, *supra*, at 22.

<sup>123</sup> Excellent efforts in this regard have been made by post-colonial scholars such as Janaki Nair and Sumanta Banerjee. 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) [hereinafter *Recasting Women*]; Janaki Nair, *From Devadasi Reform to SITA: Reforming Sex Work in Mysore State, 1892–1937*, 1 *N.L.S.J.* 82 (1993).

<sup>124</sup> Chandra Talpade Mohanty, *Introduction: Cartographies of Struggle: Third World Women and the Politics of Feminism*, in *Third World Women and the Politics of Feminism*, 1, 35 (Chandra Talpade Mohanty et al. eds., 1991) [hereinafter *Third World Women*], quoting Honor Ford-Smith.

<sup>125</sup> The term *vedas* is interchangeable with *shruti*, i.e., that which was heard and handed down from generation to generation verbally. Hence, the reference to Vedic hymns. See I M. Rama Jois, *Legal and Constitutional History of India* 19 (1984).

<sup>126</sup> See generally R.K. Narayan, *The Mahabharata: A Shortened Modern Prose Version of the Indian Epic* (1978); John Campbell Oman, *The Great Indian Epics: The Stories of the Ramayana and the Mahabharata* (1975); Chakravarti Rajagopalachari, *Mahabharata* (1991); Chakravarti Rajagopalachari, *Ramayana* (1968).

as concubinage, maintenance of harems by royalty and female slavery. Prostitutes accompanied hunting expeditions of Kings and armies to war. They could and did form guilds, hold meetings and demand greater civic and domestic rights. However, with the advent of the Smritis,<sup>127</sup> considered one of the sources of Hindu law, prostitution came to be categorized along with what was considered the most heinous of sexual offenses in those times, namely, bestiality.<sup>128</sup> In turn, prostitution was heavily regulated by the state; it was legalized and the Smritis contained several rules as to how prostitution was to be conducted.

[\*PG198] In ancient India, prostitute women were categorized clearly into three types: the *Kumbhadasi*, the *Rupajiva*, and the *Ganika*.<sup>129</sup> The *Kumbhadasi* and the *Rupajiva* carried on prostitution in a clandestine fashion; the *Ganika* did so openly.

The *Kumbhadasi* was the lowest class of prostitute women. She was usually a servant or a house-maid and rendered sexual services to the owner of the household. *Rupajivas* were next in the hierarchy and were of many types. Some held important maid positions in households, while others were bored wives who sought sexual satisfaction either with or without their husbands' knowledge. Still others were professional dancers, while others came from lower classes and carried on prostitution while their husbands acted as pimps and benefited from their wives' work.

The category of *Ganikas* consisted of women who properly took to prostitution as an occupation, and the laws of the state regulated their activities. They were usually required to be well-versed in the sixty-four arts described by Vatsyanana before they could be called a *Ganika*. Sinha and Basu describe a *Ganika* thus:

A *ganika* by virtue of her intellectual attainments, singularly good qualifications and fine beauty receives a seat of honour in the assemblage of men. She is held in esteem by the

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<sup>127</sup> Smritis are an authoritative source of Hindu legal literature. According to legal historian Rama Jois, "the compilation of the Smritis resembles the modern method of codification." Jois, *supra* note 124, at 22. He notes that Smritis are a systematic subjectwise codification of all legal principles scattered in the Vedas and included in the Dharma Sutras, as well as the custom or usage which came to be practiced and accepted by society. *Id.* Smritis also detailed "the constitution and gradation of courts, appointment of judges, their qualification and also the procedural law for the enforcement of substantive law." *Id.* at 22–23. To give us some sense of when Smritis were written, one can look to the most important of them, the *Manusmriti*, which was compiled sometime between 200 B.C. and 200 A.D. *Id.* at 27.

<sup>128</sup> Sinha & Basu, *supra* note 121, at 114.

<sup>129</sup> *Id.* at 194–97. I do not discuss the prevalence of the devadasi tradition in Indian society because of the distinct religious connotations of the system. This tradition of a marriage between a girl and a male or female deity was particularly prevalent in the South Indian states, where kings often undertook to build temples for deities. On the completion of construction, the King would dedicate thousands of beautiful girls to the deity. The girls would sing and dance before the deity at least twice a day. These dances brought in revenue for the state. In later times, devadasis made all the arrangements (such as washing the clothes of the deity or bringing water to the temple) for the conduct of daily rituals and worship within the shrine. There seems to be no uniformity in texts regarding the restrictions placed on their sexual relations. There are several theories explaining the origin and the social uses of the system. However, the devadasi system today has degenerated into dedicating women in the rural areas and then trafficking them to the red-light districts of Mumbai. For a detailed analysis of the system in its historical contexts, see generally K.C. Tarachand, *Devadasi Custom* (1991).

king and highly eulogised by the appreciative people. Her company and favours are always sought for, [sic] she becomes the cynosure of all eyes.<sup>130</sup>

Thus, *Ganikas* constituted a highly accomplished and talented group of women who earned themselves respect in society and who [\*PG199]were probably the only women to have access to education.<sup>131</sup> In addition, of the three types of prostitute women then, *Ganikas* were the only ones who were allowed to formally learn to sing and dance. Also, *Ganikas* were considered a source of good luck. Hence, *Ganikas* used to bless the sacred thread that is tied around a bride's neck during the wedding ceremony. This was considered an auspicious gesture since a prostitute never married or became attached to any one man and hence, was thought to be someone who could never become a widow.

A *Ganika* was treated like a government servant.<sup>132</sup> According to Kautilya's *Arthashastra*, a *Ganika* received a fixed government salary of 1000 *panas* per year.<sup>133</sup> As a result, the amounts that she received from her customers were turned over to the King's treasury. In the Maurya period, *Ganikas* worked under the supervision of a state minister for prostitutes (*Ganikadhyaksh*) who fixed their fees, resolved their disputes and decided matters of succession relating to their property. *Ganikas* were also taxed on their incomes, similar to musicians, dancers and other court performers.

In addition to the regulations on income, the state controlled and regulated a *Ganika's* very freedom. In theory, a *Ganika* could be redeemed; however, the price for doing so was prohibitive. As a result, her freedom and that of her children realistically could not be bought. Moreover, if her daughter had the qualifications of a *Ganika*, she could be made a *Ganika* as well. However, *Ganikas* did have the freedom to organize into associations that could voice prostitute women's concerns and draw the attention of the state to their complaints. They made financial contributions to these associations that were used to assist prostitute women who were in dire need of money or were sick. In addition, *Ganikas* regularly contributed to the building of community facilities such as temples, tanks, wells, bridges and to the planting of road-side trees.<sup>134</sup>

In case of illness or old age, the state also took care of a *Ganika's* needs. For example, royal households could employ a retiring prostitute as a mid-wife, nurse, cook or maid. When a prostitute died, her property usually went to her daughters or sisters and, in their absence, to the king's treasury.<sup>135</sup>

[\*PG200] In addition to these rules that governed the women, clients faced certain restrictions as well. For example, when a man had sex with a *Ganika* against her will or with her virgin daughter, he would suffer the highest punishment possible.<sup>136</sup> Similarly, if a client kept a *Ganika* under confinement, abducted her against her will or disfigured her,

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<sup>130</sup> *Sinha & Basu, supra note 121, at 196–97.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id. at 207.*

<sup>133</sup> *Id. (citing Kautilya).*

<sup>134</sup> *Id. at 121, 240–41.*

<sup>135</sup> *Sinha & Basu, supra note 121, at 207.*

<sup>136</sup> *Id. at 208.*

he would be fined 100 *panas*<sup>137</sup> This amount could be increased to double her ransom depending on the circumstances that accompanied the abduction and abuse of the *Ganika*. Yet, while these punishments were seemingly stiff against the client, they were not as extreme as the punishments linked to a *Ganika*'s misdeeds. For example, the punishment for a *Ganika* woman who did not entertain the man that the King ordered her to entertain was 100 lashes and a fine of 5000 *panas*.<sup>138</sup>

Common prostitutes were subject to similar rules. For example, if a common prostitute promised to entertain a particular client, collected money from him and then backed out of the arrangement, she had to return twice the amount that she had been paid. Similarly, if she promised sex but did not collect any money from her client and subsequently refused to have sex with him, she was required to pay an amount equal to what she would have been compensated. On the other hand, if the client agreed to sexual activity, paid the prostitute a fee and then went back on their agreement, the prostitute was not obliged to return his payment. Instead, the client was required to pay an equal amount to her as retribution. If he refused to do so, the client was fined four times that amount.

In addition to setting these fines, the state also defined and regulated permissible sexual conduct between a client and a prostitute. For example, a man could, along with his friends, use the services of a prostitute at any given point in time; however, in that case, she was allowed to charge each one of them double the amount she would have ordinarily charged one client. Similarly, a client would be subject to a fine if he indulged in extra-vaginal intercourse with a prostitute.

During Buddhist times, well-educated and accomplished women could resort to prostitution as an occupation. As such, they could control their price for sexual activity and were not a community that faced discrimination. In fact, these women were considered to wield a great deal of influence on royalty and nobility, as well as the masses. [\*PG201]Courtesans regularly donated to noble and charitable causes. Moreover, the *jatakas* (the life-stories of Lord Buddha) are replete with stories of how Lord Buddha often ate food at courtesans' houses, accepted their contributions, read them sermons, and even lived with them. Thus, the doors of spirituality and of the Buddhist religion were open to prostitute women.<sup>139</sup>

Unfortunately, these descriptions do not enable a completely informed judgment of the institution of prostitution as a whole as it existed in ancient India. There are a few conclusions that we can draw, however. First, no one category of prostitutes existed in ancient India; prostitute women were divided into several categories according to their class and level of accomplishment. Second, they were subject to state regulation. Finally, it appears that *Ganikas* had the least to complain about. However, even the *Ganikas* were subject to conflicting rules that are very disturbing and detract from the glory that may have been attributed to the acceptance and celebration of prostitution in ancient India. While they were well-educated, received a steady income, received protection from the

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<sup>137</sup> *Id.*

<sup>138</sup> *Id. at 209.*

<sup>139</sup> *Id. at 171–72.*

state, were taken care of in their old age, and were even free to form organizations, air their grievances, and have those complaints redressed, they were still subject to many regulations that unfairly and unequally punished them. Thus, while the *Ganikas* of ancient India had, it appears, realized what the modern prostitute women's movement currently advocates, they still could not be redeemable except through the payment of an exorbitant amount, something reminiscent of slave labor.

Indeed, this duality of the prostitute woman's condition is reflected in her portrayal in popular culture. The prostitute is, at times, portrayed in *Kamasutra* style<sup>140</sup> as one who is in complete control of her sexuality such that she could seduce any man that she desires. However, at the same time, several stories tell of courtesans who, in expressing this sexuality, fell victim to treacherous male lovers who, given a chance, parted them from their wealth. Hence, the message is that prostitute women in ancient India were both slaves and sex workers; their sexuality simultaneously made them powerful and brought them ruin. In short, prostituting was a mixed experience depending on the position a prostitute woman occupied in the hierarchy of prostitution. This contingent nature of gender oppression in the ancient period rings true even today.

### III. How the Queen's Daughters in India Joined the Ranks of the Proletariat

The colonial encounter was a defining moment for Indian prostitute women. At one level, it transformed Indian women's conceptions of sexuality and therefore, our views on the morality of prostitution.<sup>141</sup> On quite another level, it heralded a distinct shift in state policies concerning prostitution. Hence, while in ancient India one witnessed the legalization of prostitution, during the colonial period, one saw the rise of the criminalization of prostitution. Accompanying this shift was the shunting of prostitute women's bodies between treacherous lock hospitals in Cantonment areas, British armies assisting in an imperialist project, and a nationalist movement that, in its anxiety to resist the British, colluded with them to degrade its own women. This section therefore attempts to unearth the "colonial discourse" on prostitution and to imagine the voices of the "subaltern" sections of society during this time.<sup>142</sup>

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<sup>140</sup> *Cliché as this may sound, one cannot resist being surprised at and envious of the manner in which sex seems to have been celebrated in texts and social life alike in ancient India, in comparison to the reticence which surrounds the subject in India today.*

<sup>141</sup> *It is tempting to blame the British alone for the degradation of Indian prostitute women. I would, however, suggest that degradation may have begun before the British came to India, namely, during Mughal rule. Surprisingly, this period has been ignored despite the detailed works that have been generated regarding the periods both preceding and following it. Except for Emperors Akbar and Aurangzeb, Mughal kings recognized prostitution as an institution. Emperor Akbar tried to regulate and reform prostitute women, while Emperor Aurangzeb attempted to ban prostitution by asking all prostitute women to either marry or leave his kingdom. See Sures Chandra Banerji & Ramala Banerji, *The Castaway of Indian Society* 82–83 (1989).*

<sup>142</sup> *Lata Mani describes colonial discourse to mean "a mode of understanding Indian society that emerged alongside colonial rule and over time was shared to a greater or lesser extent by officials, missionaries and*

The primary motivation for the British regulation of Indian prostitute women presents itself in the form of a simple story told by Kenneth Ballhatchet in his book on race, class and sex under the British rule:

[\*PG203]Special provision seemed necessary for the sexual satisfaction of British soldiers because they came from the lower classes and so were thought to lack the intellectual and moral resources required for continence, while as ordinary soldiers they lacked the material resources required for marriage. . . . The official elite, on the other hand, were supposed to shun Indian mistresses and content themselves with British wives. . . . [T]he prestige of the ruling race came to be a matter of serious concern.<sup>143</sup>

Thus, the British needed Indian prostitutes to satisfy this “natural sexual desire” of the British troops.

