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Beyond Victimhood *and* Beyond Employment? Exploring Avenues for Labour Law to Empower Women Trafficked into the Sex Industry

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ABSTRACT

This article explores under which circumstances a labour law approach could make a meaningful contribution to combatting human trafficking into the sex industry. In this, I critique the existing criminal law approach to human trafficking and its policies, which focus on trafficked persons as idealised victims in need of protection, rather than on their rights as workers, migrants and women. Furthermore, I also challenge the exclusion of sex workers from arguments for a labour law response to human trafficking, as they maintain the construction of trafficking for sexual exploitation and trafficking for labour exploitation as separate phenomena. Instead, this article advocates an alternative labour law approach to human trafficking, which incorporates wider interdisciplinary issues of gender equality and societal exclusions for women and migrants, and particularly female migrant sex workers, within a labour response. My focus is therefore on exclusions maintained by existing labour legislation, which are based on the standard employment contract and amplified by barriers to labour protections faced by workers in female-dominated service jobs in general and by sex workers in particular. As sex workers' embodied feminised labour is deemed not to be 'real work', they seem to be unworthy of labour protections. My proposed labour response to human trafficking into the sex industry therefore combines some of the strengths of the existing labour rights-focussed anti-trafficking and exploitation discourse with arguments from feminist labour law theory in order to tackle the intersectional dimension of human trafficking into the sex industry.

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1. INTRODUCTION

The phenomena of 'human trafficking' and 'modern slavery' are normally discussed from a criminal law perspective, which is sometimes wrongly referred to as a 'human rights approach',[1] despite its conditionality of 'rights' on victim status and its problematic victim category, which further restricts access to rights.

Advocates of a labour law approach to human trafficking have focussed their efforts on understanding human trafficking as a subset of broader issues of forced labour and exploitation in highly precarious labour sectors,[2] but have shied away from explicitly including sex workers and women trafficked for sexual exploitation in their approaches. Considering the separation of sexual exploitation and labour exploitation in counter-trafficking legislation and policy, this exclusion is hardly surprising. However, the explicit inclusion of sex work in a labour approach to human trafficking not only serves as a perfect example to illustrate the intersectional vulnerabilities of highly precarious workers, but also brings together feminist labour law's critiques of the standard employment contract,[3] and wider feminist critiques of labour as commodity and the 'free' and 'unfree' labour binaries. I call this the 'intersectional feminist reproductive labour law paradigm'. It returns to labour law and labour protections as both a root cause and the possible solution to human trafficking and related exploitation. My approach incorporates wider issues of gender equality within a labour law response to human trafficking, as well as feminist critiques of the separation of public and private. It is intersectional in that it highlights the particular vulnerabilities of female migrant workers in the sex industry, as women, as migrants and as sex workers. It challenges the notion that the accommodation of reproductive labour is possible in the existing conceptualisation and interpretation of labour rights and points towards the problematic notion

[1] T. Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Leiden: Martinus Nijhoff, 2006); H. Shamir, 'A Labor Paradigm for Human Trafficking' (2012) 60 *UCLA Law Review* 76.

[2] See, eg, Shamir (n.1); C. Costello, 'Migrants and Forced Labour: A Labour Law Response' in Alan Bogg et al. (eds), *The Autonomy of Labour Law* (Oxford: Hart, 2015).

[3] S. Fredman, *Women and the Law* (Oxford: Oxford University Press, 1998); S. Fredman and J. Fudge, 'The Contract of Employment and Gendered Work' in M. Freedland (ed), *The Contract of Employment* (Oxford: Oxford University Press, 2016); J. Fudge, 'Women Workers: Is Equality Enough?' (2012) 2 *feminists@law* http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/63 (accessed 23 June 2018); L. Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford: Oxford University Press, 2009).

of reproductive labour as 'naturally' female-dominated as one of the root causes of gendered labour exploitation.

In order to do so, this article first unpacks and critiques the dominant criminal law approach to human trafficking and modern slavery. It looks at the separation of trafficking for sexual exploitation from human trafficking for labour exploitation, a result of sex work being viewed as the form of feminised labour least likely to be considered work. It also explores the conditional protections prevalent in the human trafficking discourse and the highly gendered victim category employed in this approach as conceptually at odds with what is—or should be—a concern with exploitative labour conditions in a number of under-regulated industries. To illustrate this further, it also explores how the victim category in the human trafficking narrative is essentially founded on the notion of the victim of trafficking as a victim of 'forced prostitution' rather than one of exploitative labour conditions.

The article then turns to existing approaches to human trafficking and exploitation, which are built on labour rights and labour protections (in contrast to the criminal law approach and its subset of 'victims' rights' or misnamed 'human rights' approaches).

The third and final part of the article then provides a rationale for an alternative approach, which combines some of the strengths of the labour rights-focussed anti-trafficking and exploitation discourse with existing feminist labour law theory in order to arrive at a meaningful response to the intersectional dimension of human trafficking into the sex industry.

2. THE CRIMINAL LAW RESPONSE TO HUMAN TRAFFICKING

Today human trafficking is predominantly conceptualised within a criminal law framework at international level and in most domestic legislation. The UN Trafficking Protocol, the key international agreement on human trafficking, is part of the UN Convention Against Transnational Organised Crime,[4] establishing the focus of counter-human trafficking action as both cross-border/transnational and crime-focussed. In this, the UN Trafficking protocol takes the so-called '3P' approach, focussing on a combination of prosecution, prevention and victim protection. This approach is also reflected in regional and domestic responses to human trafficking. Both on

[4] UN Trafficking Protocol.

international and domestic level, the focus within this approach is on the criminalisation of human trafficking and the prosecution of its perpetrators.

The criminal law approach is sometimes *wrongly* called a 'human rights approach', as it incorporates certain protections for victims.[5] However, the protections are only afforded to those who meet a narrow victim category and behave in certain ways deemed acceptable by governments in receiving countries.[6]

The UN Trafficking Protocol includes human trafficking not only for the exploitation of the prostitution, but also for other forms of sexual exploitation, as well as forced labour or services and even the removal of organs. However, historical legislation on human trafficking dealt exclusively with human trafficking for sexual exploitation, which was used synonymously with prostitution.[7] In the context of the contemporary criminal law approach and its victim category, the historical treaties' focus on 'protecting innocent women' plays a role in shaping a narrative that continues until today.[8] This narrative affects both the demands it places on 'innocence' for victims, as well as in a conceptualisation of trafficked persons as requiring rescue and charity, rather than rights.

