

SEX WORK AND THE LAW IN INDIA: PERSPECTIVES, VOICES AND NARRATIVES FROM THE MARGINS

DIPIKA JAIN¹ & KIMBERLY RHOTEN²

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¹ Dipika Jain, Associate Professor & Executive Director, Centre for Health Law, Ethics and Technology, Jindal Global University; OP, Jindal Global University; LLB (Delhi), LLM (Dalhousie), LLM (Harvard).

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² Kimberly M. Rhoten, Researcher, Centre for Health Law, Ethics and Technology, Jindal Global Law School; OP, Jindal Global University; JD (University of Chicago Law School); BA in Anthropology and Biology (University of California, Berkeley).

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I. INTRODUCTION

The Supreme Court of India recently took up the issue of physical and sexual abuse faced by sex workers³ as a result of a 2010 public interest litigation (“PIL”) filing on behalf of several sex workers. The case arose out of a criminal appeal⁴ by the defendant who had been convicted of murdering a sex worker. In its dismissal, the Court took note of the harassment and abuse that sex workers contend with every day and recognized that “prostitutes also have a right to live with dignity.”⁵ It then converted the case *suo moto* into a PIL, which called into question the constitutionality of India’s sex worker policies itself. Observing that “prostitutes also have a right to live with dignity under Article 21 of the Constitution of India since they are also human beings,” the Supreme Court directed the appointment of an expert panel to consider any potential reforms regarding the rights of sex workers and to compile recommendations to the Court.⁶ The Court directed the National Commission for Women (“NCW”)⁷ to attend these panel meetings and propose legislative reforms. Durbar Mahila Samanwaya Committee (“DMSC”), a sex workers’ organization, and its affiliate Usha Multipurpose Cooperative Society (“USHA”), were both impleaded and are represented

³ We have utilized the term “sex work” in lieu of other alternatives (e.g. prostitution, sex trade, etc.) because that is the term worker unions in India use to refer to their members. See DURBAR MAHILA SAMANWAYA COMMITTEE, <http://durbar.org> [<https://perma.cc/KKX4-5Y2S>]. We also utilize this terminology to emphasize and acknowledge sex work as work. See Jana et al., *The Sonagachi Project: A Sustainable Community Intervention Program*, 16 AIDS EDUC. & PREVENTION 405, 407 (2004).

⁴ *Budhadev Karmaskar v. State of West Bengal*, (2011) 2 SCR 925 (India).

⁵ *Id.* at 930.

⁶ *Id.*

⁷ The National Commission for Women (“NSW”) was established in 1992 under India’s Constitution, and its role was delineated by the 1990 National Commission for Women Act. The Commission advocates for the rights of women in India by advising the government on all policy matters affecting women. In addition, the Commission reviews constitutional and legal safeguards for women. *About Us*, NAT’L COMM’N FOR WOMEN, <http://ncw.nic.in/firmAboutUS.aspx> [<https://perma.cc/7ZF8-E3Q2>].

by the NGO Lawyers Collective. The recognition of sex worker rights by the Supreme Court as a discussion worthy of judicial discussion is already a significant step forward in sex worker legislative reform in India, but meaningful reform requires consideration of the sex workers themselves.

India's current anti-trafficking laws, including the Immoral Traffic (Prevention) Act ("ITPA") and law enforcement efforts, erroneously conflate sex work and sex trafficking. For example, the ITPA includes a blanket criminalization of solicitation for sexual services without exempting those who do not willfully engage in sex work.⁸ Thus, the ITPA can have the unfortunate effect of criminalizing the sex trafficking victims whom it intends to protect. On the other hand, criminalizing sex work also leads to the misconstruction of voluntary sex workers as sex trafficking victims in need of rehabilitation.

Decriminalizing sex work under the ITPA and other relevant laws could potentially avoid such results. Decriminalization would prevent the unfortunate arrests of sex trafficking victims and end the misplaced forced rehabilitation of sex workers. Legalization of sex work on the other hand is a step beyond merely decriminalizing the paid sex transaction. Under a legalization framework, the industry would be responsible for upholding certain government regulations. Furthermore, sex workers would be entitled to potential social benefits (e.g. health insurance) and would be required to fulfill employee obligations (e.g. taxation).

Given the aforementioned issues with current legislation, the NCW submitted a proposal for legalizing sex work to the cabinet in November 2014. According to Lalitha Kumaramanglam, chairperson for the NCW, the proposal for legalization "is meant to regulate the trade"⁹ and covers various employment rights such as healthcare and work hour regulations. NCW's proposal is controversial not only among the public at large but also within the sex worker communities of India. Generally, India's sex worker communities appear to be fractured on the question of whether sex work should merely be decriminalized or whether generative legislative steps should be taken to fully legalize and regulate the industry. Decriminalization would result in the repeal of several provisions in the ITPA, which currently criminalizes multiple aspects of paid sex transactions including the solicitation of clients and brothel keeping.

Academics grapple with the subject of sex work in India and around the globe.¹⁰ While some feminists oppose sex work, arguing that it encourages

⁸ Immoral Traffic (Prevention) Act, No. 104 of 1956, INDIA CODE (1993).

⁹ Smriti Kak Ramachandran, *NCW Chief for Legalising Sex Trade*, THE HINDU (Oct. 28, 2014), <http://www.thehindu.com/news/national/NCW-chief-for-legalising-sex-trade/article11086511.ece> [<https://perma.cc/J99C-QPWK>].

¹⁰ See generally PRABHA KOTISWARAN, *DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA* (2011) (examining sex workers' demands that they be treated as workers and contemplating questions of redistribution through law within the sex industry by examining the political economies and legal ethnographies of two urban sex markets in India); Catherine A. MacKinnon, *Trafficking, Prostitution and Inequality*,

exploitation of women, others call for a distinction between sex work and sex trafficking, noting the agency that many sex workers have. In light of these perspectives, what does it mean for “prostitution” to be decriminalized? In her famous work, Rajeswari Sunder Rajan describes the “prostitution question” (namely whether “prostitution” should be decriminalized or remain criminalized in order to prevent the subjugation of women¹¹) as being exceptionally fraught due to the divide it creates amongst feminists in India and across the world.¹² However, she questions whether any of the perspectives in this debate truly reflect the interests of “prostitutes” or sex workers themselves.

In this article, we critically evaluate India’s current anti-trafficking and anti-sex work laws as well as the country’s implementation of such laws in light of the actual lived experiences of sex workers. These experiences were gathered from growing ethnographic literature as well as our own interviews with members of the DMSC in Sonagachi (the red-light district of Kolkata, India), government officials, law professors, and activists in Delhi, Kolkata and Bangalore. Interviews were conducted as part of a joint and collaborative clinical project between the Centre for Health Law, Ethics and Technology of the Jindal Global Law School, the University of Chicago Law School, and Cornell Law School.¹³ The interviews were semi-structured in nature and lasted approximately one hour. Interviews were conducted in person with translation assistance when necessary.

This paper is divided into six parts that explore the various issues articulated by those key stake holders who were interviewed. Section A explores the effects of India’s anti-trafficking efforts and the sex work industry. Section B delves into the reactions and experiences of the sex worker community in response to India’s anti-trafficking legislation. Section C covers the debate within India’s sex worker community on the benefits of the decriminalization and legalization approaches. Section D argues for an agency labor framework that requires the consideration of sex workers as persons with agency and decisional capacity—individuals with voices and lived experiences necessary to inform and guide sex work legislation and policy. Section E explores the sex work industry as situated within a discussion about what constitutes “work.” Section F discusses the conflation of

46 HARV. C.R.-C.L. L. REV. 271 (2001) (discussing how sex trafficking for prostitution is a practice of inequality, with reference to the Swedish model); Kamala Kempadoo, *Globalizing Sex Workers’ Rights*, 22 CANADIAN WOMAN STUDIES 3 (2003) (examining sex workers’ rights movements in different times and places and addressing the effect of economic globalization on the sex industries).

¹¹ See, e.g., Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 13 (1993) (discussing the gap between the promise of civil rights and the real lives of prostitutes).

¹² RAJESWARI SUNDER RAJAN, *THE SCANDAL OF THE STATE: WOMEN, LAW, AND CITIZENSHIP IN POSTCOLONIAL INDIA* 117 (2003).

¹³ CTR. FOR HEALTH LAW, ETHICS & TECH., JINDAL GLOB. LAW SCH., INDIA’S HUMAN TRAFFICKING LAWS AND POLICIES AND THE UN TRAFFICKING PROTOCOL: ACHIEVING CLARITY (2015) [hereinafter ACHIEVING CLARITY].

voluntary sex workers and voluntary migrants with involuntary migration for forced human trafficking in the flesh trade and its implications.

Several themes are apparent from our research findings: (1) there exists a disproportionate and unquestioned enforcement focus on preventing and penalizing sex trafficking in comparison to labor trafficking, and (2) conflating persons engaged in voluntary sex work with victims of sex trafficking by law enforcement is harmful. Additional interview findings suggest a diversity of opinion within the sex worker community regarding how to best structure India's sex work laws and policies. Perspectives on the benefits and downfalls of legalization or decriminalization legislation highlight the many forms of discrimination faced by sex workers. Our interviews also indicate that an agency labor framework may exculpate sex workers from the academic-generated feminist question of "sex work" and allow the sex workers to speak for themselves. While the sex worker community lacks a uniform consensus about how the Supreme Court should proceed, the community's concerns should figure prominently in any policy reform discussion or potential future legislation. We argue that any significant sex work legislative change cannot take place without meaningful participation by the most important stakeholders: the sex workers. It is time that lawmakers allow lived experiences from the margins to inform the lawmaking process rather than only expertise. This article advocates for the incorporation of the subaltern voices of sex workers into national policy because their voices are informed by actual lived experience.¹⁴

No one can speak for sex workers except sex workers themselves. In accordance with such conservatism, this article does not seek to advocate for one legislative approach over another but rather puts forward the immediate need to involve sex workers and their lived experiences in legislative reform. Furthermore, passively listening to the sex worker community would serve only to achieve, at worst, a filtered representation of the sex worker voice and, at best, passive inaction. In the future, legislators instead must be willing to speak to this diverse community of people representing a myriad of personal as well as shared experiences to achieve reform.¹⁵ It is imperative that the voices of these important stakeholders are not only heard but also represented and accommodated in policy and legal reforms.