The British were amazed by the tolerance accorded prostitution in India as evidenced by the writings of S.M. Edwardes on crime in India. In fact, he begins his essay on prostitution-related offenses in India by quoting Dr. W. Crooke, who had once remarked that “at the present day prostitutes are tolerated in India to an extent which can hardly be paralleled in any other part of the world.”<sup>144</sup> He then observed:

Of recent years a certain number of educated Indians, who have imbibed western ideas and education, have openly dissociated themselves from practices of long standing, which tend to popularize the prostitute’s profession. . . . [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>145</sup>

British officials working in India echoed this sentiment. For instance, Major C.A. McMohan observed that prostitution was an occupation in India equivalent to choosing to blacksmithing or carpentry.<sup>146</sup> Also, he reported that prostitute women in India did not lead as [\*PG204]degraded a life as did British prostitutes, nor were they looked down upon by their communities as were prostitute women in Great Britain. In some instances, the British were so confused by this phenomenon that they labeled native women hypocrites with regard to prostitution, viewing them as a typical example of women who

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*the indigenous elite, although deployed by these various groups to different, often ideologically opposite ends.” Lata Mani, Contentious Traditions: The Debate on Sati in Colonial India, in Recasting Women, supra note 122, at 88, 90. The meaning of the word “subaltern” can be traced from that of its opposite, i.e., the “dominant” or “elite.” “Dominant” or “elite” groups are defined as groups in power and, in the Indian case, classes allied either with the British, who held India for 300 years, or with a select number of disciples, students or epigones who in a sense collaborated with the British.” Edward W. Said, Foreword to Selected Subaltern Studies, at v–vi (Ranjit Guha & Gayatri Chakravorty Spivak eds., 1988).*

<sup>143</sup> Kenneth Ballhatchet, *Introduction to Race, Sex and Class under the Raj* 5 (1980).

<sup>144</sup> Edwardes, *supra* note 121, at 71.

<sup>145</sup> *Id.*

<sup>146</sup> Ratnabali Chatterjee, *The Queen’s’ Daughters: Prostitutes as an Outcast Group in Colonial India*, Report submitted to the Chr. Michelsen Institute, Department of Science and Development 6 (1992) (on file with author).

said “no” when they actually meant “yes.” This inability to comprehend Indian social mores was, however, not explored convincingly. Instead, the British relied on superficial religious and superstitious reasons to explain away this toleration of prostitution.<sup>147</sup>

The British used these reasons to further the project of colonial rule to the detriment of Indian prostitutes. Having recognized the need for British troops to have access to Indian women’s bodies,<sup>148</sup> the British had to find a way to salvage the superiority of the British race. As attempts to manage sexuality through morality were integral to the very identity and authority of the colonial project,<sup>149</sup> the British found that the most convenient way of maintaining superiority with regard to prostitution would be by degrading Indian prostitutes themselves. Since Great Britain was using India simply to service the Industrial Revolution in Britain, British rule in India had taken a toll on the Indian economy. This forced many women to leave their traditional occupations and migrate to urban areas where, due to the lack of jobs in factories, many turned to prostitution as a source of livelihood.<sup>150</sup> In [\*PG205]turn, the British administration set about obtaining Indian prostitutes for its troops in a diligent fashion. For example, Katherine Bushnell and Elizabeth Andrew, two American women who were members of the abolitionist movement in the latter half of the nineteenth century, describe an instance of such state-sponsored trafficking in Indian women, in which the Commander-in-Chief of the British army in India, Lord Roberts, issued an order in June of 1886 to all military cantonments, suggesting that “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 ablution being always available.”<sup>151</sup> Young soldiers were also asked to consider it a “point of honour” to save each other from disease by identifying prostitutes who suffered from venereal diseases. Acting on these

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<sup>147</sup> *In addition, the agenda of the colonial nation-state concerning the criminalization of prostitution is evident, not so much in the chapter on prostitution, as from the concluding chapter of Edwardes’s book entitled, “Crime and Indian Aspirations.” See Edwardes, supra note 121, at 149. Here, he explains that India was actually an “ancient world on a large scale” and could not be compared with civilized countries such as Great Britain, having, as it did, “wild tribes of hereditary criminals.” Id. at 149, 151. Hence, Indian criminal law had to be framed and enforced with such people in mind. This is important from the point of view of prostitution because, as explained earlier, it is the general criminal laws, often enacted during colonial rule to handle situations of law and order, and seemingly disrupted by the struggle for independence, that are currently used by Indian police to arrest prostitutes in lieu of the ITPA of 1986.*

<sup>148</sup> *We also need to recognize that this decision was, in some ways, rooted in the “difference” between native women and British women. In her book, Elizabeth Andrew narrates an incident that seems to confirm this theory. The book describes a British aristocratic woman who was seized by a British soldier in India who sought to molest her. She had him expelled from the army, but not without also speaking with high-ranking British military officers about providing the British soldiers with native women so as to protect decent British women. See Andrew, supra note 121, at 13–14.*

<sup>149</sup> *M. Jacqui Alexander, Redrafting Morality: The Postcolonial State and the Sexual Offenses Bill of Trinidad and Tobago, in Third World Women, supra note 123, at 133.*

<sup>150</sup> *Chatterjee, supra note 145, at 1–2. She notes that the participation of women in peasant struggles reflects this impact on their rights. Also, according to her, with the codification of high-caste Hindu practices relating to the distribution of land and property, women in communities where the devolution of such property had been matrilineal became dispossessed and impoverished. As a result, they often had to resort to prostitution. This view is endorsed by other scholars as well. See Kumkum Sangari & Sudesh Vaid, Recasting Women: An Introduction, in Recasting Women, supra note 122, at 6–8.*

<sup>151</sup> *See Andrew, supra note 121, at 17–18.*

orders, applications were filed with magistrates for the requisition of Indian women.<sup>152</sup> In turn, the military officials employed the services of a native woman to recruit prostitutes through whatever means possible; in many instances, prostitutes would ultimately be recruited through false promises and deception. This woman, a precursor of the brothel-keeper or “madam” of today, was known as the *mahaldarni*, and was ultimately in charge of the prostitute women.

The degree to which prostitution was actively sponsored and encouraged by the colonial state is reflected by the institutionalization of the practice in the form of government-run brothels. Typically, in every cantonment area where troops were stationed, there used to be a few Indian women, or natives, the British called them, living in adjoining houses. These brothels came to be known as *chaklas*.<sup>153</sup> Every such *chakla* had high walls and small, carefully barred windows so the women could not escape. The *mahaldarni*, or brothel-keeper, was also careful to ensure that women did not escape or associate with any of the native men.<sup>154</sup> In addition to being held in captivity, the women were also physically and sexually abused by the soldiers,<sup>155</sup> and fined, [\*PG206]imprisoned and starved by the officialdom without reason.<sup>156</sup> Each *chakla* also had its own prison hospital where women were later similarly confined against their will.

The British administration regulated the health of prostitute women in order to protect the health of the troops stationed in Indian cities. The manner in which the administration set about doing this is interesting. For the first half of the nineteenth century, the government regulated the health of prostitute women through executive resolutions. For example, in 1805, Lord Bentinck passed a resolution which provided for the following:

- (i) Formation of lock hospitals, or *lal bazaars* as they were known in Hindi, in areas where European soldiers were stationed;
- (ii) Identification and medical inspection of all prostitute women in each district;<sup>157</sup>
- (iii) Powers to the Magistrate to direct the arrest of any woman who, on the recommendation of military officials, was suspected of being infected. She could then be produced before the Civil Magistrate and be sent to the lock hospital;
- (iv) Confinement of women found to be infected to the lock hospital until they were entirely cured. All contact with British soldiers was prohibited until that point;<sup>158</sup>

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<sup>152</sup> *One such application requested young and attractive women since some of the women already at hand at the time were not very attractive. See id. at 18.*

<sup>153</sup> *Id. at 15.*

<sup>154</sup> *Id. at 17, 36.*

<sup>155</sup> *Id. at 34.*

<sup>156</sup> *Andrew, supra note 121, at 42.*

<sup>157</sup> *Andrew describes these inspections, conducted once a week, as “surgical rape.” Id. at 16.*

<sup>158</sup> *Id.*

(v) Expulsion by the British government, on the recommendation of the medical board, of infected women from the cantonments, where the above measures did not work, in order to protect the health of the troops.<sup>159</sup>

However, some of these measures did not last very long. For example, the lock hospital system proved ineffective and it was ultimately abolished in the 1830s.<sup>160</sup>

[\*PG207] In the aftermath of the Sepoy Mutiny of 1857,<sup>161</sup> the government shifted from executive resolutions to legislation to regulate prostitution. As the number of British troops stationed in India increased, the government, at both the central and provincial levels, sought to introduce a framework of regulation not very different from the 1805 resolution described above. This took the form of the Cantonment legislation that required every prostitute who wanted to reside in the cantonment area to register with and obtain the permission of the Superintendent of Police.<sup>162</sup> The legislation categorized prostitute women according to whether they worked in registered brothels or outside of them.<sup>163</sup> In addition, the legislation mandated weekly health check-ups at the lock hospital. Prostitute women who committed a breach of these rules were punished.<sup>164</sup>

The inadequacy of this legislative framework and the passage of contagious disease laws in Britain incited the British to pass similar legislation in India in 1868. The British enacted provisions similar to the ones that earlier acts contained, along with additional requirements as to the registration of brothel-keepers and the provision of identity cards to both prostitute women and brothel-keepers.<sup>165</sup> This legislation sparked a hide-and-seek game between enforcement officials and prostitute women. Prostitute women defied the jurisdictional dictates of these laws by working outside of the city areas in which the law was enforceable. The British, in turn, extended the geographical application of the laws, and also provided for warrantless arrests and the summary conviction of prostitute women in their absence. However, prostitute women did not become passive; even in these oppressive conditions, they continued to resist the law. For example, when the Contagious Diseases Act was introduced in the state of Madras, prostitute women filed requests with the Magistrates to suspend the application of these laws in their individual cases.<sup>166</sup> Meanwhile, in Britain, the abolitionist movement and its fearless leader, Josephine Butler severely criticized the Contagious Diseases [\*PG208]Act. This

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<sup>159</sup> *Id.* at 20. In the Bangalore cantonment, such expulsion included cutting of a woman's hair and drumming her out of the area in the presence of a public gathering. M. Sundara Raj, *Prostitution in Madras* 23–25 (1993).

<sup>160</sup> Several reasons account for the failure of this system, including corruption, faulty statistics that counted readmissions of infected men into hospitals as new cases who would be cured eventually, and the rise of clandestine prostitution.

<sup>161</sup> The Sepoy Mutiny of 1857 refers to the revolt of Indian soldiers in the Bengal army of the British East India Company. The revolt developed into a widespread uprising against British rule in India. The mutiny was quelled by the British, who then initiated institutional reform which was marked by the replacement of the British East India Company by direct rule of the British crown.

<sup>162</sup> Raj, *supra* note 158, at 35.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 37.

<sup>165</sup> *Id.* at 43–44.