The separation of trafficking for labour exploitation and trafficking for sexual exploitation in the UN Trafficking Protocol build the foundation for a problematic dual approach: the inclusion of trafficking for labour exploitation in the Protocol together with the special and separate mentioning of sexual exploitation and exploitation of prostitution has been interpreted in a way that turns them into separate categories.[9] This separation is problematic for several reasons. First, many states have in practice focussed their efforts on trafficking for the exploitation of prostitution only and ignore both exploitation for forced labour and organ trafficking.[10] This narrow focus has been rightly criticised by labour lawyers such as Hila Shamir.[11]

[5] Obokata (n.1); J. C. Hathaway, 'The Human Rights Quagmire of Human Trafficking' (2008) 49 *Virginia Journal of International Law* 1; S. H. Krieg, 'Trafficking in Human Beings: The EU Approach between Border Control, Law Enforcement and Human Rights' (2009) 15 *European Law Journal* 775.

[6] M. Dottridge (ed), *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World* (Bangkok: Global Alliance Against Traffic in Women, 2007).

[7] J. Doezema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (London: Zed Books, 2010).

[8] Ibid.

[9] M. Wijers, 'Purity, Victimhood and Agency: Fifteen Years of the UN Trafficking Protocol' (2015) 5 *Anti-Trafficking Review* 56, 62.

[10] K. Warren, 'The 2000 UN Human Trafficking Protocol; Rights, Enforcement, Vulnerabilities' in M. Goodale and S. E. Merry (eds), *The Practice of Human Rights. Tracking Law between the Global and the Local* (Cambridge: Cambridge University Press, 2007) 250.

[11] Shamir (n.1).

Second, and more importantly, this separation implies that sex work cannot be labour and that forced labour does not exist in the sex industry. Such an assumption excludes sex workers from protections against forced labour and, as I will discuss in more detail, excludes them from labour-based approaches to combatting human trafficking and exploitation.[12] At the same time, it also calls for separate measures to end trafficking into the sex industry, including the further criminalisation of prostitutes and their clients. Finally, the separation also silences victims of sexual exploitation in other lines of work, as the focus on sexual exploitation is solely targeted at exploitation in the sex industry, rendering sexual violence against trafficked persons in other employment sectors 'collateral damage' in the experience of trafficked persons.

The approach taken in the UN Protocol is by no means new or unusual. It reflects the conflict between the abolitionist feminist approach, which views sex work not as work, but as a unique form of gendered exploitation on the one hand,[13] and the liberal feminist approach, which views sex work as a job like any other and advocates legalisation.[14] I reject the abolitionist view, as it both deprives sex workers of their agency and from ever having access to labour rights. However, I consider sex work not from a liberal feminist perspective, but in the context of embodied work or personal service work.[15]

The continuation of the historical victim category, placed into the context of a criminal law approach then sets trafficking up as a binary criminal act with two polar opposites, the trafficker as the perpetrator and the trafficked person as the victim. By defining trafficking as a phenomenon that only concerns criminals in their active role as traffickers and trafficked persons as their passive victims, trafficking is placed outside of any larger societal

[12] Wijers (n.9) 62–3.

[13] C. A. MacKinnon, *Women's Lives, Men's Laws* (Cambridge, MA: Harvard University Press, 2007) 151; K. L. Barry, *The Prostitution of Sexuality* (New York: New York University Press, 1996); C. A. MacKinnon, 'Trafficking, Prostitution, and Inequality' (2011) 46 *Harvard Civil Rights Civil Liberties Law Review* 271, 296; S. Jeffreys, *The Industrial Vagina: The Political Economy of the Global Sex Trade* (London: Routledge, 2008) 17.

[14] For example, Doezema (n.7); S. E. Day, *On the Game: Women and Sex Work* (London: Pluto Press, 2007) 114; V. Schultz, 'Sex and Work' (2006) 18 *Yale Journal of Law and Feminism* 223; J. A. Chuang, 'Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy' (2010) 158 *University of Pennsylvania Law Review* 1655, 1701.

[15] See, eg, E. Albin, 'The Case of Quashie: Between the Legalisation of Sex Work and the Precariousness of Personal Service Work' (2013), 42 ILJ 2, K. Cruz, 'Unmanageable Work, (Un)liveable Lives the UK Sex Industry, Labour Rights and the Welfare State' (2013) 22 *Social & Legal Studies* 465; J. O'Connell Davidson, 'Let's Go Outside: Bodies, Prostitutes, Slaves and Worker Citizens' (2014) 18 *Citizenship Studies* 516.

context and trafficked persons are defined as mere props to the traffickers' crimes. Additionally, this binary approach obscures state contributions to conditions, which foster trafficking,[16] such as exclusionary immigration regimes and lack of labour controls.[17] This approach is problematic, as it ignores governments' involvements through the complex interplay of economic inequalities between countries of origin and destination countries, as well as the role of destination countries' immigration controls and labour regulations in creating the conditions, which render people vulnerable to human trafficking.[18]

The UN Protocol's definition of trafficking is founded on a narrow historic concept of human trafficking as 'sexual slavery in migrant prostitution'.[19] However, its definition encompasses both human trafficking for sexual exploitation, human trafficking for labour exploitation and services, as well as the exploitation of organ trading.[20] Such a broad definition, built on such a narrow original victim category, makes it both too wide and too narrow, if trafficking is to be distinguished from other forms of exploitation and from human smuggling. By keeping the broad definition of human trafficking in the UN Protocol, NGOs, the media and government policymakers equally use human trafficking as an umbrella term and sometimes blur the lines of the definition even further. This definition includes everyone who may be a trafficked person, including people who might be described as smuggled or as irregular migrants under different circumstances. In non-binding statements, policymakers often state that trafficking victims make up a large percentage of irregular migrants, evoking an emotional response based on a curious combination of pity for the 'Victim of Trafficking' and fear of the influx of migrants in receiving states.[21] In political rhetoric, human trafficking has been portrayed as one of the main methods through which people enter Western countries. The British Home Office Minister stated in March 2007 that 'three

[16] B. Anderson and R. Andrijasevic, 'Sex, Slaves and Citizens: The Politics of Anti-Trafficking' (2008) 2008 *Soundings* 135, 137.

