CHAPTER 3

STATE SCRIPTS

Antisodomy Law and the Annals
of Law and Law Enforcement

According to the National Crime Records Bureau, 2,243 First Information Reports (FIRs), or police crime logs, were registered under the antisodomy law statute over a ten-year period, 1996–2005, for twenty-five states. The state of Madhya Pradesh had the most crime reports for Section 377 (401), followed by Rajasthan (337) and Haryana (312), while, at the other end of the spectrum, the states of Sikkim and Tripura reported only two such cases. The accuracy and consistency with which FIRs are channeled to the NCRB is unclear; for example, Madhya Pradesh reported eighty-four cases for Section 377 in 2003—the highest for any state in any year—but as few as four cases in the previous year.

These numbers are often compared with figures for Section 375, the law that criminalizes rape. Against the 2,243 cases for Section 377 over ten years, 18,359 cases of rape against girls and women were registered nationally in one year alone. For metropolitan Delhi, which is home to some fourteen million, the reported figures for Section 375 are more than seven times higher than those for Section 377. As one senior police official noted, social taboos and fear of the police and criminal procedures mean that some number of rapes are never reported. Even though crime committed under Section 377 is also likely to be underreported for similar reasons, the volume appears to be considerably less, confirming the view that rape represents a social problem but numbers for Section 377 do not warrant attention (see chapter 2).

Case law for Section 377 parallels the pattern from law enforcement; since 1860 only an estimated twenty-six to forty-six cases, depending on the cutoff date, went through the higher courts. Even when the tally in-
creases to the ninety-nine cases that I was able to collate for this chapter, or in the case of the final Supreme Court verdict on the Naz Foundation writ, which covers 140 cases, it still does not compare to the voluminous case law for rape. But statistics tell incomplete stories, and numbers gesture toward only the most preliminary comparisons. While charges under rape law require evidence of the lack of or inability to consent, consent is irrelevant to Section 377, and although rape is not seen as normal, neither is it seen as unnatural. If rape laws are meant to protect, the antisodomy law is meant to punish. Whereas the rape law refers to violations involving “sexual intercourse,” the antisodomy law uses the language of “carnal intercourse against the order of nature” to create a tautology between unnatural sexual practices and criminality.

In contrast to its pattern of sporadic (formal) enforcement, the antisodomy statute became the centerpiece of gay, lesbian, and queer activism in India in the years preceding the Delhi High Court verdict; originally known only in limited circles, it rapidly became the icon of homophobia in national liberal discourse. Marking the law’s ascent into the public limelight, an open letter signed by the highly regarded novelist Vikram Seth and many other Indian luminaries argued that Section 377 jeopardizes human rights and fundamental freedoms as well as the spirit of a democratic and plural nation and should be revoked. In what he described as an exceptional gesture, the Nobel laureate Amartya Sen supported this appeal, arguing that the criminalization of gay behavior contradicts human civilizational progress; however, he begged the question of why a relatively little-used law warranted an extraordinary response on his part.

Plaguing Section 377 are not the number of crimes recorded or the cases adjudicated, for numbers, after all, are unreliable and inadequate as measures of violence and injustice. Rather driving the struggle against Section 377 is its discursive history—that it inaugurates and institutionalizes the sodomite in Indian legal history, and by extension social history, and that it facilitates the persecution of homosexuals not least through law and law enforcement. As such, the 2001 Naz Foundation writ challenging Section 377 makes the case that the law’s letter and spirit discriminate against homosexuals and serve as a barrier to equal and full citizenship for sexual and gender minorities.

These tensions between a sporadically used but abused law that is also an icon of injustice raise questions about juridical governance and
histories: Does the law indeed import the sodomite as personage, in the Foucauldian sense, into the Indian context? If the law is not being enforced, why does it linger? What are the patterns of juridical governance across the law’s more than 150-year history? Is it used at all, and, if so, does case law indicate the continued persecution of same-sex sexualities? Or does it yield a different picture, and would it hold across the annals of law enforcement, such as police crime logs?

In this chapter these questions segue into an analysis of case law and FIRs that articulates with the critique of the sexual state in the following ways. First, I expose the subjectivities of law, the institution that, in South Asian history, is seen as the emissary of the state or, more broadly by theorists such as Weber, as the source of its legitimacy and meaning with particular attention to sexuality. Building on previously established insights, I trace the disjunctures and inconsistencies between the statute’s history and its use to primarily prosecute sexual violence against children. Instead of treating it as a ready archive, I disarticulate and disaggregate the body of case law, marked as it is by the instabilities of meaning—stretching tautly across 150-year colonial and postcolonial histories—and the uncertainties of numbers: which cases have been left out and which ones qualify. Taking the caveat that legal materials are not merely descriptive but normative, and the caution that legal archives are often used to produce the very histories and subjects that they ostensibly corroborate, I read legal archives from the perspective of child sexual assault to highlight law’s irrationalities and affects.

Second, I track the increasing range of sexual practices and discourses that have fallen within Section 377’s ambit over the years, thereby powering the reach of law and law enforcement and implicitly securing the state. Section 377 may not be frequently deployed to register or prosecute crime, but its documented history tracks closely with expanding judicial definitions and understandings of what constitutes unnatural sexual practices, which, without exception, are articulated in the context of sexual assault on children. Third, taking issue with Foucauldian genealogies of homosexual persecution institutionalized into law, I invite more complex renderings of colonial and postcolonial histories of homosexuality. Coming to grips with these histories in ways that do not presume a beleaguered homosexual subject at the outset draws attention to a broader and multiphonal set of discourses—unnatural, wrongful, perverse, depraved, and habitual—that animate how Section 377 is gov-
erned. Not least, I also bring to the forefront the nuances of gender, age, and social class that mediate sexualized practices of governance helping produce state-effect.

Taking the ambiguities of the legal-juridical framework (after Janaki Nair) as my point of departure, I begin by analyzing the discursive intent of Section 377 and locating it within a history of colonialism, penal codification, and criminality. The chapter’s emphasis then shifts to inconsistencies between the intent of the law and its archival life and the passions of its gradually expanding scope. I end by reflecting on the pitfalls of reading an ongoing history of homosexual persecution, or a Eurocentric Foucauldian genealogy, to drive the struggle against Section 377.

