
Abject Labours, Informal Markets: Revisiting the Law's (Re)Production Boundary

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Gendering Labour Law: An Introduction

Feminist legal scholarship has for long richly contributed to the project of gendering labour law. In this article, I consider the efforts of both feminists and women workers alike to have abject forms of labour recognized as valuable labour and as legitimate work. I consider women in three sectors, namely, sex work, exotic dancing and commercial surrogacy and pursue two lines of inquiry. The first line of inquiry is to articulate why the work of these women ought to be recognized as legitimate work. In other words, I build on feminist efforts in the context of social reproduction to redraw what they call the production boundary to in turn critique feminists' own reluctance to include within this production boundary the reproductive labour of women like sex workers, dancers and surrogates. In effect, I ask what it means to redraw what I call the 'reproduction boundary'. My second line of inquiry assesses the implications of this recognition of reproductive labour for labour law. How has labour law acknowledged the labours of these women in the past? Is it possible for labour law to accommodate the demands of these women workers and if so in what ways can it do so and what are the strengths and drawbacks of a labour law model in this context? The immediate setting in which I examine these questions is the postcolonial context of India. However I believe that insights from the Indian experience could be instructive elsewhere on more than one count. Developing countries have for long grappled with designing suitable labour law models for addressing workers' rights in the informal economy,¹ which could inform labour law reform in the increasingly informalized labour markets of the developed West. Also, of the sectors that I examine in this paper, the political economy of commercial surrogacy as it has emerged in India is resolutely transnational. Although the Indian sex industry is at best a regional economy (unlike say the Thai sex industry which is internationalized), there are significant similarities in the vocabularies of regulation of this sector worldwide.

Feminist Theorizing on Social Reproduction

The impetus for recognizing the labour of women in sex work, dancing and surrogacy comes from a rich feminist tradition of conceptualizing reproductive labour. By reproductive labour, I mean the labour involved in social reproduction, namely, "biological reproduction; unpaid production in the home (both goods and services); social provisioning (...voluntary work directed at meeting needs in the community); the reproduction of culture and ideology; and the provision of sexual, emotional and affective services (such as are required to maintain family and intimate

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¹ In this essay, I use the terms 'informal economy' and 'unorganized sector' interchangeably.

relationships)",² all of which are performed predominantly by women typically within the institutional context of marriage. Demands for the recognition of this labour have ranged from radical proposals such as wages for housework in the 1970s³ to more recent attempts at the equitable distribution of marital property upon the termination of a marriage to a rearrangement of the responsibilities for care between men and women when both participate in the paid labour market.⁴

Social reproduction under the neo-liberal conditions of globalization has however dramatically shifted the parameters of these debates. Decisive trends include women's increased employment in the West, a larger aging population and declining social welfare, which have resulted in the homemaker/breadwinner "family wage" model being replaced by a "dual earner model" that seeks to accommodate global competitive pressures for flexible labour.⁵ Confronted with the crises that the global economy and welfare states are thrown into, feminists point to how women are not only increasingly called upon to perform paid work in and for transnational markets, but that they also face increased burdens of social reproduction. This may be ameliorated to some extent by the vast inflow of female migrant workers from the developing world particularly for domestic work and childcare.⁶ Yet, as states are driven by neo-liberal thinking to address the 'care deficit',⁷ feminist scholars point out that "the gap between the outflows — domestic, affective and reproductive labour — and the inflows — medical care, income earned and leisure time — falls below a threshold of biological, financial and affective sustainability"⁸ which has resulted in the depletion of social reproduction.⁹

The challenges facing the provision of social reproduction are significantly different in the developing world. For one, the institutions constituting what Razavi calls the 'care diamond', which meet the needs of social reproduction namely, the market, family, state and community¹⁰ are configured in fundamentally varied ways when compared with the West. In a country like India for instance, the welfare state is at best minimalist, constituting a "residual welfare regime".¹¹ Urban women's participation in the workforce is abysmally low at 16% resulting in the family as the privileged site of care work. Where women's work has been commodified, it is in sectors like teaching or paid domestic work, which accommodates unpaid

² C Hoskyns and S Rai, "Recasting the Global Political Economy: Counting Women's Unpaid Work" (2007) 12:3 *New Political Economy* 297, at 300.

³ L Vogel, *Woman Questions: Essays for a Materialist Feminism*, New York: Routledge, 1995, 57.

⁴ For a debate amongst legal feminists on whether the law should support women's increased paid work in the labour market or compensate them for the unpaid work they perform at home, see the 2000-2001 special issue of the *Chicago-Kent Law Review*.

⁵ J Conaghan, "Introduction" to Special Issue: Legal Constructions of Unpaid Caregiving (2007) 58 *Northern Ireland Legal Quarterly*, at 248-9.

⁶ H Shamir, "Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care" (2009) 30 *Berkeley Journal of Employment & Labor Law* 404, at 439-40.

⁷ J Conaghan, *supra* note 5, at 247.

⁸ S Rai *et al.*, <http://www.e-ir.info/2012/03/19/depletion-the-costs-of-unpaid-domestic-work/>.

⁹ *Id.*

¹⁰ S Razavi, "The Political and Social Economy of Care in a Development Context: Conceptual Issues, Research Questions and Policy Options" (2007) Gender and Development Programme, Paper 3, United Nations Research Institute for Social Development, Geneva, at 20.

¹¹ R Palriwala and N Neetha, "Stratified Familialism: The Care Regime in India through the Lens of Childcare" (2011) 42:4 *Development and Change* 1049, at 1050.

reproductive labour more easily.¹² The institutional parameters within which the political economy of reproductive labour is nestled and the regulatory impulses that govern it are thus driven by what Palriwala and Neetha term “gendered familialism”.¹³ In other words, care is a familial and female responsibility and work in the market devalues and diminishes the dimensions of care.¹⁴ Paradoxically however, feminists also delineate the patriarchal reorganization of reproduction¹⁵ whereby sex selection has increasingly become a technique used to facilitate female foeticide in the post-conception, prenatal moment rather than killing women through dowry harassment or prematurely later in their life cycles. The resultant lop-sided sex ratio of 914:1000¹⁶ as reported by the 2011 census has fuelled the trafficking of women for social reproduction.¹⁷