<sup>166</sup> *Id.* at 60.

sustained attack led to the repeal of the legislation in Britain in 1886. The government in India, however, refused to follow suit. A letter by the provincial government in Madras to the central government reflected their attitude:

With regard to the social objections to the Cantonment Act in a country in which prostitution is not only tolerated, but caste prostitutes are employed in the services of their pagodas, and in which parents even used to devote their children to the service of pagodas, in other words to a life of prostitution, it cannot well be urged that the compulsory registration and treatment of the . . . lowest of the class who alone consort with British soldiers and on whom alone it would be necessary for the protection of these soldiers, to enforce the Cantonment Regulation . . . could be considered objectionable.<sup>167</sup>

Ultimately, following a House of Commons resolution on the relevance of these laws in India, the government in India did repeal the Contagious Diseases Act of 1864, except as it applied to the cantonment regions. Even there, the Act was meant to be a stop-gap measure until new rules were framed. In the meantime, the British government in India was directed to cease the compulsory registration or medical examinations of prostitute women, as well as the licensing of prostitution.<sup>168</sup> By 1888, the Contagious Diseases Act was abolished throughout India. Thereafter, the British apparently relied on the Indian Penal Code and police legislation at the local level to suppress immoral traffic and prostitution.<sup>169</sup>

From the accounts of state sponsored trafficking of Indian women and the institutionalization of prostitution in cantonment areas, it is clear that the British used Indian women's sexual labor to advance the project of British colonial rule in India. Under the guise of protecting public health, the British introduced a form of legalization of prostitution with the trappings of identification, registration, compulsory medical examinations and confinement of prostitute women. Even if somehow related to public health, this certainly bore no relationship to the health and welfare of prostitute women. To the contrary, it laid a foundation for the criminalization of the prostitute [\*PG209]woman where none before existed. Local police law, carrying the seed of the tolerationist approach of criminalizing trafficking and every aspect of prostitution except for the act of sex in prostitution itself, reinforced this move toward the criminalization of prostitution.

## **IV. “We Told Them, ‘We Are Your Sisters;’ They Replied, ‘*We Are Your Slaves*’”<sup>170</sup>**

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<sup>167</sup> *Raj, supra note 158, at 63.*

<sup>168</sup> *Id. at 64.*

<sup>169</sup> *Id. at 70.*

<sup>170</sup> *Andrew, supra note 121, at 62.*

In the context of British colonial rule in India, two determined American women, M.P. Katherine Bushnell and Elizabeth Andrew of the World Women's Christian Temperance Union, made the first concerted and focused feminist intervention into the state of prostitution in India. The story of their experiences in the military brothels of ten Indian cities during their visit to India in December 1891 is recorded in *The Queen's Daughters in India*, with prefatory letters by the well-known British abolitionists Josephine Butler and Henry Wilson. Through their travels, Bushnell and Andrew discovered that though the official line denied any regulation of prostitute women by the state, institutional practices from the days of regulation persisted. This was evident from their conversations with British military personnel, medical practitioners and the subordinate judiciary. Bushnell and Andrew also effectively articulated the sexual double standards that informed the contagious diseases law and the law's ineffectiveness in controlling the spread of venereal disease. Bushnell and Andrew concluded that the fact that a mere one-ninth of one percent of the approximately 70,000 soldiers stationed in India were incapacitated annually by venereal disease was not a sufficient reason for the British government to thrust legalized prostitution on a reluctant non-Christian population.<sup>171</sup> Most importantly, Bushnell and Andrew documented the outrage women felt toward compulsory medical examinations. Their critical insights into the laws regulating prostitution could easily pass for an introduction to a book on feminist legal theory:

What is the use of women clamouring for . . . a law as long as men enact and enforce all our laws? Men will never legislate themselves into the degradations and inconveniences of the compulsory periodical examination, and go to reside in hospitals as long as they are afflicted with disease. Will the Cantonment magistrate leave his judicial bench to go and sit in the Lock Hospital idly until he is no longer a source of danger to the community? Will the colonel of a regiment leave his soldiers to mutiny while he goes to reside in a Lock Hospital for a term of weeks?<sup>172</sup>

Bushnell and Andrew also raised the question of male responsibility, especially, when it was the soldiers who had transmitted venereal disease to the native women by virtue of their various stationing abroad.<sup>173</sup> On the whole, the two Americans passionately defended and sought protection of individual liberty. Most importantly, they exposed the fact that the British government in India ignored the House of Commons' resolution that sought to repeal the Contagious Diseases Act, by enforcing materially the same provisions under the guise of the cantonment legislation. As a result, the government created a spate of commissions, both in Great Britain and in India, to examine Bushnell's and Andrews' allegations, that resulted in the British government's decision to amend the provisions of the Cantonment Acts that related to the compulsory examination of women suspected for contagious diseases due to vice (as compared to diseases such as cholera, diphtheria, smallpox or typhoid fever that this legislation was also meant to tackle). The resulting Amendment Act of 1895 employed vague terminology in stating that there should be no legal sanction of prostitution nor any special registration of prostitute women. Before its passage, the Act had originally incorporated penalties for officials who

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<sup>171</sup> *Id.* at 99–101.

<sup>172</sup> *Id.* at 71–72.

<sup>173</sup> *Id.* at 73.

disobeyed these requirements, specifically, a fine of 100 rupees or imprisonment. However, this provision met with such opposition that the entire bill almost failed to pass. Hence, the penalty clause was finally dropped.

However, due to considerable pressure from the medical profession in India and well-to-do British women, coupled with the differences of opinion within the abolitionist movement itself, the Indian government ultimately changed its policy toward prostitution. The new law contained the perfunctory safeguards that no prostitute women should be “provided” to the soldiers and that there should be no registration of these women unless required of all inhabitants of the cantonment areas. Moreover, the stated policy of the new law was to treat venereal disease similarly to any other contagious disease.<sup>174</sup>

[\*PG211] Notably, various offensive provisions regulating the health of prostitute women were introduced seemingly through the back door. Notwithstanding the feminist intervention, the British government in India still maintained a skewed policy toward regulating prostitution. For example, the law provided for a system of periodic examinations. If a soldier was found to have a venereal disease, this diagnosis would be *prima facie* evidence that the prostitute women with whom he had been in contact had the disease too and, as such, they would then be required to leave the cantonment. Thus, this presumption was considered a sufficient enough threat for the prostitute women to attend medical examinations “voluntarily.” However, there was no sanction against the soldiers who had contracted or transmitted venereal diseases.

Without detracting from the credit due to Bushnell and Andrew for their brave intervention in India, their approach does warrant some critical analysis. First, in the preface of their book, Bushnell and Andrew admit that they wrote it “under a deep sense of obligation to the womanhood of the world, but more especially under a sense of duty to God.”<sup>175</sup> Hence, while recognizing their commitment to the cause of women’s rights, it is equally important to be aware of the influence of their greater commitment to Christianity and its proselytizing agendas. Further, it is interesting to note how Josephine Butler’s construction of Indian women as “fellow-citizens” in her prefatory letter demonstrates that alliances between women across continents need not necessarily be subversive, sensitive or even aware of an equally serious, if not larger system of oppression, namely, colonial rule. Thus, Josephine Butler made her gesture of solidarity towards Indian women as fellow-citizens without an underlying recognition that that very construct of citizenship was the undoing of many Indian women. The Indian women at *chaklas* of the North West Frontier Province that Bushnell and Andrew visited articulate this notion with more accuracy, as is evident from an encounter with them that Bushnell and Andrew describe:

As we . . . turned into a little sort of lane, a woman shouted . . . to us, “Why do you come here? Don’t come here; all are prostitutes who live here.” With a smile of reassurance we

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<sup>174</sup> *Id.* at 96–97.

<sup>175</sup> *Andrew, supra note 105, at v.*

[\*PG212]replied, “We know it, and you are just the women we are seeking; *we have a message for you.*”<sup>176</sup>

Describing an earlier visit by another woman, the response to this humanitarian mission came forth as follows:

“Then the lady went home to England and talked to the Queen. She spoke with wonderful power on behalf of the poor women of India. She said to the Queen that she (the Queen) was a woman, and these in India were women, and their shame was the Queen’s shame, and for them to be outraged as though she (the Queen) was outraged, that it was a shame for women to be treated so when a woman was Queen. Then the Queen ordered it to be stopped. But the officers still carry it on.” . . . They blessed and thanked us over and over. We told them, “We are your sisters;” they replied, “*We are your slaves.*”<sup>177</sup>

Though the prostitute women clearly welcomed the solidarity of the abolitionist women, from their perspective the violence of the colonial encounter was inescapable and unforgettable. Thus, the subaltern women’s contemplation of their “slave” status, impaired by the brutalities of colonial law, renders a more complex and complete understanding of prostitution in the colonial period. In comparison, had it not been for the prostitute women’s retort, the humanist narrative of the abolitionists would have been quite incomplete. This is a useful lesson for present-day Indian feminists who place much faith in the redemptive value of human rights discourse for prostitute women, while ignoring the experiences of prostitute women themselves. Moreover, the above conversation serves to remind both Third World and First World feminists alike of the fraught nature of our attempts at solidarity, as we embark on collaborative projects of feminist theorizing. This conversation also acts as an antidote to what Third World feminist scholars like Chandra Talpade Mohanty argue is the tendency of most Western scholarship on Third World women to presume an essentialist and universalist category of the “Third World woman.”<sup>178</sup>

[\*PG213][T]he feminist writings discursively colonize the material and historical heterogeneities of the lives of women in the third world, thereby producing/representing a composite, singular, “third-world woman”—an image which appears arbitrarily constructed, but nevertheless carries with it the authorizing signature of Western humanist discourse.<sup>179</sup>

Ironically, Western feminists and Third World women are equally to blame for an image of the Third World woman in which:

This average third world woman leads an essentially truncated life based on her feminine gender (read: sexually constrained) and her being “third world” (read: ignorant, poor, uneducated, tradition-bound, domestic, family-oriented, victimized, etc.). This . . . is in

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<sup>176</sup> *Id.* at 60 (*italics added*).

<sup>177</sup> *Id.* at 61–62.

<sup>178</sup> See *infra* notes 233–236 and accompanying text.

<sup>179</sup> Mohanty, *supra* note 123, at 51–53.

contrast to the (implicit) self-representation of Western women as educated, as modern, as having control over their own bodies and sexualities, and the freedom to make their own decisions.<sup>180</sup>

Thus, the recognition that colonial law caused the subaltern prostitute woman's slave status immediately enriches our understanding of prostitution in the colonial period.

Although the British ultimately won the struggle between the abolitionists and colonial rulers in India, they did not win without introducing some radical changes in the structuring and regulation of prostitution in India. Janaki Nair describes these changes as the "gradual proletarianisation of unorganised, subaltern female sex-workers."<sup>181</sup> Thus, the British effectively maintained their use of the law and legal system as an instrument of colonial subjugation. While on one level, the law reflected the status quo; on another, it assumed an identity of its own, influencing the public perception of prostitution in a country historically tolerant of, if not even ambivalent toward prostitution.

The role of criminal law in particular illustrates the effect of British law on the perception and categorization of prostitute women in [\*PG214]India. In their zeal to protect British troops from venereal disease, the administration used criminal law, in addition to civil law, to ensure better enforcement of their policies. As a result, prostitute women had no choice but to either follow the law and be subject to civil law regulation, or resist the law and be subject to criminal law penalties. For example, a prostitute woman who fell on the civil side of the law was subject to humiliating health examinations; a woman who fell on the criminal side, in addition to the forced health check-ups, had to pay hefty fines and, occasionally, to choose between imprisonment and remaining on the run in a bid to avoid the law. Thus, the Contagious Diseases Act, 1864, in its various forms, laid the foundation for the conceptualization of prostitute women as criminals in the decades to follow, simply by treating certain acts of the prostitute woman as criminal.<sup>182</sup> Ultimately, the irony of this approach is that British officials realized that these laws were ineffective and that their efforts at prevention hinged solely on the restraint that soldiers displayed.<sup>183</sup> The harm had, however, already been done; laws reflecting a tolerationist approach that criminalizes all acts leading to prostitution, but excepting the sexual act itself, had already taken root. Indeed, even the configuration of urban space between cantonment areas and non-cantonment areas was established, laying the foundation for the organization of red-light areas in Indian cities that are still prevalent today.

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<sup>180</sup> *Id.* at 56.

<sup>181</sup> Nair, *supra* note 122, at 82. In fact, this process is especially clear in the case of devadasis. Nair describes how their sources of income were gradually stemmed, leading to their decline from professional performers to workers with nothing to offer but their sexual services. As such, the devadasi became, according to Nair, "a threat, rather than an adjunct, to the patriarchal household." *Id.* at 90.

<sup>182</sup> Barry, in her book on female sexual slavery, makes a similar observation. She notes that in the initial years of the Contagious Diseases statutes, prostitute women tended to be young and single. Barry, *supra* note 98, at 25. However, in the years to come, the law had made rigid the social role of prostitute women and reduced their social mobility considerably. See *id.* As a result, their involvement with prostitution lasted much longer. She also notes that this "social and geographical isolation [had] facilitated the criminal organization of prostitution." *Id.*

<sup>183</sup> Nair, *supra* note 122, at 91.