¹⁴ For example, the Criminal Law (Amendment) Act 2013, passed in 2013 by the Indian legislature, incorporates the sex worker community's concerns regarding the previous Indian Penal Code's definition of trafficking. Specifically, the Criminal Law Amendment reforms portions of Section 370 of the Indian Penal Code, which had previously and erroneously conflated all forms of sex work (regardless of consent) with trafficking. Criminal Law (Amendment) Act, 2013, No. 13 of 2013, Acts of Parliament, 2013 (India).

¹⁵ See generally Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg eds., 1988) (giving a detailed description of the institutional obscuration of subaltern choices and experiences).

A. *Trafficking Laws & Policy in India: Conflating the Trafficking Victim with the Sex Worker*

Prior to British colonization in India, there was a more nuanced cultural understanding of sex work.¹⁶ Temple dancers, courtesans, and monogamous concubines existed in society and culturally they were not considered immoral.¹⁷ However, the British, unfamiliar and unable to situate such groups within the paradigm of their own culture, lumped them into the larger category of “prostitute.”¹⁸ This did not stop British officers from taking Indian mistresses and visiting brothels. The eventual increase in the prevalence of venereal disease amongst the British officers heightened the government’s growing concern over health costs. As a result, the colonial state enacted laws penalizing such professions under the larger umbrella definition for prostitution in the Contagious Diseases Act of 1864, which “required the registration and periodic medical examination of prostitutes in all cantonment cities.”¹⁹ According to some scholars, an insidious purpose of this Act was to determine which women were healthy and allowable in cantonment areas, rather than to prohibit such transactions across the board.²⁰ These legislative efforts and British cultural control devalued the cultural significance of these diverse groups of women within India.²¹

The ITPA, originally passed in 1956 and amended in 1986, outlaws the trafficking of persons for commercial sexual exploitation (prostitution)²² and penalizes brothel keeping,²³ pimping,²⁴ procuring,²⁵ detention of girls or women in a place for commercial sexual exploitation,²⁶ and living off of the earnings of prostitution.²⁷ Any discussion of sex work policy in India necessitates a discussion of the ITPA. The ITPA clearly showcases the misguided conflation of sex work and sex trafficking in India’s laws and policies.²⁸ Such prohibitions extend to violators regardless of whether they are volunta-

¹⁶ Erica Wald, *Defining Prostitution and Redefining Women’s Roles: The Colonial State and Society in Early 19th Century India*, 7 HISTORY COMPASS 1470, 1470 (2009).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Veena Talwar Oldenburg, *Lifestyle as Resistance: The Case of the Courtesans of Lucknow, India*, 16 FEMINIST STUDIES 259, 260 (1990).

²⁰ Sudhanshu Bhandari, *Prostitution in Colonial India*, MAINSTREAM WEEKLY (June 19, 2010) <https://www.mainstreamweekly.net/article2142.html> [<https://perma.cc/6EAG-6V4Q>].

²¹ Veena Talwar Oldenburg, *Lifestyle as Resistance: The Case of the Courtesans of Lucknow*, in CONTESTING POWER: RESISTANCE AND EVERYDAY SOCIAL RELATIONS IN SOUTH ASIA 23, 23–61 (Douglas Haynes & Gyan Prakash eds., 1991).

²² Immoral Traffic (Prevention) Act, No. 104 of 1956, INDIA CODE (1993) § 5(1).

²³ *Id.* § 3.

²⁴ *Id.* § 4(2)(c).

²⁵ *Id.* § 5.

²⁶ *Id.* § 6.

²⁷ *Id.* § 4.

²⁸ See, e.g., *id.* § 8 (prohibiting solicitation for the purpose of prostitution). The Immoral Traffic (Prevention) Amendment Bill, 2006, Bill No. 47 of 2006, sought to delete § 8, the provision penalizing prostitutes for soliciting clients. However, the bill lapsed.

rily and lawfully engaged in sex work or are forced to solicit.²⁹ Thus, the ITPA treats sex workers and victims of sex trafficking alike by subjecting both to criminal penalties. This not only re-victimizes sex trafficking victims but also stigmatizes sex workers.³⁰ The failure of the ITPA to consider an exception for those persons who are voluntarily soliciting clients reflects the implicit tendency maintained throughout India's laws, schemes, and implementation efforts to conflate sex work with sex trafficking.³¹ Furthermore, the ITPA's restriction against adults living off the earnings of prostitution prevents sex workers from taking care of their own adult children and family members.³² This restriction prevents any adult children and other family members of sex workers from being supported in any way by the wages of their sex worker parents and relatives.

In May 2011, India ratified the United Nations Convention against Transnational Organized Crime and its three protocols, including the UN Trafficking Protocol.³³ Although India's ratification of these international treaties is a significant step towards addressing the prevalence of human trafficking, prior laws and their implementation must be amended to ensure full compliance with the UN Trafficking Protocol. The legislature's and law enforcement's mistaken conflation of sex work and human trafficking is a

²⁹ Immoral Traffic (Prevention) Act § 8.

³⁰ The United Nations recognizes the non-criminalization of trafficked persons and their actions. *See, e.g.*, United Nations Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines for Human Trafficking*, U.N. Doc. E/2002/68/Add, at 1 (May 20, 2002) (providing practical, rights-based policy guidance on the prevention of trafficking and the protection of victims of trafficking); Organization for Security and Co-operation in Europe, *Decision No. 557 OSCE Action Plan to Combat Trafficking in Human Beings*, PC.DEC/557 (Jul. 24, 2003) (“[The permanent council] adopts a multidimensional approach to combating trafficking in human beings, addresses the problem comprehensively, covering protection of victims, the prevention of trafficking in human beings and the prosecution of those who facilitate or commit the crime”); U.N. OFFICE ON DRUGS AND CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS, at 271, U.N. Sales No. E.06.V.11 (2008) (advocating for the decriminalization of trafficking).

³¹ *See* ACHIEVING CLARITY, *supra* note 13 (interview with P.M.Nair and Ratna Kapur) (interview transcripts on file with authors). Such conflation between trafficking and sex work is also visible in judicial opinions. For example, in *Sahyog Mahila Mandal v. State of Gujarat*, the Gujarat High Court held that “[t]o recognize prostitution as a legitimate means of livelihood would be an open invitation to trafficking in women which is shunned internationally and in all the civilized nations of the world.” (2004) 2 GLR 1764, ¶ 8.4 (India).

³² *See* Interview with Dolly Saha, Outreach Worker, and Purnima Chatterjee, President, DMSC, in Kolkata, India (Mar. 22, 2013).

³³ G.A. Res. 55/25, United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000). The three protocols are: G.A. Res. 55/25, annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Nov. 15, 2000); G.A. Res. 55/25, annex III, Protocol Against the Smuggling of Migrants by Land, Sea and Air (Nov. 15, 2000); G.A. Res. 55/255, annex, Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition, (May 31, 2001). Together, these are known as the “Palermo Protocols.”

significant impediment to compliance.³⁴ The context in which human trafficking occurs in India is mostly intra-country for the purpose of labor rather than sex.

According to Dr. Smarajit Jana, who began the initial government-sponsored HIV prevention program that later spawned DMSC,

In the way that sex workers are seen by people like us who represent mainstream society, we see them all as trafficked, all in bondage situation [sic], all forced to engage in this situation. We assume that they have no agency to make change in their life. But slowly and steadily more we discovered that this is not the fact. The more we interacted with sex workers, the more we started to recognize our ignorance.”³⁵

Dr. Jana’s interview reveals that not all sex workers are in fact trafficking victims; yet they are mistakenly treated similarly under the law.

Such conflation pervades and trickles down to government anti-human trafficking (most often, sex trafficking) schemes and reports. For example, studies conducted by the Ministry of Women and Child Development mistakenly assumed that all of the estimated three million sex workers in India were victims of human trafficking.³⁶ This analysis does not account for the possibility that a percentage of the total number of sex workers living in India are engaged in the industry voluntarily, rather than as victims of trafficking. These studies predict that the number of victims of sex trafficking may likely rise into the millions solely on the basis of an increasing number of sex workers. However, usage of the term “sex worker” is both under- and over-inclusive. The term may be over-inclusive because it would include people who are involuntarily engaged in sex work. It may also be under-inclusive because it excludes women and girls engaged in other forms of sex trafficking such as bride trafficking, which are not readily documented.³⁷

³⁴ Wendy Chapkis, *Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants*, 17 GENDER & SOC’Y 923, 926–27 (2003).

³⁵ Interview with Dr. Smarajit Jana, Founder, Sonagachi Research and Training Institute, in Kolkata, India (Mar. 21, 2013).

³⁶ GOV’T OF INDIA, INDIA COUNTRY REPORT: TO PREVENT AND COMBAT TRAFFICKING AND COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN AND WOMEN (2008) at 4.

³⁷ In “bride trafficking,” the trafficker lures the girl into a sham “marriage” with a customer who has paid the trafficker a pre-determined sum. The trafficker also often tricks the girls into believing that it is indeed a real marriage. Usually these marriages take the girls far away from their own homes and from any social and supportive network they may have. The girl then becomes a sexual slave/unpaid domestic servant in her “husband’s” home without a means of escape. The girl may then be re-trafficked as the trafficker may set up a meeting with a different “sympathetic” customer who promises to take the girl away from her sham marriage and to marry her himself. See ACHIEVING CLARITY, *supra* note 13 (interview with Shafiq ur Rahman Khan) (interview transcripts on file with authors). See also Dwaipayan Ghoshi, *Cops Bust Bride Trafficking Ring in Haryana*, TIMES OF INDIA (Sept. 2, 2011), <http://timesofindia.indiatimes.com/world/us/Service-dog-comforts-bride-on-wedding-day/articleshow/50615682.cms> [https://perma.cc/56KJ-5ZB2].

Similar misunderstandings plague the case law as well. In the case of *Gaurav Jain v. Union of India*, the Court erroneously noted that “to recognize prostitution as a legitimate means of livelihood would be an open invitation to trafficking in women which is shunned internationally and in all the civilized nations of the world.”³⁸ Conflation of voluntary sex work with the crime of sex trafficking leads to ineffective and inimical effects on the rights and needs of sex workers. In the end, neither the trafficked victim nor the sex worker wins in a system confounded by such a desultory understanding of the differences between trafficking and sex work.

