Social Reproduction, Feminism and the Law: Ships in the Night Passing Each Other

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Introduction

In this essay, I consider the vexed relationship between feminist legal scholarship and social reproduction theory (SRT). I offer an overview of Anglo-American feminist legal scholarship on care/reproductive labour and then reflections on an agenda for the study of the laws of social reproduction by incorporating critical legal, legal realist and socio-legal approaches to women's reproductive labour. In the process, I hope to articulate an agenda for materialist legal feminism drawing on SRT that offers a critique of care discourse (which has had a significant impact on legal scholarship) alongside sharpening a feminist legal agenda for redistributive politics.

Social reproduction feminism and feminist legal theory are like ships passing each other by. Social reproduction feminists say little about the law plausibly because as Marxist theorists, they view the law as an instrument of capitalist oppression. Materialist feminists are sceptical of liberal legal strategies focused on the individual and have offered a robust critique of popular forms of legal feminism including governance feminism (see Halley et al., 2018) or UN feminism in Silvia Federici's

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terms, preferring instead a longer-term vision for systemic social change. If social reproduction feminists barely invoke the law, conversely, feminist legal scholars seem strangely inoculated from social reproduction theory barring a few mostly UK-based feminist legal scholars. A few US scholars use the term "social reproduction" to simply refer to the reproduction of society and its next generation (McClain, 2008; Suk, 2012) with no mention of the comprehensive critique of capitalist patriarchy that social reproduction theory entails.

Despite the above disconnect, if we understand social reproduction to include all labour that is needed for our everyday upkeep, it becomes clear that feminist legal scholars are deeply invested in the study of reproductive labour done in siloes of legal fields (e.g. family law, criminal law, labour law) or in sectoral silos (e.g. nursing, teaching, sex work, surrogacy, domestic work) or in the interstices of inter-disciplinary research (feminist sociology of law, feminist law and economics, feminist legal ethnography). Predictably, the most extensive scholarship by Anglo-American feminist legal scholars on reproductive labour is on unpaid domestic and care work which I turn to.

Making Visible Law's Role in the Recognition of Social Reproduction

Feminist legal scholars have demonstrated the central role of the law in producing and entrenching the invisibility of women's reproductive labour. They are predominantly engaged in a politics of "recognition" (Fraser, 1997) with fewer feminists being explicitly interested in intra-gender redistribution. Much of the early, path-breaking work by legal feminists dealt with the lack of legal *recognition* of women's reproductive

labour as valuable whether in the fields of family law, tort law, welfare law, bankruptcy law, tax law, labour law (Silbaugh, 1996), property law, EU and international law (Conaghan, 2007), immigration law, tenancy law and household norms (Halley and Rittich, 2010) and now constitutional law (Suk, 2012). Feminist lawyers have had some success by focusing on the three sites that structure social reproduction, namely the market, the state and the family. Family law now provides better deductions for childcare expenses, post-divorce compensation and improved child support than before (Silbaugh, 2007), yet, it is not a site for radical redistribution (Williams, 2002). The welfare system is pernicious in how it views women's unpaid work within the home as leisure rather than work (William 2002) while the market discriminates against women, in particular, mothers who tended to be part-time workers. Feminists nevertheless sought to reform the workplace through accommodations, flexible schedules, increased labour law protection especially for part-time workers (who are predominantly female) and part time equity, a shorter work week of 35 hours and the passage of the Family and Medical Leave Act, 1993 (Schultz, 2010; Suk 2012).

In the face of a hostile political environment, feminist legal scholars have argued creatively for the recognition of unpaid work. Martha Fineman in her 2005 book, *The Autonomy Myth* sketched, as a thought experiment, the advantages of abolishing marriage as a legal category and, instead, using contracts and contract rules to regulate adult–adult intimate relationships. Martha Ertman argued for applying commercial law to family arrangements such that the lower earning spouse (typically, the woman) could: "recoup her investment in the marital enterprise" through the device of the premarital security agreement (Ertman 2011, p 1735); have limited liability for debts incurred in raising children or interpret prenuptial agreements so as to compensate

the spouse that performed unpaid work during the marriage (id.). Joan Williams focused on employment litigation as an effective short-term strategy by proposing the idea of "family responsibilities discrimination" or "caregiver discrimination" and using empirical evidence from feminist economists and sociologists (Williams 2012, p. 55) to document the "maternal wall" (Williams, 2004). This resulted in guidance issued by the Equal Employment Opportunity Commission on caregiver discrimination (Silbaugh, 2007).