Formatting Discourse

Section 377 was part of the 511 criminal codes that composed the Indian Penal Code, introduced by the colonial state in 1860, and has been amended only a few times since then. It reads, “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.” Section 377 was the revised version of Clause 361 that was part of the draft first submitted in 1837. Although Section 377 aimed for greater precision, Clause 361 makes clear that the intent is to penalize what is defined as unnatural lust regardless of consent: “Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and must not be less than two years.” Section 377 replaces “unnatural lust” and the vagueness of “touching” with “carnal intercourse against the order of nature,” which requires penetration, as Arvind Narain points out. But it also retains an expansive scope compared to, say, the specificity of rape law, requiring continual judicial interpretation.

Some versions of the Indian Penal Code provide further clarifications on the intent of Section 377: “General Comments: This section is
intended to punish the offence of sodomy, buggery and bestiality. The offence consists in a carnal knowledge committed against the order of nature by a person with a man, or in the same unnatural manner with a woman, or by a man or woman in any manner with an animal.” The general commentary serves to further emphasize the intent of Section 377 in ways that were earlier achieved by providing what were called “illustrations,” aimed at facilitating legal interpretations of some of the codes due to the absence of an established body of case law to serve as precedent. Also notable about the general comments is that they amplify what is implicit in Section 377: that the law applies equally to men and women.

Despite the relevance of consent, Section 377 was placed in chapter 16 of the penal code with other violent offenses relating to the body, such as rape, kidnapping, and assault. In terms of punishment, life imprisonment or ten years rigorous imprisonment (hard labor) and a fine are severe for consensual sex but represented an improvement over the death penalty for sodomy in England. It is important to note, however, that in England sodomy was sporadically prosecuted through its common law tradition, and there existed no direct parallel to Section 377 in law or in the acts that subsequently legislated same-sexual sexual activity in nineteenth-century England, namely Blackstone’s Commentaries on the Laws of England (1769), the Offences against the Person Act of 1828, the Criminal Law Amendment Act of 1885, and the Offences against the Person Act of 1861. Section 377, then, was a specifically colonial invention that was shaped by extant meanings of sodomy in England and the exigencies of colonialism, crime, and social relations in a context at once far removed and linked by rule.

COLONIALISM, CODIFICATION, AND CRIMINALIZED SUBJECTIVITY

Attempts to standardize law by codifying the Indian Penal Code of 1860 were fundamentally about discourses of desire and sexuality that encompassed the breadth of colonial rule in ways noted by critical scholars such as Anne McClintock, Ann Laura Stoler, and Robert Young. Law was a particularly charged site through which the excesses associated with the colonies could be produced only to be harnessed by impositions of European law, synonymous with reason and universality, for, as Piyel Haldar notes, the East was fabricated, fantasized, and even envied as the
other side of law in colonial representations, while helping constitute Occidental legality. These oscillations between the East and Europe, between lawlessness and the rule of law, between multiple confusing legal systems and a universal system helped rationalize the drive toward codification in the Indian colonial context.

Nair suggests that although the process of codifying law started after 1772, it became an urgent matter in the 1830s, leading to the formation of the First Law Commission in 1835, under the stewardship of T. B. Macaulay. The draft, prepared mostly by Macaulay, was submitted to the government of India in 1837 but adopted only twenty-three years later. Influenced by Jeremy Bentham and the Utilitarians, Macaulay strongly espoused the need to standardize criminal law to ensure universal jurisprudence even though the definition of universality was severely mediated by race, gender, and nation in the colonial context. While the codification of law was highly contested and divisive, its legacy has been predominantly understood through the discourses of modernization and reform.

Through the decades support for codification oscillated between the need for law and the need to reform a legal morass; less disputed were the underlying premises of ushering Indian law into history and codification as progress. That the penal code stabilized the rule of law by systematizing, standardizing, and simplifying amid multiple, confusing, and complex legal structures is a position shared by Macaulay and his supporters well beyond the colonial period. Writing across the distant shores of historical space, Macaulay and the present-day legal historian M. P. Jain paint similar modernist narratives of rupture with the past. The state of law prior to the Indian Penal Code is repeatedly described as chaotic, confusing, and uncertain as a result of multiple colonial and pre-colonial structures of law that varied by region, religion, and jurisdiction. Thus in his “Introductory Report upon the Indian Penal Code” Macaulay describes an uncertain legal system in India that must be superseded by a uniform penal code:

It appears to us that none of the systems of penal law established in British India has any claim to our attention, except what it may derive from its own intrinsic excellence. All those systems are foreign. All were introduced by conquerors differing in race, manners, language, and religion from the great mass of the people. The criminal law of
the Hindoos was long ago superseded, through the greater part of the territories now subject to the [East India] Company, by that of Mahomedans, and is certainly the last system of criminal law which an enlightened and humane Government would be disposed to revive. The Mahomedan criminal law has in its turn been superseded, to a great extent, by the British Regulations. Indeed, in the territories subject to the Presidency of Bombay, the criminal law of the Mahomedans, as well as that of the Hindoos, has been altogether discarded, except in one particular class of cases; and even in such cases, it is not imperative on the judge to pay attention to it. The British Regulations, having been made by three different legislatures, contain, as might be expected, very different provisions.18

If Macaulay fails to note the ironies of a legal morass, which was an administrative effect of colonial rule and the imposition of conquest, then it is also lost on Jain in his narrative on codification:

The chaos with which the legal system was afflicted in India could be effectively dealt with only through the process of codification, i.e. reduction to a definite written form of law which had previously been unwritten or written only in such form as reported cases. Codification envisages reduction of different branches of law to a clear, compact and scientific form. Only through codification it was possible to achieve certainty for uncertainty, a written and stable law instead of a wilderness of judicial precedents which were bewildering to the litigant and confusing to the court. It was only through codification that homogeneity of law in the country could be achieved, and the law could be systematized, simplified and made somewhat clear and precise.19

The grammar of the excesses of law mixes with metaphors of wilderness to affirm codification as inevitable and an improvement.