India officially adopted its first comprehensive national definition of human trafficking in the 2013 Criminal Law (Amendment) Act³⁹ recognizing both sex trafficking as well as labor trafficking.⁴⁰ Prior to the Criminal Law (Amendment) Act, the ITPA was the major anti-trafficking law in effect within India.⁴¹ Until its passage, India lacked a comprehensive definition of trafficking. This hindered state governments from coordinating legislative efforts with each other and the central government.

India’s anti-human trafficking laws, schemes, and implementation efforts fail to adequately differentiate sex trafficking victims from persons who voluntarily engage in sex work, as well as those individuals who potentially bridge both groups (e.g. someone who was forcibly trafficked for sex but who later decides to continue doing sex work of their own volition⁴²). The selling of sex and sexual services for compensation is legal in India, but the purchase of and solicitation for sex work is illegal.⁴³ Therefore, sex work as a form of employment is not illegal in and of itself, but rather numerous aspects of the trade are curtailed (e.g. public solicitation of clients for sex). Despite the allowance of sex work in India, those engaged in it, regardless of whether they are indeed a victim or not, are summarily treated as though

³⁸ Sahyog Mahila Mandal and Anr. v. State of Gujarat and Ors., (2004) 2 GLR 1764, ¶ 8.5 (India).

³⁹ Criminal Law (Amendment) Act, 2013, No. 13 of 2013, Acts of Parliament, 2013 (India) § 8.

⁴⁰ See *id.* § 8 amending § 370 of the Penal Code (“Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by—*First.*—using threats, or *Secondly.*—using force, or any other form of coercion, or *Thirdly.*—by abduction, or *Fourthly.*—by practicing fraud, or deception, or *Fifthly.*—by abuse of power, or *Sixthly.*—by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harbored, transferred or received, commits the offence of trafficking.”).

⁴¹ The Goa Children’s Act, 2003, contains a definition of “trafficking” that mirrors the definition in UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, but it only applies to trafficking of children and only within the state of Goa. Goa Children’s Act, 2003, No. 18 of 2003 (India) § 2(z).

⁴² Indeed, some experts suggest many victims of sex trafficking may voluntarily choose to work in the sex industry after being trafficked in lieu of seeking employment in other sectors, such as domestic labor, where earnings are much lower. See Interview with Jeevan Prakash Sahal, Member and ex-MLA, All India Forward Block, in Kolkata, India (Mar. 22, 2013).

⁴³ Immoral Traffic (Prevention) Act, No. 104 of 1956, INDIA CODE (1993) § 8.

they have been trafficked for the purposes of sex. If we can parse out those within the population of sex workers who are providing sexual transactions without consent and those who are consensually engaging in the industry, we can more clearly see the vast differences between the two groups. Our research and interviews were conducted precisely in order to see and understand these differences. The next section will explore these lived experiences of sex workers in India and give insight into their perspectives on the anti-trafficking legislation and implementation efforts.

B. Sex Workers' Union Critiques Anti-Trafficking Laws: How Implementation Efforts Exacerbate the Conflation of Sex Workers and Sex Trafficking Victims

According to interviews conducted with sex workers living in Sonagachi, India and members of DMSC, the ITPA is used predominantly against persons who voluntarily engage in sex work rather than for its intended use—to prevent trafficking and to rescue and rehabilitate⁴⁴ trafficked persons.⁴⁵ DMSC is a sex-workers' organization headquartered in Sonagachi, India. It was established in the 1990s as an offshoot of the government's response to combat HIV amongst sex workers and in the community. Dr. Jana recalled that the government program was ineffective and impotent. Dr. Jana attributes the program's failure to the apparent futility of teaching a marginalized sex worker community about condoms at a time when their bargaining position with clients was nearly nil due to discrimination and police harassment.⁴⁶ Thus sex workers, despite their relative knowledge of what constitutes unsafe sex and HIV risks, were unable to negotiate for condom use with clients. As Dr. Jana noted, “[sex workers’] ability to enforce condom use depends on their level of understanding [of HIV], of confidence, [and] of power to negotiate.”⁴⁷

As a result, the DMSC sex workers' collective formed in 1995 to address the factors contributing to the higher prevalence of HIV amongst the sex worker community: “stigma, related [human rights] violations, violence, rape (by police), [and] eviction.”⁴⁸ The organization took on a self-

⁴⁴ The powers for rescue and rehabilitation are provided under the ITPA and are referred to throughout the Act. Rehabilitation programs are run by non-governmental organizations or the Indian government itself. These programs allegedly consist of a housing program as well as services to reintroduce the trafficking victim into society (e.g. employment etc.). However, there are numerous reports that those accepted into rehabilitation programs face poor conditions and abuse while in rehabilitation homes. See Aziza Ahmed & Meena Seshu, “*We have the right not to be ‘rescued. . .’*”: *When Anti-Trafficking Programmes Undermine the Health and Well-Being of Sex Workers*, 1 ANTI-TRAFFICKING REV. 149, 155–56 (2012).

⁴⁵ See P.M. NAIR & SANKAR SEN, A REPORT ON TRAFFICKING IN WOMEN AND CHILDREN IN INDIA 2002-2003 at 249 (2004).

⁴⁶ See Interview with Dr. Smarajit Jana, *supra* note 35.

⁴⁷ *Id.*

⁴⁸ *Id.*

regulatory approach by monitoring those participating in the industry (e.g. preventing underage sex workers) as well as types of services offered (e.g. encouraging sex with a condom).⁴⁹

Proponents of the legalization of sex work like DMSC argue that legalization would finally treat sex workers as workers.⁵⁰ Legislation establishing sex worker labor rights may bring sex work within the purview of the formal economy and thus establish firm employment rights for sex workers. Sex workers could then be entitled to the social protections allotted to all other employees within the formal economy such as minimum wage and tax benefits. According to DMSC, such legislation would “create a step forward to provide respect and dignity to sex workers” and would help distinguish “between sex work and trafficking.”⁵¹

DMSC’s approach to supporting sex workers is in part derived from the negative consequences of the implementation of the ITPA. According to other interviews conducted with outreach workers of DMSC, “The problems with the law are: first, the police were allowed to come pick up the prostitutes; then, they were allowed to pick up the clients; now, you can’t live off of the income of sex workers.”⁵² The ITPA enables police harassment and extortion of sex workers.⁵³ Those engaged in sex work are subject to bans, police raids, and forced rescue and repatriation operations even when they are not victims of trafficking.⁵⁴ There have even been instances of police cutting off the electricity and water supplies to sex workers’ homes.⁵⁵ There are significant financial costs, both to sex workers as well as to the Indian government, due to the ineffective and erroneous policing of sex work. The ITPA is often utilized to extort money from sex workers with money going to both the brothel keepers and law enforcement. There is a system of manipulation in which police officers push sex workers to plead guilty and pay high fees.⁵⁶ In some instances, these workers are imprisoned for months, accruing costs to the state for their maintenance while in jail.

The ITPA’s prohibition against persons above eighteen years of age living off of the earnings of sex workers serves to further stigmatize sex work-

⁴⁹ See *The Durbar Mission*, DURBAR MAHILA SAMANWAYA COMMITTEE, <http://durbar.org> [https://perma.cc/KKX4-5Y2S].

⁵⁰ See *Support the View of the New Chairperson of NCW*, DURBAR MAHILA SAMANWAYA COMMITTEE, <http://durbar.org>, <http://durbar.org/html/NCW%20update.pdf> [https://perma.cc/KKX4-5Y2S].

⁵¹ *Id.*

⁵² Interview with Outreach Workers, DMSC, in Kolkata, India (Mar. 22, 2013).

⁵³ See Interview with Peer Counselor, DMSC, in Kolkata, India (Mar. 22, 2013); see also ACHIEVING CLARITY, *supra* note 13 (interview with P.M. Nair and Sankar Sen) (interview transcripts on file with authors).

⁵⁴ RATNA KAPUR, *MAKESHIFT MIGRANTS AND LAW: GENDER, BELONGING, AND POSTCOLONIAL ANXIETIES* 51, 59 (2010) [hereinafter KAPUR, *MAKESHIFT MIGRANTS*].

⁵⁵ See Interview with Dolly Saha and Purnima Chatterjee, *supra* note 32.

⁵⁶ Monica R. Biradavolu et. al, *Can Sex Workers Regulate Police? Learning from an HIV Prevention Project for Sex Workers in Southern India*, 68 SOC. SCI. & MED. 1541, 1543 (2009).

ers as well as their families. This provision prevents dependent family members of sex workers from receiving financial support as well.⁵⁷ Rather than being utilized to prevent pimps and traffickers from taking the earnings of sex workers, interviews revealed that the provision is also used to justify police harassment of sex workers and their children. In one such incident narrated by a DMSC worker, police surrounded several children of sex workers in order to prevent them from entering their school.⁵⁸ Only when thirty women assembled and convinced the police to let them go were the children allowed to enter.⁵⁹ One anonymous interviewee lamented the over-inclusivity of the ITPA provision:

The biggest problem is that people above 18 cannot live on sex worker's wages. I have a child who is 18—I want him to be a doctor or an engineer too. If there are so many laws for us, why aren't there laws in place for actors and models too? Even when you are getting a girl married and she is above the age of 18, if I pay for her marriage, that is also a criminal offence [sic]. If she is above 18—the child is being punished and if she is below the age of 18—the parents are being punished.⁶⁰

These interviews reveal that India's trafficking laws and implementation efforts suffer from an inefficient, ineffective, and harmful conflation of sex work and sex trafficking.

As Shannon Bell stated, “[T]here can no longer be a philosophy of prostitution in which there is an absence of prostitute perspectives and prostitute philosophers.”⁶¹ The voice of the sex worker, an individual, person and subject, must be heard. With their unique perspective and position within the industry under legal consideration, the sex worker community is necessarily a key stakeholder in any policy discussion on regulation or decriminalization. However, policymakers in India have not yet made serious efforts to engage with sex workers in policy. The next section will argue the importance of taking the individual sex workers' perspectives and points of view into account as to decriminalization and legalization policies.

C. *Reforming the Sex Work Industry in India: Letting the Workers Speak on Decriminalization and Legalization Policies*

The voices of sex workers are being drowned out; they have been stifled by the crashing waves of feminist discourse regarding the supposed

⁵⁷ See Interview with Jeevan Prakash Sahal, *supra* note 42.