[17] Costello (n.2); C. Costello and M. Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: Oxford University Press, 2014); J. Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 34 *Comparative Labor Law & Policy Journal* 95.

[18] B. Anderson, *Us and Them?: The Dangerous Politics of Immigration Control* (Oxford: Oxford University Press, 2013); R. Andrijasevic and B. Anderson, 'Conflicts of Mobility: Migration, Labour and Political Subjectivities' (2009) 29 *Subjectivity* 363.

[19] See Doezema (n.7).

[20] UN Trafficking Protocol.

[21] Anderson and Andrijasevic (n.16) 137.

quarters of illegal immigrants to Britain are trafficked',[22] giving an impression that the government wants to help all these victims of a terrible crime, while at the same time protecting Britain's borders. This ambiguity helps to contribute to a climate of remedies for 'real victims' rather than rights for all irregular migrants as human beings and for (irregular) migrant workers as workers.

A. Conditional Rights for 'Real Victims' within the Criminal Law Approach

Trafficked persons, particularly women and particularly in the sex industry, then have to fulfil the conditions of being a 'real' victim in order to qualify for a 'rescue' from their traffickers.[23] Since 'Victim of Trafficking' is an administrative and legal category with implications for state protections and obligations towards trafficked persons, policymakers' definition of the category is very narrow when it comes to whether or not someone qualifies as a 'Victim of Trafficking' in legal or administrative terms. Most of the 'three quarters of illegal immigrants' who could be construed as 'Victims of Trafficking' in the wider sense would fail to be able to claim government protections and legal status as a trafficked person. Consequently, those victims who do not meet preconceptions of idealised victimhood may find themselves denied (temporary) leave to remain, as well as social, legal and medical services.[24] Additionally, the conditionality of access to services in destination countries on 'Victim of Trafficking' status is based either on worthiness as a victim (by fulfilling the narrow victim category) or usefulness to the prosecution (by being a credible victim). This conditionality of services, together with their temporariness, normalises trafficked persons' status as non-citizens,[25] but as recipients of charity and 'protections'. Thus, the victim category, which requires absolute and passive victims, maintains trafficked persons' exclusion from labour rights and human rights at the

[22] Quoted in R. Andrijasevic and B. Anderson, 'Anti-Trafficking Campaigns: Decent? Honest? Truthful?' (2009) 92 *Feminist Review* 151, 153–4.

[23] E. Kinney, 'Victims, Villains, and Valiant Rescuers: Unpacking Sociolegal Constructions of Human Trafficking and Crimmigration in Popular Culture' in M. J. Guia (ed.), *The Illegal Business of Human Trafficking* (Cham: Springer, 2015) 95; J. A. Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 *The American Journal of International Law* 609.

[24] J. Srikantiah, 'Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law' (2007) 87 *Boston University Law Review* 212; J. Todres, 'Law, Otherness, and Human Trafficking' (2009) 49 *Santa Clara Law Review* 605; Kinney (n.23).

[25] Anderson and Andrijasevic (n.16) 143–4.

hand of the traffickers and ignores the underlying exclusions they face as women, migrants and sex workers, which facilitated their initial alienation from those rights.[26]

Focussing on trafficking as a category distinct from other forms of irregular migration and from other forms of highly precarious work shifts the focus away from a larger picture of underlying vulnerabilities. It restricts the human rights violations to those perpetrated by traffickers, employers and pimps, who deny access to basic human and labour rights. However, if they were not denied access at this stage, trafficked persons and exploited migrants alike would still fail to access those rights due to state-legitimated restriction of access to social rights, such as a possibility to sue for wages not received, which is one of the main sources of all irregular migrants' vulnerabilities. In the case of human trafficking for sexual exploitation, this problem is amplified as the gains from prostitution are not considered to be wages at all, as prostitution is not considered work in most countries' legislation. Placing sex workers outside the scope of legality in their work results in piecemeal forms of protection in countries where sex work is not illegal, but aspects of it are criminalised, such as in the UK and Israel. Equally, the trafficking narrative also creates dual structures in countries where sex work is considered work, such as Germany and the Netherlands, where there are unique protections for victims of trafficking, but certain labour rights remain outside the reach of sex workers, as I will discuss further below.

By focussing the vulnerabilities of trafficked persons on the trafficker, states' role in creating such vulnerability is obscured and questions regarding the human and labour rights of migrant workers are excluded from the debate.[27]

B. The Feminised Victim of Trafficking

Such a separation of trafficking from other forms of exploited and exploitable labour is amplified by the notion of the victimhood that is the core of the trafficking narrative. The idealised 'victim of trafficking' concept is a highly gendered category, as it relies on the historical notion of the female victim of trafficking in the sex industry.[28] The 'innocent victim against the

[26] C. Nieuwenhuys and A. Pécoud, 'Human Trafficking, Information Campaigns, and Strategies of Migration Control' (2007) 50 *American Behavioral Scientist* 1674; N. Sharma, 'Travel Agency: A Critique of Anti-Trafficking Campaigns' (2003) 21 *Refuge: Canada's Journal on Refugees* 53–65.

[27] Anderson and Andrijasevic (n.16) 142.

[28] Doezema (n.7); C. Terrot, *The Maiden Tribute: A Study of the White Slave Traffic of the Nineteenth Century* (London: Muller, 1959).

evil trafficker' dichotomy is further amplified by a second image: that of the exploited prostitute and evil pimp.

The exploited prostitute category is reserved for women: the case of the recent 'Rentboy' raid in the USA shows that the male exploited prostitute is not a category, which readily pops up in the dominant narratives.[29] Men, even male prostitutes, tend to bear and retain a level of agency regardless of their sexual circumstances. Ironically, in the 'Madonna vs whore' dichotomy, the female prostitute is the epitomised form of the whore, who is usually cast as the evil one, as she expresses agency and lack of innocence. This negative image of female sex workers may explain why extra effort has to be made to cast trafficked women in the sex industry as worthy victims of trafficking. Thus, the 'Madonna–whore' dichotomy ensures that women, who are perceived as 'deviants' in the face of these social norms, are seen as immoral and therefore potentially more culpable than others for the circumstances in which they find themselves, specifically because of their gender.