In addition to using the law to redefine and delegitimize prostitution and prostitute women, the British used the law to attack Indian culture as well. Editors Susie Tharu and K. Lalita, in their introduction to an anthology of women's writings in India from pre-colonial times to date, describe the controversy that erupted out of the 1910 republication of *Radhika Santwanam*, a poetic work written by a courtesan named Muddupalani, who was part of the Thanjavur royal court during the mid-eighteenth century.<sup>184</sup> Bangalore Nagaratnamma, herself a courtesan, undertook this republication. The British government objected to the contents of *Radhika Santwanam*, and subsequently seized all the copies of the book and charged its publishers with obscenity.<sup>185</sup> Renowned poets, writers and academics submitted several petitions to the government protesting the ban on *Radhika Santwanam*, along with the ban on certain other classics, but the government refused to lift the ban, and instead continued its strict enforcement.<sup>186</sup>

Several aspects of this particular attack on Indian culture are instructive for a discussion of the feminist reconceptualization of prostitution in India. First, it is notable that the content of the publication itself is a deviation from the traditional discourse describing the love between Radha and Lord Krishna. In *Radhika Santwanam*, Radha takes the initiative of the sexual relationship with her lover, Lord Krishna, and it is her pleasure that is central to the narrative of the book. Writings of prostitute women that unearth explorations of female sexuality, such as *Radhika Santwanam*, are invaluable to the feminist imagination. Secondly, the fact that the book won critical acclaim during its time indicates the high social status of the author and the intellectual esteem accorded prostitute women prior to colonial times. Tharu and Lalitha observe that “unlike a family woman in her time, as a courtesan Muddupalani would have had access to learning and the leisure to write and practice the arts. She would have owned property and expected and enjoyed a functional equality with men.”<sup>187</sup> Finally, the fact that it took one courtesan to seek out the work of another and reproduce a complete version of it, including the author's prologue describing Muddupalani's literary heritage, a heritage that a male “classicist” previously omitted in the original publication, is testimony to the solidarity that prostitute women shared and continue to share. Thus, the suppression of this work by the British government makes evident that even when the legal system was not itself the primary vector of colonial rule, it nevertheless played a significant role in maintaining British cultural domination of India.

## V. A Battle Was Over, but the War Remained

For some time during the colonial period, the nationalist movement for independence from British rule was gathering strength, and its leaders were more than anxious to use

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<sup>184</sup> Susie Tharu & K. Lalitha, *Introduction to Women Writing in India 1* (Susie Tharu & K. Lalitha eds., 1991).

<sup>185</sup> *Id.* at 4.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 6.

their moral superiority over [\*PG216]the British race as a means of resistance. The social status of women was considered an important indication of a society's degree of civilization. Thus, it is no surprise that a plethora of nationalist reformers worked for the amelioration of women's conditions. According to Chatterjee, the nationalist movement resolved the "women's question," as he calls it, based on their view of the world as divided into the public, material, male sphere and the private, spiritual, female sphere. Since Indians could not challenge the British in the public, material sphere, we had no option but to challenge them on the spiritual, private level. For the English-educated Indian male, this meant conforming Indian women who occupied the private sphere to Victorian roles. This then required the "new woman" to be distanced from and, therefore, be the exact opposite of the "common woman" who tended to be "coarse, vulgar, loud, quarrelsome, devoid of superior moral sense, sexually promiscuous, [and] subjected to brutal physical oppression by men."<sup>188</sup> As such, prostitute women and, for that matter, all women who expressed their sexuality, were "bad" women.

This harsh contrast translated into the actual lives of women, both "good" and "bad," and reduced their social spaces considerably. Sumanta Banerjee's article on women's culture in nineteenth century Bengal illustrates this vividly.<sup>189</sup> According to Banerjee, during this nationalist period, Bengal witnessed the creation of the Western-educated middle classes, or the *bhadralok*, who in turn created their notion of the ideal Indian woman, or *bhadramahila*.<sup>190</sup> The only access that the *bhadramahila* had to the outside world was through women of lower castes who used to perform regularly in these middle-class households.<sup>191</sup> These performers tended to be folk-artists, singers and dancers. They included many old prostitute women, as well as prostitute women who wanted to leave prostitution. These women sang songs describing romantic encounters between gods and performed *bashya sangeet* (the songs of prostitute women) in which they made fun of themselves and their clients. These songs were often women's only means of challenging patriarchy.<sup>192</sup> Consequently, men of the *bhadralok* worried about the influence that these women would have on the [\*PG217]*bhadramahila*. They were afraid that the *bhadramahila* would begin to demand freedom equivalent to that of their male counterparts, to the extent of even leaving their homes for good. Hence, they sought to curtail the singers' visits on the basis that their songs were bawdy, vulgar, distasteful, base and obscene, and that the women themselves were prostitutes.<sup>193</sup> In rejecting this art form, men of the *bhadralok* also made sure that these prostitute women were excluded from the formal education system and from participating, or even attending, popular events such as the theater, village festivals and musical gatherings. However, these attempts to exclude them from all forms of public life did not daunt the women. Many of them were accomplished writers having written on, among other things, their lives as

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<sup>188</sup> *Id.* at 241.

<sup>189</sup> See Banerjee, *supra* note 122, at 127.

<sup>190</sup> *Id.* at 160–68.

<sup>191</sup> Banerjee observes that women of the "rich" and "middle" stations stayed in seclusion in the *andarmahals* (literally translated, inner palaces, also secluded quarters for women). *Id.* at 128.

<sup>192</sup> *Id.* at 136.

<sup>193</sup> See *id.* at 141.

prostitute women. As such, they protested in the local newspapers by explaining the circumstances that forced them to enter prostitution. This, however, was of little use.<sup>194</sup>

The reaction of the nationalist movement toward prostitute women was not limited to contempt. Reformers constantly urged the government to pass more stringent laws against prostitution and trafficking in women and children. They relied on the notion of the victimized prostitute that the abolitionist movement had previously introduced, and that groups, both Indian (the *Brahmo Samaj* and Indian vigilance organizations) and British (usually missionary institutions), seeking to curb what they called a “social evil,” had reinforced. The government, however, soft-pedaled on the issue. There are several explanations for this inaction. One possible explanation is that the British administration had consolidated its rule in India and did not perceive its troops, or their health, to be as crucial as before. Also, having seen the ineffectiveness of the contagious disease laws, British officials promoted restraint by their soldiers. Furthermore, the government appeared hesitant to pass a law against trafficking because it did not want to bear the additional responsibility of housing and sustaining displaced women and children.<sup>195</sup>

International conventions for the prohibition of traffic in white slaves, such as the passage of the White Slave Act of 1910<sup>196</sup> in the United States of America and the prevention of immoral trafficking [\*PG218]laws in Indian provinces,<sup>197</sup> mitigated this complete lack of will on the part of the British government in India to address the problem of trafficking. However, even those who were in support of these laws and were against prostitution viewed these trafficking laws as not concerned so much with the welfare of prostitute women as a tool for the agenda of “national reconstruction.” Supporters of these laws believed that the social evil of prostitution and trafficking should be eliminated as soon as possible. Conversely, opponents of the laws were concerned that the missionaries would convert the rescued women and girls to Christianity and that prostitution, which had for centuries supported the institution of family, would no longer be available.<sup>198</sup> In conclusion, if the colonial regime provided the legal machinery with which to ostracize and degrade prostitute women, then the nationalist movement endorsed this with a legitimizing ideology that, apart from being divisive of Indian women, led to the atrophy of their common public and social spaces and their exclusion from the political sphere.<sup>199</sup>

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<sup>194</sup> *Banerjee, supra note 122, at 163.*

<sup>195</sup> *See Raj, supra note 158, at 74.*

<sup>196</sup> *White Slave Traffic Act (1910), microformed on History of Women, no. 9901, United States Dept. of Justice (Research Publications); Raj, supra note 158, at 74.*

<sup>197</sup> *For example, in 1923, the Government of Bengal passed the Suppression of Immoral Traffic Act. Raj, supra note 158, at 94. Similarly, the Madras Legislative Council passed The Madras Suppression of Immoral Traffic Act in 1930.*

<sup>198</sup> *Nair, supra note 122, at 93–94.*

<sup>199</sup> *The exclusion of prostitute women extended to the political sphere as well. For example, contempt for prostitute women found expression in Mahatma Gandhi’s refusal to allow prostitute women to participate in an independence rally held at a North Indian town. His views on prostitution are such that it is too tempting not to recite them here: Not until a woman of exceptional purity and strength of character rises and devotes herself to the task of redeeming this portion of fallen humanity, will the problem of*

Nair succinctly describes the impact of colonial rule and the resultant nationalist response on the perception of the prostitute woman in India:

We may plot a series which resulted in the complete proletarianisation of sex-work: from dangerous non-wife to willful perpetrator of disease; from the active sexuality of the devadasi and cantonment sex-worker to voiceless victim who had to be rescued by the institution of marriage; from one [\*PG219]whose life work was embedded in a religio-cultural sphere to one who was the embodiment of vice.<sup>200</sup>

As is evident from the ban of the play, “A Touch of Brightness” in the 1960s, as described at the beginning of this article,<sup>201</sup> the post-independent Indian state, engrossed in its nation-building exercise, carried on the nationalist movement’s legacy of contempt for prostitute women. On the legislative front, the post-colonial state continued its use of the tolerationist mold of prostitution law previously cast during colonial rule despite the radical normative departure expected from the adoption of the Indian Constitution after the advent of independence.

## **VI. Reflections and Implications for Feminist Legal Theory: Blind (Wo)man’s Bluff**

### ***A. The Monoliths of Prostitution***

For those working in the area of prostitute women’s rights, the most frustrating trend deals with prostitution as if it were a monolithic and uniform institution in which women are entirely free or entirely enslaved. This trend was evident in my brief encounters with prostitute women in one Indian state. Most researchers working in the area delineate prostitution into oppressive urban and semi-urban brothel prostitution. However, upon visiting the rural areas of Karnataka, my group of law students began to realize that a wholly different set of dynamics existed there. For example, except for the random development worker, few visible structures of the nation-state exist in Karnataka. With the nearest police station located miles away, prostitute women in rural Karnataka experience little worry that police will harass or arrest them for soliciting, let alone for running a brothel. Moreover, it appears that entire communities in this region sometimes

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*prostitution be tackled. No doubt man can do much among men. . . . Prostitution is as old as the world, but I wonder if it was ever a regular feature of town life that it is today. In any case, a time must come when humanity will rise against the curse and make prostitution a thing of the past as it has got rid of many evil customs, however time honored they might have been.*

*Lakshmi Raghuramaiah, Night Birds: Indian Prostitutes from Devadasis to Call Girls v (1991) (quoting Mahatma Gandhi).*

<sup>200</sup> Nair, *supra* note 122, at 94.

<sup>201</sup> See *supra* notes 31–32 and accompanying text.

take to prostitution. This may be due to their membership in a particular caste that has lost its traditional means of livelihood, thereby leaving them disenfranchised and forcing them into prostitution out of sheer desperation. Conversely, the proliferation of prostitution within certain communities may be the result of a community whose women have for generations been concubines of the rich, landed classes. In this case, the children of the resulting relationships [\*PG220]do not necessarily face the social ostracism that children of urban prostitutes face. As such, these prostitute women's needs are quite different from those of urban prostitutes, who need anti-discrimination provisions to prevent the state from depriving them of the custody of their children. Also, rural prostitute women may have regular clients with whom they have children and who ensure that they receive some income every month. Moreover, membership in these rural communities may ensure that sexually abusive clients receive a severe community response. Consequently, discussion of minimum wage and sexual assault laws in India as a whole may prove less relevant to the prostitute women of rural areas like Karnataka.