⁵⁸ Interview with Peer Counselor, *supra* note 53.

⁵⁹ *Id.*

⁶⁰ See Interview with Outreach Workers, DMSC, *supra* note 52.

⁶¹ SHANNON BELL, *READING, WRITING AND REWRITING THE PROSTITUTE BODY* 185 (1994).

“plight” of sex workers in India.⁶² Notable scholars such as Gloria Steinem speak out against legalizing sex work based on the assumption that sex work is itself trafficking.⁶³ However, this approach limits the sex work industry to the illegal delineations of human trafficking and withdraws the possibility of decisional capacity from sex workers.⁶⁴ Without the perspectives, stories, and information from sex workers regarding their own work and lives, how can policy anticipate the barriers facing these persons? Or, better yet, how can policy fully comprehend the sex work industry without understanding the actors within it? If the goal truly is to craft the best sex work laws and policies, the voices of the industry’s biggest stakeholders, the sex workers themselves, should be front and center in such considerations.

India’s sex worker organizations are divided between the two legal frameworks of decriminalization and legalization. DMSC is a staunch vocal proponent of adopting sex work legalization through “labor” legislation. However, the National Network of Sex Workers (“NNSW”) denounces the step towards legalizing sex work and strongly advocates for decriminalization only.⁶⁵ NNSW fears that legalization will lead to intrusive regulation by the state and would merely open the floodgates for government corruption and the extortion of sex workers in exchange for licenses.⁶⁶ On the other hand, NNSW believes that if sex workers were no longer labeled as criminals, then the rate of unjustified police harassment of sex workers would decline. The NNSW also argues that decriminalization would help clarify the distinction between sex trafficking victims and sex workers.

Nations across the globe are taking steps towards legalization, decriminalization, or some combination, of the sex work industry. Although India has its unique set of cultural, social, and political circumstances, sex work reforms in other countries may offer guidance. Several countries limit legalization to specific types of sex work. For example, brothel-based sex work is legal in Turkey, while non-licensed sex work remains criminalized.⁶⁷ Sex workers who are licensed through the government’s regulatory requirements may operate within brothels known as “General Houses.” Such li-

⁶² Joe Doezema, *Ouch! Western Feminists’ ‘Wounded Attachment’ to the ‘Third World Prostitute,’* 67 FEMINIST REVIEW, 16–38 (2001); Nandita Sharma, *Anti-Trafficking Rhetoric and the Making of a Global Apartheid,* 17 NWSA JOURNAL, 88–111 (2005).

⁶³ Svati Shah, *Gloria Steinem vs. Prostitution,* HUFFINGTON POST (Nov. 28, 2014), http://www.huffingtonpost.com/american-anthropological-association/gloria-steinem-vs-prostitut_b_6198614.html [https://perma.cc/5E3B-LU6C].

⁶⁴ See generally LAURA M. AGUSTIN, *SEX AT THE MARGINS: MIGRATION, LABOUR MARKETS AND THE RESCUE INDUSTRY* (2007) (arguing against the ideas that migrants who sell sex are passive victims and that selling sex is completely different than other forms of work).

⁶⁵ *Sex Workers Not In Favour of Legal Status for Their Trade,* TIMES OF INDIA (Oct. 30, 2014), <http://timesofindia.indiatimes.com/city/pune/Sex-workers-not-in-favour-of-legal-status-for-their-trade/articleshow/44977452.cms> [https://perma.cc/C96E-MFNL].

⁶⁶ *Id.*

⁶⁷ Sukran Simsek, Adnan Kisa & Sophia F. Dziegielewski, *Sex Workers and the Issues Surrounding Registration in Turkey,* 17 J. OF HEALTH & SOC. POLICY 55, 57 (2004).

censed sex workers in Turkey are entitled to social security and other governmental benefits. However, there are specific requirements that must be met in order to be eligible for a sex work license: sex workers must have citizenship in Turkey, be unmarried, have graduated from primary school, be over 21 years of age, and have legal capacity. Furthermore, licensed sex workers must undergo bi-weekly health checkups and cannot engage in sexual commerce if they are diagnosed with a sexually transmitted infection (STI).⁶⁸

Other nations with a legalization framework regulate the industry with mandatory health checkups and medical licensing requirements. In 1969, Senegal legalized sex work as part of an effort to reduce the incidence of STIs.⁶⁹ Sex work in Senegal is regulated under a licensing scheme,⁷⁰ and all sex workers must have sanitary cards indicating they are free from STIs.⁷¹ Sex workers in Senegal must also be at least 21 years old and register with the police.⁷² Despite these reforms, Senegal is experiencing a rise in illegal unlicensed sex workers known as “les clandestines.”⁷³ These sex workers do not receive the health benefits that are given to registered sex workers.⁷⁴

New Zealand’s Prostitution Reform Act⁷⁵ not only decriminalized sex work but also introduced health and safety requirements for sex workers and their clients.⁷⁶ According to a study, sex workers felt more empowered to refuse clients,⁷⁷ felt that their employment rights had improved,⁷⁸ and perceived an improvement in police attitudes.⁷⁹

Although there are clear and important distinctions between decriminalization and legalization, there is a common thread: citizenship rights. As sexual subalterns, sex workers are largely culturally disenfranchised from society. Many face extortion and harassment at the hands of the police. Sex workers today, regardless of whether they advocate for legalization or

⁶⁸ General Hygiene Law, Law No. 1593/1930, approved on 24 April 1930. *See also* JULIA BINDMAN & JO DOEZEMA, REDEFINING PROSTITUTION AS SEX WORK ON THE INTERNATIONAL AGENDA 3 (1997) (disputing the characterization of prostitution as a human rights violation of the same severity as slavery and arguing for the redefinition of prostitution as sex work on the international agenda).

⁶⁹ Nazaneen Homaifar & Suzan Zuljani Wasik, *Interviews with Senegalese Commercial Sex Trade Workers and Implications for Social Programming*, 26 HEALTH CARE FOR WOMEN INT’L 118, 119 (2005).

⁷⁰ Chi Mgbako & Laura A. Smith, *Sex Work and Human Rights in Africa*, 33 FORDHAM INT’L L.J. 1178, 1186 (2010).

⁷¹ Homaifar & Wasik *supra* note 69, at 122.

⁷² *Id.* at 120.

⁷³ *Id.* at 123.

⁷⁴ *See id.* at 124.

⁷⁵ Prostitution Reform Act 2003, (N.Z.).

⁷⁶ *Id.* §§ 8,9. *See generally* Gillian Abel & Lisa Fitzgerald, *Risk and Risk Management in Sex Work Post-Prostitution Reform Act: A Public Health Perspective*, in TAKING THE CRIME OUT OF SEX WORK, 217–37 (Gillian Abel et al., eds., 2010) (considering the impact of decriminalization on health and safety of sex workers in New Zealand).

⁷⁷ Abel & Fitzgerald, *supra* note 76, at 224–25.

⁷⁸ *Id.* at 226.

⁷⁹ *Id.* at 228.

decriminalization, call for the termination of their status as criminals and recognition as participating members of society.⁸⁰ The next section will discuss the importance of recognizing the agency of sex workers and giving them a space to exercise their rights and freedoms.

D. Sex Worker Agency and Labor Rights: A Space for Sexual Subalterns to Speak

To address the conflation of sex work and sex trafficking, one must confront the voice of the sex worker—individual, not plural; person, not community; and tangible, not abstract. It is precisely the de-subjected structuralist⁸¹ couching of sex work as a “question” to be answered within the lecture halls of academia and policy corridors rather than the streets, brothels, homes, porn studios, bars, night clubs, expensive hotel rooms, and other occupational spaces of sex workers that leads to the continued harassment, violence, and forcible rescuing of sex workers themselves. Sex workers are indeed “subjects and objects of social and historical processes,”⁸² but it is not tenable, in light of our interviews with sex workers, to continue abstractly denying the “practice and institution”⁸³ of sex work without addressing the individualism of sex work through a historical and cultural lens.

This is not to say, however, that the structure of sex work as an industry is not gendered or patriarchal; that may indeed be the case. As Martha Nussbaum cavalierly points out, most societal institutions are indeed patriarchal.⁸⁴ Thus, to say that a woman sex worker within a patriarchal society lacks the agency to be a sex worker is to “force victimization of women, many of whom are no more victims than non-prostitute women under our current, patriarchal, capitalist system.”⁸⁵ Such a structuralist obliteration of the individual sex worker dissolves the agency power of the worker themselves and instead “locates power and influence only with male customers or the wider structures that determine economic relations.”⁸⁶ Being blinded by the gendered nature sex work leaves behind the agency of individual sex workers participating and living within the industry, in essence denying their selfhood. Lost amongst these debates are the sex workers themselves. Disem-

⁸⁰ Gowri Vijayakumar, Shubha Chacko, & Subadra Panchanadeswaran, ‘As Human Beings and As Workers’: *Sex Worker Unionization in Karnataka, India*, 6 GLOBAL LAB. J. 79, 84 (2015).

⁸¹ Elisa Glick, *Positive Feminism, Queer Theory and the Politics of Transgression*, 64 FEMINIST REVIEW 19, 36 (2000).

⁸² *Id.*

⁸³ C. Overall, *What’s Wrong With Prostitution? Evaluating Sex Work* 717 SIGNS 705, 708 (1992).

⁸⁴ Martha Nussbaum, “*Whether From Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693, 718–719 (1998).

⁸⁵ Kari Kesler, *Is a Feminist Stance in Support of Prostitution Possible: An Exploration of Current Trends*, 5 SEXUALITIES 219, 223 (2002).

⁸⁶ Teela Sanders, “*It’s Just Acting*”: *Sex Workers’ Strategies for Capitalizing on Sexuality*, 12 GENDER, WORK & ORGANIZATION 319, 336 (2005).

bodied and serving as a communal symbol of patriarchal victimhood, the sex worker is left voiceless and devoid of individuality. Therein lies the ironic result; sex workers, who are routinely constructed as cis-gender female victims (with little or no attention paid to those who are transgender, third gender, or male⁸⁷) and who are supposedly in need of protection, are the ones who are silenced, while the male-dominated, client-driven structure is allowed to speak.