Codification of law was also a reach for secularization, away from what Bernard S. Cohn has described as the theocratic understanding of the Indian state, whereby Hindu and Muslim became administrative categories of convenience to stabilize complex and hybrid legal and cultural practices.20 Macaulay and Jain each note that although English law applied in some parts (presidency towns), other parts (mofussil) were governed by Hindu and Muslim law depending on the religious-cultural
affiliations of the subjects. This nominalization of Hindu and Muslim law was first undertaken by colonial agents and later partially undone by administrators such as Macaulay for whom secularization became the pretext for excluding local law. It was argued that even among presidency towns and the mofussil there was lack of uniformity due to judicial decisions and interpretations; non-Hindus and non-Muslims were governed by a different set of laws depending on where they resided; and the highest court often had to weigh in on which particular aspects of law applied in which areas. All of these elements were cited as arguments for a universal, secular, modern penal code.

But the colonial discourses of reform, modernization, and secularism were also feints for making systems of governance intelligible and subject to European orientations. David Skuy, who argues that the Indian Penal Code was not about the reform of the Indian primitive criminal justice system but was a British attempt to modernize its own criminal justice system, suggests one angle of critique. Characterizing the British criminal justice system as primitive, Skuy notes that by the time Macaulay started his work on the Draft Code of 1837, Britain's messy, bloody, and inchoate legal system had been under reform for half a century and that India received a penal code that reflected the needs of England. Although Skuy's analysis ignores the particularities of the colonial context, it is useful in unsettling the persistent narratives of modernity and reform that shape not only colonial but also postcolonial discourses of law. Elizabeth Kolsky takes a different approach; she argues that codification was driven by the exigencies of the local, particularly the need for colonial authorities to harness lawlessness among European communities. Both Skuy and Kolsky start by relating histories (after Kumkum Sangari) of the metropole and colony but point to different sites of significance. My point is not to reconcile these different analyses but to note their critiques of modernity while underscoring law as the means through which the East and excess are produced and (unevenly) harnessed.

Rather than a progression of history and modernity, Section 377 represents what RadhikaSingha has called the despotism of law possible within an authoritarian context. Lost in the colonial and postcolonial liberal narratives on codification as inescapable and inevitable is the underside of introducing criminal laws like Section 377 where they did not previously exist. Seen from the perspective of Section 377, the rupture between past and present, modernity and its predecessor is not celebra-
tory but suspect. In his introductory notes on the Draft Code, Macaulay emphasizes the need to meld simplicity and precision in any law and declares law a travesty, an “evil,” if it does not adequately convey meaning to the people who must abide by it. He seems to have missed entirely the irony of his own beliefs; one wonders what greater evil or travesty there is than the introduction of a law against unnatural lust where it did not previously exist. Indeed there is scant explanation in the written record about the introduction of Clause 361. Macaulay’s “Introductory Report upon the Indian Penal Code,” for example, makes references to this clause only to forestall public discussion on it: “Clauses 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said. . . . We are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of the opinion that the injury which could be done to the morals of the community by such discussion would more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.”25 Macaulay drew heavily on Bentham, but regrettably he appears to have been unaware of Bentham’s polemic that homosexuality should not be treated as a crime.26

Section 377 introduced the criminalization of nonprocreative sexual practices in a way that did not have a precedent in precolonial India, and although the code does not overtly interpellate any specific persons or what have come to be identified as sexual orientations, the consensus is that it inaugurated the homosexual into legal history. Taking a Foucauldian stance, Narrain notes that while homosexual intercourse, contingent on subjects’ caste and gender, could be punished for violating religious-legal texts, the “deviant” or “criminal” homosexual did not exist in precolonial India.27 Similarly Alok Gupta argues that Section 377 is a law not merely about sexual practices but about homosexuality, for its target is not transgressive sexual acts but the transgressive person: the consenting homosexual.28 Aniruddha Dutta crystallizes the analytics of the modern homosexual and the attendant homophobia: “Section 377, though externally imposed without consultation, becomes part of the process of re-mapping and re-figuration of extant categories of gender/sexual difference vis-à-vis a modern taxonomy of sexual acts and subjects and allows for the retroactive consolidation of tendencies phobic or resistant to such difference into a loose yet powerful assemblage of
something like modern homophobia.” Thus Section 377 can be seen as intended for persons who have the appearance of being homosexual and therefore likely to commit aberrant sexual acts. Not surprisingly, as Anjali Arondekar elaborates in her critique on retrieving sexual subjectivities from the colonial legal archive, one of the very first cases under Section 377 had to do with the prosecution of a hijra for a crime without an eyewitness, a victim, or a chronology of events, but merely the appearance of homosexuality. Thus Narrain speculates that Section 377 “contributed to the very emergence of the homosexual as a rights bearing subject who would one day question his/her very criminalization.” Section 377 may have served the imperatives of colonialism and governance of sexual subjectivities, but, as Upendra Baxi asserts, it is not enough to register the emergence of law as discourse, for it must be analyzed more thoroughly.

Law’s Subjectivities and Expansions

As an imprecise collation of judgments, sentencing, and appeals mostly from the high courts and the Supreme Court, case law for Section 377 is a rough rather than ready archive. Some records are lengthy, others are brief, and the handful of studies on Section 377 identifies varying numbers of legal cases. For example, Suparna Bhaskaran bases her analysis on some twenty-seven cases, while Shamona Khanna identifies thirty cases and Gupta forty-six. I was able to locate ninety-nine cases due to a combination of search methods, improved online search engines, and additional cases in the past few years, but even this is not an exhaustive list. The law reports are not always thorough, the search engine is not comprehensive, and there are human errors, for example where Section 377 is mistakenly recorded for Section 337. The list is also partial because it is drawn from the higher courts, as records from the lower courts are difficult to access. If only those high court cases that mention Section 377 are considered, even when the charges are not filed under this code, the cases multiply. Still, if one were to hold more closely to cases that are primarily charged under Section 377, the problem extends beyond identifying a numerically stable archive to reading an archive spanning 150 years and shifting conditions.