These differences in the structure and experience of prostitution raise interesting questions for feminist legal scholars. For example, we readily accept the idea of law and rights in law as centered around the post-independent nation-state with its institutionalized court system and legal profession. The fact, however, that the nation-state and its formalized institutions may not prove relevant in many parts of the country is reason enough for us to question whether reform of this formalized legal system is adequate at all. Do we have adequate information then, on the parallel systems of authority and law-making in Indian society? What is our understanding of this legal pluralism? What is the relevance of ITPA or its repeal or reform in the Bedia community of Madhya Pradesh, where the caste panchayats strictly regulate prostitution by its women and girls?<sup>202</sup> Are the demands of a formalized legal system shaping the responses of feminist legal scholars in a fashion that precludes us from asking more fundamental questions? For example, is it even advisable to advocate a uniform legal policy to deal with the myriad forms of what we understand as prostitution?<sup>203</sup> Even with respect to brothel prostitution in red-light [\*PG221]districts of major cities, there are fundamental differences in the structure of prostitution. Of the Sonagachi project, it is said that it cannot be replicated in Mumbai, for instance, because a "brutal and powerful mafia" runs the sex trade there, as opposed to the more encouraging view of trade unionist efforts in Kolkata.<sup>204</sup>

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<sup>202</sup> *The caste panchayats, or courts, openly approve of prostitution. Thus, the money a woman can earn for her family by prostituting determines her value. For instance, if a woman or girl from the community elopes with a man from the same or a different caste, the caste panchayat is known to order the boy's parents to return the girl and to compensate her parents for the loss in earnings while she was away. In addition, filing a complaint with the police could lead to ex-communication from the caste since such eloping is an affront to the authority of the caste panchayat. Debashish Mukerji, Brothel Buster, The Week, Jan. 25, 1998, available at <http://www.the-week.com> (last visited Nov. 18, 1999) (on file with author).*

<sup>203</sup> *I do not raise these questions in order to initiate an essentialist inquiry about Third World societies and whether formal legal systems, such as in the Western liberal democracies, can function in India. All I wish to draw attention to is the ease with which the Indian elite make certain assumptions. I propose that the Indian women's movement be more skeptical in this regard.*

<sup>204</sup> *Dugger, supra note 45, at A1. The religious composition of the prostitute community could be another level of distinction. Issues relating to the religious identity of prostitute women have not been explored yet,*

In asking these questions and providing these accounts, I suggest that we acknowledge that prostitution assumes different forms and that responses to them must be framed accordingly. Also, the Indian women's movement must acknowledge that prostitute women suffer not only because they are prostitute women, but also because of the added stigmas of belonging to certain castes. As it currently stands, there are numerous instances of community and caste based prostitution.<sup>205</sup> Also, it appears that in some regions, prostitute women tend to be from the lowest and most disenfranchised castes.<sup>206</sup> However, it is also interesting to note that contextual understandings of prostitution and the postmodernity that characterizes this approach is not a privilege of late twentieth century Western thought. In the 1930s, a *devadasi* woman by the name of Moovalur R. Ammaiyar wrote a novel on the *devadasi* system in the South Indian language of Tamil.<sup>207</sup> She had broken away from prostitution and was working for the rights of [\*PG222]women; as such, she spoke from the perspective of a *devadasi* and was able to offer resistance to the dominant nationalist and conservative discourses of her times regarding the issue of *devadasi* abolition.<sup>208</sup> However, what is most fascinating about Ammaiyar's novel is the multiplicity of its prostitute women's characters.<sup>209</sup> They are described in the background of an incredible sensitivity to the hierarchy of prostitution that tends to be missing in much present-day literature.<sup>210</sup> The prostitute woman could be a wealthy, greedy woman who looks at the *devadasi* system merely as a means of making more money. On the other hand, she could be a poor *dasi* girl who was abducted and forced into prostitution and yearns to leave it and get married. There were yet other *ex-devadasis*, who, like Ammaiyar, left prostitution and developed a critique of the oppressive structures that sustained the practice. Thus, while the novel voices the experiences of *devadasis* themselves, it also allows for significant differences even within these experiences, and thereby acknowledges that a single, monolithic patriarchy is not the sole cause of prostitution. In so doing, the novel is a post-modern text, assuming that we acknowledge prostitute women's expressions of their experiences to be valid, rather

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*but it is estimated that out of the approximately 100,000 prostitute women in six major Indian cities, 84.36% of them are Hindus, 10.96% are Muslims and 0.5% are Christians. Also, 94.6% of the prostitute community in India is Indian, 2.6% are of Nepali origin and 2.7% are of Bangladeshi origin. Shalini SCN & Lalitha SA, supra note 107, at 1–2 (citing a 1994 report of the Human Resource Department Ministry).*

<sup>205</sup> *In the state of Bihar, a community exists that reportedly engages in prostitution much like the devadasi system. Women and Children in Prostitution, supra note 30, at 67. In addition, prostitution is apparently practiced among Venkatasanis of the Domara community in the state of Andhra Pradesh. Id. at 80. Similarly, prostitution is also practiced by the Banchara and Bedia communities in the state of Madhya Pradesh, and the Rajnat community in the state of Rajasthan. Shalini SCN & Lalitha SA, supra note 107, at 4–5.*

<sup>206</sup> *See Women and Children in Prostitution, supra note 30, at 88–89. Usha Wagh, from the city of Pune, reports that Dalit women are looked down upon in the sex trade because clients tend to prefer higher caste prostitute women. Id. Conversely, Sister Bridget, working in the state of Karnataka, notes most of the prostitute women she works with are Dalit women who are visited by upper caste men, whereas women from the upper castes are not dedicated as devadasis. Id. at 85.*

<sup>207</sup> *I draw here from a review of the novel. See generally Anandhi S., Representing Devadasis: 'Dasigal Mosavalai' as a Radical Text, 26 Economic and Political Weekly 739 (1991) (reviewing Moovalur R. Ammaiyar, Dasigal Mosavalai Allathu Mathi Petra Minor: The Treacherous Net of Devadasis or the Minor Brown Wise (1936)). See supra note 128 for a brief overview of the devadasi system.*

<sup>208</sup> *Anandhi S., supra note 206, at 739.*

<sup>209</sup> *Id. at 745.*

<sup>210</sup> *Id.*

than a product of false consciousness. Such acknowledgment is critical; otherwise, we have no hope of unearthing the range of prostitute women's experiences and comprehending the complex reality that is prostitution. In order to arrive at a more contextual and realistic legislative policy then, the call for detailed ethnographic and participant observational studies of prostitution must be heeded.<sup>211</sup> This leads us to certain methodological issues in the study of prostitution.

## ***B. The Dilemmas of Feminist Research***

The methodology of feminist legal theory seeks to question whether the law actually addresses women's experiences. To answer this query, it seeks out the assumptions that the law makes, the areas of mismatch, distortion or denial created by the differences between women's actual experiences and the perceptions that the law relies on, and the patriarchal interests that are supported by this mismatch. Feminist legal theory then fields reform proposals that can reduce or [\*PG223]eliminate any such mismatch or distortion.<sup>212</sup> Thus, a central aim of feminist legal theory is to uncover and voice the real life experiences of women. However, feminist legal theorists have not sufficiently addressed the several dilemmas concerning the nature of feminist research that arise out of direct field contact with women. Such an examination, apart from severely impacting the substantive goal of feminist legal theory, is vital to the success of any law reform initiative, especially on a problem as complex as prostitution.

The goals of feminist research that are relevant to this article are its commitment to anti-positivist and participatory research. That is, feminist research aims for a "horizontal reciprocal relationship where there is dialogue, mutual exchange of information and development of a trusting and personal relationship over time . . . wherein the participant is every bit as influential to the outcome of the research as the manipulated variables that supposedly affect the participant's responses."<sup>213</sup> Thus, this approach presumes that prostitute women, as subjects of the research, have the "ability to acquire the information and the skills to critically understand how social structures around them actually shape and compound their powerlessness,"<sup>214</sup> and that they can, in fact, change their life conditions as a result of this knowledge. During such research, feminist researchers must use "the double consciousness [of being oppressed as women while at the same time, being privileged as academics] as a methodological and political opportunity and not as an obstacle."<sup>215</sup> Thus, it is clear that feminist research methodology aims at action research.

There are two methodological issues that I choose to examine. First, how does one begin to make sense of women's experiences and articulate them in order to effect law reform?

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<sup>211</sup> See Elizabeth Bernstein, *What's Wrong with Prostitution? What's Right with Sex Work? Comparing Markets in Female Sexual Labor*, 10 *Hastings Women's L.J.* 91, 99 n.43 (1999) (quoting Lynn Sharon Chancer).

<sup>212</sup> Wishik, *supra* note 4, at 26–28.

<sup>213</sup> *Too Much Heat, Not Enough Light*, *supra* note 24, at 19.

<sup>214</sup> *Id.* at 20.

<sup>215</sup> *Id.*

Second, is the feminist researcher realistic about her role and limitations in doing participatory research? My experiences as a member of a group of law students who attempted a community-based law reform proposal and experienced severe research constraints, in terms of time, finances, and expertise, color my responses to these questions.

Initially, the most common responses to our attempts at field work in the rural communities of Karnataka, were hostility, distrust and denial that any form of prostitution existed there. In later conversations, after the community became comfortable with the nature of [\*PG224]our research project, its members would readily admit to engaging in prostitution. However, their responses were quite confusing. On the one hand, they were able to rationalize being employed in prostitution. Their working conditions were certainly less abusive than in the urban brothel form of prostitution. On the other hand, they also made stray remarks regarding their desire for better irrigation facilities so that they could engage in agricultural cultivation rather than prostitution as a means of livelihood. Similarly, some members admitted to having misgivings about the immorality of making a living out of prostitution.

At least one successful attempt at community rehabilitation in rural Karnataka reinforced this perspective. In that instance, credit facilities, a motivated bank manager and some amount of moralizing on the evils of prostitution were seemingly sufficient for members of the community to forego prostitution. While similar confusion is also seen in urban prostitution, the fact that urban prostitute women suffer more ostracism and fewer occupational alternatives forces them to return to prostitution after their release from government homes. Hence, at times, prostitute women are able to say categorically that prostitution is what they want to do for a living. Nonetheless, these women also create pockets of resistance regardless of the type of prostitution in which they engage. Indeed, instances of such agency are seen even in oppressive situations of brothel prostitution that are portrayed as akin to sexual slavery. At other times, however, women are vocal about the circumstances under which they had to enter prostitution and how they would leave it if they could find alternative employment or get married. The overarching issue therefore, is to determine and articulate this apparent contradiction in terms of legal policy without romanticizing the willingness of entire communities to engage in prostitution for a living as an expression of their distinct standards of sexual morality, dismissing it as false consciousness, or reducing all the community's problems to issues of poverty and the lack of sound development policies.

Given that the conversation between feminist legal researchers and these communities may be the only interface between law makers and prostitute women, the act of interpreting such experiences is critical. Also, when feminist researchers are expected to act only as facilitators in helping articulate the perspective of a community aware of its own realities, it is difficult not to evaluate and judge them in the light of one's own feminist framework. For example, an account by a social worker during a project with an NGO amongst the tribal communities of the state of Madhya Pradesh that engage in prostitution is [\*PG225]quite telling. His innate sense is seemingly that prostitution is wrong and oppressive of women; however, this opinion is at odds with the good health

and prosperity of a community that thrives because of the prostitution of its girls and women. He notes:

I want to tell you about the situation that perplexes [sic] us. I am dealing with some villages which traditionally are the source for prostitution. I have been observing these families for the last few years and have been taking the doctors there. None of them have been found to be suffering from STD and AIDS. They live up to 60 years and are active sex workers from the age of 16 to 40 years. They take a lot of non-vegetarian food, drink heavily and take on 8 to 10 customers on an average per day.<sup>216</sup>

He notes elsewhere that although efforts have been made to induce women to leave the profession and take up government-sponsored vocational training programs, veering the community away from prostitution will be a long and difficult task.<sup>217</sup> Prostitution is “easy money”; families can earn up to Rs. 2000 (approximately \$40 U.S.) a day, which is substantially more than they would otherwise earn though grazing livestock or cultivation.<sup>218</sup> Hence, an issue is whether, in the attempt to engage in law reform, reformers should enter the field with a predetermined agenda—such as the abolition of prostitution—or if they should allow for a two-way dialogue when the community, and more importantly, the women engaged in prostitution are satisfied with the current system. In this context, the agenda for a Third World feminist theoretical process, as articulated by Nair and John, would be:

[T]he task of theorisation, which can never take the form of the application for a theory that one possesses in advance, [\*PG226]but must resemble a process, a historical and political mode of conceptualising sexual economies that would be true to our experiences of an uneven modernity, calling for multiple levels of analysis and the forging of articulations between the global and local.<sup>219</sup>

Another issue is how one actually mobilizes people through participatory research, given the enormous resources required in terms of time, people and money. How do we interpret women’s experiences to effect law reform while ensuring that this research qualitatively changes their lives? We constantly faced this dilemma at the government homes we visited in Karnataka. For example, many of the prostitute women we met expected us to find them jobs. When we turned to a feminist non-profit organization in Bangalore to explore the possibility of formulating such a program, we found that the task was enormous and that resources were scarce. Without belittling the truth of this

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<sup>216</sup> *Women and Children in Prostitution, supra note 30, at 58.*

<sup>217</sup> *The fact that these attempts could take a lifetime is evident in the life story of Ram Sanehi, a reformer in the state of Madhya Pradesh whose personal crusade against the practice of prostitution in his native Bedia community has lasted several decades. His crusade has also taken many forms, including alerting the police to the location of brothels in urban areas, rehabilitating prostitute women, lobbying the government to grant land to families engaging in prostitution, filing public interest litigation in the High Court to have authorities notified in the state of Madhya Pradesh, and running a school exclusively for the children of prostitute women in his community. However, of the 265 Bedia families in Ram Sanehi’s town, only 120 families have quit prostitution as a means of livelihood. See Mukerji, supra note 201.*

<sup>218</sup> *Women and Children in Prostitution, supra note 30, at 78.*

<sup>219</sup> *Nair & John, supra note 35, at 7.*

reality, the fact that there was not a single NGO working in the area of prostitute women's rights in Bangalore has grave consequences for feminist research. Thus, it will be a long time before our proposals for law reform reflect the real life experiences of prostitute women which test their utility for women's struggles. Thus, on paper, we may have a blueprint for our expectations for feminist theory and feminist research. However, in the absence of institutional structures to foster and implement the results of such research, we may have to continue to grope for meaning in what prostitute women say to feminist researchers and advocates for law reform.