Not all sex workers experience sex work similarly, and legislation should reflect such diversity. The needs and desires of sex workers may vary considerably, particularly in relationship to their lived gender and sexual identities (only a handful of factors that influence such variation). Even though sex workers are routinely considered monolithically cis-gender, not all sex workers are women and not all women sex workers are cis-gendered. In 2010, it was estimated that over two-hundred thousand men who identified as transgender were engaged in sex work in India.⁸⁸ The study further pointed out that gender variant people in India are more likely to engage in sex work due to discrimination in other employment sectors.⁸⁹ Furthermore, gender-variant sex workers often face discrimination within India's health-care system and doctors are unwilling to accept or treat them as patients.⁹⁰ There have also been recorded raids by the police that specifically target *hijra*⁹¹ sex workers.⁹² As the Peoples Union for Civil Liberties stated, "The police attitude seems to be that since *kothis*⁹³ and *hijras* engage in sex work, they are not entitled to any rights."⁹⁴ Thus, the lived experience of transgender sex workers differ from their cis-gender counterparts. Side-lined to

⁸⁷ Shivandanda Ratnapala, *Through a Window Darky: Men Who Sell Sex to Men in India and Bangladesh*, in MEN WHO SELL SEX: INTERNATIONAL PERSPECTIVES ON MALE PROSTITUTION AND AIDS 193–212 (Peter Aggleton ed., 1999).

⁸⁸ UNDP INDIA, *HIJRAS/TRANSGENDER WOMEN IN INDIA: HIV, HUMAN RIGHTS AND SOCIAL EXCLUSION* 4 (2010).

⁸⁹ *Id.* at 6–9.

⁹⁰ Venkatesan Chakrapani et al., *Hijras in Sex Work Face Discrimination in Health-Care System*, 7 RES. FOR SEX WORK 12, 12 (2004).

⁹¹ UNDP INDIA, *supra* note 88, at 13 ("Hijras are biological males who reject their 'masculine' identity in due course of time to identify either as women or 'not men' or 'in between man and woman' or 'neither man nor woman'"). "Hijra" is the term used in India and certain other South Asian countries to refer to transgender persons, specifically those who were assigned male at birth but present as female. They are now recognized as a "third gender" in the country following a Supreme Court decision in 2014, in the case of National Legal Services Authority v. Union of India, (2014) Writ Petition No. 400 of 2012 (India).

⁹² See Monica R. Biradavolu, *supra* note 56. See also Human Rights Watch, *Stop 'Social Cleansing' in Bangalore* (Nov. 18, 2008), <https://www.hrw.org/news/2008/11/18/india-stop-social-cleansing-bangalore> [<https://perma.cc/7U7H-JDCT>].

⁹³ The term "kothi" is used to refer to effeminate men or boys who often take a female role in same-sex relationships. Aarefa Johari, *Hirja, Kothi, Aravani: A Quick Guide to Transgender Terminology*, TIMES OF INDIA (Apr. 17, 2014), <https://scroll.in/article/662023/hijra-kothi-aravani-a-quick-guide-to-transgender-terminology> [<https://perma.cc/7U7H-JDCT>].

⁹⁴ PEOPLE'S UNION FOR CIVIL LIBERTIES, *Extended Summary, Human Rights Violations against the Transgender Community: A PUCL Report* (Sep. 2003), <http://ai.eecs.u>

the shadows of sex work debates, issues facing cis-gendered men, transgender and gender-variant sex workers are largely ignored.

It is imperative to consider the “prostitution question” and invite sex workers themselves to engage in policy reforms. Sunder Rajan claims that the subject-position accorded to the prostitute is either that of victim or willing worker.⁹⁵ There is a complete denial of agency in forcing either of these labels upon prostitute women, as well as a deliberate ignorance of the nuances and complexities of sex trade industries. Quoting Gail Pheterson, Sunder Rajan states that prostitutes or “whores” are viewed as “lost women” or as “bad women.”⁹⁶ Labeling women as victims subjects them to state measures for surveillance and rehabilitation, and labeling them as willing workers dismisses them as deviant and criminal.

In contrast, an agency labor framework, based on the notion that sex workers as human beings have agency, allows the voices, desires, and concerns of sex workers as workers to exist in their own right. Agency, in all of its forms,⁹⁷ is the idea that a sex worker owns their self and thus, as proprietor of their own body may contract the control of their physical self in exchange for compensation.⁹⁸ As duly noted by Laura M. Agustin, granting agency to persons “does not mean denying structural conditions, nor does it make them over-responsible for their fate, but it does consider their own perceptions and desires to be crucial.”⁹⁹ Additionally, individual agency takes into account the diversity of experiences within the sex work industry. Accord to Ronald Weitzer, “the evidence shows variation, rather than uniformity, in the degree to which workers feel exploited versus empowered and in control of their working conditions.”¹⁰⁰ Creating space for conversations with sex workers themselves may reveal sector-specific conditions, issues regarding safety and health, and other particular sex work industry concerns relevant to policy decisions.

However, many notable scholars deny that sex workers have agency over their own sexual autonomy at all.¹⁰¹ Simultaneously and albeit hypocrit-

mich.edu/people/conway/TS/PUCL/PUCL%20Report.html [https://perma.cc/RW2S-T8FZ].

⁹⁵ RAJESWARI SUNDER RAJAN, *supra* note 12, at 120.

⁹⁶ *Id.* at 121.

⁹⁷ Kathy Miriam, *Stopping the Traffic in Women: Power, Agency and Abolition in Feminist Debates over Sex-Trafficking*, 36 J. SOC. PHIL. 1, 5 (2005). According to Kathy Miriam, there are two generalizable models of agency: expressivist and economic. In an expressivist model of agency, the individual freedom is created from the “self” as a human being and the beings wish for self-expression. In an expressivist model of agency, a sex worker does sex work in order to externalize their own freedom and externalizes his or her being. In an economic model of agency, the sex worker exercises his or her agency to earn money.

⁹⁸ *Id.*

⁹⁹ Laura Agustin, *supra* note 64, at 41.

¹⁰⁰ Ronald Weitzer, *The Social Construction of Sex Trafficking: Ideological Institutionalization of a Moral Crusade*, 35 POL. & SOC'Y 447, 453 (2007).

¹⁰¹ Scott A. Anderson, *Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution*, 112 ETHICS 748, 780 (2002) (“While most of us are fortunate to

ically, such a stance advocates for the continued prohibition against sex work in order to defend “the sexual autonomy of the least-powerful members of our society.”¹⁰² Others go as far to argue that sex workers are, by definition, without even the agency to form collectives.¹⁰³ This begs the question, do all sex workers lose their agency *ab initio* as a result of engaging in the sex work industry? Does each individual sex worker’s life, made up of different timelines of entry into and exit out of the sex work industry, “disappear” into a “mythical metaphor” symbolizing communal suffering?¹⁰⁴ Should sex workers be disavowed of their individual personhood in order to engage in a philosophical debate over the industry’s existence? A sex worker is a *person* who has a voice regardless of the type of feminism to which one ascribes, the legality or illegality of sex work, or the patriarchal nature of the industry.

Framing sex work within a decontextualized discussion precariously premised on the razor-sharp edge of “consent” is not a particularly workable concept when it comes to actual legislation or the practical implementation of sex work policy. Regardless of whether sex workers are truly making a free choice to engage in sex work, they are undoubtedly human beings engaged in an industry whose participants are, in numerous countries, denied the equal employment rights and legal benefits enjoyed by workers in other sectors. It would be more purposeful to address the forms and politics of prostitute activism¹⁰⁵ than to repeatedly question why and how women (and people of other genders) enter the sex industry. The latter approach has room for the autonomy of sex workers and better represents their interests and demands. Sunder Rajan uses the example of sex workers’ collectives in Kolkata, which won legal cases against eviction and harassment. Collectives in Delhi went to court to gain admittance of children to schools without providing names of their fathers.¹⁰⁶ The widespread mobilization happening through the NNSW is also a safeguard against violence.¹⁰⁷ An outreach worker at DMSC said it best with regard to the organization: “I can walk down the street with my head held high, my child now has respectability. If we don’t stand up for ourselves, who else will?”¹⁰⁸

fall within a variety of social strictures that protect our sexual autonomy from various external forces, prostitutes—even under a normalized prostitution—manifestly, lack one of the key protections”).

¹⁰² *Id.* at 751.

¹⁰³ Melissa Farley, *Bad for the Body, Bad for the Heart: Prostitution Harms Women Even if Legalized or Decriminalized*, 10 VIOLENCE AGAINST WOMEN 1087, 1089 (2004). (“When prostitution is understood as violence, however, unionizing prostituted women makes as little sense as unionizing battered women.”).

¹⁰⁴ Jo Doezema, *Now You See Her, Now You Don’t: Sex Workers at the UN Trafficking Protocol Negotiation*, 14 SOC. & LEGAL STUD. 61, 74 (2005).

¹⁰⁵ RAJESWARI SUNDER RAJAN, *supra* note 12, at 133.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Interview with an Outreach Worker, DMSC, in Kolkata, India (Mar. 22, 2013).

The next section will explore how an agency labor framework relates to discussions of sex workers' labor rights. It will examine how these frameworks may differ, as well as the ways in which these philosophies may interact with one another to promote the rights of persons engaged in the sex work industry. Sex work, at its most basic definition, is sexual. Svati Shah, an academic and ethnographer whose research focuses on the politics of sexuality, notes that sex work is a form of work that should be recognized by labor movements, but not one where the simple label of "work" is enough to address all the political and social complexities.¹⁰⁹ Shah quotes Gail Pheterson who argues that "women's social worth and rights as citizens are based on their ability to distance themselves from the identity of 'whore' by adhering to standards of respectability."¹¹⁰ Thus, all activity in opposition to prostitution or promiscuity becomes good and moral. However, by acknowledging the agency of the persons participating in the sex work industry, any uniqueness of sex work as a whole dissolves and may be examined by a labor rights discourse.