In a bid to rectify this exclusion and to render women sex workers capable of victimhood, they are then treated as absolute victims without agency. They are denied personhood, which in turn renders the 'victims' rights' bestowed upon them charitable gifts, conditional on their perfect victimhood, rather than the full human rights and labour rights of persons whose rights have been violated.

Amy Russell argues that the 'depiction of the trafficked woman as an innocent, abused victim is a useful construction for the state as it removes her as an agent',[30] who wilfully crossed a border. Instead of portraying trafficked persons as complex, the state can present itself as a saviour of the innocent and lay the blame for 'trafficked persons' exploitation solely on the traffickers, 'who are understood as criminal "others"'.[31]

Such depictions of trafficked persons as passive victims exclude them from debates about labour exploitation and obfuscate the role of employers in oppression. The separation of human trafficking from other exploitation

[29] M. M. Page, 'What the Rentboy Raid Tells Us about the Gendered Rhetoric of Trafficking', *Tits and Sass*, http://titsandsass.com/what-the-rentboy-raid-tells-us-about-the-gendered-rhetoric-of-trafficking/ (accessed 23 June 2018); 'Rentboy Wasn't My "Brothel". It Was a Tool to Stay Alive in This Economy of Violence', *Guardian*, 1 September 2015 http://www.theguardian.com/commentisfree/2015/sep/01/rentboy-online-brothel-tool-economy-sex-work (accessed 23 June 2018); C. Sosa, 'The Feds' RentBoy Raid Is an Attack on LGBTs and Sex Workers', *Huffington Post* http://www.huffingtonpost.com/chris-sosa/the-feds-rentboy-raid-is-_b_8039818.html (accessed 23 June 2018).

[30] A. M. Russell, 'The Boundaries of Belonging: Gender, Human Trafficking and Embodied Citizenship' (2014) 25 *Journal of Gender Studies* 1, 14.

[31] Shamir (n.1) 99.

also excludes human trafficking from debates about labour law's role in managing the imbalance of power between workers and employers. Most importantly, treating human trafficking as a separate category enables governments to present themselves as 'doing something' about human trafficking, rather than as perpetuating structures in labour and immigration law that reinforce a power imbalance between precarious migrant workers and their employers.

3. LABOUR LAW ALTERNATIVES TO THE CRIMINAL LAW APPROACH TO HUMAN TRAFFICKING

As outlined above, this article argues for a labour law approach to human trafficking. It is not the first to do so, but it focuses on the workers at the core of the trafficking narrative, sex workers, rather than rejecting the trafficking narrative's focus on them in favour of broader approaches.

In her labour paradigm for human trafficking, Hila Shamir identifies four core problems in human trafficking that a labour approach illuminates better than the existing paradigm which she calls a human rights approach, but which I consider a paternalistic criminal law approach which only offers victim protections to 'worthy' victims. First, human trafficking is a form of exploitation, and this is not a new phenomenon. Second, this exploitation happens on a continuum. Understanding trafficking on a spectrum of labour—ranging from safe, secure employment settings, where rights and safety are ensured, to sites where trafficking and other severe forms of exploitation occur and rights are nullified—helps counter the notion that either an individual is a victim or he or she made a choice and therefore can never be a victim.[32] Third, human trafficking is a feature of a capitalist market, in which supply and demand affect labour relations and traffickers are primarily pursing financial gain. If labour regulations are weak, both employers and traffickers will opt for work contracts that make exploitative working conditions more likely for employees.[33] Fourth, she argues, a labour law approach brings labour trafficking to the forefront, while existing approaches have favoured focussing on human trafficking for sexual exploitation.[34] She also suggests that a labour paradigm helps to shift the focus away from trafficking for sexual exploitation and onto trafficking for labour

[32] Ibid.
[33] Ibid.
[34] Ibid.

exploitation. Whereas this is important in creating awareness and sympathy for exploited workers in other areas of labour exploitation, it ignores both the historical development of human trafficking legislation, as well as the similarities between human trafficking for sexual exploitation and for labour exploitation. Shamir argues for a rights-based approach that focuses on exploited workers claiming rights through collective action. However, for sex workers and other workers in the private sphere, assertion of rights through such mechanisms is difficult at best, if not completely impossible.

Cathryn Costello rightly points out the greater likelihood of people in casual and under-regulated types of labour relations to end up in and to be unable to escape exploitative working conditions, up to and including situations that qualify as human trafficking. She acknowledges migrant status as a factor of increased vulnerability:

> […] forced labour persists even amongst migrant workers with a relatively secure right to live and work in the UK, such as EU citizens.[35] [Structures] are now in place in the UK to make even migrants with a right to reside and work vulnerable to forced labour. A combination of low wages, proliferation of agents and agency working, and social exclusion seem to foster forced labour, in some cases, irrespective of secure migration status. [This can lead] to conditions of dependency and insecurity, similar to those experienced by other immigrants.[36]

Costello also mentions the exploitation of sham self-employment, the practice of claiming that someone is self-employed, but in which the worker is not actually independent. Such situations are beneficial for the 'contracting authority', which escapes the obligations of an employer, while reaping the benefits of having a worker who de facto acts as an employee.

In other European countries where sex work is legal, such as the Netherlands and Germany, this is also true for sex workers. In Germany, many migrant women from Bulgaria and Romania, whose status prevented them from accessing employment, but not self-employment, worked as (bogus) self-employed sex workers. Sham contracts are rife in the German sex industry and migrant sex workers are particularly vulnerable to exploitative forms of third-party controlled prostitution. Thus, being a migrant can in itself be a deterrent from better working conditions, as well as create situations in which workers feel unable to quit their jobs, despite theoretically having other options available. In this, it can be seen that de jure rights to

[35] Costello (n.2) 213.
[36] Ibid. 214.

certain legal remedies do not necessarily translate into de facto enjoyment of those rights. This practical barrier is a problem not only for migrants, but also for other disadvantaged groups, such as women and minorities, even though Costello does not mention gender or race as factors in her analysis.

Additionally, despite a focus on precarious work and migration status as an issue within this context, the precariousness of feminised work in the private sphere (which is dominated by migrant women) in general, and sex work in particular, are absent from her discussion of these issues. However, these issues also affect sex workers, as sham self-employment is prevalent in the sex industry in countries where prostitution is legal.[37]

Thus, whereas Cathryn Costello points out that lifting the restrictions of migration legislation on labour rights would ameliorate the situation of workers,[38] she pays insufficient attention to the gendered exclusions enshrined in labour law, which fail to grant sufficient rights to some of the most vulnerable workers. She also underestimates the role of societal structures,[39] which exclude women from less precarious types of work and, like Shamir, disregard sex work as a category of precarious work.