In her work on U.S. colonialism and law in Hawai’i, Sally Merry explains that case law always emerges through an “interpretive screen,”
which in the context of Section 377 has to do with the decriminalization of homosexuality. Notwithstanding the significance of legal precedence, case law on Section 377 has been collated and analyzed due to scholarly or activist interest, including this study, not least because law dictates the terms of its contestation. Inasmuch as Section 377 might be understood to criminalize homosexuality, any criticism or challenge thereof must show how the law constitutes the sodomite and unfairly and unreasonably discriminates against homosexuals.

Critiques of Section 377 range from the discriminatory spirit of the law to the records as proof of that discrimination. Bhaskaran’s analysis of case law is undergirded by the AIDS Bhedbhav Virodhi Andolan writ, submitted in the Delhi High Court in 1994 to decriminalize homosexuality by repealing Section 377 (see chapter 5 for more on this writ), and Gupta’s and Khanna’s discussions of the legal archive occur in the context of the 2001 Naz Foundation writ, also aimed at decriminalizing sodomy. These analyses of case law are driven by the need to show inherent legal biases against the sodomite as a precursor of the homosexual. My point is not to take issue with these insights, for I build upon them. Rather I wish to underscore the point that the engagement with case law thus far has been primarily deployed as evidence of the legal bias against homosexual subjects and to hold it up as emblematic of contemporary homophobia, the origins of which lie within the colonial state.

UNYIELDING BODIES
But case law on Section 377 does not so easily yield. Rather than figur- ing the sodomite, it turns out to be a collection of sexual offenses that lie beyond the pale of the natural and normal, including consensual and nonconsensual sex between adult men, sexual assault on children and women by adult men, anal and oral sex coerced by men from their wives, and bestiality.34 In fact the vast majority of Section 377 case law involves the sexual assault of boys and girls, typically young children, by adult men. This is not an innovative insight into case law by any means, for Bhaskaran skims this point in her analysis while Gupta notes that more than 60 percent of the forty-six cases in his study are about child sexual abuse, with a trend toward increased use of Section 377 in the 1990s to prosecute sexual assault on girls.35

Since the Indian Penal Code offers only narrow definitions of rape in Section 375 and makes no provision there for sexual assault on children,
Section 377 has until recently been the only way to prosecute sexual violence against male children and male adults, as well as aggravated sexual assault against girls and women. The format of Section 375 offers a narrow understanding of sexual assault so that women and girls are consistently reproduced as heterosexual subjects whose bodies are violable, and men are produced as violators. “Forcible penis penetration of the vagina by a man who is not her husband” remains the operational understanding of rape, as a result of which a judge of the Delhi High Court did not hold responsible the father who repeatedly sexually assaulted his young daughter in the infamous Jhaku case on the grounds that the harm caused her did not fall under the criteria of Section 375. In contrast, Section 377’s imprecise but adaptable grammar of carnal intercourse against the order of nature allows for the prosecution of sexual violence on boys, otherwise excluded from Section 375, and also aggravated sexual assault that exceeds the scope of forcible penis penetration of the vagina. The irrelevance of consent under Section 377, or what is the crux of the problem for same-sex consenting adults, ends up facilitating prosecutions in cases of child sexual assault, as is amply evident in the legal case record.

Despite this the legal record for Section 377 has been analyzed from the angle of adult homosexuality. Gupta observes that, ironically, of the forty-six cases in his study only six are related to adult male-male anal intercourse, of which one case alone involves consensual sex. Similarly, of the ninety-nine cases collated for this chapter, seventy-one of the victims are children: forty-four boys and twenty-seven girls. These cases do not lend themselves to facile characterizations, even though the record starts dismally in 1884 with the higher court setting aside the conviction of Bapoji Bhatt by a sessions judge in the state of Mysore partly by expressing doubt about the nine-year-old boy’s testimony in Government v. Bapoji Bhatt. Another case from the same year, Queen-Empress v. Khairati, has to do with a hijra whose appeal is granted since she was convicted of a “crime” without any substance or witness or harm to anyone, but not without the judge railing against her as a habitual sodomite. Although not all appeals are upheld in the higher courts, most of the archive contains pleas to the rulings or sentences of lower courts in cases of child sexual assault.

When considered from the vantage point of child sexual assault, the most conspicuous pattern in the legal record has to do with the plausibility of the case, which is primarily based on whether a child can give
testimony or the testimony of a young child can be credible, much like in Bapoji Bhatt. Years later, in the relatively brief record of Sardar Ahmad v. Emperor from 1914, the judge rejected the appeal that the uncorroborated testimony of the thirteen-year-old boy should not be the basis for conviction. Even though there appear to be no other cases in the years between Bapoji Bhatt and Sardar Ahmad, the judge upheld the district magistrate's reliance on the child's “practically uncorroborated” testimony without much discussion and let the conviction stand. The very next case in the archive, Ganpat v. Emperor, decided in Lahore four years later, presents a stark contrast despite similarities in the basis of the appeals. The petitioner appealed his conviction under Section 377 for assault on a fourteen-year-old boy, and this time the presiding judge set aside the conviction and acquit him on grounds of uncorroborated evidence by a young child. These contrary judicial conclusions are not without consequence, for Ganpat was cited as recently as 2010 to deny conviction for sexual assault on a young boy in State of Himachal Pradesh v. Yash Paul. A more recent case, Raju v. State of Haryana, related to sexual assault on a nine-year-old girl, reveals the persistent ambivalence toward children's testimony in Indian law. The judge wrote:

In a long chain of decisions, it has been observed that children are a most untrustworthy class of witnesses, for when of tender age, they live in a realm of make believe, they are prone to mistake dreams for reality. They are pliable as clay and repeat glibly as of their own knowledge what they had heard from others. However, there is no rule of law in India that evidence of child witness cannot under any circumstances be acted upon. . . . When the oral testimony of the child witness is found to be thoroughly honest and straightforward and implicitly reliable, even the solitary testimony of the child witness is sufficient to sustain the conviction of the accused.