## VII. "We Both Know Some Things, Neither of Us Knows Everything"<sup>220</sup>

### A. *Who Produces Feminist Knowledge?*

It is evident from the discussion in Part VI that there are many gaps in our understanding of prostitution and, as such, there is a serious need for input from prostitute women. Recent feminist legal theory, at least in North America, appears to have been unsuccessful in acknowledging or validating prostitute women's experiences thus far. In the words of one such prostitute woman:

[\*PG227]You're not giving legitimacy to our story of how we're being hurt and who is hurting us. You—with your unwillingness to contact us—*you're* hurting us . . . you're talking as a fucking observer. I know fucking violence. You sit on your little pedestal. And I can't come to you as a politicized whore and say, "I've been hurt like this, and this is who did it." You don't like my definition of who's doing it, and so you don't want to hear my story.<sup>221</sup>

As feminist legal theory currently stands, prostitute women's experiences have to pass through the feminist legal gaze before being validated as possibly true and legitimate. Thus, feminist legal scholars hold the reins of what qualifies as feminist and what does not. Privileging feminist knowledge in the hands of feminist legal scholars in this way is problematic. However, cultivating respect for prostitute women's experiences and their views of the law could stem this trend. This insight is the basis for the most compelling argument in favor of decriminalization yet. The current criminal attribute of prostitution has led to its organization around other forms of criminal activity, thereby making it immensely dangerous for non-prostitute women to communicate with prostitute women. Hence, decriminalization would decrease this danger, facilitating the conversation between prostitute women and feminists. Meanwhile, the strength of the prostitute rights movement has increased. This phenomenon, even in the absence of overwhelming support from feminist academia, has prompted some in the movement to herald it as a

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<sup>220</sup> *Too Much Heat, Not Enough Light*, *supra* note 24, at 20 (quoting Patricia Maguire, *Doing Participatory Research: A Feminist Approach* 45–46 (1987)).

<sup>221</sup> *From the Floor*, in *Good Girls/Bad Girls: Sex Trade Workers and Feminists Face to Face* 181, 182 (Laurie Bell ed., 1987) [hereinafter *Good Girls/Bad Girls*].

distinctly post-modern turn in feminist theory-building in North America. I feel it is important to note that I do not romanticize the contributions of prostitute women's groups. These groups are in no way the true representatives of prostitute women's interests since they are subject to all the limitations that organizations in general face. Indeed, only a small percentage of their members are, or at one time were, actually working prostitutes, and even some prominent leaders of the movement, such as Priscilla Alexander, never have, in fact, engaged in prostitution.<sup>222</sup> However, their presence corrects, to some extent, the present invisibility of prostitute women.

[\*PG228] The experiences at the national workshop on prostitution held in 1997 bolster the above insights.<sup>223</sup> At the workshop, it was evident that the image of prostitute women as devoid and incapable of any agency<sup>224</sup> precluded us from realizing the full potential of the liberating discourses that we choose to use, such as human rights discourse. The stated aim of the workshop was to understand prostitution from a human rights perspective so that we could empower these purportedly "violated" human beings in the process. Instead, the workshop only went so far as to suggest that we view prostitute women as victims in need of rehabilitation, rather than as deviants in need of correction. This suggestion was made despite the fact that prostitute women had already begun to organize themselves to fight daily oppression long before the government, the medical community or the women's movement took an interest in their welfare.<sup>225</sup> For example, recently, prostitute women have used the AIDS epidemic creatively with the assistance of NGOs or the government, as the situation demands, to organize, push for their agendas of empowerment and resist an unfair legal system. The achievements of the women in the Sonagachi area of Kolkata in this regard are well known.<sup>226</sup> In the state of Andhra Pradesh, K.J. Prasad, working with the Society for Awareness through Learning and Training (SALT), reports that many prostitute women attended a conference that his organization held, despite threats that the police would arrest them if they attended the conference. The police did, in fact, arrest them upon their return to their hometowns.<sup>227</sup> Prasad quotes the women as saying:

We are not pickpocketing, we are not looting people, we are only selling our bodies to earn our living. How are the police and *dadas* living? If prostitution is stopped today 50% of the police income will also be stopped. If you go to the Special [\*PG229]Court at 8 in

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<sup>222</sup> Valerie Jenness, *Making It Work: The Prostitutes' Rights Movement in Perspective* 114, 115–16 (1993).

<sup>223</sup> See *supra* notes 111–119 and accompanying text.

<sup>224</sup> This denial of the agency of Third World prostitute women is even shared in certain non-academic quarters in North America. For instance, Carter and Giobbe note that "the overwhelmingly white leadership of this [international prostitutes' rights] movement is comprised of academics and attorneys who don't have to do sex work, and middle aged former sex workers who no longer do sex work. . . . [T]hese individuals exploit third world women of color who have few viable alternatives to sex work." Vednita Carter and Evelina Giobbe, *Duet: Prostitution, Racism and Feminist Discourse*, 10 *Hastings Women's L.J.* 37, 50 (1999) (*italics in original*). Thus, even though the article seeks to analyze racism and sexism in prostitution, it is able to view Third World women only as poor victims. See *id.*

<sup>225</sup> See discussion *supra* Part I.

<sup>226</sup> See generally Dugger, *supra* note 45.

<sup>227</sup> *Women and Children in Prostitution*, *supra* note 30, at 49.

the morning the judge even does not investigate the charges before pronouncing his sentence and asks us to pay a penalty of Rs. 50. Allow us to live and not die.<sup>228</sup>

Similarly, in the state of Bihar, prostitute women have established HIV prevention efforts which have taken root amongst both the women themselves and their clients. The women have also scheduled regular meetings with the police and other administrative officials to reduce government harassment.<sup>229</sup> Moreover, the recent formation of the National Network of Sex Workers demonstrated prostitute women's efforts to organize and fight oppression. In response to the call of the NCW for the rehabilitation of prostitute women, Nimmi Bai, general secretary of the Northern India Secretariat of the Network, called a press conference during which she argued that rehabilitation was impossible as a practical matter. Instead, Bai advocated for the licensing of prostitute women.<sup>230</sup> She argued that sex workers, like other workers, have a right to their livelihood. As such, she demanded "self-regulatory boards of sex workers, destigmatisation of women in prostitution, and recognition of their human rights and civil liberties."<sup>231</sup> The plan, according to the Jan Shakti Vahini, the NGO that organized the conference along with the Network,<sup>232</sup> was to organize demonstrations in major Indian cities to highlight the problems of sex workers and lobby for legalization on a country-wide basis. Moreover, every year since 1996, sex workers from all over the country have gathered in Kolkata to address the needs of women in prostitution. The demand for the repeal of the ITPA and the call for legalization of prostitution has been reiterated each year.<sup>233</sup>

## ***B. East/West, First World/Third World Global Feminisms***

The unwillingness to acknowledge prostitute women's experiences as legitimate acquires a whole new dimension in the Third World context. Third World feminist scholars like Chandra Talpade Mohanty have already argued that most Western scholarship on Third World women tends to presume an essentialist and universalist categorization of the "Third World woman" as "frozen in time, space and history."<sup>234</sup>

As previously explained, Western feminists and Third World women are equally to blame for an essentialist image of the Third World woman.<sup>235</sup> Particularly, in the context of prostitution, several Indian feminists, like Jean D'Cunha and Donna Fernandes, rely on Kathleen Barry's 1979 book on sexual slavery in making their arguments against decriminalization as a solution to the legislative impasse in India today. Ironically, Barry's book is a classic case of research which is afflicted by the patronizing attitude

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<sup>228</sup> *Id.* at 85 (*italics added*).

<sup>229</sup> *Id.* at 97.

<sup>230</sup> *They Come Out of the Shadows, The Hindu (New Delhi), May 3, 1998, at 10.*

<sup>231</sup> *Id.* (quoting Nimmi Bai).

<sup>232</sup> *The NGO claims to represent about 1.5 million sex workers nationally and has branches in Kolkata, Sangli, Tirupati and Delhi.*

<sup>233</sup> *See supra notes 71–73 and accompanying text.*

<sup>234</sup> *Mohanty, supra note 123, at 5–6.*

<sup>235</sup> *See discussion supra Part IV.*

that Chandra Talpade Mohanty alludes to, an attitude that would today be considered culturally insensitive if not outright racist. In her book, Barry indicts various practices in the non-Western world, ranging from wearing veils and seclusion to arranged marriage and polygamy, as synonymous with female sexual slavery. If, however, arranged marriage were indeed sexual slavery,<sup>236</sup> the absurd conclusion that would follow is that the great majority of Indian women are sexual slaves. As such, the reliance on Western feminist writings has fueled the primary argument for not decriminalizing prostitution in India, namely that India, as part of the Third World, is basically different from the West. Thus, the argument proceeds, while women in the West choose to prostitute and hence, may clamor for decriminalization, women in the Third World are coerced into prostitution and therefore, decriminalizing it would be equivalent to condoning the very acts of violence that brought these victims to prostitution. However, the stubborn assumption on the part of Indian feminists, as well as the Indian government that informs this argument that prostitute women in India, like all Third World women, are exploited victims with no ability to change their own conditions is both uncritical and incorrect. Also, as Janaki Nair and Mary John point out:

Ironically enough, the very conception of the other of the West as being something to which western concepts do not apply (or only as an act of violation from which one must be redeemed) is itself a western legacy. Such constructions of cultural difference leave the West firmly in command.<sup>237</sup>

[\*PG231]Indeed, reinforcing the stereotypes that Western feminist writing creates leaves the West firmly in command over feminist discourse in India.

This is, however, changing and an incipient Third World prostitute women's movement seems to be emerging. Kamala Kempadoo notes in her book, *Global Sex Workers: Rights, Resistance and Redefinition*, which is a collection of writings of Third World sex workers, that Third World sex workers are challenging the dominance of Western sex workers at so called international sex workers' conferences:

I realized that sex workers' movements were no longer exclusive to the United States or Western Europe. Prostitutes and other sex workers were fighting to keep brothels open, challenging the various stigmas about prostitution, and exposing corruption within sex industries in many different countries—yet very few people had heard about these courageous steps. The voices and activities of sex workers outside the industrialized North went unheard, nearly invisible to all but those in the immediate surroundings.<sup>238</sup>

Kempadoo further notes:

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<sup>236</sup> Barry, *supra* note 98, at 166.

<sup>237</sup> Nair & John, *supra* note 35, at 6.

<sup>238</sup> *Redefinition 1–2* (Kamala Kempadoo and Jo Doezema eds., 1998) [hereinafter *Global Sex Workers*]. *Third World sex workers' challenges on issues of accessibility and setting the agenda of the international sex worker conferences heralds their increasing visibility within the world prostitute rights movement. Id. at 23. These challenges are somewhat reminiscent of similar struggles in conferences in which Western feminists and sex workers met face to face, with the sex workers demanding a role in setting the agenda of the conference.*

Despite the marginality and vulnerability of sex workers internationally, the notion of sex workers as exclusively “victims” is rejected by the authors of this volume. Even in cases where women, men, boys and girls are clearly harmed within the sex industry or are caught in debt-bondage and indentureship situations, it is the respectful recognition of subjectivity and personal agency that creates continuity in this collection. . . . By underlining agency, resistances to, and contestations of, oppressive and exploitative structures are uncovered, and the visions and ideologies inscribed in women’s practices made visible. Such analyses position sex workers as actors in the global arena, as persons capable of [\*PG232]making choices and decisions that lead to transformations of consciousness and changes in everyday life.<sup>239</sup>

Kempadoo argues that Western understandings have come to dominate the international discourse on sex work.<sup>240</sup> Hence, there is a need to provide a “direct counter point to a North American-Western European hegemony within contemporary feminist and prostitute writings about the sex trade.”<sup>241</sup> Jo Doezema provides one such critical conceptual counterpoint, arguing that the traditional refrain of the international debate on prostitution that delineates between voluntary sex work and forced prostitution simply divides prostitute women into madonnas and whores.<sup>242</sup> Advocates working under this divisive framework focus their energies on redressing the wrongs inflicted upon women forced into prostitution while ignoring the women who chose to enter prostitution on the theory that they deserve what they get. Doezema concludes, therefore, that “[a] number of today’s campaigns have become a platform for reactionary and paternalistic voices, advocating a rigid sexual morality under the guise of protecting women, and incorporating racist and classist perceptions in their analysis of the sex industry in developing countries.”<sup>243</sup> Also, if recent efforts of certain women’s organizations to ban the annual sex workers’ conference in Kolkata are anything to go by, the harm that an extreme view of sex workers as nothing but “victims” can do to the prostitute women’s rights movement is evident.<sup>244</sup>

Doezema’s thesis is certainly borne out in the Indian context, in which the government, conceptualizing prostitute women as victims, [\*PG233]has proposed to step up anti-trafficking and preventive efforts but is unwilling to recognize the rights of prostitute

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<sup>239</sup> *Id.* at 8–9.