4. WHY EXISTING LABOUR LAW IS NOT ENOUGH: THE CASE FOR AN INTERSECTIONAL FEMINIST LABOUR LAW APPROACH

As discussed in the first section of this article, the current criminal law approach to human trafficking problematically treats sexual and labour exploitation as separate issues, and labour lawyers' critiques of the human trafficking narrative seem unwilling to fully challenge this separation. Leaving human trafficking for sexual exploitation out of their approaches certainly makes it easier to argue for a labour rights approach for 'normal' precarious workers. It removes the additional layer of having to cast reproductive labour in general, and sex work in particular, as labour. However, by doing so, it fails to see gender as an additional layer of exclusion and misses out on the parallels between the marginalisation experienced by migrants in labour law and the marginalisation experienced by women workers, and women workers in feminised labour in particular.

[37] C. Adams, 'Sham Contracting Rife in Sex Industry' (2014) *Green Left Weekly* 11.

[38] Costello (n.2); Bundesregierung Deutschland, 'Bericht Der Bundesregierung Zu Den Auswirkungen Des Gesetzes Zur Regelung Der Rechtsverhältnisse Der Prostituierten (Prostitutionsgesetz – ProstG)' (2007).

[39] Fredman and Fudge (n.3).

Existing labour protections, which are still based on the standard employment contract, do not suffice in taking into account women's and migrants' lived realities. Due to their additional vulnerabilities, women who have been trafficked—or are exploited in sex work in some other way—can only access labour rights if these rights can be re-defined to encompass women's disadvantaged position under existing labour laws and provide remedies to it.

Traditional labour protections, which rely on a two-party relationship between employer and employee, ignore not only the employer functions often performed by customers in all service jobs.[40] They also neglect the unavailability of comparable workers for non-discrimination purposes within solitary work such as domestic work and sex work in private households, as well as the lack of access to mechanisms of unionising and collective bargaining for fragmented work in the private sphere. As feminist labour lawyers, such as Fudge and Fredman argue, women, like migrants, are disproportionately found in these jobs at the 'non-standard' end of the labour market.[41] In such non-standard jobs, particularly in the isolation of the private sphere, labour rights such as maximum hours and minimum wages are often unenforced, while issues such as equal pay and equal chances for promotion are often entirely unenforceable due to lack of comparators.

Nonetheless, women's and minorities' claims to improved labour conditions have usually been made on the basis of equal treatment and non-discrimination.[42] Equal treatment in turn is still based on the male citizen worker and the standard employment contract, and thus on a male norm, which acts as the comparator for the granting of rights to those who are considered disadvantaged due to their 'otherness'.[43] This norm may prove useless in certain situations: particularly in areas of work that are female dominated, there is often no male full-time worker who enjoys better pay or better working conditions to compare oneself to.[44]

Furthermore, women face particular challenges that are part of a gendered experience. Even when men do engage in sex work, which they rarely do, a significant portion of the exclusions and risks women face in sex work are different from those of men. Thus, a meaningful reconceptualisation of a

[40] E. Albin, 'Labour Law in a Service World' (2010) 73 *MLR* 959.

[41] J. Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 34 *Comparative Labor Law & Policy Journal* 95; Fredman and Fudge (n.3).

[42] Fredman and Fudge (n.3); Fredman (n.3).

[43] Vosko (n.3).

[44] Fredman and Fudge (n.3).

labour rights approach that applies to human trafficking does not only need to take into account the incomparability of exploited women workers in the sex industry to a 'free' male worker in the public sphere. It may be equally problematic to compare women to men within the same area of work. Whereas male sex workers certainly face prejudice, the gendered expectations on female sexuality and the portrayal of female sex workers as deviant creates significantly higher stigma for women sex workers. Additionally, the more intersectional vulnerabilities a group of people faces, the less likely they are to be able to *access* the rights theoretically available to them on the basis of the male citizen worker norm.

The German example shows that even in countries where exploited workers theoretically have access to compensation, they are often unaware of their rights: With regard to human trafficking for labour exploitation, German law also includes wage usury §291 StGB and the employment of migrants under unfavourable conditions (§10 Sec.1, §11 Arbeitnehmerüberlassungsgesetz) as alternative crimes. These paragraphs only apply to irregular migrants, who, through their status, are under unique pressures and are particularly vulnerable to exploitation.[45] Foreign victims of wage usury can also make compensation claims under the Residence Act, whereas women in exploitative working conditions in the sex industry can only claim exploitative prostitution, which normally leads to compensation for harm rather than for unpaid wages. With the implementation of the 2009 EU Sanctions Directive, wage compensation claims have been simplified under German law and penalties for employers have increased.[46] According to §98a Residence Act (AufenthG), employers have a duty to compensate foreign employees who were employed without a work permit. It is assumed that the work relationship lasted (at least) three months. It is further assumed that the remuneration is in line with customary remuneration, unless the employer had agreed lower or higher remuneration of a permissible level (§98a(2) AufenthG). As a general rule, a permissible level means the standard union wage for the same kind of work. Under German law, undercutting of wage levels agreed with unions can amount to exploitation or wage usury, if wages fall below a level of two thirds of the relevant union wage. Union charities often help

[45] H. Rabe and N. Tanis, *Menschenhandel Als Menschrechtsverletzung. Strategien Und Maßnahmen Zur Stärkung Der Betroffenenrechte* (Berlin: Schwabendruck, 2013) 17–20.