Of particular importance in cases involving children are judges' concerns about questionable motives and spurious allegations by victims. In the 1947 case Mirro v. Emperor, the judge set aside the conviction established by the assistant sessions judge, reasoning that the accounts of the boy, the blacksmith who tried to intervene, and other witnesses who gathered at the behest of the blacksmith did not add up plausibly. In particular the judge referred to the petitioner's concern that the accusation was the result of “bad blood” between him and the community of
Chamars, to which the boy belonged. Dismissing any question of “communal feelings,” the judge set aside the conviction on the “impression” (his word) that the accused was seen as an undesirable person and the accusation was the result of enmity.

Mirro is also important as a case in which plausibility was at least partly based on medical evidence. Continuing a line of reasoning present in the earliest case, Khairati, Mirro extends the role of medical evidence as the gap in the prosecution’s story. In her discussion of Khairati, Arondekar writes that in a case tried under the antisodomy law, without a complainant or a specific crime, no location of the alleged crime, and no witness, medical evidence of a subtended anus and signs of syphilis was damning.46 Arondekar emphasizes the heightened role of medical jurisprudence in colonial history involving offenses against the body, including under Section 377. What Mirro extends after Khairati is further amplified in Ghanashyam Misra v. The State of Orissa in 1957, where the petitioner, a schoolteacher, appealed his conviction for raping a ten-year-old girl student under Sections 376 (rape laws) and 377 in the Orissa High Court.47 In considering the appeal, the presiding judge carefully weighed the various facts but also repeatedly emphasized the role of the medical examination. The petitioner’s appeal was rejected and the sentence was actually increased based on the medical evidence of a tear in the girl’s hymen, her blood-stained sari, the abrasion on the prepuce of the petitioner, the standards of medical jurisprudence that required a satisfactory explanation for the injury on the penis, and the medical opinion that penetration, though incomplete, likely occurred.

Across this archive medical jurisprudence is consistently refracted through the lens of legal guidelines and what is considered commonsensical reasoning. Thus the question of plausibility in these cases extends beyond the matter of child victims and witnesses to the integrity of the overall case, and judicial reasoning requires putting together the jigsaw puzzle of facts, legal arguments, and medical jurisprudence. Corroborating children’s testimony with other children and adults to whom they report sexual assaults, the sequence of events in which the assault occurred and was reported to the police, and the circumstances under which the assault occurred are among the points of consideration in the archive. Put together with legal precedence and judicial interpretations of the letter and spirit of the law, the legal archive of Section 377 becomes subject to its own discourses and performance. On the one hand, judicial
decisions in upholding or modifying convictions and sentences have all the appearance of legal and commonsensical reasoning. Their authority is derived from such appearances, affirmations about plausibility, recourse to legal precedence, and reiterations of the spirit and logic of the law. On the other hand, the archive and sometimes the individual cases are quite arbitrary. For example, close reading of the letter of the law in relation to legal precedence sometimes means upholding convictions, at other times overturning them. And, as noted earlier, reasoning used for similar circumstances sometimes leads to entirely different conclusions, for neither legal guidelines nor common sense are free from subjective and contrary sociolegal discourses.

LAW’S EXPANDING SCOPE
Also evident across the unwieldy archive is Section 377’s expanding scope, not in reference to the homosexual as sodomite but consistently in cases to do with child sexual assault. In Bapoji Bhatt (1884), the judge accepted the appeal to conviction from a lower court because he considered the testimony of the nine-year-old to be doubtful but also because, in his reasoning, oral sex with a nine-year-old boy did not fall under the scope of Section 377. Arguing that “Section 377 is almost word for word the same as the form of indictment prescribed by English law for cases of Sodomy,” he concluded that judges in England did not see a man’s forcing his penis into the mouth of a child as constituting sodomy.48 A similar appeal some decades later in Khanu v. Emperor (1925) that oral sex with a child does not constitute an offense under Section 377 was rejected. Khanu serves as a point of rupture in case law by arguing that oral sex involves sexual euphoria but is nonprocreative and therefore is against the order of nature. Further spinning out sociolegal discourses on sodomy, the court also weighed in on the question of why “modern states, now freed from the influence of superstition, still make the sin of Sodom punishable,” only to conclude that it is to encourage legitimate marriage, to discount unmanly and less useful members of society, and to prevent the premature sexual indoctrination of the young.49

Khanu is cited frequently and used to expand the scope of sodomy to crimes of nature involving bestiality, buggery, and oral sex, leading to a conviction of three men for sexually assaulting a boy by forcible, if incomplete, penetration of the mouth with a penis in Lohana Vasantlal Devchand and Others v. The State.50 As Narrain notes, Lohana Vasantlal
Devchand settles the matter of sodomy by including in its purview any unnatural sexual activity involving the sexual organs of either of the participants.51 The judge wrote, “It could be said without hesitation that the orifice of mouth is not, according to nature, meant for sexual or carnal intercourse. Viewing [sic] from that aspect, it could be said that this act of putting a male-organ in the mouth of a victim for the purposes of satisfying sexual appetite, would be an act of carnal intercourse against the order of nature.” The following year, in State of Kerala v. Kundumkara Govindam and Another, the Kerala High Court justice cited Khanu at length and ruled that forcible sex between the thighs of a fourteen-year-old girl was within the ambit of carnal intercourse against the order of nature and was therefore punishable under Section 377.52

Alongside the expanding statute’s scope, case law was also proliferating discourses of sexual perversity, mostly through cases of sexual assault on boys. In Fazal Rab Choudhary v. State of Bihar, the Supreme Court interpreted Section 377 as synonymous with sexual perversity while weighing an appeal from Fazal Rab Choudhary, who had been sentenced to three years of rigorous imprisonment for what was described as an unnatural offense on a young boy.53 In deliberating the merits of the appeal, the justices wrote, “The offence is one under Section 377, . . . which implies sexual perversity.” The justices who furnished the historic judgment Naz Foundation v. Government of NCT of Delhi and Others in 2009 summarized the legal record of Section 377 as spanning “from the non-procreative to imitative to sexual perversity.”54