Situating Feminist Legal Theorizing on Social Reproduction

Like their feminist counterparts in other disciplines, feminist legal scholars have on many occasions engaged with the law’s regulation of women’s reproductive labour. They have in particular demonstrated the central role of the law in producing and entrenching the invisibility of women’s reproductive labour. One can discern two strains of theorizing here. Much of the early, path-breaking work on the law’s regulation, and indeed, appropriation of women’s reproductive labour dealt with the lack of legal *recognition* of women’s reproductive labour as valuable. In this vein was Katherine Silbaugh’s writing on the significance of legal rules ranging from family law through to tort law, welfare law, bankruptcy law, tax law and labour law that consistently failed to value women’s housework. In the process of revealing that these rules did not recognize women’s housework, but could have, Silbaugh’s work also showed that no default legal regime governing a certain sector of women’s work at any given point in time is necessary in any way. In other words, legal categories are contingent. Thus, we may currently default to using family law for recognizing women’s reproductive labour. However, labour law might just as well have mandated wages to housewives. Indeed, feminist lawyers continue to delineate how unpaid care giving is regulated by laws as disparate as property law, family law, labour law, tort law, EU and international law.¹⁸ It is this contingent legal categorization of women’s labour that, both itself amounts to, and further enables the patriarchal appropriation of women’s labour. Meanwhile, some legal feminists here have reached into the depths of Carol Gilligan’s work on difference to articulate a normative view of unpaid reproductive labour or care work¹⁹ which is reflected in a range of legal proposals,²⁰

¹² *Id.* at 1054.

¹³ *Id.* at 1049.

¹⁴ *Id.*

¹⁵ K Sangari, “Settled Alibis and Emerging Contradictions: Sex Selection, Dowry and Domestic Violence” (2012) XLVII: 34 *Economic & Political Weekly*, 39-48.

¹⁶ “India’s skewed sex ratios: Gendercide stings”, 18 December 2012, available at <http://www.economist.com/blogs/banyan/2012/12/indias-skewed-sex-ratios>.

¹⁷ N Antelava, “The girls stolen from the streets of India”, available at <http://www.bbc.co.uk/news/magazine-20938125>.

¹⁸ J Conaghan, *supra* note 5, at 245.

¹⁹ See the discussion of care feminists in P Tsoukala, “Gary Becker, Legal Feminism, and the Costs of Moralizing Care” (2007) 16 *Columbia Journal of Gender and Law*, 387-8.

²⁰ M Ertman, “Commercializing Marriage: A Proposal for Valuing Women’s Work Through Premarital Security Agreements” (1998) 77 *Texas Law Review*, 17-112.

thus bolstering feminist claims to the recognition of social reproduction.

Other legal feminists have increasingly focused on theorizing care in terms of *redistribution*, especially intra-gender redistribution or the effects of recognizing the reproductive labour of wives for other women. One can perform this critique between households or within the household. Mary Ann Case has provocatively written about the intra-gender effects of increased employer responsibility for children. Feminist legal realists like Halley, Rittich and Shamir have shown how the exceptional status of the family as a legal category performs concrete distributional work. Their starting point is to highlight the significance of background legal rules, which influence the bargaining power of a social actor in any given situation. Thus, Halley and Rittich have argued against the exceptionalist legal treatment of the family through family law (FL). They back-ground legal rules in the process into several categories ranging from FL1, the subject matter of family law textbooks to FL2 (tax, immigration, bankruptcy laws), FL3 (tenancy law, employment rules, labour laws) and FL4 (incorporating norms around the household).²¹ Similarly, Shamir assesses the distributive consequences of accommodations structured within employment law for working families, which were meant to recognize care responsibilities but can in fact have unpredictable effects that consolidate and entrench class and gender disparities. Thus Shamir's analysis shows that the ability of a worker to take unpaid leave to care for oneself, a child or a specified family member who is seriously sick under the US Family and Medical Leave Act, 1993 might be ultimately used only by working women rather than their husbands due to the gender wage gap.²² Alternatively, the fact that such leave is unpaid means that in the absence of any other leave entitlement, only middle-class workers can avail of this optional benefit.²³ The legal analysis here is highly attuned to the unintended consequences of legal rule changes. Thus accommodations within employment law for working families, which were meant to recognize care responsibilities, can in fact consolidate and entrench class and gender disparities while ignoring protections for the secondary labour market of migrant care workers who support working parents.

Many feminist scholars have also pointed out that the law's recognition of female reproductive labour is narrow in that it normalizes heterosexual marriage to the exclusion of other organizational forms for the provision of social reproduction. Barlow speaks of a sliding scale of value²⁴ wherein a high value is placed on non-financial contributions to a marriage, which is not available within cohabitation law.²⁵ Even less value is accorded to non-couple care-giving relationships or state-dependent single parenthood where paid work is considered to be the carer's primary goal and reproductive labour becomes non-existent at best. Similarly, recognition of the reproductive labour of families formed by lesbians, gays, bisexuals and transsexuals is

²¹ J Halley and K Rittich, "Critical Directions in Comparative Family Law", Introduction to the Special Issue on Comparative Family Law (2010) 58:4 *American Journal of Comparative Law* 573, also available at <http://www.law.harvard.edu/faculty/jhalley/cv/Halley.pdf>.

²² Shamir, *supra* n. 6, at 431.

²³ *Id.* at 435.

²⁴ A Barlow, "Configuration(s) of Unpaid Caregiving within Current Legal Discourse In and Around the Family" (2007) 58 *Northern Ireland Legal Quarterly* 251.

²⁵ See also S Wong, "Would You 'Care' to Share Your Home?" (2007) 58 *Northern Ireland Legal Quarterly* 268, for how courts have adjudicated property claims when cohabitation arrangements end.

premised on their approximation of the heterosexual marriage model requiring “two parents (no more), cohabiting in a monogamous, long-standing relationship, acting as one economic unit with the associated assumptions around financial dependency, and involved in a romantically defined sexual relationship”.²⁶

Revisiting the Production Boundary, Redrawing the (Re)production Boundary

Feminist endeavours to convince states and increasingly international institutions to recognize women’s reproductive labour have met with little success. As feminist economists and development theorists look to successful campaigns elsewhere in trying to get the UN to redraw the ‘production boundary’, feminist lawyers have had to be content with family law doctrine where the labours of married mothers in long-term marriages are recognized, but only at the point of exit namely, divorce. What is perplexing however is that despite feminist critiques of mainstream economic theory and state policy, feminists’ own conceptualization of the production boundary is somewhat limited when it comes to reproductive labour. In the literature on social reproduction, the ‘reproduction boundary’, if I can call it that, is fairly consistently and strictly drawn around unpaid reproductive labour performed in a relational context or the reproductive labour of working mothers who struggle to balance work and care responsibilities. Even the vocabulary for the recognition of social reproduction is couched in terms of “care work”, “care giving”, “familial care”,²⁷ and “unpaid caregiving”,²⁸ which assume underlying affective arrangements. Glaringly absent is an understanding of reproductive labour performed by women for the market in terms of social reproduction.