E. Sex Work & Labor Rights

A paradigm respecting sex work as *work* as well as the agency of sex workers themselves finds traction in Prabha Kotiswaran's, *DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW*.¹¹¹ In her cutting edge legal ethnography on the legal and moral complexities of the sex work industry, she advocates from a materialist feminist perspective for what she terms "the work position:" the stance that sex workers are active agents within the industry who, with improved protection of their rights by governmental laws and policies, can and should be able to negotiate for their own benefit(s).¹¹² Kotiswaran's "work position" applies Marxist notions of labor to the sex worker industry in lieu of morality-laden vocabulary and questions the endemic ethical reasoning utilized by abolitionist or decriminalization arguments.¹¹³ According to "the work position," sex work is "legitimate work" and thus deserving of any and all such employment structures and protections.¹¹⁴

A labor framework for sex work can be broken down into the following: sex work is real work, a type of erotic labor, and singular.¹¹⁵ In other

¹⁰⁹ Svati Shah, *Sex Work in the Global Economy*, 12(1) *NEW LAB. F.* 74, 75 (2003).

¹¹⁰ *Id.* at 75.

¹¹¹ Prabha Kotiswaran, *supra* note 10.

¹¹² *Id.* at 10.

¹¹³ *Id.*

¹¹⁴ *Id.* at 223.

¹¹⁵ Martha Nussbaum, *supra* note 84, at 705. *See generally* WENDY CHAPKIS, *LIVE SEX ACTS; WOMEN PERFORMING EROTIC LABOR* (1997) (detailing that prostitution continues to create ideological schism among the feminist community with some who believe that commodified sex is a form of violence and others who believe commercial sex may be liberating. Chapkis argues that the "key to resolution of this conflict is the recognition

words, sex work should be legal and regulated employment, sex work is sexual in nature, and sex work is exceptional only with regard to the societal stigma it receives. The proposition that sex work is real work is based on two sub-assumptions: (1) sexual acts can be commodified, and (2) such recognition of sex work as work is necessary. With regard to the former, sex workers, feminists, and other voices argue that in a contemporary, capitalist society, “any pleasure is now a commodity.”¹¹⁶ Ergo, sex as a pleasure can be sold with a price tag. Sex work must be socially and legally acknowledged as work in order to address the rights and working conditions of those who engage in such forms of employment.¹¹⁷ Recognizing sex work as work dissolves the question of sex worker’s existence as an academic feminist subject (often purportedly victimized and exploited) and the sex workers’ rights (as laborers) can be properly addressed.¹¹⁸

The second proposition that sex work is erotic labor denotes the seemingly straightforward idea that sex work does indeed involve labor that is at its essence sexual. However, it points to something a bit more illuminating—that the term sex work encompasses more than sex and encapsulates other types of erotic exchanges.¹¹⁹ Furthermore, the realm of what is considered sexual or erotic is vast and diverse.¹²⁰

The third proposition that sex work is singular recognizes that all professions require “parts of our bodies for which we receive a wage in return.”¹²¹ As Margo St. James stated, “To make a great distinction between being paid for an hour’s sexual services, or an hour’s typing or an hour’s acting on a stage is to make a distinction that is not there.”¹²² Thus, sex work may be seen merely on a continuum of corporeal utilization. Nussbaum compares sex work to other employment options in which employees utilize their bodies to receive money: a professor of philosophy, a Perdue chicken factory worker, and a “colonoscopy artist”¹²³ (paid for having instruments tested on her colon). Despite similarities amongst all professions, sex work differs from the above professions as it is stigmatized and marginalized on

that truth about sex, including commercial sex, is necessarily more complex than any one position can express.”)

¹¹⁶ Momocca Momocco, *Japanese Sex Workers: Encourage, Empower, Trust and Love Yourself!*, in *GLOBAL SEX WORKERS: RIGHTS, RESISTANCE AND REDEFINITION* 178, 180 (Kamala Kempadoo & Jo Doezema eds., 1998).

¹¹⁷ Joanna Brewis & Stephen Linstead, *Managing the Sex Industry*, 8 *CULTURE & ORG.* 307, 309 (2002).

¹¹⁸ Oliver J. McKinstry, *We’d Better Treat Them Right: A Proposal for Occupational Cooperative Bargaining Associations of Sex Workers*, 9 *U. PA. J. L. & EMP. L.* 679, 707 (2007).

¹¹⁹ Elizabeth Bernstein, *What’s Wrong With Prostitution? What’s Right with Sex Work? Comparing Markets in Female Sexual Labor*, 10 *HASTINGS WOMEN’S LJ* 91, 116–117 (1999).

¹²⁰ Debra Satz, *Markets in Women’s Sexual Labor*, 106 *ETHICS* 63, 71 (1995).

¹²¹ Martha Nussbaum, *supra* note 84, at 693.

¹²² WENDY CHAPKIS, *supra* note 115 (quoting Margo St. James, founder of COYOTE).

¹²³ *Id.* at 701.

the basis of moralistic notions of female sexuality. Under a labor framework, in which sex work is work, sex work would not invoke moral condemnation because it would be regarded as just another method of receiving earnings.

Sex workers themselves call for the legal establishment of their right to contract their labor. As noted by Sritha Batliwala in the *THE BUSINESS OF SEX*, “sex workers are now becoming the subjects of their own analysis by breaking free of this [consent] ideological and conceptual stranglehold . . . Further, they are making shocking and uncomfortable arguments within it: that it gives them a higher income, more purchasing power, better long-term economic security and independence, and far less drudgery than the other options available to them.”¹²⁴ In 2009, sex workers at the Indira Female Peer Educators Collective in Chennai boycotted the polls demanding status for their work, chanting calls of “No Status, No Vote.”¹²⁵

Qualitative interviews of sex workers in India and across the globe, including our own, indicate sex workers’ need and desire to have their work recognized as work that is socially and legally acceptable.¹²⁶ For example, in Elizabeth Bernstein’s ethnography of sex work and sex workers in San Francisco, she noted sex worker interviewees’ persistent framing of their work as labor regardless of the class (upper, middle, or lower) of the sex worker.¹²⁷ Similarly, in a study of elite sex workers by Ann M. Lucas, sex workers understood their work as real work with “income potential, autonomy and flexibility.”¹²⁸ According to our interviews with sex workers at DMSC, sex workers want their work acknowledged as work and protected accordingly. Sex workers at DMSC unionized in order to provide their own safeguards because there are not adequate safety channels through the formal branches of the law.

Furthermore, the regulation of sex work via a labor framework either by the relevant national or state government or by sex worker collectives themselves enjoys success nationally and internationally. In the U.S. State of Nevada, for example, sex work is a legally regulated industry. The Nevada Revised Statutes legalizes sex work and regulates the zoning, advertising, and selling of sex work.¹²⁹ A study based on eight years of interviews with sex workers, brothel owners, and policy makers in the State found that Nevada’s policies led to a decrease in the risk of three types of violence (interpersonal violence against sex workers, violence against community order,

¹²⁴ Srilatha Batliwala, *How Sex Workers Expand Feminist Concepts of Choice and Consent*, in *THE BUSINESS OF SEX* 125, 143 (Laxmi Murthy & Meena S. Seshu eds., 2013).

¹²⁵ *Id.*

¹²⁶ Interview with Dr. Smarajit Jana, *supra* note 35.

¹²⁷ ELIZABETH BERNSTEIN, *TEMPORARILY YOURS: INTIMACY, AUTHENTICITY AND THE COMMERCE OF SEX* 47 (Gilbert Herdt ed., 2007).

¹²⁸ Ann M. Lucas, *The Work of Sex Work: Elite Prostitutes’ Vocational Orientations and Experiences*, 26 *DEVIANT BEHAV.* 513, 521 (2005).

¹²⁹ NEV. REV. STAT. § 244.345 (2016); NEV. REV. STAT. § 201.380 (2015).

and disease as violence) amongst sex workers.¹³⁰ Researchers also found that the majority of sex workers felt safer and were in support of legalized brothels.¹³¹ In fact, of those interviewed, only one sex worker experienced violence in the brothels since the passage of Nevada's sex work regulations.¹³²

Germany protects sex work as legal work under the 2001 Act Regulating the Legal Situation of Prostitutes (the "Prostitution Act").¹³³ One of the stated purposes of the Prostitution Act was to found "an employment relationship subject to social insurance contributions, to give [sex workers] access to social insurance and very generally to improve their social protection."¹³⁴ Since few sex workers take advantage of the Prostitution Act's employment contract option (many preferring to be freelance workers), it is only beginning to create improved working conditions.¹³⁵ The Prostitution Act protects the legal relationship between a sex worker and their client as a unilateral contract¹³⁶ and provides the right to sex workers (and to no other person such as brothel keepers, etc.) to claim remuneration. A study conducted on the opinions of sex workers found that the majority of workers believed that the Prostitution Act was a good thing and would probably lead to further improvements of their working conditions.¹³⁷ According to the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, "prostitutes are no longer without rights vis-à-vis clients who are unwilling to pay" as a result of the Prostitution Act.¹³⁸

The DMSC is committed to improving the working conditions of sex workers in India by taking steps to prevent police harassment. DMSC provides evidence that sex workers in the area are not minors and therefore not in contravention of the law. As a result, DMSC is able to highlight the discriminatory and fallacious nature of police raids, which are in reality attempts to harass, abuse, extort, or rape sex workers while under the guise of enforcing the law.¹³⁹ For example, one interviewee described a case in which the police picked up a 23-year-old sex worker who looked younger than her

¹³⁰ Barbara G. Brents & Kathryn Hausbeck, *Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy*, 20 J. INTERPERSONAL VIOLENCE 270, 270 (2005).

¹³¹ *Id.* at 288–89.

¹³² *Id.* at 287.

¹³³ Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten [ProstG] [The Act Regulating the Legal Situation of Prostitutes], Dec. 20, 2001, BGBl I at 3983 (Ger.).

¹³⁴ FEDERAL MINISTRY FOR FAMILY AFFAIRS, SENIOR CITIZENS, WOMEN AND YOUTH, REPORT BY THE FEDERAL GOVERNMENT ON THE IMPACT OF THE ACT REGULATING THE LEGAL SITUATION OF PROSTITUTES (PROSTITUTION ACT) 16 (2007).

¹³⁵ *Id.* at 19.

¹³⁶ *Id.* at 13.

¹³⁷ *Id.* at 62. ("[T]he Prostitution Act does not contain any positive regulations governing working conditions; it merely aims to eliminate criminal-law obstacles on the one hand and on the other hand, trusts that the fact that prostitution is no longer considered immoral will pave the way for other, existing legal means being applied to prostitution.")

¹³⁸ *Id.* at 14.