[46] H. Rabe, *Stellungnahme Umsetzung der EU-Menschenhandelsrichtlinie* (Deutsches Institut für Menschenrechte, 2012).

with exploited workers wage claims and civil law court cases or out of court settlements.[47]

This obviously does not apply to industries that are not unionised, which includes sex work. Setting a benchmark for a normal or acceptable salary in the sex industry may be difficult, but this should not mean that sex workers are excluded from such compensation. In fact, it might be particularly beneficial for them, as they often have difficulty proving their working hours and length of exploitation, given the lack of witnesses and their credibility being routinely challenged. If it were assumed that they were employed for at least three months, serving an average amount of clients at an average fee, they could at least receive some compensation for their labour. Additionally, the exclusion of sex workers from wage usury legislation seems unjustifiable in a country in which prostitution is a legally recognised form of labour.[48] In addition to the different standards of labour rights for trafficked persons in the sex industry as opposed to trafficked persons in other industries, the practical implementation of the available labour legislation is weak. Even when they are successful in making their claims, victims of trafficking for sexual exploitation often do not receive any monies, as there are no assets recovered from the perpetrators.[49] Whereas exploited workers and victims of human trafficking for labour exploitation can receive compensation under §98a Sect.4 AufenthG, the same compensatory liability does not exist for sexual exploitation.[50]

Thus, the German examples show that whereas these laws theoretically establish protections for exploited foreign workers, they create a hierarchy of protections in which workers in sectors that have not profited from unionisation and collective bargaining are further disadvantaged when it comes to making claims. Furthermore, the unclear legal situation regarding the ability of sex workers to sue for wages not received, as well as the potential stigma of being 'outed' as a sex worker in the process, makes sex workers even more reluctant than other exploited workers to apply for such remedies. Thus, legal remedies which are unattainable for workers due to stigma, lack of resources—such as legal aid or competent advice through NGOs or charities, or other barriers—are insufficient in addressing vulnerable groups' powerlessness vis-à-vis employers or customers.

[47] Rabe and Tanis (n.45) 35.
[48] Ibid. 18.
[49] R. Kalthegener, 'Legal Basis of the Phenomenon Trafficking in Women for Sexual Exploitation' in E. Adams et al. (eds), *Trafficking in Women in Germany* (Berlin: KOK, 2008).
[50] Rabe and Tanis (n.45) 36.

Furthermore, sex work, like domestic work and other areas of reproductive labour, lacks access to core labour law mechanisms, such as collective bargaining and even formal contracts of employment with clear sets of duties and entitlements. Additionally, building on the erroneous notion that the private sphere constitutes a safe space for women, there are also insufficient legal bases for the monitoring of working conditions of women in reproductive labour in private households. Due to these factors, women workers in sectors which have been traditionally female dominated continue to suffer from lesser access to labour rights, despite non-discrimination legislation.[51] This has led some feminist labour law theorists, including Leah Vosko, Judy Fudge and Sandra Fredman, to argue for fundamental minimum labour standards instead.[52] There clearly is a need for the extension of labour protections, which have so far only been granted to citizen men—or those women who comply with a male norm of 'productive labour' within the standard employment contract—to all workers.

Thus, an intersectional labour rights paradigm that would be useful to all workers, including highly precarious migrant workers in the sex industry, needs to not only acknowledge the problematic aspects of the existing labour rights regime and its foundation in full-time employment from which women have been routinely excluded, both historically and presently. It also needs to shift the way we view all reproductive labour, paid and unpaid, and acknowledge this work as labour. Building on Fredman and Fudge's approach to changing the focus away from a contractual basis in labour law,[53] we need to question whether there should be unalienable labour rights, which are detached from demands in relationship to an employer or customer, but instead exist as minimum standards regardless of the working relationship. Such an approach needs to take into account the feminist critique of the artificial separation of the public and private sphere and question the idea that the work which women perform for their partners, children and wider families (and often also the wider community) does not count as 'work' because it is presumed to be performed 'out of love'.

This notion of female 'labour of love,' which does not qualify for labour protections, applies to all areas of reproductive labour. In fact, there is a

[51] L. Blackwell, 'Occupational Sex Segregation and Part-Time Work in Modern Britain' (2001) 8 *Gender, Work & Organization* 146; N. Busby, 'The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000: Righting a Wrong or Out of Proportion?' (2001) *Journal of Business Law* 344.

[52] Vosko (n.3); Fredman and Fudge (n.3).

[53] Fredman and Fudge (n.3) 249.

perceived connection between reproductive labour and womanhood as such. As Fredman and Fudge have illustrated, the development of the standard employment contract and the commodification of male or productive labour in that context have also contributed to the 'un-commodifiability' of reproductive labour in the private sphere.[54] The skills needed in reproductive labour are so closely tied to embodied female personhood that we perceive them as 'natural' and pre-existing in women, to a degree that these skills are not even considered skills. Women-dominated work spheres,[55] particularly those that have not recently been 'feminised', but have traditionally been considered women's work (paid or unpaid), such as domestic work and care work, are often excluded from full labour protections.[56] The areas of care work and domestic work either have exceptions to or lack enforceability of rest periods and maximum working hours. Sex work is an example of a type of work which enjoys no labour protections at all (at least in most countries).[57] This exclusion from labour protections can be explained with the continuing notion that women's work is not *real work*. Traditional notions of work focus on work as an 'impersonal activity, with bodies, emotion, sexuality and even one's physical attractiveness restricted to the province of private, family life and associated with women rather than men'.[58] Additionally, as women have entered the 'real' labour force of employment in the public sphere, those who remain engaged in traditional female labour continue to be seen as outside of the 'normal' labour force. This separation is amplified by the fact that traditional women's labour is performed either by women or racialised, often migrant, minorities, or both, in the form of

[54] Ibid.

[55] J. Webster, *Shaping Women's Work: Gender, Employment and Information Technology* (London: Routledge, 2014); H. I. Hartmann and B. F. Reskin, *Women's Work, Men's Work: Sex Segregation on the Job* (Washington, DC: National Academies Press, 1986); M. Torre, 'The Scarring Effect of "Women's Work": The Determinants of Women's Attrition from Male-Dominated Occupations' (2014) 93 *Social Forces* 1.

[56] Anderson (n.18); D. McCann, 'New Frontiers of Regulation: Domestic Work, Working Conditions, and the Holistic Assessment of Nonstandard Work Norms' (2012) 34(1) *Comparative Labor Law & Policy Journal* 167; E. Gutiérrez-Rodríguez, 'The Precarity of Feminisation' (2013) 27 *International Journal of Politics, Culture, and Society* 191; V. H. May, *Unprotected Labor: Household Workers, Politics, and Middle-Class Reform in New York, 1870–1940* (Chapel Hill, NC: University of North Carolina Press, 2011).

[57] An exception to this are countries like Germany and the Netherlands, which have regulated sex work as work and where sex workers can therefore theoretically be employees.