Admittedly, feminists have expressed concerns about the exploitation that the commodification of women’s reproductive labour brings. These arguments must be taken seriously. However, the very framing of the feminist issue in these sectors is up for grabs. The predominant feminist framing so far has been to view sex workers and exotic dancers (and commercial surrogates to a lesser extent) as victims of patriarchal violence. Radical feminists have been most influential in setting the agenda for policy discourse in these sectors, although an equally vocal group of pro-sex worker feminists exists. Nevertheless, the lack of a well-articulated materialist feminist position on sex work has meant that there is a considerable blurring of lines between the anti-commodification and anti-coercion strains of feminist arguments. Elsewhere I explore in great depth how we might envision a postcolonial materialist feminist theory of sex work.²⁹ There I argue that the vast cataloguing by Western radical feminists of the harms of sex work and sexualized dancing are not unique to women’s work in those sectors. Indeed, harms abound in whatever sector women work in, whether as housewives or mothers or domestic workers. A close examination of these sectors suggests enough similarities to *not* warrant a differential legal treatment. In other words, it is not clear that the harms of sex work are so exceptionally unique as to justify the abolition of sex work. I will not rehearse the many complexities of

²⁶ J Conaghan and E Grabham, “Sexuality and the Citizen Carer” (2007) 58 *Northern Ireland Legal Quarterly* 325, at 340.

²⁷ Shamir, *supra* note 6.

²⁸ This is the term that the special issue of the *Northern Ireland Legal Quarterly* uses.

²⁹ P Kotiswaran, *Dangerous Sex, Invisible Labor: Sex Work and the Law in India*, Princeton: Princeton University Press, 2011, see chapters 2, 3 and 6.

generations of feminist debates that have taken place within several disciplines over sex work, dancing and commercial surrogacy. For the time being, suffice it to say, that the widespread prevalence of women's reproductive labour performed for the market necessitates at the very least some feminist re-think of these issues from a labour perspective. In other words, if there is no normative feminist justification for treating these markets exceptionally in relation to other sites of women's labour, what can feminists say about whether and how the market values and compensates women's reproductive labour? Using the term "reproductive labour" here leaves open the possibility that feminists recognize the labour that women perform in these sectors, even if they vehemently disagree with the characterization of such labour as work, deserving the protections of labour law.

Theorizing the Multiple Sites of Female Reproductive Labour

Conceptualizing women's reproductive labour, whether performed for the family or the market, in terms of a continuum is not altogether a theoretical exercise. Even a preliminary empirical investigation will reveal fairly quickly that women's reproductive labour performed within marriage and in other market sites often *overlaps*. Thus in the context of sex work, one could think of the figure of the housewife-sex worker. In the commercial surrogacy industry as it has emerged in India, surrogates are also often housewives. Indeed, fertility clinics often insist on 'proven' fertility, which given the stigma of extra-marital sex, will translate into a limited pool of surrogates who are already married mothers. The law is often littered with reminders of this inter-connectedness. To illustrate, in the context of surrogacy, the Indian Council of Medical Research guidelines insist on referring to the legitimacy of the baby born of a surrogacy agreement. The law clarifies the non-adulterous nature of assisted reproductive technologies (ART) when performed with the husband's consent. Similarly, conception through ART precludes the wife's claim for marital dissolution on the basis of impotency.

Women's reproductive labour performed for marriage and for the market can be viewed in terms of a *continuum*. Thus in the course of my field work in Kolkata's largest red-light area, I learnt that almost 75% of sex workers there had been once married. The fragility of the institution of marriage meant that upon the breakdown of the relationship, wives who were not in a position to support themselves and their children resorted to sex work. This came at an enormous social cost and these sex workers continued to aspire to the life of a married woman. Domesticity was highly valued and marriage was viewed as facilitating exit out of sex work. However, it was not unusual for sex workers to exit sex work only to return a few years later. Similarly, one could view a commercial surrogacy transaction as only having a temporary effect on the reproductive labour commitments of a housewife such that she will revert back to reproducing for the household once the baby has been handed over to the commissioning parents. However, housewives are also known to enter into surrogacy arrangements in order to save enough money to enable exit from marriage. This mobility between the institutional sites of reproductive labour has interesting implications for how we think about the distributive effects of the law.

Last but not least, one could view female reproductive labourers at varied institutional sites as being in competition with each other. They often develop

conflicting interests vis-à-vis each other, striking *bargains* in the process. Thus wives of men who visit sex workers are likely to support johns' schools where customers of sex workers are sought to be 'reformed' away from patronizing sex workers. Sex workers have opposed such initiatives, especially as it typically involves the increased prosecution of customers. I offer another illustration from the controversy around the emergence of dance bars in the Indian city of Mumbai. In the wake of a proposal to ban bar dancing in 2006, the conservative pro-ban lobby did not hesitate to position the dancer or 'bar girl' as a deviant, greedy, sexual provocateur.³⁰ In newspaper advertisements placed by the State Women's Commission, the bar dancer was shown as hurting the interests of wives and children whose husbands and fathers would return from the dance bar, intoxicated and abusive.³¹

Interestingly, the distinctions that supposedly delineate marriage from non-marital economies of reproductive labour are invoked to distinguish economies at the abject end of the spectrum, despite the striking similarities in the social profile of the women who undertake such labour and the structural similarities of these economic sectors.³² This has significant implications for law reform, as the recognition of one form of reproductive labour is achieved at the expense of the other; in other words, a zero-sum game. So in the Indian context (and it is not unrealistic to expect to find such arguments made elsewhere), the recognition by the Bombay High Court of the rights to livelihood of bar dancers was possible only because of the sharp distinction between dancing and sex work; so the court analyzed dancing as being *res commercium* whereas sex work was *res extra commercium* (outside the boundaries of commerce). Thus, despite the inter-related nature of these economies, a change in rules in any one sector could in fact adversely affect women in related sectors.

Recognizing Reproductive Labour, Defaulting to Labour Law

Advocates who make the case for the recognition of abject reproductive labour often default to demanding some form of labour law protection. There is something very ironic about this. After all, it has been an uphill struggle for any form of women's reproductive labour to be recognized within Marxist and leftist theoretical and

³⁰ F Agnes, "State Control and Sexual Morality: The Case of the Bar Dancers of Mumbai" in *Enculturing Law: New Agendas for Legal Pedagogy*, eds. M John and S Kakarala, New Delhi: Tulika Books, 2007, at 161.

³¹ F Agnes, "Fundamental freedom and bardancers", *Asian Age*, 4 October 2005, available at: http://el.doccentre.info/website/DOCPOST/Legal_Rights/Oct-05/PDF%20Oct-05-LR/RE10-Fundamental%20freedomand%20bar%20dancers.pdf.