<sup>240</sup> *See id.* at 13.

<sup>241</sup> *Id.* at 14.

<sup>242</sup> Jo Doezema, *Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy*, in *Global Sex Workers*, *supra* note 237, at 34, 46–47. This is ironic especially because, at least historically, North American prostitute women sought to achieve exactly the opposite result with the distinction of forced prostitution and voluntary prostitution. Arguing that engaging in prostitution was an exercise of their right to choose their work was intended not to be divisive, but rather to be a move towards empowerment.

<sup>243</sup> *Id.* at 45.

<sup>244</sup> *Press Release, Jyoti Sanghera, Centre for Feminist Legal Research & Global Alliance Against Traffic in Women (GAATW), Only Rights Can Stop the Wrongs (Mar. 2001) (on file with author)*. Apparently, some well known women’s rights activists who were participating in a meeting in Kolkata on violence against women handed a petition to the Governor of West Bengal calling for the ban on the Millennium Milan Mela, organized by sex workers for March 3–6, 2001 in Kolkata. *Id.* The organizing committee was soon served with a notice denying permission for the event. *Id.* However, the sex workers were able to muster enough political support to have the ban revoked in time for the meeting. *Id.*

women and support complete decriminalization. The dichotomy that exists in India today, then, is not between “good girls” and “bad girls,” but between “good girls” and “poor girls,” which is equally abusive. Moreover, this stance cripples our imagination at the policy making level. Despite the constant reiteration of prostitute women as victims, neither the feminist quarter nor the NCW wish to rework the tolerationist basis of ITPA to build in, for instance, stringent measures against the sexual abuse of prostitute women. Instead, they continue to delineate between the issues surrounding the trafficking of women and children and the issues facing women who are already involved in prostitution.

This distinction is of little use, because it makes little sense for human rights discourse to stop at the doors of the brothel. That is, women’s claims to human rights should not disappear twenty-four hours following their being trafficked. As such, if the state does not satisfy its obligations under the law in those twenty-four hours, then the prostitute women are left awaiting meaningful rehabilitation programs from the state, forty-five years in the coming, suffering abuse at the hands of police, clients, brothel-keepers, and pimps in the meantime. I propose that irrespective of whether women enter into prostitution voluntarily or not, once they are in prostitution, the aim should be to eliminate their exploitation and to improve the conditions of their sex work. Given that prostitute women in India are readily organizing to reclaim their human rights, it is absolutely unjustifiable to postpone agendas of complete decriminalization and, more importantly, the enactment of anti-discriminatory laws, especially when moralistic resolutions and the concomitant lack of any true representation of the prostitute women’s constituency are the key factors crippling law reform workshops on the issue of prostitution.<sup>245</sup> Moreover, the Government of India must avoid the inconsistent approaches that its agencies take on this issue. On the one hand, NACO, in the course of its HIV prevention efforts, has realized the importance of empowering prostitute women. However, if, the NCW decides to ignore the chronic problems in enforcing the ITPA and retain the Act, albeit with a few amendments, we will witness only further disempowerment of prostitute women. Since the ITPA in its proposed form will require the arrest of clients, prostitute women will have no ability to provide for their livelihood and, thus, will be left at the mercy of a state that is neither politically nor financially committed to the empowerment of prostitute women, and to the contrary, has only poorly funded rehabilitation programs that have a history of failure.

Third World feminists have tentatively begun to explore whether the Third World should treat prostitution as a legitimate form of work. Rajeswari Sunder Rajan identifies three predicaments in identifying sex work as any other form of labor.<sup>246</sup> The first is that “as long as sex work is associated with crime, health hazards and other anti-social aspects, it will be hard to “normalise” it legally or professionally within the protocol of work.”<sup>247</sup>

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<sup>245</sup> Dr. Vijay Thakur made such a call for representation by prostitute women, as recorded in the proceedings of the workshop. In so doing, he urged the participants to consult prostitute women rather than start out with an ideological stance. *Women and Children in Prostitution*, supra note 30, at 44.

<sup>246</sup> See Rajeswari Sunder Rajan, *The Prostitution Question(s): (Female) Agency, Sexuality and Work*, in *Feminist Terrains in Legal Domains: Interdisciplinary Essays on Women and Law in India* 122 (Ratna Kapur ed., 1996).

<sup>247</sup> *Id.* at 138.

Second, she struggles to identify the form of work that prostitution involves and to find a value for it in the specific function that it may serve. For instance, how does one avoid the commodification of sex as a product while expressing prostitute women's rights as worker's rights? At the same time, were one to alternately treat sex work as sexual labor, Sunder Rajan believes that this formulation would create a disjunction between prostitute women's personalities and their bodies.<sup>248</sup> Though this disjunction may be overcome by treating sex work as a service instead of labor, Sunder Rajan questions whether the variables that prostitution involves would detract from treating it as a service, thereby interfering with the conferral of benefits that designating an activity as a profession and service provides to its practitioners.

Sunder Rajan's final problem with treating prostitution as work concerns the highly engendered nature of this activity. Since most prostitutes are, and will probably continue to be women, treating prostitution as work would feminize it, thereby reducing the value of the occupation. On the other hand, feminists like Kamala Kempadoo, who addresses each of Sunder Rajan's concerns, offer the counterpoint to this skepticism about treating prostitution as a legitimate form of work. Kempadoo begins with the argument that "sexual labor today forms a primary source for profit and wealth and it is a constituent part of national economies and transnational industries [\*PG235]within the global capitalist economy."<sup>249</sup> Hence, she continues, given that sexual labor has value, it should be recognized as such, and the conditions of workers within this industry, and particularly their exploitation, should be addressed adequately.<sup>250</sup> Moreover, in the absence of adequate research detailing the experiences of Third World sex workers, Kempadoo notes that Western understandings of work dominate the international discourse on sex work.<sup>251</sup> Drawing from Than-Dam Troung's work on prostitution, Kempadoo wonders whether wet-nursing, temple prostitution, surrogate child bearing and donor sex could serve as illustrations of the historical and contemporary ways in which sexual labor has been organized for the re-creation and replenishment of human and social life.<sup>252</sup> Furthermore, while she agrees with a study that concludes that sex work is considerably similar to other forms of "emotional labor" that are commodified, such as the work of airline service personnel, masseuses, child care professionals, and so on, she argues that sex workers can distinguish between love and intimacy on the one hand and the sexual act itself on the other, and are therefore able to maintain an emotional and professional distance from their work.<sup>253</sup> Finally, Kempadoo observes that sex work is not exclusively the domain of women anymore, as male prostitutes also service men as well as women.<sup>254</sup> She does, however, acknowledge that there is a preponderance of prostitute women over prostitute men.

I agree conceptually with Kempadoo; however, I reject treating prostitution as a legitimate form of labor in my legislative proposal for two reasons. My primary concern

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<sup>248</sup> *Id.* at 139.

<sup>249</sup> *Kempadoo, supra note 237, at 8.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 13.

<sup>252</sup> *Id.* at 4.

<sup>253</sup> *Id.* at 5.

<sup>254</sup> *Kempadoo, supra note 237, at 5–6.*

with treating prostitution as a legitimate form of labor at the legislative level is due to the inefficacy of the minimum wage mechanism as it currently exists in India.<sup>255</sup> Given the varied forms of prostitution that exist in India today, there does not seem to be any real hope for enforcement of the law in this respect. The fact that the framework of most Indian labor laws traditionally has not been very useful for the unorganized sector further decreases the likelihood of enforcement. My second concern with treating prostitution as a legitimate form of labor is that this discussion is bound to reduce to a mere ideological battleground, unless prostitution is completely decriminalized, freeing prostitute women themselves to articulate their views on the issue.

### ***C. Historical Method as a Means of Doing Feminist Theory***

In resolving to correct the “blind spots” in Indian feminist theory mentioned in this Part, Parts II, III, IV and V of my article cease to be an unnecessary detour into Indian history. At the very minimum, I believe that this discussion adds a much-needed historicity to the feminist debate in India today on prostitution. It demonstrates the agency of prostitute women through the ages, against oppressive patriarchal structures, of the graded nature of state policies on prostitution, and of the tolerance and ambivalence of Indian society toward the practice. Furthermore, it illustrates the role of criminal law in the British project of sex colonization and of their apathy toward the needs of prostitute women when they no longer regarded prostitutes as necessary to their soldiers’ well-being. This refreshes our memories of nationalists eager to condemn prostitution while they constructed an image of the Indian prostitute as victim that persists to date. Thus, Indian feminists can set aside our collective amnesia on the issue today and take the first step toward truly maintaining feminism’s commitment to redressing the invisibility of women in history.

Moreover, on a substantive level, Parts II, III, IV, and V warn that history may be in danger of repeating itself. Unfortunately, the debate on prostitution in India today bears an uncanny resemblance to the debate during colonial times. The actors and speakers have changed, but the perspectives they espouse have not. For example, Indian feminists and the NCW are quite similar to the nationalist reformers who campaigned vigorously for the abolition of prostitution. The only difference seems to be that instead of salvaging the glory of Vedic Indian womanhood, today’s Indian feminists and the NCW seek to rescue the Third World woman from her numerous forms of oppression through the human rights discourse. Meanwhile, self-interested conservatives of the colonial era who spoke about the social importance of prostitution in ancient India find their counterpart today in the numerous prostitute women’s groups that brothel-keepers run in their efforts to maintain their own vested interests in the name of sexual liberation. Hence, if prostitution has been previously looked upon as a legitimate occupation in Indian history, even in the ancient form of state-run prostitution with its mixed consequences for women’s rights, there is no reason why we cannot, at the very least, currently

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<sup>255</sup> *Supra note 104 and accompanying text.*

decriminalize prostitution, thereby undoing the degradation of prostitute women brought about by the colonial encounter.

The hazards of engaging in this historicist study are two-fold. First, the above suggestion sounds revivalist and hence regressive. To be sure, my aim is not to call for a return to any glorious Indian past, much less to state-sponsored and regulated prostitution.<sup>256</sup> The limited purpose of Parts II, III, IV, and V is to suggest that by uncritically reinforcing stereotypical images of the Third World woman at a time when India is seriously rethinking its legislative policy on prostitution, the women's movement, the government and sex worker organizations will be hopelessly unprepared to meet the challenge in more ways than one. Moreover, by not engaging with the nascent prostitute rights movement, we, as feminist lawyers, isolate ourselves from groups such as the Bharatiya Patita Uddhar Sabha or the National Network of Sex Workers. This leads to an inability to be included in the Network's active engagement with the law and its potential to yield ground-breaking constitutional law decisions. Also, we will not be able to effectively challenge some of the misguided interventions of the Sabha or the Network, such as their proposal for licensing, which has proven abusive of prostitute women's rights in countries that have legalized prostitution. Thus, we may ultimately be laying the foundation for the same sort of paralysis currently evident in North American feminist theory regarding prostitution.<sup>257</sup>

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<sup>256</sup> I acknowledge the danger of being grouped with revivalists who bemoan the fallen status of devadasis and critically detail the role of the law in the process. According to them, the devadasi tradition was "Hindu society's strategic way of guaranteeing the preservation of the classical arts as religious, not secular expressions." *Devedasis: India's Legendary Temple Dancers, Hinduism Today*, v.15, n.8, available at <http://www.hinduism-today.com/1993/8/gen4> (Aug. 1993). They clearly distinguish however, between devadasis and other "public women" such as ganikas, courtesans and dance girls. On this point, feminists and revivalists stop being strange bedfellows.