[58] R. L. Cohen et al., 'The Body/Sex/Work Nexus: A Critical Perspective on Body Work and Sex Work' in *Body/Sex/Work* (Basingstoke: Palgrave Macmillan, 2013) 8; D. Gimlin, 'What Is "Body Work"? A Review of the Literature' (2007) 1 *Sociology Compass* 353.

women migrants, who experience intersectional exclusions.[59] The ultra-feminisation of this labour force 'contributes to the marginalisation of this work and increases workers' vulnerability'.[60]

Whereas 'productive' work has developed in ways in which the labour rights movement has imposed restrictions on maximum work hours and minimum rest times, as well as minimum wages, holiday entitlements, etc., the realm of reproductive work has not. In fact, the disconnection of reproductive work from 'real' labour has prevented a similar reform in the reproductive labour sectors.

Instead, as Fredman and Fudge,[61] as well as Vosko,[62] have shown, the simultaneous disconnection of reproductive work or feminised work and 'real work' and the forcing of women of all social classes into reproductive labour as wives occurred parallel to the improvement of working conditions in the 'productive' labour sphere and reached its height in the 1950s.[63]

A. The Problematic Notions 'Free' and 'Unfree' Labour

In the context of exploitation, Cathryn Costello rightfully challenges the binary of free and unfree labour, with human trafficking at the extreme end of unfree labour. Costello argues that while slavery and human trafficking are certainly forms of unfree labour, due to the power imbalance between employers and employees, 'free' labour is not the opposite of unfree labour, as it, too, is never fully free.[64]

This critique of the free/unfree binary is certainly illuminating, which leads me to suggest a different approach: to think about labour exploitation as a scale between commodified labour and commodified persons instead, which can also help to challenge the notion of productive and reproductive labour.

[59] F. Williams, 'Towards a Transnational Analysis of the Political Economy of Care' in R. Mahon and F. Robinson (eds), *Feminist Ethics and Social Policy: Towards a New Global Political Economy of Care* (Vancouver: UBC Press, 2011) 21, 25; F. Anthias, M. Kontos and M. Morokvasic-Müller (eds), *Paradoxes of Integration: Female Migrants in Europe* (Springer: Dordrecht, 2012).

[60] Cohen et al. (n.58).

[61] Ibid.

[62] Vosko (n.3).

[63] J. Lewis, *Women in England, 1870–1950: Sexual Divisions and Social Change* (London: Prentice-Hall, 1984) 146; Fredman and Fudge (n.3) 233.

[64] Costello (n.2) 198.

I do not use 'commodification' in the sense of the Marxist notion of commodification as a precondition of alienation, the exchange of labour for wages as a cause of estrangement.[65] Indeed, I argue that such a concept of commodification as alienation in the workplace, which includes a notion of the home as 'ideologically demarcated as the safe haven of emotional intimacy, a place where one recovers from the alienation of the marketplace',[66] is as patriarchal a notion as the standard employment contract itself. The Marxist concept of commodification offers little to women, particularly those working in the private sphere, as their realm of work is construed as 'not really a workplace' and therefore not really a place of possible alienation through labour.

Instead, I approach commodification of labour as an ability to capitalise one's labour, to treat one's labour—or the service one is trying to sell—as a 'product' and to attach monetary value to it, as is perceived to be the case with wage labour in general.

In contrast, in cases of human trafficking and slavery, people themselves are perceived to be commodities that can be treated like things. They are considered to be commodified persons, who are unable to decide whether or not to sell their labour. They are perceived to be commodities themselves.

Materialist feminist scholars rightly describe many forms of wage labour, including sexual labour, and the majority of other feminised labour, as embodied and challenge the notion of the neat distinction between commodified labour and commodified people.[67] In fact, 'free' workers may not have full control over all or many aspects of their commodified labour, especially those 'free' workers who partake in other forms of embodied work. However, they have control over other aspects of their personhood. Exploitative labour can thus be described as labour relations in which the commodification of the labour encroaches on the person in ways that renders part or all of the person herself a commodity.

[65] K. Marx, 'Economic and Philosophical Manuscripts' in L. Colletti (ed.), *Early Writings* (London: Penguin, 1975); H. Collins, 'Is There a Human Right to Work?' in V. Mantouvalou (ed.), *The Right to Work. Legal and Philosophical* Perspectives (Oxford: Hart, 2015).

[66] H. Wardlow, 'All's Fair When Love Is War: Romantic Passion and Companionate Marriage among the Huli of Papua New Guinea' in J. S. Hirsch and H. Wardlow (eds), *Modern Loves: The Anthropology of Romantic Courtship and Companionate Marriage* (Ann Arbor, MI: University of Michigan Press, 2006) 74.

[67] For a discussion of embodied work in the sex work context, see, eg, Cruz (n.15) and O'Connell Davidson (n.15); for a discussion of embodied work or 'body work' more broadly, see Cohen et al. (n.58); L. M. Agustín, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry* (London: Zed Books, 2007).

From this starting point, the perceived uncommodifiability of reproductive labour becomes explicable—as does an intersectional feminist call to challenge this uncommodifiability: until very recently women have been a commodity themselves. This is why women's work is so embodied—and potentially also why current labour law fails to categorise reproductive labour in meaningful ways—the demands of constant availability placed on women as mothers and caretakers may exceed what we consider 'demandable' in the normal work context. However, it is work that has always been demanded from women and has been demanded from working class, migrant and women of colour disproportionately throughout history.[68] Thus, in varying degrees, women have always had labour infringe upon their personhood.

Therefore, instead of accepting the notion that work in the private sphere is inherently different from other labour and therefore 'uncommodifiable', I propose to utilise Laura Agustin's conceptualisation of work, which offers a simple base line to put an end to the exclusion of women's work from the category of labour. She argues that

> [if another] person could be paid to do the unpaid activity of a household member, then it is 'work'; so clearly cooking, child care, laundry, cleaning and gardening are all work, as a household servant could be hired to perform these activities. On the other hand, it would not be sensible to hire someone to watch a movie, play tennis, read a book, or eat a meal for you, as the benefits of the activity would accrue to the servant, the third person, not the hirer.[69]

On the basis of this definition a number of working relationships, which currently enjoy little or no labour rights, should be considered 'work' and indeed work worth protecting. It also follows that *all* such work is commodifiable. In this, my call *for commodifiability* is not to be understood in opposition to materialist feminist concepts of embodied work, but instead as complementary. The embodied nature of much of feminised labour does raise concerns about the 'commodification of anything and everything' and the effects of attempting to fully detach the work performed from the person. However, in the case of feminised labour, the inability to detach the work from the person is even more problematic, as it renders women's work 'not real work', unskilled work and, ultimately, work not worth protecting. Thus, the notion of commodifiable work should be understood as one

[68] Fredman and Fudge (n.3).
[69] Agustín (n.67) 54.

of work that has value and deserves protection within a capitalist system, regardless of whether or not one agrees with the notion of attaching a price to every type of labour to start with.