³² To illustrate, bar dancers, like sex workers, had entered dancing through other low-paying jobs traditionally held by women, to which they were likely to return after the ban. Natal and marital families played a significant role in women's entry into bar dancing as in sex work. Like sex workers, bar dancers formed each other's support system that ultimately saw them through breakdowns in relationships with men and their own families. Bar dancers experienced similar levels of social stigma as sex workers so that marriage was an unlikely exit option. They often kept their work a secret from their family. Yet, like sex workers, they internalized the stigma attributed to their ill-earned money. Bar dancers lived in the same urban residential spaces as sex workers. Dancers, like sex workers, viewed themselves as independent, without the desire to marry, earning an income with self-respect. Romantic liaisons were viewed as a threat to one's career. Even where some dancers aspired to marriage, its fragility was always high on their minds, as with sex workers. Although they understood their work as lacking social respect, they reclaimed some agency and dignity by asserting that they were in dancing out of need, not by force, and were therefore not doing anything wrong.

political projects. It is not for nothing that Marx included within “the lowest sediment of the relative surplus population...vagabonds, criminals, prostitutes, in short the actual lumpenproletariat”.³³ Despite this characterization, strong leftist mobilizational traditions can and do hold promise for workers whose labour is invisible in social and legal terms. Thus, the sex workers of West Bengal whose protest politics I have studied,³⁴ derived inspiration to articulate their demands for workers’ rights from watching strikes and protest marches by other workers pass by Sonagachi, Kolkata’s largest red-light area.³⁵ To draw on Doug McAdam’s work on social movements, ‘cognitive liberation’³⁶ was achieved through identification with other workers. Sex workers have thus arrived somewhat late to the modernist promises of redistribution through labour law, even as labour law’s influence worldwide in effecting the meaningful redistribution of resources is receding.

Significantly, female reproductive labourers’ aspiration for the legal recognition of their rights through labour law is contingent on overcoming the default legal categories that regulate the sectors they work in and the logics of governance that these default legal rules generate. Thus formally speaking, the sectors I consider are governed by three different substantive areas of the law, sex work through criminal law, bar dancing through licensing law, and commercial surrogacy through contract law. In the sex work sector, the default regulatory regime is a prohibitionist one enforced through an anti-sex work criminal law. Its uneven enforcement ensures a circumscribed zone within which sex work is carried out. The threat of enforcement however always persists. This allows a range of stakeholders within the industry to abuse sex workers. The state itself is engaged in rent-seeking arrangements when enforcement personnel accept bribes to desist from using the criminal law. Bar dancing on the other hand is regulated through a labyrinth of licensing laws relating to food, liquor and public entertainment. However, the general criminal law can and is often invoked against what the police perceive as obscenity or public nuisance; this becomes an opportunity for the police to extract bribes from stakeholders in the industry. By contrast, the Assisted Reproductive Technologies Bill, 2010, which has been proposed to regulate the Indian surrogacy industry, facilitates contracts between the various parties to a surrogacy transaction within specified limits. In considering all three sectors then, it is clear that the default legal categorization can pose obstacles for mobilization as workers in certain sectors. Thus, despite the repeated efforts of the Kolkata-based sex workers’ group to have their trade union registered by the Registrar of Trade Unions, they have been unsuccessful, as the Registrar has repeatedly queried the legal status of their occupation. This is why the group has

³³ K Marx, *The Eighteenth Brumaire of Louis Bonaparte*, New York: International Publishers, 1963.

³⁴ P Kotiswaran, “‘Sword or Shield?’ The Role of the Law in the Indian Sex Workers’ Movement” in “Emergent Sexual Formations in Contemporary India”, eds. S Legg and S Roy (2014) 15:4 *Interventions International Journal of Postcolonial Studies*, 461-473.

³⁵ Sonagachi borders a major arterial road of North Kolkata.

³⁶ Doug McAdam, in his seminal work on the American civil rights movement, proposed the political process model to explain the emergence of a social movement. According to him, the three prerequisites are indigenous organizational strength (networks that provide the social glue for marginalized populations), political opportunity (any event or broad social process that serves to undermine the calculations and assumptions on which the political establishment is structured) and cognitive liberation (the subjective prerequisite which translates grievance into action). D McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*, Chicago: University of Chicago Press, 1982.

repeatedly demanded that the Indian anti-sex work law is repealed and that labour laws become applicable to sex work.

Even while efforts to shift the default rules need to continue, any normative claim for recognizing object reproductive labour has to necessarily go hand in hand with reconceptualizing labour law. This reconceptualization is essential not only because female reproductive labour is often performed within the informal economy, but also because of the stigmatized nature of such work. Here the work of Nancy Fraser is pertinent. In *Justice Interruptus*,³⁷ Fraser claims that one of the predicaments of the postsocialist condition is the shift in social movements' claims of the state from demands for redistribution to demands for recognition. Characteristic of this shift is how group identity (such as sexuality) supplants class interest, cultural domination supplants exploitation as the problem and cultural recognition supplants socioeconomic redistribution as the solution. Certain identities like race and gender are however bivalent. Remedies could be either affirmative or transformative. Affirmative remedies are those which do not disturb the underlying framework while transformative remedies restructure the underlying generative framework. Thus an affirmative remedy to a problem of recognition would attempt to redress disrespect whereas a transformative remedy would engage in deconstruction.

Nancy Fraser's powerful conceptualization of the distinction between demands for recognition and redistribution tends to suggest a trade-off between the two so that redistribution is often achieved at the expense of recognition and vice versa. For female reproductive labourers however, demands for recognition are as crucial as demands for redistribution. Thus, paid domestic workers not only wish to access the material benefits of labour laws (redistribution) but also to shift the social stigma attached to domestic work (recognition). This is certainly true in the Indian context where domestic workers are often from lower castes and social distinctions mediate their relationship to work. Similarly, sex workers across the world seek conventional workers' rights such as wages, safe working conditions and social security protection. However they equally want to ensure that they are respected for the labour that they perform. Despite these similarities in demands made by reproductive labourers, the emphasis on recognition or redistribution may vary between sectors. Thus, for sex workers, the overwhelming focus is on the removal of stigma, but claims for redistribution are weak as they often internalize the logic of the market.

The Architecture of Indian Labour Laws

Conventional Labour Laws

Having acknowledged the demands by female reproductive labourers for both recognition and redistribution, what use are labour laws to them? This depends on the architecture of labour laws in any given legal system. In the Indian context, there are at least three generations of labour laws. The first set of labour laws apply to the formal sector. They include in the Indian context, the Industrial Disputes Act, 1947,

³⁷ N Fraser, *Justice Interruptus: Critical Reflections on the Postsocialist Condition*, New York and London: Routledge, 1997.