The Law as a Lever for Redistribution

Feminists interested in redistribution start by denaturalising the family. Feminists argue that the recognition of female reproductive labour ends up normalising heterosexual marriage to the exclusion of other living arrangements—including cohabitation arrangements (Barlow, 2007; Wong, 2007), non-couple care-giving relationships, state-dependent single parenthood and where LGBTQIA families do not approximate the heterosexual marriage model (Conaghan and Grabham, 2007). Even household membership does not clearly align anymore with the family defined either as the narrow, marital, normative family or the more common, new-normal non-marital family (Silbaugh, 2016).

Redistributive feminists are also legal realists highlighting the contingency of legal categories (see also Fudge, 2014); thus, we may default to family law for recognising women's reproductive labour, but we could well default to labour law. Hence the need to investigate background legal rules. To understand the distributive effects of family law, Halley and Rittich urge us to go beyond family law 1 (the law of marriage, divorce,

custody, maintenance) to consider family law 2 (family-related provisions in tax, welfare, immigration laws), family law 3 (structural rules that impact the family like employment law, tenancy law) and family law 4 (informal norms governing the household) (Halley and Rittich, 2010). Similarly, the "gender of sprawl" which is mediated through property law, mortgage law and zoning laws locates large single-family homes in suburban areas thus negatively impacting on the time, money, and flexibility available to women to navigate paid and unpaid work (Silbaugh, 2007).

Feminist lawyers also examine the intra-gender effects of recognising women's reproductive labour. Accommodations within employment law for working families, which were meant to recognise care responsibilities can in fact consolidate and entrench class and gender disparities. A working woman might avail of the US Family and Medical Leave Act, 1993 rather than her husband due to the gender wage gap (Shamir, 2009). Alternatively, since such leave is unpaid, only middle-class workers might avail of this benefit. The UK Work and Families Act 2006 produces similarly class disparate outcomes (Conaghan and Grabham, 2007). Accommodations for mothers could effectively subsidise married men's work to the detriment of working women who are not mothers (Case 2001). Recognising the care responsibilities of a household might ignore protections for the secondary labour market of migrant care workers who support working parents (Fudge, 2014). Ann Stewart draws on global care chain literature to delineate how historical relations of colonialism and recent structural adjustment programs push Ghanian nurses to migrate to the UK to fill a 'care gap' which results in Ghana providing a subsidy to the UK healthcare system. In a globalised world, the care economies of the UK and Ghana are deeply inter-twined (Stewart 2007; see also Stewart 2011). Philomila Tsoukala draws on the work of

Grossbard-Shechtman who shows that although a joint property regime could work to either encourage a sexual division of labour or discourage it by providing an incentive for the husband to send the wife to market work, it will most probably do the former (Tsoukala, 2007). However, as Tsoukala argues, legal feminists have moralised the recognition of household work which makes a discussion of the costs and benefits of specific policy proposals and their unintended consequences unpalatable (p. 376). Indeed, we need to embrace "anti" market fundamentalism, yet cultural and radical feminist projects in law exemplify "anti-market" fundamentalism (Kotiswaran 2013, p. 125).

The Case for Laws of Social Reproduction

To theorise the "laws of social reproduction" as an iteration of feminist legal materialism (Conaghan 2013, p. 44), I propose both an expansive understanding of social reproduction and the use of a varied critical legal toolkit drawing largely on my work in the global south context of India.

The Anglo-American care work debates above presume a particular configuration of what economist Shahra Razavi calls the "care diamond" namely the organisation of care in a society between four institutions, namely the market, the state, the family, and the community (Razavi 2007, 20). In the Anglo-European context, we assume a post-industrial economy revolving around financialised capital, a welfare state (albeit under attack from austerity measures) and low rates of marriage accompanied by high rates of divorce. Transposing legal responses to the work-life 'conflict' from the American care work debates would however make little sense in India with a large

informal economy, a residual welfare state (Palriwala and Neetha 2011, p. 1050), a high marriage rate of 92% and low divorce rate of 2% alongside a culture of "gendered familialism" whereby care is considered to be a familial and female responsibility, which work in the market devalues (id., p.1049). Add to that a low and declining female labour force participation rate. Not only are employment, tax, and family law reforms for recognising unpaid work somewhat meaningless, one would struggle to find a crisis of care; if anything, there is a crisis of employment because women are thought to perform too much care. Feminists also understand the very concept of unpaid work differently. While unpaid domestic and care work are core concerns in the West, in agricultural economies, feminists focus on unpaid economic activity and subsistence agriculture, an insight provided by Maria Mies (Mies, 1998, Mies et al., 1988) who argued that subsistence production defied the productive-reproductive dyad and by wages for housework feminists. Hence the need to reimagine the premises of social reproduction theory based on women's lived experiences in the global south.