<sup>257</sup> I briefly summarize the debate on prostitution in North America here so as to draw lessons from the North American experience. The question of how human beings, especially women, should view prostitution or sex for money has, in recent years, been the subject of much acrimony between feminists and prostitute women's groups in the United States and Canada. Responses to the feminist intervention, or lack thereof, have assumed expressions from anger to disillusionment with the women's movement in North America. Ironically, these sentiments are not as pronounced when it comes to the question of what legislative approach one should take toward prostitution. There seems to be a belief that decriminalization is the most appropriate policy with which to begin to address prostitute women's needs in North America, even if this belief is a feeble one, and valid only for the short-term. Barry, *supra* note 98, at 235–36; Jody Freeman, *The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent*, 5 *Berkeley Women's L.J.* 75, 107–08 (1989–90) [hereinafter *The Feminist Debate*]. This seems to unite feminists and prostitute women's groups alike who are usually understood to represent the two extreme positions on prostitution. However, feminists and prostitute women's groups do differ on where decriminalization will take them. Hence, while the latter look to decriminalization as a prelude to legalization, some feminists look to it as a means of eradicating prostitution.

The feminist approaches toward prostitution closely correspond with the three feminist schools of thought namely, liberal feminism, socialist feminism and radical feminism. Freeman, *supra*, at 94. With the liberal feminist and radical feminist positions being at the two ends of the spectrum, it has in the North American context become clear that neither the radical feminist nor the liberal feminist positions on prostitution can by themselves comprehend the complexity of the situation. Furthermore, the division within the feminist movement regarding prostitution has hindered work towards realistic proposals for reform. Over the years

[\*PG239][\*PG238] The second hazard of this historicist study is that it presumes that there are indeed unearthing voices of prostitute women from the past. Post-colonial feminists like Gayatri Chakravorty Spivak would probably disagree. In her famous essay, *Can the Subaltern Speak?*, Spivak observes that:

Between patriarchy and imperialism, subject-constitution and object-formation, the figure of the woman disappears, not into pristine nothingness, but into a violent shuttling which

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*however, both camps have inched towards a consensus over an immediate legislative strategy namely, decriminalization. Radical feminists acknowledge that the eradication of prostitution is not possible in the near future. They have also moved away from the original radical feminist position of partial decriminalization advocated by Kathleen Barry in 1979, presumably because it is unrealistic and could therefore, prove ineffective. See generally Barry, supra note 98. Meanwhile, liberal feminists visualize the ill effects of state regulation that would be inevitable if prostituting were treated like any other profession. Thus, it appears that notwithstanding the seemingly irreconcilable divide between the radical and liberal feminist views on prostitution, there may in fact be consensus at several levels, namely, the conceptual, philosophical and policy levels.*

*The most exciting developments in recent feminist legal theory on prostitution seems to come from the growing body of post-modern feminist writing. Post-modern views of prostitution have been espoused by at least two feminist writers, namely, Mary Joe Frug and Shannon Bell, the latter representing the prostitute women's quarter. Frug appears (only by inference) to prefer decriminalization over the post-modern stance of legalization. Bell on the other hand, does not even pretend to offer any policy suggestions. Thus, this could confirm a feminist's worst fears that post-modernism inevitably means disengagement from the feminist struggle. In understanding prostitution itself, Frug proposes first, that sex differences are semiotic. Mary Joe Frug, A Postmodern Feminist Legal Manifesto- An Unfinished Draft, in After Identity 7, 9 (Dan Danielsen and Karen Engel eds., 1995). Second, Frug argues that the nature of gender is indeterminate, incoherent and contingent. Therefore, the prostitute body engaging in sex for payment does not have an inherent meaning apart from that which the discourse that is describing her, creates of her. Bell, supra note 2, at 1-2. Also, Bell points to the "impossibility of a unitary female subject." She instead attempts a feminism which takes into account the "positional and experiential differences" of all women including prostitute women. Id. at 6. She seeks to rescue the prostitute body from modern and feminist discourse and opens up spaces for prostitute feminist voices. Conceding that liberal, socialist and radical feminisms are counter-hegemonic when it comes to patriarchy, she observes that they are all still rooted in modernity where there is no space for the prostitute woman's voice. A post-modern feminist reading of prostitution according to Bell, would acknowledge that "the gaps, silences and ambiguities of discourse provide the possibility for resistance, for a questioning of the dominant discourse, its revision and mutation." Bell goes on to state that "[w]ithin these silences and gaps new discourses can be formulated that challenge the dominant discourse." Id. at 87 (quoting Susan Hekman, Gender and Knowledge: Elements of a Postmodern Feminism (1990)). Hence, a post-modern reading would not engage as much in counter-identification as it would in dis-identification. In terms of the law, they contend that legal rules contain within them particular constructions of the female body. Specifically then, in relation to prostitution, legal discourse tends to at once terrorize, maternalize and sexualize the female body. Also, it makes these sex differences appear natural. The post-modern task therefore, would be to unearth these alternative meanings of the female body contained within rules directly on and related to prostitution. Legalization, to the extent that it refutes the sexualized version offered by radical feminists and the maternalized and terrorizing versions offered by the present legal system, constitutes the post-modern approach to prostitution. The post-modern suggestion is that we understand prostitution through the lenses of the radical sexual pluralism of Gayle Rubin wherein "no noncoercive sexual act, sexual identity, sexual community, or sexual object choice is morality or medically privileged over others as closer to some sexual ideal." Bell, supra note 2, at 92. At the same time, this "does not preclude critique of gender oppression in both dominant and marginal forms of heterosexuality or analyses of the relationship among consent, desire and power in a sexist, racist, and classist society." Id. at 95. Thus, the radical pluralist position differs considerably from the liberal pluralist position which does not take these differences into consideration.*

is the displaced figuration of the third-world woman caught between tradition and modernization.<sup>258</sup>

Hence, she concludes that:

The subaltern cannot speak. There is no virtue in global laundry lists with “woman” as a pious item. Representation has not withered away. The female intellectual as intellectual has a circumscribed task which she must not disown with a flourish.<sup>259</sup>

Spivak’s skepticism of unearthing the subaltern female voice is well taken. However, to the extent that even these imagined voices of the subaltern can challenge the essentialism our own discourse embodies, the risk of speaking for the subaltern is worth taking, albeit cautiously. It is this multiplicity of female subaltern experiences that the Vedic *dasi*, the *devadasi* and the present-day prostitute woman embody that I sought to demonstrate in Parts II, III, IV and V of my article.

Moreover, Part II portrays the contingency of gender throughout history. The ambivalence of ancient Indian society towards prostitu[\*PG240]tion is a classic example of the existence and management of this contingency without brutalizing the prostitute woman. Conversely, the degradation that colonialism forced on the Indian prostitute woman is, if anything, an endorsement of Shannon Bell’s observation that the prostitute body has no inherent meaning apart from the one that the dominant context gives her.<sup>260</sup>

## Conclusion

In conclusion, due to the AIDS epidemic, the emergence of sex worker organizations, and the NCW’s increased interest in prostitution, a national debate has developed on the various possibilities for law reform in the area of prostitution in India. The NCW’s focus on tackling the root causes of entry into prostitution and on cracking down on trafficking is welcome and finds support in the nascent Indian prostitute women’s movement.<sup>261</sup> At the same time, the government must be reminded that law reform is a lengthy process and that, in the interim, women and children are engaged in prostitution. Irrespective of whether they entered prostitution voluntarily or not, the government must address and protect their rights. Where prostitute women are organized and have articulated their demands and their vision of the law, the Indian women’s movement and the government would do well to welcome the few, stifled prostitute women’s voices that we hear, before seeking refuge in essentialist formulations of Third World womanhood. This preserves hope for the recognition of Third World women’s agency in feminist theory.

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<sup>258</sup> Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *Marxism and Interpretation of Culture* 271, 306 (Cary Nelson & Lawrence Grossberg eds., 1988).

<sup>259</sup> *Id.* at 308.

<sup>260</sup> Bell, *supra* note 2, at 2.

<sup>261</sup> See *supra* note 72 and accompanying text.

Thus, I offer concrete suggestions on two fronts—substantive and methodological. On the substantive front, I provide a desirable legislative policy on prostitution in India. On the methodological front, I prepare a tentative, though incomplete, checklist for feminist legal research.

As previously explained, the predominant feminist position of decriminalizing all aspects of the prostitute woman's activities, while penalizing brothel-keepers, pimps and clients, does prostitute women more harm than good.<sup>262</sup> Moreover, the current tolerationist approach contains questionable clarity and doubtful utility. It has, in its forty-five years of enforcement in India, proved singularly ineffective and violative of the rights of prostitute women. Thus, in adopting this approach, feminists are in danger of aligning themselves with conservatives who view prostitution as a necessary evil. Similarly, the legalization of prostitution would not be a sound approach, especially given the concerns about limiting the reach of the state's powers over prostitute women's lives, especially in the context of the AIDS epidemic. Hence, legalization alone, without any legislative support to address the systemic discrimination that prostitute women face, is counter-productive to the feminist agenda of enhancing their life choices.<sup>263</sup> The best alternative, therefore, is the legislative proposal outlined earlier as the Sex Worker (Legalization for Empowerment) Bill, 1993, with certain modifications.<sup>264</sup> The Bill not only decriminalizes prostitution entirely, but also provides for anti-discrimination provisions in the nature of civil rights legislation.<sup>265</sup> It also enables, but does not require, the organization of prostitute women into collectives, if they so desire. These provisions on anti-discrimination and organization assume renewed vigor in light of the AIDS epidemic and the possible infringement of prostitute women's rights as a result.

As for feminist legal theory and, consequently, feminist legal research, they should be focused on concrete struggles for social change. Theory-building has to be intimately linked with policy analysis. Moreover, feminist legal theory should stay true to the

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<sup>262</sup> *There are other Indian feminists who support complete decriminalization of prostitution. See Women in India, supra note 35, at 24–25. The Consultation recognized the value of the AIDS pandemic in inspiring a reevaluation of sexual mores in society, thereby providing us with an opportunity for rethinking the legislative policy on prostitution and allowing the women's movement to build alliances across borders on the issue. The Consultation, however, also saw the danger of HIV prevention agendas that could end up violating prostitute women's rights. Thus, it suggests decriminalization as the appropriate policy approach in contrast to legalization, because legalization allows the state too much power in regulating the lives of prostitute women. It also opines that abolition would be impracticable and would amount to ignoring the reality that prostitution is indeed an industry in and of itself*

<sup>263</sup> *See supra notes 97 & 102.*

<sup>264</sup> *See supra notes 100–105 and accompanying text. I support this proposal completely except for its suggestions that prostitution be made an exercise of the right to work and, in so doing, be enforced through the framework of Indian labor laws. Moreover, I disagree with the suggestion that we treat sexual services like any other services. Despite its unmistakable leanings toward legalization, in substance, my proposal falls within the gray area between the complete legalization of prostitution and the decriminalization of prostitution with the ultimate aim of its eradication. This intermediate approach, decriminalizing prostitution while enhancing the civil rights of prostitute women, has been set out in detail by the International Committee on Prostitutes' Rights. For details of their Charter, see D'Cunha, supra note 22, at 144–45.*

<sup>265</sup> *The NCW has begun to articulate a non-discriminatory approach in certain areas. See supra notes 102–114 and accompanying text.*

aspirations of feminist research and its participatory goals. Despite the dilemmas [\*PG242]and constraints that accompany this type of research, commitment to action research will ensure that feminist legal research reflects the experiences of all women. In turn, such legal theory would distance itself from gender essentialism, and because gender is an important cause of women's oppression, feminist legal theory would acknowledge that gender has no inherent meaning, but rather is contingent and historically conditioned. The aim, therefore, should be to attempt post-essentialist and contextual research. In this endeavor, legal theory would continue to summon support from other critical disciplines such as feminist historiography, literary criticism and subaltern studies. Moreover, feminist legal theory should be particularly wary of stereotypical constructs of Third World women and consider unfeasible, and even undesirable, one overarching Third World or Asian feminist view. Rather, legal theory should seek, whenever possible, to illuminate women's experiences and, in particular, instances of their agency and resistance. In addition, legal theory should be conscious of the fact that women's rights in India have often been the battleground between competing discourses such as the nationalist and colonial discourses and, as a result, should seek to unearth this conflict when understanding any issue regarding prostitution. Finally, feminist legal theory should welcome a variety of feminist positions on any given area, both in the theoretical as well as political realms, without insisting that one of them is more complete or true than the rest. In so doing, it should assume that even fundamental differences between these approaches would not derogate from feminist struggles, but rather would enrich feminist debate on a given issue and make possible more options in addressing the realities of women's lives. Meanwhile, Scarlot continues with her civil disobedience.

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