Payment of Wages Act, 1936, the Minimum Wages Act, 1948, the Payment of Bonus Act, 1965, Workmen's Compensation Act, 1923, Employees' State Insurance Act, 1948, Employees' Provident Fund & Miscellaneous Provisions Act, 1952 and the Payment of Gratuity Act, 1972. They are robust in establishing tripartite relationships between the state, employers and employees. The ideal workplace is imagined to be a factory and the law mandates the mediation of the relationship between the employer and employees at a fairly micro-level. Workers are envisaged as being unionized. Such laws typically deal with working conditions, wage issues, social security benefits, and the management of industrial disputes.

Considering that only 8% of the Indian working population is in the formal workforce, the centrality of this model to Indian labour law has always been perplexing. As the Second National Commission on Labour noted in 2002, the Factories Act, 1948 was often not applicable to the work in the informal economy because the threshold for the minimum number of employees was not met or the unit under consideration was engaged in non-factory, non-manufacturing work. Similarly, the Minimum Wages Act, 1948 did not apply to the large percentage of home-based or self-employed workers who worked in the informal economy. The Payment of Wages Act, 1936 was inapplicable due to the wage threshold it imposed, nor was it applicable to self-employed/home-based workers. The Workmen's Compensation Act, 1923 similarly had many restrictions and was difficult to enforce. The Contract Labour Act, 1970, required an establishment to have a minimum of 20 workers. Social security laws such as those dealing with employees' state insurance, provident funds or gratuity all had qualifying thresholds so were not applicable to many unorganized workers.

Labour Laws for the Unorganized Sector

A second generation of Indian labour laws took shape soon after independence and has originated both from the federal legislature, namely, the Indian Parliament as well as from provincial state legislatures. Several of the federal labour laws are sector specific and include laws applicable to plantation workers, journalists, motor transport workers, beedi and cigar workers, construction workers, cine workers, seamen, dock workers, mine workers and so on. These laws were enacted largely as a result of local pressure from labour movements. The Preamble to the Beedi and Cigar Workers Act, 1966 states the reasons for its enactment. These include the circumvention of traditional labour laws such as the Factories Act, the poor definition of the employer-employee relationship, the use of contract and home labour, the significance of intermediaries in many labour markets and the collective action problem of workers in the informal sector. These federal labour laws deal primarily with the payment of wages and social security benefits rather than maintaining workplace conditions and are funded by a global cess on the product obtained through indirect taxation.

State level laws can also deal with a specific sector. However the most innovative of the state level labour laws have tended to be broadly framed to cover a certain category of work such as "manual work" or sector such as the "unorganized sector". The earliest such law was passed by the state of Maharashtra and was titled The Maharashtra Mathadi, Hamal and Other Manual Workers (Regulation of Employment and Welfare) Act, 1969. The state of Tamil Nadu followed suit when it

passed The Tamil Nadu Manual Workers (Regulation of Employment and Conditions of Work) Act, 1982 (“Manual Workers’ Act”) and Karnataka when it proposed the Karnataka Unorganized Workers Welfare Bill, 2002.

I will briefly outline some features of the Manual Workers’ Act because although it aims to address workers in the unorganized sector much like the sector-specific federal laws I have mentioned above, its underlying model is substantially different and therefore, worth considering in some detail for addressing the concerns of female reproductive labourers. Under the 1982 law, the employer is defined to mean the principal employer in case a contractor is used, and in other cases as the person who has the ultimate control over the affairs of the establishment and includes any agent or manager to whom the affairs of the establishment are entrusted. The manual worker is defined as someone engaged directly or indirectly for wages or no wages to work in a scheduled employment. It also includes someone who is not employed by the employer or contractor but who works with the permission of or under agreement with the employer or contractor and a person who is given raw materials for working on it. In 1998, this definition was amended to include a person who directly engages himself in any scheduled employment.

Schemes under the statute are set up for each scheduled employment. The Schedule to the Manual Workers Act with a list of scheduled employments is fairly long and lists 63 forms of employment, several of which cover self-employed workers.³⁸ This Act initially visualized a motherboard for the varied scheduled employments, which could be supplemented over time. However for political reasons, boards for specific occupations began to be established. A motherboard scheme under the Act that is not restricted to any particular scheduled employment is the Tamil Nadu Manual Workers’ Social Security and Welfare Scheme, 1999. An example of a sector specific scheme under the Act is the Tamil Nadu Workers (Construction Workers) Welfare Scheme, 1994.³⁹ A given scheme for a scheduled employment seeks to register employers and manual workers, regulate the conditions of work, offer health and safety measures, provide social security benefits and ensure the general welfare of manual workers. Laws relating to the payment of wages and workmen’s compensation and maternity benefits are made applicable to the scheduled employments. The Act provides for an employment guarantee scheme to ensure a

³⁸ Examples include fishing, toddy tapping, boat working, *papad* making, bullock cart driving, cooking food, coconut peeling, collection of forest produce, catering, driving autos and taxis and cycle rickshaws, handloom, incense sticks, laundry, flour mills, pottery, rag picking, hair dressing and beauty parlour, street vending, shops, tailoring, tree climbing, wood working and domestic work and cycle repair.

³⁹ A manual worker needs to register with the Board along with a certificate of employment, which can be issued by an employer or registered contractor. In the case of a self-employed worker, the card could be issued by a government organization or agencies in the building industry and a registered trade union. The Scheme provides access to crèche services, provident funds, employee’s state insurance, pension, funeral expenses, assistance on natural death, assistance for education and marriage of children, and for delivery, miscarriage or termination of pregnancy of a registered female manual worker. The Scheme also provides for a group personal accident insurance scheme whereby the Board purchases insurance from an insurance company, pays the premium and pays out compensation to its employees in the case of major accidents and death. Contributions from employers and employees go into a General Fund from which expenses are met although the Board can borrow money to provide for benefits under the scheme.

minimum wage for a period when, despite their willingness to work, any employment or full employment is not available. All scheduled employments are listed under a schedule to the Minimum Wages Act. A Board with representation from employers and manual workers is set up to implement these schemes and there could be one or more boards for a certain scheduled employment. The respective Boards receive contributions from employers and manual workers; the state may also make grants to the Board. The Board steps in to assume the responsibilities of an employer where the employees are self-employed, thus dispensing the range of benefits assured under the law. Labour protections created for one sector are not assumed to apply equally well to other sectors. Schemes are instead tailored for specific industries, although schemes for one scheduled employment can be made applicable to another scheduled employment if employers and manual workers from a scheduled employment make a request. An advisory committee with representation from employers, manual workers and the state advises the government on the general implementation of the law and co-ordinates the actions of the various Boards.