Feminist legal theorising of reproductive labour takes as its object, the middle class heterosexual marital household, rendering invisible the labour of those working in the satellite economies that support the household (e.g. driver, cook, cleaner, nanny, au pair, housekeeper or services in the fast-food industry, childcare centres or old age homes) and what it takes to ensure their social reproduction. What is reproductive labour for the middle-class family is productive labour for women working in the satellite economies. Meanwhile, stigmatised reproductive labour like sex work, stripping, erotic dancing, egg donation, massage or surrogacy which seems only tangentially related to this middle-class household is rendered exceptional on registers of violence or exploitation, especially by 'radical' feminists. This normalises the

inequalities of the marital household and precludes a critique of marriage. In theorising social reproduction, we need a non-exceptionalist account of reproductive labour that does not render marriage special and recovers the critique of marriage, a key insight of second wave feminism (Valverde, 2015).

Plotting reproductive labour along a marriage-market continuum also helps identify the roles and interests of reproductive labourers (including married women who do not work outside the home) across sectors and vis-à-vis each other. These relationships constitute an overlap; a continuum and sometime, bargains. The same woman can perform reproductive labour *simultaneously* at two institutional sites e.g. housewife-sex worker, the surrogate-housewife or domestic worker-housewife. A woman can also *move between* institutional sites along the marriage-market continuum; thus 75% of the sex workers in Sonagachi, Kolkata's largest red-light area had been once married and were deserted, widowed, or divorced. Interestingly, although there are rich, sector-specific sociological and ethnographic accounts by feminists of reproductive labour, they are rarely studied in relation to each other despite similarities in these labour forms. Finally reproductive labourers also develop conflicting interests vis-à-vis each other striking *bargains* in the process (e.g. sex workers, customers, wives of customers). Notably, the law embeds (often zero-sum game) interconnections between reproductive labour forms.

Mapping the laws of social reproduction also requires innovative empirical methodologies which furthers critical, redistributive projects in law and feminism. For a legal realist can assess the relative importance of one set of background legal rules over the other, especially in dense plural legal spaces only through empirical work

(Kotiswaran, 2011). Again, empirical research highlights the heterogeneity of women's experience so that even seemingly progressive rule changes will have a varied impact on different groups of women. As feminists wield influence and secure hard-won victories, assessing the costs and benefits of our strategies through distributional analysis is crucial (Halley et al., 2018, Kennedy, 1993); empirical research makes the distributional analysis robust (Kotiswaran, 2011).

Conclusion

Feminists have for long theorised women's unpaid work in terms of social reproduction and an ethics of care. Frustrated by the "juridogenic" nature of liberal legalism, feminist lawyers have carried forth this critical project in the legal academy, persuaded more by the literature on care than social reproduction given the 'tainted' nature of materialist feminism (Conaghan 2013). I argue for drawing on social reproduction theory given its analysis of the structuring of social reproduction under capitalism but also its refusal to slavishly follow Marxist orthodoxy which made it inclusive as far back as in the 1980s. Materialist feminism's transnational 'scale' also allowed it to redefine social reproduction in the global south to also account for subsistence production and to plot the interdependent nature of the global economy.

Post pandemic, the term 'care' has assumed policy significance for international and UN agencies (see Federici 2019, p. 177). When households around the world are reeling from high rates of inflation and economic shock resulting in unbearable levels of debt incurred simply to sustain their social reproduction (Gago 2022), states may well want to drive women back into the workforce in greater numbers; "care talk" could be a

convenient way to clear the pathway to capitalist exploitation. While being vigilant to such co-optation we need to forge a new plural politics of care; in other words, there cannot be any one global "care manifesto" (Kotiswaran 2021, p 862). And as Silvia Federici notes in a call for joyful militancy (Federici 2020), we cannot wait for the revolution to come, the time for revolution is now (Federici 2021). And feminist lawyers have a key role to play in this revolution.

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