¹³⁹ Interview with Purnima Chatterjee, President, DMSC, in Kolkata (Mar. 22, 2013).

age.¹⁴⁰ DMSC intervened and produced the relevant documents to prove her legal age, so the police had no choice but to release her.¹⁴¹

Approaching the “prostitution” question through the framework of labor rights benefits both sex workers and victims of trafficking. An agency labor framework assists trafficking victims as well as sex workers by drawing a sharp distinction between those who are engaged in the industry voluntarily and those who are victims of the illegal enterprise of human trafficking. A labor framework requires basic employment law standards such as individual agency and age of majority to be considered an adult.¹⁴² According to interviews with Purnima Chatterjee, DMSC representative and government official,

A lot of girls from villages come here, are promised good jobs, and then sold into brothels. If a girl says she wants to go back, DMSC sends her back and does follow up to make sure she’s not brought again. Information about where she went is kept private to avoid stigma associated with sex workers when she returns . . . On the other hand, the Government takes a very long time even when they bother to try to send the girl back. And even if the girl wants to do that work, the government sees her as trafficked. There is no kind of consent that the government recognizes that would distinguish sex workers from trafficked persons.¹⁴³

In addition, DMSC protects the work of sex workers from societal harassment. Pintu Maity, a DMSC peer counselor, related once such incident of DMSC’s involvement and protection from societal discrimination,

Last night at 11:30 [we] got a call that sex workers living in [a] house [had trouble]. The owner of the house (landlady) sold [it] to someone else even though [it was] meant for sex workers . . . there was a lock on the door of the house [with the] objective is [sic] to make sure the sex workers leave the area . . . the girl called . . . DMSC. DMSC spoke to the new [owner who] . . . said it was a mistake but DMSC still insisted on filing [a] report with police because people do not do these things accidentally, but rather because they want to get rid of the sex workers.¹⁴⁴

In order to end the conflation of sex work and sex trafficking in India, reforms to India’s laws, policies and enforcement measures must be undertaken in light of a labor framework that protects the agency of sex workers. Laws (particularly the ITPA) must be reformed to recognize and operate

¹⁴⁰ Interview with Dolly Saha, Outreach Worker, DMSC, in Kolkata (Mar. 22, 2013).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See Interview with Purnima Chatterjee, *supra* note 139.

¹⁴⁴ Interview with Pintu Maity, Peer Counselor, DMSC, in Kolkata, India (Mar. 22, 2013).

upon the understanding that sex work and sex trafficking are different and, relatedly if not necessarily, such laws and enforcement mechanisms, particularly by police, must acknowledge that sex workers are workers with agency. The next section addresses the conflation of migrants and sex trafficking victims and the sidelining of migrant experiences of voluntary sex work in favor of those that match the mainstream narrative of prostitution as exploitation.

F. Voluntary Migration and Sex Work: Policy Concerns in India

A multi-pronged approach to sex work reform is required because sex work does not exist within a red-light district vacuum; its space is expansive and mobile, and those engaged in it are constantly subject to change. Nowhere is this clearer than in the area of migration: the conflation of voluntary migrants and victims of trafficking demonstrates another aspect of the connection between sex work and labor rights. Similar to the conflation of sex trafficking victims (without agency) with sex workers (with agency), India's laws, policies, and implementation efforts fail to adequately distinguish between cross-border or cross-state sex trafficking victims (without agency) and cross-border or cross-state migrant laborers (with agency).¹⁴⁵ There is an absolute lack of recognition that many of these migrants may be voluntary migrants who are also sex workers. As a consequence, the conflation denies the agency of the sex workers by confusing them with trafficked victims and thus restricting their movement.

Similar to the issues facing sex work policy reform in India, India's lack of a comprehensive definition of trafficking negatively impacts legal migration into the country. In addition to the absence of central legislation that clearly defines trafficking and distinguishes between voluntary and forced migration, "no comprehensive migration policy exists in India and the legal provisions that do exist to address migration adopt different standards for dealing with emigration, immigration and repatriation (especially with regard to sex workers)."¹⁴⁶ This lack of policy has wide-ranging impact. For example, according to interviews with DMSC's self-regulatory board,

Migration policy is integral to the situation for international trafficking. Many Bangladeshi girls come and the police target them for abuse because they don't have identification. And you can't trace back where she came from, so they spend their whole lives in

¹⁴⁵ Shohini Ghosh, *Decriminalizing Sex Work*, 583 SEMINAR (2008), http://www.india-seminar.com/2008/583/583_shohini_ghosh.htm [<https://perma.cc/S4FR-7QBJ>].

¹⁴⁶ Ratna Kapur, *India*, in GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD 128 (2007) [hereinafter Kapur, *India*].

these homes [government trafficking victims' homes]. It is the job of the government but the police are ineffective.¹⁴⁷

Moreover, while “pronouncements on inter-state migrant workers have tended to be in favor of the promotion of migrant workers’ rights,” the “courts have completely ignored the rights of women migrant workers.”¹⁴⁸ The “Bargirls” case challenged the Maharashtra state government ban on bar dancers from dancing in beer bars, eating halls, and permit rooms. The government’s justifications for the ban included the need to prevent trafficking of women into the bars, arguing that the majority of arrested bar dancers were Bangladeshi.¹⁴⁹ The Bombay High Court struck down the ban without addressing trafficking and did not guarantee the women their right to migrate for work.

Just like an individual’s reasons for entering the sex work industry differ and are multi-faceted, the reasons behind migration are complex and beyond the economic goal of escaping from poverty as well.¹⁵⁰ India’s lack of comprehensive migrant policies affects not only individuals who might willingly migrate for sex work, but also those who come to the country seeking employment in other traditional areas of the economy, such as in the construction industry or as domestic workers.

It must be noted that one of the emergent themes from discussions with stakeholders was the disproportionate focus on preventing and penalizing sex trafficking in comparison to labor trafficking. This is apparent even in the Criminal Law (Amendment) Acts, which criminalizes trafficking persons for sexual exploitation but does not address the trafficking of persons in other labor sectors like domestic work, agricultural work, and the construction industry.¹⁵¹

Sexism and notions of concretized gender roles pervade the treatment of migrants (particularly women and girls) much like such notions suffocate agency amongst sex workers; both groups are erroneously conflated with sex trafficking victims. Migrant women and girls are not seen as independent persons with agency in their migration decisions and individual rights to freedom of movement. Indeed, as Svati Shah astutely noted, “‘trafficking’ has effectively become a dominant way to speak about female migrants in

¹⁴⁷ Interview with Self-Regulatory Board, DMSC, in Kolkata, India (Mar. 21, 2013).

¹⁴⁸ *Id.* at 131.

¹⁴⁹ KAPUR, MAKESHIFT MIGRANTS, *supra* note 54, at 13–32.

¹⁵⁰ John Davies & Benjamin Davies, *So If You are Not ‘Natasha,’ Who Are You?: Revealing the Other Trafficked Women and Their Uses*, in SEX TRAFFICKING, HUMAN RIGHTS AND SOCIAL JUSTICE 223 (Tiantian Zheng ed., 2010) (citing Laura Agustín, *Challenging Place: Leaving Home for Sex*, 45 DEV. 110, 111 (2002)).

¹⁵¹ Prabha Kotiswaran, *An Innocent Omission? Forced Labour and India’s Anti-Trafficking Law*, SOUTH ASIA AT THE LONDON SCHOOL OF ECON. (June 10, 2013), <http://blogs.lse.ac.uk/southasia/2013/06/10/an-innocent-omission-forced-labour-and-indias-anti-trafficking-law/> [https://perma.cc/CF5J-MCGY].

the Global South.”¹⁵² Human trafficking discourse, particularly sex trafficking, equates the poverty of female migrants with the absolute stripping of the migrant’s agency.¹⁵³ Poverty, female migration, and trafficking are seen as inextricably linked.¹⁵⁴ Invariably, the migrant woman is assessed as transgressing these very boundaries that are installed for women’s protection and is therefore undeserving of such attention.¹⁵⁵ Such a view ignores women migrants’ need to search for better economic opportunities in today’s global economy and undermines their contribution to the labor market.¹⁵⁶ The conflation of women’s migration with sex trafficking unnecessarily restricts the freedom of movement of these women¹⁵⁷ and creates increased moral surveillance over all voluntary migrant women’s lives, including those who engage with sex work.¹⁵⁸

In fact, the failure to recognize women who migrate freely and assuming their vulnerability to being trafficked as a self-fulfilling prophecy, leads to responses for increased restrictions on migration. While there is a lack of primary research on the impact of laws and policies “in the name of protecting women, especially from trafficking, India has imposed some restrictions on the migration of women.”¹⁵⁹ For example, in 2006, the Indian government considered women migrant workers a “particularly vulnerable lot” and “issued an order prohibiting any female household worker below the age of 30 from being employed in the Kingdom of Saudi Arabia under any circumstance.”¹⁶⁰ This resulted in women having to take riskier migration options, making them more vulnerable to abuse.¹⁶¹ For, where legal and safe opportunities for migration do not exist, potential migrants are more susceptible to being trafficked themselves as they search for available routes into a country with strict migration policies.¹⁶² Tighter border control causes migrants to take the help of smugglers or traffickers for transportation.¹⁶³ Since undocumented migrants are illegal, they may fail to report abuse and exploitation.¹⁶⁴

¹⁵² Svati P. Shah, *Distinguishing Poverty and Trafficking: Lessons From Field Research in Mumbai*, 14 GEO. J. ON POVERTY L. & POL’Y 441, 442 (2007).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ KAPUR, MAKESHIFT MIGRANTS, *supra* note 54, at 7.

¹⁵⁸ *Id.*; Ratna Kapur, *Cross-border Movements and the Law: Renegotiating the Boundaries of Difference*, in *TRAFFICKING AND PROSTITUTION RECONSIDERED: NEW PERSPECTIVES ON MIGRATION, SEX WORK, AND HUMAN RIGHTS* 25, 30 (2005); JYOTI SANGHERA AND RATNA KAPUR, *TRAFFICKING IN NEPAL: POLICY ANALYSIS, AN ASSESSMENT OF LAWS AND POLICIES FOR THE PREVENTION AND CONTROL OF TRAFFICKING IN NEPAL* 10–11 (2000).

¹⁵⁹ Kapur, *India supra* note 146, at 129.

¹⁶⁰ *Id.* at 129.

¹⁶¹ Julie Ham, *Beyond Borders: Exploring Links Between Trafficking and Migration*, 2010 GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN 22 (2010).