Discourses of morality, excess, and the unnatural flourished throughout the legal record as judges considered cases and appeals related to sexual assault on children. Persisting in the discourse is the language of depravity, heinousness, and sexual perversity associated with unnatural behavior that cannot be directly traced to Macaulay’s notion of the “heinous crime”; whereas Macaulay seems to refer to the heinousness of consensual sex among men, the heinousness in the legal record is primarily about the monstrosities of sexual assaults on children by adult men. In Mirro, involving sexual assault on a young boy, the judge characterized the accused as a terror and a morally depraved man. More recently, in the State of Maharashtra v. Rahul alias Raosaheb Dashrath Bhongale, the presiding judges repeatedly used the language of depravity to deny the appeal of the petitioner.55 Characterizing the ferocity with which the accused sexually assaulted and murdered the young girl, this legal record
is replete with phrases such as “depravity of the accused,” “depravity of the mind,” and “depravity of nature” to register shock and dismay at the vicious crime. Crime under Section 377 is often described as beastly and heinous, but perhaps no word is more frequently used in child sexual assault cases than unnatural, where it is both a synonym for sodomy and a means to characterize excess that cannot be contained within the realm of nature (or, really, culture). Thus unnatural sex is frequently used to signal coerced anal or oral sex but mostly for cases of excessively violent or brutal crimes committed on young children.

Case law spanning some 150 years can be broadly read as shifting from initial preoccupations with nonprocreative sex to interpreting and expanding the scope of unnatural sex by the early decades of the twentieth century. The homosexual as sodomite may well have been the reference point in early case law, which is why oral sex forced on a nine-year-old in Bapoji Bhatt would be seen as outside the scope of Section 377. But the relentlessness of cases of sexual assault on children forced judges to gradually enlarge the scope of Section 377 and include an increasing range of practices—oral sex, forcible sex between the thighs, and so on—within its ambit. Across the archive the reference point shifts away from the putative perversity of the homosexual as sodomite to the persistence of perversity, sexual depravity, and heinousness in relation to adult male sexual violence on children. Seen from the angle of child sexual assault, the legal archive of Section 377 is inconsistent with the ideological underpinnings of the code and is suggestive of law’s irrationalities.

Before proceeding, I would like to juxtapose the legal record with police crime records, for they are the foundations upon which convictions are won and lost in the courts. The handful of analyses on the legal record of Section 377 does not take into account police crime records, perhaps because they are difficult to access. Providing more immediate insight into what sometimes ends up in the higher courts, police crime records serve a twofold purpose in this discussion: they provide a useful point of comparison with the trends of case law for Section 377, and they speak to another facet of Section 377’s illogics. Therefore I turn to a sampling of sixty-six FIRs related to Section 377 for the period 1999–2005 obtained from three police districts of New Delhi, covering tens of police stations, to explore the uneven ways in which state institutions and procedures format sexuality, governance, and criminality.
Wrongful versus Unnatural Acts: Police Crime Records

First Information Reports are mandated under Section 154 of the Criminal Procedure Code, related to what are classified as cognizable offenses. Section 377 is a cognizable offense, which means that a case may be investigated and an arrest made without a warrant. Section 154 reads:

Information in cognizable cases. (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. (2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.56

FIRs are the written reports related to the commission of an offense that is supposed to be recorded in writing by the police, based on the testimony and attestation of the informant. As affidavits, they serve as another iteration of “paper truths” of the state.57 Like many other state records, FIRs are standardized, aimed at registering the same information in each case while leaving room for each case’s peculiarities. They format otherwise unmanageable details of crime reports into the following categories: police district and date of record; relevant sections of the penal code; the day, date, and time of the crime and the place, date, and time where the complaint was filed; details of the complainant or information, including name, father’s or husband’s name, date of birth, nationality, passport details, occupation, address, and telephone number; details of the accused; reasons for delay in filing a police report, if any; details of any stolen property; details in a case of murder; and the details of the crime, as well as the name of the person creating the record.

The sixty-six FIRs from New Delhi corroborate what is evident from the legal archive; the vast majority (fifty-nine) are crimes committed on children; forty-nine are about sexual assault on boys, while ten chronicle crimes against girls. The ages of the victims were not recorded in three of the cases, although the narratives suggest that two were boys and one was a girl. The FIRs also include four adult men as victims or
complainants; their ages were eighteen, nineteen, twenty-five, and forty. The nineteen-year-old reported that a classmate committed the crime; the eighteen- and twenty-five-year-old were assaulted while trying to find employment. In what appears to be an unusual case, the forty-year-old reported being abducted by two men in a van, robbed, and sexually assaulted while he was walking to work one early morning. None of the four cases involving the adult men, nor any of the other sixty-six cases, bears obvious traces of consensual rather than coerced sex, even though the circumstances could be more complex than what is recorded.

These FIRs also provide additional insight into what becomes the legal record of Section 377 through the higher courts. The informants or complainants logged in the FIRs are either the victims of crimes or, typically, family members who intervene on behalf of their children. A twelve-year-old boy may be identified as the complainant, but at other times a father or mother may be recorded as such. Typically a mother or father is listed as the informant or complainant when the child is younger than ten. Women are more likely to register the FIR for their young daughters. Children are typically listed as students, and the adults are generally from the working classes, listed as laborers, owners of a small business such as a juice stand, or engaged in other low-skill occupations. Almost all the women are described as housewives. At least based on these sixty-six FIRs, it appears that the working poor and the lower middle classes are the ones reporting crime related to Section 377. Most of the accused are neighbors; in only one of the cases the identity of the accused was not known. The age of the accused is rarely noted, but there are ample references in Hindi to ladka/ladke (boy/boys) or aadmi (man). Since ladka might be used to describe a boy or a young man, it is hard to ascertain the age of an accused, whether he is also a minor possibly assaulting another minor or legally an adult committing a crime on a minor.