The second generation of Indian labour laws targeting the informal economy (of which the Manual Workers Act is an example) have much to offer to female reproductive labourers working in sex work, bar dancing and commercial surrogacy. To begin with, there are significant similarities between these sectors and the informal economy. These include the poor socio-economic background of most informal workers, the mode of entry into the informal economy, the ease of entry and exit, the migrant, even seasonal and intermittent nature of the work, the prevalence of debt bondage, high levels of harassment from state officials, particularly the police, the substantial role of intermediaries in facilitating the employment relationship, the scattered nature of establishments, the lack of implementation of labour laws and the low degree of unionization. There is often difficulty in identifying an employer-employee relationship and where identified, it is casual. Then there are workers who are self-employed or home-based. The work itself is often precarious with low pay and no job security or social security and poor conditions of work. Worst of all, much of the work in the unorganized sector is not viewed as work at all. There is also a lack of homogeneity across sectors within the informal economy in terms of the nature of work, the number of employees in the undertakings and the level of organization.

State-level labour laws like the Tamil Nadu Manual Workers' Law signal a significant departure from the first generation of Indian labour laws in that they are resolutely geared towards workers in the informal economy. Conventional labour laws typically deal with regulating conditions of work on the factory floor, the resolution of industrial disputes between unions and employers, the payment of wages and social security benefits. The economic vulnerability of workers in the informal sector means that their priorities centre round wage issues and social security benefits, especially in a country that has a poor social safety net. The Manual Workers' Act provides precisely this emphasis. Moreover, significant obstacles, which in the past prevented workers in the informal economy from availing of workers' rights, are addressed through a creative interpretation of the employment relationship. The Tamil Nadu law thus caters to self-employed manual workers as much as it does to workers who have an identifiable employer. The definition of the term 'employer' is also rather broad in order to capture complex sub-contracting arrangements. Also particularly significant for female reproductive labourers is the fact that the broad list

of scheduled employment covers sectors which involve the performance of services rather than employment that leads to the production of goods. A contributory scheme, which draws on the contributions of workers engaged in the production of goods and services, is preferable to a cess-based welfare fund, which relies on the taxation of goods. Also, since the law accommodates a range of schemes, which can be sector specific, schemes that are tailored to varied sectors of reproductive labour are conceivable. For reproductive labourers who have a significant collective action problem, being able to lobby for a scheme requires far fewer resources than mobilizing for the passage of a new statute at the federal or state level to address their needs. The economy of effort in this regard is striking, as is the fact that a scheme under a manual workers' statute for reproductive labourers will likely have fewer stigmatizing effects than a sector-specific law. It is little wonder then that the largest Indian sex workers' group, namely, the 65,000 member strong Kolkata-based Durbar Mahila Samanwaya Committee (DMSC), has for long lobbied the West Bengal Labour Commissioner to add sex work to the schedule of employments under the Minimum Wages Act, 1948. Thus, laws modelled on the Manual Workers Act effectively meet reproductive labourers' demands for both recognition and redistribution.

The Fragmentation of Labour Law into Welfare Governmentality

The economic reforms set into motion in the wake of the New Economic Policy of 1991 and the resultant structural adjustment programs led to a new phase of thinking around labour law in India. India's strong system of conventional labour laws and a culture of trade union militancy were in fact viewed as an obstacle to the economic reforms that the Indian state sought to implement. In 2002, the Second National Commission on Labour (NCL) was appointed with a mandate to reviewing and consolidating Indian labour laws. This had implications for laws applicable to the informal economy as well, when the NCL expressed its preference for an umbrella legislation for the workers in the unorganized sector rather than sector-specific laws. It stated: "we want to minimize the number of separate laws for different kinds of workers. Our attempt is to ensure that the existing laws are consolidated, and reformulated to provide protection and welfare, to all workers."⁴⁰

Notably, the NCL paid fleeting attention in its report to one category of reproductive labourers, namely, sex workers. As of 2002, neither bar dancing nor commercial surrogacy had been debated publicly as a significant policy question. In a bold step, the NCL devoted a section of its description of work in the informal sector to sex workers. Noting that the issue of considering sex work as a form of labour was raised only furtively and only once during the NCL's several consultations all over the country, the NCL proceeded to take the view that sex workers should be considered as self-employed workers. In their words:

There are no grounds today, to believe that the phenomenon, or if one wants to term it a 'profession', will disappear merely through exhortation. And as long

⁴⁰ The Report of the Second National Commission on Labour, 2002, Volume I, at 613
<http://www.prsindia.org/uploads/media/1237548159/NLCII-report.pdf>.

as it exists, we have to recognise that it is related to exploitation, inhuman conditions and public health.⁴¹

The NCL then invoked the unmentionable dangers of the AIDS pandemic to public health to assert that:

In the interest of public health, sex-workers need to be subjected to periodic health checks. To ensure this, they have to be registered. In terms of protection and welfare as workers, they have to be considered as self-employed workers. They should, therefore, have the facility to be registered as self-employed workers with access to health policies, insurance etc. that all self-employed workers will be entitled to under the schemes that we have recommended. As for the need to ensure safe and humane working conditions and protection from occupational hazards, we have not gone into the related questions in detail.⁴²

The NCL's recommendations were not entirely satisfactory, since it seemed to propose a conventional model of legalization (involving periodic health check-ups), which Indian sex workers' groups were opposed to. Yet the Commission identified sex workers as self-employed workers who could avail of the same scheme of social security benefits as other workers in the unorganized sector. In other words, sex workers were treated on par with other workers, which has for long been a key demand of Indian sex workers' groups. This recognition of women's reproductive labour by a state agency offers hope for a similar recognition of the labour of women like bar dancers and commercial surrogates.

In line with the NCL's original mandate, the NCL proposed an Unorganized Sector Workers Bill,⁴³ an umbrella legislation, which sought to include recognition for all workers in the unorganized sector, economic security, social security, removal of poverty and elimination of child labour, to encourage the formation of membership-based organizations of workers including trade unions and to ensure the representation of the workers through their organizations in local and national economic decision making. Social security would be work-linked and would include healthcare (maternity, injury), childcare, shelter and old age support. Once this umbrella legislation was in place to provide for basic protection, the NCL opined, then states could pass special laws for specific sectors.

The proposals of the NCL were not implemented immediately. In 2008, the Indian Parliament passed the Unorganised Workers' Social Security Act, 2008. This Act heralds a third significant moment in the development of Indian labour laws. Where an explicit commitment to workers' rights formed the foundation of earlier generations of labour laws, the 2008 Act is geared towards providing welfare to economically vulnerable segments of the population. In definitional terms, Parliament seems to have taken cognizance of the difficulties involved in applying conventional labour laws to the informal economy. Thus, under the 2008 Act, the unorganized

⁴¹ *Id.* at 614.