¹⁶² KAPUR, MAKESHIFT MIGRANTS, *supra* note 54, at 30.

¹⁶³ GUNJAN KINNU, *FROM BONDAGE TO FREEDOM: AN ANALYSIS OF INTERNATIONAL LEGAL REGIME ON HUMAN TRAFFICKING* 23 (2006).

¹⁶⁴ KAPUR, MAKESHIFT MIGRANTS, *supra* note 54, at 9.

Curbing migration does not stop human trafficking,¹⁶⁵ but instead drives illegal activities underground, leading women to clandestinely migrate and renders trafficking victims more vulnerable to abuse.¹⁶⁶ Other factors, like the risk of prolonged detentions and deportation processes, may also hinder migrants from reporting such abuse.¹⁶⁷

Efforts worldwide to prevent trafficking impact women's rights to freely migrate. For example, an international effort by various organizations including the European parliament, NGOs such as Amnesty International, and the German government to prevent sex trafficking during the 2006 FIFA World Cup in Germany (a country that legalized sex work in 2001)¹⁶⁸ led to the unlawful policing of sex workers, restricted mobility of women, and unnecessary restrictions on migration.¹⁶⁹ This also had the unfortunate result of restricting the movement of persons from the global South who wanted to migrate to Germany but were prevented by the imposition of tough visa regimes and border controls.¹⁷⁰ Thus concerns about the risk of trafficking led to the restriction of women's mobility.¹⁷¹

It is undeniable that many women and girls fall prey to the trafficking industry. However, the reluctance to address the root causes of human trafficking (lack of economic opportunities in the home country in comparison to the receiving country), which requires more complex solutions than simply creating stricter borders, perpetuates the industry. Without the push factors (such as high unemployment, poverty, insecurity, and low economic prospects) the number of individuals seeking assistance from traffickers in their illegal transport to the receiving country would likely decrease.¹⁷² Of particular note is the oft-seen paradox in supply and demand migration: the receiving country only grants legal migration to skilled labor migrants, however the receiving country has a high demand for migrant unskilled labor.¹⁷³ This paradox creates an environment in which a migrant may find incentive to move to a country in order to provide unskilled labor but, being unable to do so legally, must resort to the assistance of a smuggler. The need for labor coupled with the migrant's desire to perform it but the inability to migrate

¹⁶⁵ SANGHERA & KAPUR, *supra* note 158, at 6.

¹⁶⁶ See Julie Ham, *supra* note 161.

¹⁶⁷ *Id.*

¹⁶⁸ Sanja Milivojevic & Marie Segrave, *Responses to Sex Trafficking: Gender, Borders and Home*, in *TRAFFICKING AND HUMAN RIGHTS: EUROPEAN AND ASIA-PACIFIC PERSPECTIVES* 39–41 (Leslie Holmes ed., 2010).

¹⁶⁹ Sanja Milivojevic & Sharon Pickering, *Football and Sex: the 2006 FIFA World Cup and Sex Trafficking*, 11.2 *TEMIDA* 21, 21 (2008).

¹⁷⁰ *Id.* at 43–44.

¹⁷¹ *Id.* at 41.

¹⁷² See L.T. Katseli et al., *Effects of Migration on Sending Countries: What Do We Know?* 11 (OECD Dev. Ctr., Working Paper No. 250, 2006).

¹⁷³ Ann D. Jordan, *Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings*, 10 *GENDER & DEV.* 28, 29 (2002).

legally, proves to be fertile ground for traffickers who can promise to provide migration assistance.¹⁷⁴

While a call for immediate liberalization of migration restrictions may prove naïve and unrealistic, there is a need for a comprehensive gender-inclusive migrant policy that does not discriminate against women migrants. Some studies suggest that more fluid borders and expansive legal migration policies may actually prevent some forms of trafficking as well as reduce the risk for trafficking victims during transportation across borders. According to a study in Italy, women trafficking victims were involved in trafficking contracts only because it was one of the “few available means of informal labor migration.”¹⁷⁵ The study went on to conclude that the tightening of borders and restrictive immigration policies would only serve to increase the need for undocumented migration and, therefore, the demand for traffickers. Instead, this study and others suggest that a deeper look into the conditions of the country from which trafficking victims were recruited is necessary rather than a focus on the migration borders between the two countries. In fact, many victims had originally expected to improve their lives by immigrating to the receiving country and often ended up resorting to illegal migration to do so.¹⁷⁶

To myopically view trafficking victims as victims indefinitely, both in the present and past tense, obscures the original motivations (possibly even initial agency) behind the later trafficked person’s potential desire to migrate.¹⁷⁷ Migration policies must separate forced human trafficking from voluntary migration. Such reform, however, must be guided by a nuanced, agency-based paradigm that separates the trafficking victim (without agency) and voluntary migrant (with agency). Such reform must also be guided by listening to the voices of migrant women and using their input to shape policies, as noted above. Laura M. Agustin advocates for the integration of human trafficking laws into a migration framework:

[M]igration is the framework most useful for thinking about the great majority of people being paid to provide sexual, domestic, and “caring” services . . . Migration studies allow consideration of all aspects of people’s lives and travels . . . and do not force them to identify as “sex workers” or “maids,” or be labeled according to what may be a chance or temporary occupation.¹⁷⁸

¹⁷⁴ *Id.*

¹⁷⁵ Rutvica Andruasevic, *The Difference Borders Make: (Il)legality, Migration and Trafficking in Italy Among Eastern European Women in Prostitution*, in *UPROOTINGS/REGROUNDINGS: QUESTIONS OF HOME AND MIGRATION* 251, 265 (Sara Ahmed et al. eds., 2003).

¹⁷⁶ MINNESOTA OFFICE OF JUSTICE PROGRAMS AND MINNESOTA STATISTICAL ANALYSIS CENTER, *HUMAN TRAFFICKING IN MINNESOTA* 14 (2006).

¹⁷⁷ Laura M. Agustin, *Forget Victimisation: Granting Agency to Migrants*, 46 *DEV.* 30, 32 (2003).

¹⁷⁸ Laura M. Agustin, *Migrants in the Mistress’s House: Other Voices in the ‘Trafficking’ Debate*, 12 *SOC. POL.* 98, 113 (2005).

Additionally, one of the emergent themes from discussions with stakeholders was the disproportionate focus on preventing and penalizing sex trafficking in comparison to labor trafficking. This is apparent even in the Criminal Law (Amendment) Acts, which criminalizes trafficking persons for sexual exploitation but does not address the trafficking of persons in other labor sectors like domestic work, agricultural work, and the construction industry.¹⁷⁹ Only with an exacting migration-based human trafficking policy will the conflation of human trafficking and voluntary migration cease to unnecessarily restrict the freedom of movement for female migrants.

Current lack of clarity and restrictions on voluntary migration is not an anti-sex trafficking initiative but something that allows, or hides, existing trafficking. Much like the conflation of sex workers with trafficking victims has led to deficient trafficking policy and the policing of false victims, conflating all voluntary women migrants with trafficking victims creates similar smoke and mirrors in India's anti-trafficking policy. This disproportionately restricts the voluntary movement of women and obscures migrant experiences of voluntary sex work in favor of those that match the mainstream narrative of prostitution as exploitation. In today's global economy, what is required is a mix of policies and approaches that clearly differentiate between voluntary sex work, voluntary migration, and sex trafficking.

II. CONCLUSION

India's anti-sex trafficking laws, schemes, and implementation efforts fail to adequately differentiate sex trafficking victims from voluntary sex workers. In order to address and remedy this, sex workers should be actively engaged and participate in policy reforms. Further, it is contended that sex work should be recognized as *work*, and reforms should be undertaken in light of a labor framework that protects the agency of sex workers. Finally, voluntary migration should also be differentiated from sex trafficking because current migration policies conflate with the aim of preventing sex trafficking.

This article concludes, unabashedly and unreservedly, that the voices of sex workers must be heard. Relatedly, the agency of such groups must be respected by anti-trafficking legislation, policies, and implementation efforts. Allowing the sex worker to speak does not deny the presence of the structure itself. It merely allows the most knowledgeable persons—the sex workers themselves—to bring their experiences to light. Who better to ask about the legal and social barriers facing sex workers than the workers themselves? Or, more pertinent to the question facing the Supreme Court today,

¹⁷⁹ Prabha Kotiswaran, *An Innocent Omission? Forced Labour and India's Anti-Trafficking Law*, SOUTH ASIA AT THE LONDON SCHOOL OF ECON. (June 10, 2013), <http://blogs.lse.ac.uk/southasia/2013/06/10/an-innocent-omission-forced-labour-and-indias-anti-trafficking-law/> [https://perma.cc/CF5J-MCGY].

who better to ask about the feasibility of legalization as opposed to decriminalization? Sex workers, at the end of the day, know more about sex work than anyone else. The voices of all sex workers, not merely those of cis-gendered women, must be heard.

To allow sex workers from diverse socio-economic backgrounds to speak for themselves does not deny the historical and social processes that contribute to the sex work industry. Nor does listening to their lived experiences and desires anesthetize the patriarchal nature of the trade. To the contrary, speaking to sex workers could bring to light the more insidious yet tangible spaces where power asymmetries thrive within. Furthermore, the voices of sex workers do not require a mouth-piece or a funnel to speak through. According to Patricia Hill Collins, “oppressed groups are frequently placed in the situation of being listened to only if we frame our ideas in the language that is familiar to and comfortable for a dominant group.”¹⁸⁰ This article calls for a conversation between legislators and those engaged in the sex work industry. Sex workers are the dominant stakeholders; their concerns, desires, and experiences should direct legislation on the industry, not those of people who consider these workers a mere philosophical puzzle or anti-sex work moral crusaders.

Only when we hear the voices and calls for rights from these marginalized groups themselves can sex workers be separated from sex trafficking victims. It is within the paradigm of an agency framework that promotes the lived experiences of the individual sex worker that the establishment of an effective, efficient, and right protective approach may be established. India’s migration policies and implementation should reflect the ability for women to voluntarily migrate without having been involuntarily trafficked or smuggled. Opening our ears to the problems faced by sex workers will only better guide legislatures and the Supreme Court in their efforts to protect as well as assist these historically marginalized groups in India. All that is left to do now is listen.

¹⁸⁰ PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* vii (2000).