STATE SCRIPTS AND WRONGFUL ACTS

FIRs are not simply “factual” records of crimes or “paper truths” that are freighted with the power of the word in the modern state; rather they are better understood as state scripts that produce and mediate narratives on crime in three ways. First, they are forms, having a number of different fields where information is condensed and easy to read. In fact the FIRs gathered for this study include two versions, the earlier of which was phased out. The later version uses twelve fields of information re-
lated to the details of the informant or complainant and the crime, a narrative section, and another three fields at the end related to the police officer recording the FIR. The many more fields of data in the later version create a more detailed record, including age, occupation, and passport number of the informant or complainant, and is easier to read at a glance. The logic of governance appears to be dictated by the standardization of detail, which allows for more efficient gathering and tabulating of information. This is precisely the kind of information that is used by centers such as the National Crime Records Bureau to generate reports in increasing detail.

Second, FIRs are literally scripted. Since the FIRs are from Delhi police stations, all the fields are handwritten primarily in Hindi and partly in English, especially numbers, dates, and occasionally names. They are stored as paper copies and listed in hardbound ledgers, kept in the Records Room of local police stations. Third, there is relative consistency in the narratives, despite the particularities of cases, the different police districts from which they were obtained, and the five-year period from which they are drawn. It’s not that the details of age, gender, and occupation of the informants or complainants do not matter, but that the formatting of the narratives gives the FIRs a kind of uniformity. While no case is the same as another, the representation of the crime and its circumstances repeat across the FIRs into what emerge as a few familiar scenarios. A FIR from the North West police district recorded in 2001 lists a twelve-year-old boy as the complainant and a male of unknown age as the accused. In the first-person account of the boy, he says that he was promised a new and bigger kite by the accused, who took him inside the house, locked the door of the room, clamped the boy’s mouth with his hand, took off the boy’s pants, and performed a wrongful act on him. The boy’s mother knocked on the door, causing the accused to flee. Several other FIRs read similarly, as boys and girls are lured by a neighbor or an older boy or man from the neighborhood and then assaulted behind closed doors. In this case the accused was charged under Section 377 as well as Section 342 for wrongful confinement. Cases involving young girls are sometimes charged under Section 377 and Section 376 (for rape), but only under Section 377 when the girls are young. For example, a mother registered a FIR for sexual assault on her three-year-old daughter, reporting that she left her daughter in the care of a neighbor,
the mother of the accused; when she returned she found her daughter crying and later learned from her that the accused had put his “ungli (finger, but possibly a child’s word for penis)” in her “private parts” (written in Hindi) and caused her pain. Another scenario repeated in the FIRs is captured in the case of a thirteen-year-old boy who accused three perhaps older boys of taking him by a small temple in a park and sexually assaulting him; when he cried out, they ran away. He returned home and told his father, who took him for a medical examination after calling the police station and then to the police station to register the FIR.

The FIR format discourses of sexuality and criminality, but in ways that are not consonant with the code. In contrast to the ideologies of unnatural sex, the sampling of police crime records is dominated by the discourse of galat kaam (Hindi), which roughly translates as wrongful act. The recorded accounts of the children, the adults reporting on their behalf, and the adult men who file complaints are thick with references to wrongful act; it is used to describe mostly coerced anal sex but also coerced oral sex and rape. One way to understand this discourse is as a euphemism for sexual assault in the case of children. But if euphemisms are necessary, especially in sexual crimes involving young children, unnatural serves just as well; indeed more linguistically formal references to aprakrit maithun (unnatural sexual intercourse) are found in the crime records, but only sparingly.

What seems to be at play here is a disjunction between the law and narratives of crimes under it. Unlike the discourse of unnatural sex and its association with that which violates or transgresses what is natural and therefore legitimate, a wrongful act is replete with injustice and injury. Rather than being generated at the threshold of nature or culture, the discourse of the wrongful act is specifically about the cultural universe of harm and the act of wronging another, especially compelling in terms of children. Whether it is generated by the person giving testimony—the children who report crime and testify to the police or the adults who file complaints on behalf of children—or the police constable who records it, the discourse clearly prevails in the context of child sexual violence and is incongruent with Section 377’s origins and intents.
Contemplations on the Code, Case Law, and Criminal Records

The egregiousness of a law criminalizing sexual practices among adults regardless of consent is inarguable, but the antisodomy law’s records point toward more complex histories of juridical governance. Under-scoring Section 377’s subjective and contradictory aspects yields a thicker understanding of how such juridical mechanisms bring within its fold a web of crime, sexual practices, and subjects—child sexual assault, sexual assault on women and men, adult male perpetrators, but also occasionally women seeking divorce and adult sexual and gender minorities—thus reaffirming the indispensability of law and, by extension, the state in preserving sociosexual order. Though Section 377’s unwieldy archive has been read primarily from a Foucauldian viewpoint to show how law introduced and wrongly criminalized the homosexual, underscoring law’s sexual ideologies offers a more thoroughgoing appraisal of governance and better serves efforts at undoing it.

Highlighting the dissonance between the provision and functions of the antisodomy law helps cast doubt on its usefulness. The intent of Section 377 may well have been to repress and prohibit sex between males and females, but in fact case law from the higher courts—and this is supported by the sample of police crime records—has been primarily used to prosecute sexual assault against children, especially boys but also girls. Complaints, supported by the medical examination required under the statute, are likely to be filed in cases of crimes against children, not in relation to the adult consensual sexual practices that may fall within the ambit of Section 377, throwing its effectiveness into further doubt. If the antisodomy law is not targeting same-sex sexual practices (or other practices that were originally implied) and is an inadequate substitute for prosecuting sexual offenses against children, then it is hard to justify.