⁴² *Id.*

⁴³ *Id.* at 740.

sector is defined in terms of enterprises employing less than ten workers who are either engaged in the production or sale of goods or provision of services. The term “unorganized worker” is defined to include a home-based worker, self-employed worker or a wage worker as well as a worker in the organized sector who is not covered by any of the legislations specified in the statute. A waged worker in turn is one who works in the unorganized sector for a monthly wage at a level notified by the federal or state governments. The definition of a waged worker in turn includes a home-based worker, temporary or casual worker, or a migrant worker or workers employed in households as domestic workers, but excludes childcare workers.⁴⁴

As I have already noted, the most significant benefits of labour laws for workers in the informal economy relate to wage protections and social security benefits rather than the regulation of the conditions of work or the resolution of industrial disputes. The 2008 Act, in dealing with social security benefits, recognizes this need of workers in the informal economy. However whether the 2008 Act actually delivers on the provision of comprehensive social security benefits in full recognition of the work of those in the unorganized sector is another matter. The 2008 Act is structurally weak in delivering on this promise. To begin with, the term “social security” is not defined in the Act and is used interchangeably with “welfare”.⁴⁵ The federal government may, in the words of the statute, introduce welfare schemes relating to life and disability cover, health and maternity benefits and old age protection. Schemes listed in a schedule to the statute are deemed to be welfare schemes for the purposes of the Act. Under the Act, the state government may formulate welfare schemes for workers in the unorganized sector that pertain to the provision of provident funds, employment injury benefits, housing, educational schemes, skill up gradation services, funeral assistance and old age homes. Yet the Act only permits, rather than obligates, the federal and state governments to introduce welfare schemes for the benefit of unorganized workers. Consequently, as of 2012, only four states had notified the formation of social security boards, which are required to be formed under the statute. Moreover, the federal schemes listed in the schedule to the 2008 Act were essentially already-existing poverty alleviation schemes for those living under the poverty line. This caused commentators to ask whether workers in the unorganized sector were being demarcated into more worthy (under the poverty line) and less worthy (above the poverty line) workers.⁴⁶

Further on wage issues, the Act makes no mention of a national minimum wage, nor does the Act penalize the non-payment of adequate wages in a timely fashion.⁴⁷ The Act does not mandate certain minimum conditions of work.⁴⁸ Critics argue that the 2008 Act lacks an overarching grievance redress mechanism based on a tripartite model. Instead, workers are required to bring up their grievances before scheme-specific redress mechanisms. Trade unions have no role to play under the

⁴⁴ TS Sankaran, “A Critique of India’s Unorganised Workers’ Social Security Act, 2008”, *Lawyers Magazine*, 16 February 2009, available at <http://www.lawyerscollective.org/magazine/dec2008-jan2009/feature-5>.

⁴⁵ *Id.*

⁴⁶ P Goswami, “A Critique of the Unorganised Workers’ Social Security Act, 2008”, *Economic and Political Weekly*, 14 March 2009, 17-18.

⁴⁷ *Id.* at 17.

⁴⁸ *Id.* at 18.

2008 Act in ensuring that the rights of unorganized workers are realized.⁴⁹ Labour scholars worry that the monolithic boards envisaged at the federal and state levels are wholly inadequate for addressing the complexity and range of occupations that fall within the ambit of the unorganized sector. The overall structure of the Act and the lack of any detailed and meaningful provisions as to core demands of workers' rights organizations has led commentators to observe: "Overall, the language of the act is not one of giving rights to the unorganised sector workers at par with the workers in the organised sector, but rather to confine their status as beneficiaries of government schemes."⁵⁰

In the period following the economic reforms of 1991, it is clear that new labour laws are unlikely to protect the rights of workers in the way that the two prior generations of Indian labour laws did. The Indian situation where labour law has been absorbed into development policy is hardly unusual, as other labour law scholars have elaborated on the increasing fragmentation of labour law.⁵¹ Another instance of such fragmentation in the Indian context is the national rural employment guarantee (NREG) scheme provided by the state, wherein all adults living in rural areas can avail of 100 days of employment for which workers can receive the guaranteed minimum wage. Some labour activists have welcomed the NREG, offering as it does 100 days of guaranteed employment in rural India for the minimum wage. Yet, one could also view these developments skeptically in light of observations by postcolonial theorists like Partha Chatterjee on the emergence of a governmentalized developmental state, which is essentially viewed as preserving the hegemony of global capital by dispensing benefits to population groups whose claims to citizenship are compromised for one reason or another, usually due to some aspect of their life being illegal.

The Dilemmas of Applying Labour Law to Reproductive Labour

Even as I have shown how it is the second generation of Indian labour laws that are the most beneficial for female reproductive labourers engaged in invisibilized service-oriented work, we should bear in mind that sectors of invisible work like sex work, dancing and surrogacy are by no means homogenous. They are highly internally differentiated sectors; some sex workers earn enough to invest in mutual funds and real estate while others earn enough to just meet basic needs. It is the same with bar dancers, where at the heyday of bar dancing before it was banned, a bar dancer in a top bar could earn almost twice as much per night as a stripper in a New York club.⁵² In trendy bars, earnings equalled corporate salaries. Similarly, commercial surrogates can earn substantial amounts of money relative to their educational and skill levels. In one of the fertility clinics in Gujarat, which pioneered commercial surrogacy in India, for instance, women earn 300,000 rupees per live delivery. Compare this to say a domestic worker in a big Indian city who might earn 2000 rupees a month for two hours of daily domestic work in a single household. Moreover, as the surrogacy sector has developed in India, only married women can become surrogates and they usually

⁴⁹ Sankaran, *supra* note 44.

⁵⁰ Goswami, *supra* note 46, at 18.

⁵¹ K Rittich, "Precarious Work and the Fragmentation of International Labour Law" (draft on file with author).

⁵² S Mehta, *Maximum City: Bombay Lost and Found*, Penguin Books India, 2004, at 248.

undertake only two transactions. The time frame of women's involvement in the other two sectors in comparison is much longer.

It is this very heterogeneity of reproductive labour markets and the diverse interests that women develop within them that explains the variety of positions that they occupy in relation to the law. Sex workers' groups for instance might occupy any position between two ends of the spectrum, from wanting no interference from the state at one end to lobbying for labour laws tailored to meet the needs of sex workers. Interestingly, it is in sex work where women's claims to the recognition of labour are best articulated. In the other two sectors I consider here, the dynamics of rights claims are quite different. In the case of bar dancing, despite the existence of dance bars since the 1960s, bar dancers mobilized only in the late 1990s by protesting against poor pay and working conditions and their treatment as pawns between the state and bar owners during police raids. When bar dancing was banned from the state of Maharashtra by an amendment to the Bombay Police Act in 2006, it was bar owners' associations that challenged the constitutionality of the amendment in the Mumbai High Court. Bar dancers simply rallied behind these associations in the litigation against the state. Their alliance with the bar owners' associations was far from seamless, for the bar dancers' union restricted itself in pre-ban litigation to the conduct of police raids and in the post-ban phase to the lack of rehabilitation. Still, the associational life of bar dancers was sparse and, consequently, organizational claims to representation weak. Collective rights consciousness however, is the weakest in the commercial surrogacy industry when compared to sex work and bar dancing. The strong ideology of motherhood and expected altruistic behaviour undoubtedly permeates surrogates' understanding of the reproductive labour they perform. However, the establishment of large surrogacy hostels by major players in the sector (at least as it has developed in India) means that there will be space for moments of 'cognitive liberation' amongst the surrogates. As it is, since surrogates live together over a period of six to nine months, they are all aware of each other's remuneration levels per live birth, which is highly uniform. This lays the foundation for bargains to be struck with the fertility clinics and holds promise for the development of a labour consciousness over time.

Based on my elaboration of the architecture of Indian labour laws and its applicability to female reproductive labour so far, two dilemmas emerge, both suggesting a lower relevance for labour law than initially assumed. The first is whether the most relevant set of Indian labour laws, namely, the second generation laws geared towards the unorganized sector, can do any more for reproductive labourers than simply provide a safety net for the most disenfranchised of these workers, as these laws do not in their current form seem to be able to fundamentally restructure the industry. To illustrate, labour laws such as the Tamil Nadu Manual Workers' Act can provide significant social security and wage benefits to sex workers, bar dancers and commercial surrogates if schemes under such a law can take into account the specificities of the said sectors. Is such a law, however, able to produce substantial shifts in these sectors such that women can earn the most from the sale of their reproductive labour within the shortest possible time, given that earning capacity in these sectors is front-ended? Can the role of intermediaries in these sectors be minimized and is labour law the best mechanism to achieve this? The second dilemma is whether the minimalist benefits of existing labour laws cannot be

achieved through membership-based organizations. The largest Indian sex workers' organization, the DMSC, for instance, provides its members access to credit, basic health, children's education, and possibilities for exit through training for other forms of employment. Sex workers' groups also engage in protest politics wherein women's bodily integrity is maintained against the rent-seeking practices of the state and other stakeholders. Self-regulatory boards meanwhile prevent the trafficking of girls and women into the sector.

In light of these significant dilemmas for labour law, we might ask ourselves not whether sex workers need recognition on the terms on current labour laws, but how labour law itself can be reconceptualized by drawing on the intensely local efforts at self-regulation and mobilization undertaken by sex workers. What then are the conditions of possibility for such 'labour law from below' and can it be replicated elsewhere? Key to the successes of the DMSC and its phenomenal mobilization of sex workers (which I characterize as a social movement elsewhere)⁵³ is the spatial concentration of around 10,000 sex workers in a densely populated red-light area. Ironically, it is the very abject nature of socially stigmatized forms of labour like sex work, bar dancing and commercial surrogacy that lead to their being concentrated in certain parts of the third world city. This spatial congregation of female reproductive labourers enables or offers the potential for their radicalization. Labour law to be relevant here needs to be reimagined in a flat, area-based way. The Second National Commission for Labour for instance discussed an area-based social assistance scheme in its 2002 report. Due to the limited applicability of social insurance and welfare funds to the unorganized sector, the scheme envisaged that all adult workers in a geographical area would have access to it irrespective of the nature and duration of employment or place of work. Individuals would be included so that women workers did not get left out, as would be the case if the family unit were the recipient of the benefit. Benefits would include insurance against death or disability, health insurance and old age benefits and contributions linked not to wages but involving the payment of flat rates. Such a scheme could apply to areas where female reproductive labourers congregate, including red-light areas, dance bars, and surrogacy hostels.

Conclusion

In this article, I have sought to argue that feminists ought to more fully recognize the reproductive labour performed by women, whether for the institution of marriage or for the market. In other words, the mere fact that women perform labour for the market that would otherwise be performed solely for the family should not be viewed as an exceptional form of violence but as forming a part of the continuum of women's labours more generally. If we were to take on board this normative argument, how might labour law recognize such labour? I have shown that in the context of developing countries, laws geared towards the unorganized sector hold promise for female reproductive labourers. In a period of the intensifying neo-liberal economic policies where labour laws are increasingly watered down and limited to offering welfare benefits rather than rights that could achieve large-scale redistribution, the use of labour laws to recognize female reproductive labour does seem to be in question. Yet, I insist that labour laws can be re-envisioned either in sector-specific or area-

⁵³ Kotiswaran, *supra* note 34.

based terms to attempt redistribution in conjunction with the reform of other legal rules germane to the sector at hand (licensing law in the case of bar dancing or medical law in the case of commercial surrogacy) and membership-based initiatives of reproductive labourers themselves. Meanwhile, reproductive labourers themselves could well occupy the vanguard of the informal economy. For example, DMSC is actively organizing domestic workers, embroidery workers and construction workers in Kolkata while also having launched a public interest litigation challenging the constitutionality of the anti-sex work criminal law, with a view to paving the way for labour law reform for sex workers.

I will end with a note for feminist politics — for the longest time, we have spent our intellectual resources gendering the labour movement and labour law. Interestingly the labour movement is today less influential while feminists (and women’s movements) have assumed considerable influence, especially in criminal law reform, exemplified by what some of us have called governance feminism.⁵⁴ In this moment of ascending power, feminists are as prone to excluding men as the labour movement was at its heyday when it excluded gender concerns. To illustrate, in 2013 when far-ranging rape law reforms were introduced in India, trafficking was criminalized. However, the definition of trafficking excluded forced labour, a condition under which many men labour. This leaves us with two questions; can feminists in labour law learn something from feminists working in criminal law? How is it that feminist views on violence against women have today become legal common sense whereas our attempts to gender labour law have met with limited success? Second, how should a project of gendering labour law account for the interests of men?

⁵⁴ J Halley, P Kotiswaran, H Shamir and C Thomas, “From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies on Contemporary Governance Feminism” (2006) 29:2 *Harvard Journal of Law and Gender* 335, also available at <http://www.law.harvard.edu/students/orgs/jlg/vol292/halley.pdf>.