Second, discourses of sexual perversity, depravity, and the scope of sex against the order of nature have been consistently articulated and elaborated through cases involving sexual assault on children, not in relation to the so-called sodomite or the homosexual. Gupta observes that the foremost contribution of cases such as Lohana Vasantlal Devchand has been to mark sexual perversity in Indian law and trigger a growing link-age between sodomy, perversity, and homosexuality without distilling a space for consensual same-sex sexual practices. But to make this case is not only to homogenize a complex and unwieldy set of records but also
to fill a lacuna in the case records that is worth utilizing differently. By underscoring that institutional discourses and expansions of the scope of sodomy law are generated through cases of sexual assault against children, it is possible to suggest that social concerns about unnatural sex, sexual perversity, and the like are consistently being expressed on account of adult male violence on girls and boys rather than targeting homosexuality.

Third, taking a subjective view of law encourages more nuanced representations of the homosexual, not least by sifting him from the child sexual predator. In fact even though the Section 377 archive has consistently been criticized for encoding biases against homosexuals, it would be more politically efficacious to argue that the archive is not about the persecution of adult consenting homosexuals. It is not that biases against the sodomite or the homosexual do not color legal archives, but reading them systematically into the case law unwittingly reaffirms the homosexual as child predator. That law and law enforcement do not sustain homosexual persecution, despite the law's intents, becomes a way of highlighting law's irrationalities, as well as extricating the homosexual from the child predator.

I am also suggesting that by presenting the legal archive of Section 377 as primarily about child sexual assault and not about the homosexual it is possible to rewrite precolonial as well as colonial and postcolonial histories as ambiguous ones. Most significant, the archive does not evidence a clear-cut sociolegal history of persecution against homosexuals in India. (To suggest otherwise is to produce a Foucauldian genealogy of the homosexual as sodomite where it does not unequivocally exist.) Such a position also risks giving greater strength to the state, by assuming it is the site of injustice toward same-sex sexualities and also the well-spring of justice, accounting for Naz Foundation's emphasis on seeking recourse from the judiciary. One would go a lot further in demonstrating the irrelevance of the antisodomy law by rewriting legal histories of homosexuality wherein the colonial context has limited impact and the postcolonial setting shows little indication of systematic persecution of same-sex sexualities as well as by raising questions about a penal code and legislative system that, until the passing of the Protection of Children from Sexual Offences Act (2012), did not have laws and provisions to deter and prosecute sexual assault on children. And, not least, building a more capacious case challenging discrimination and injustice against
same-sex sexual subjects would necessarily implicate a whole nexus of laws, policies, and discourses in lieu of a narrow focus on Section 377.

A fourth and concluding point: the archive is hardly free from homophobic discourses. To say that there are few cases of adult homosexual consensual sex in the higher courts is not to say that troubling discourses are absent, for the issue is never just about numbers. In a recent analysis, Gupta discusses how specific cases—Queen Empress v. Khairati (1884), Noshirwan Irani v. Emperor (1934), and D. P. Minwalla v. Emperor (1935)—constitute (homosexual) personhood pejoratively. Khairati was initially apprehended for being male bodied while dressing and singing in women’s clothes, and then convicted by a lower court for having the characteristic signs of a “habitual catamite.” In Noshirwan Irani v. Emperor, the judge railed against the “vice of a catamite” in the case of the eighteen-year-old Ratansi, with whom the appellant was trying to have sex; they were observed by a policeman and neighbor, who subsequently marched the two of them to the police station. Even though the conviction was set aside—because of discrepancies in earlier and later testimonies, the likelihood that the neighbor and policeman had a grudge against the young Ratansi and did nothing to intervene on his behalf, and because no penetration could be proved—the language described the catamite as despicable and anal sex as a vice. In D. P. Minwalla v. Emperor one of the two accused of sodomy appealed his conviction under Section 377 for what appears to be consensual sex with a young man described as a lad. The judge of the High Court of Sind pored over the evidence, arguments, and plausibility of the crime to uphold the conviction under Section 377, but revealingly chastised the accused for inviting “a lad to perform upon him an odious and unnatural abomination.” These and similar cases proliferate the recursive and pejorative logic between sexual acts and (homosexual) personhood.

What stands out troublingly from the language of the cases involving consensual sex between men is the discourse of the “habitual sodomite.” The language varies superficially as the “habitual sodomist,” “the vice of a catamite,” and “the vice” (of sex against the order of nature), but its underpinnings are about criminality and habitualness. Starting with the legal record of Khairati, the notion of the habitual sodomite finds sporadic though consistent expression in the archive of Section 377. The habitual sodomite is part of a larger matrix of discourses of habitual and hereditary offenders who are codified into the policies and practices of
criminality by the late nineteenth century in colonial India. The ideology that some groups are predisposed to crime through habit or heritage was enacted into law first in the Habitual Criminals Act of 1869 and then the Criminal Tribes Act of 1871 and its subsequent iterations, casting entire communities as imminent criminals, subject to surveillance and control of mobility and coercive resettlement.62

Although Satadru Sen does not address crime related to Section 377, his reflections on the distinctions between habitual and hereditary offenders shed light on how to interpret the traces of the habitual sodomite. Sen argues that while the hereditary criminal was typically associated with the countryside and intergenerational transmission of crime, the habitual criminal was seen as his urban counterpart, hardened to crime but not predisposed to it. Additionally important, according to Sen, is that “the colonial discourse on hereditary criminals was based on a cultural, rather than the biological, model of hereditary. The biological model was always present, but was distinctly secondary.”63 If notions of the hereditary criminal are based on social heritage, then the habitual criminal is seen as someone who is accustomed to crime and likely to continually repeat it; for him, committing crime becomes a settled practice or condition, perhaps even an inward disposition.64

When judges use the grammar of the habitual sodomite or the vice of sodomy (the habit or defect of an immoral or depraved nature) in the case law of Section 377, they rehearse it as a crime that is continually repeated or becomes part of the inward or mental disposition, and therefore an inevitable practice. It seems to me that the most persistent and injurious discourse on homosexuality decried in the legal record is that it is a settled, habitual practice that will inevitably be repeated, the implications of which become especially palpable from the angle of a rights-bearing homosexual. Even though for the Delhi Police the arc from the habitual to the criminal is to some extent negotiable in the case of homosexuals, it is intractable in the case of other groups who are seen to be accustomed to unnatural sex and criminality.