B. Acknowledging Personhood of Women Sex Workers by Deeming Feminised Labour 'Commodifiable'

The unease to commodify sex work is due to the connection of sex and wifehood, which is even stronger than for other types of reproductive work. The selling of sexual services is then perceived as a deviation of what 'rightfully' belongs to men as husbands. Attempts by women to commodify their sex work have historically been and continue to be frowned upon and have resulted in women being perceived as 'public property'.[70]

Even feminist discourses struggle to detach the work in sex work from the person, seeing sex work either as a commodification of all women by proxy (the radical feminist approach) or portray sex work as a 'personal calling' and necessarily fulfilling work (the 'happy hooker' narrative). The narrative that women do not sell a service, but instead sell *themselves* runs throughout discourses of sex work. Furthermore, the notion of women 'selling themselves' also upholds the idea that sex workers *are* prostitutes, rather than work as prostitutes, thus the stigma of 'being a prostitute' is eternal.[71] In the case of human trafficking and (labour) exploitation in the sex industry, women who have migrated for sex work and trafficked persons who want to access the 'victim of trafficking' category have to deny 'being a prostitute' to access services. Ironically, the 'victim of trafficking' category seems to be as absolute and eternal as the 'prostitute' category. Additionally, the notion that women in sex work sell themselves, rather than selling a service, interacts in pervasive ways with the notion that people can be bought and sold in the context of human trafficking for sexual exploitation.

However, materialist feminists demonstrate that a more nuanced view is possible. Julia O'Connell Davidson argues that while 'the body matters in prostitution […] what is commodified in prostitution, is a complex blend of labour power, socially marked bodies and individual attributes.

[70] H. C. Barnett and H. C. Barnett, 'The Political Economy of Rape and Prostitution' (1976) 8 *Review of Radical Political Economics* 59; K. Davis, 'The Sociology of Prostitution' (1937) 2 *American Sociological Review* 744.

[71] See, eg, C. Pateman, *The Sexual Contract* (Cambridge: Polity-Press, 1988) 207; S. Jeffreys, *The Industrial Vagina* (London: Routledge, 2009).

And this does not actually distinguish prostitution from all other forms of employment'.[72]

Thus, the uncommodifiability of sex work reinforces the notion of women themselves as a commodity. As their work is *not* perceived to be work, there are no labour rights attached to it. Thus, in order to have any rights, they need to be deserving of those rights and have to navigate the complex victim category of the ideal victim of trafficking. Shifting the definition of sex work to be considered actual work and applying labour protections could free women of this unattainable victim category and protect them as rightholders whose rights have been violated, rather than as victims who *may* be deserving of charity.

The definition of sex work as women selling *themselves*, rather than selling *a service*, also requires consent that is akin to enthusiastic consent between romantic partners rather than consent in a work context. This sets the bar both too high and too low: while failure to pay sex workers for their services in exchange for money is not considered a violation of consent in most jurisdictions,[73] sex workers are supposed enthusiastically consent for their labour to be deemed consensual work. However, if sex work is commodified as a sexual service, we can untangle the consent required in sex work from the requirements of enthusiastic consent in a context in which sex or intimacy themselves are the goals for both parties.[74]

If sex occurs between two parties not because of mutual desire, but as an exchange of sex for money, the type of consent required differs from the enthusiastic consent sex-positive feminists strive for in a sexual relationship context, as mutual sexual 'fulfilment' is not what both parties intend to get out of the transaction. In a consideration of sex work as work, a consensual transaction can then involve sex. However, it is not enthusiastically consensual sex, but transactional sex.

This differentiation makes it possible to also consider cases in which partners within romantic or other intimate relationships perform sex as sex work, whenever there is a transaction of sex for anything other than sex or intimacy itself. There is no reason to assume that there are no situations in which people are willing to perform such work for free. In fact, the reasons

[72] O'Connell Davidson (n.67) 521.

[73] See, eg, *R v Linekar* [1995] 2 Cr App R 49.

[74] For a discussion of enthusiastic consent, see the edited volume J. Friedman and J. Valenti, *Yes Means Yes: Visions of Female Sexual Power and a World Without Rape* (Berkeley, CA: Seal Press, 2008).

people do perform any *other* work for free are often precisely out of love or friendship.

The notion that sex within marriage can be work may be an uneasy concept for some; however, there is little reason for sex to be the 'final frontier' of intimacy that could be commodified or outsourced and is therefore work. The commodifiability of love and care for children or elderly, the possibility to outsource the search for 'tokens of love' such as a birthday present or flowers, or even the commodification of providing support with intimate feelings through therapists, all point towards the possibility of intimate reproductive labour as work. There is no logical reason for sex work to be different.

More importantly, without the notion that sex work and other forms of reproductive work are *labour*—and not embodiments of femininity and 'the natural role of women' as such—there is no way of lifting these types of work into the sphere of work and to demand that labour laws reflect the lived realities and power imbalances of reproductive workers, rather than just idealised employer–employee relationships.

My intersectional feminist labour law response aims to detach the commodification of labour from the commodification of the person precisely because it acknowledges the habitual commodification of the personhoods of women, non-citizens and people of colour. The acknowledgement of female- and migrant-dominated reproductive work *as work* serves as a way of acknowledging both the paid and the unpaid work performed by women as well as an acknowledgment of the embodied experiences of migrant women in these areas of work.

For migrant sex workers and victims of human trafficking, such a shift to acknowledge reproductive labour as labour would open up the possibility to view exploitation they experience as a violation of their labour rights and human rights. This could lead to an alternative response to human trafficking which focuses on the violation of workers' rights, rather than viewing them as passive victims in need of protections or so-called victims' rights.

A sex work as work approach could thus help sex workers to access key labour rights enshrined in the European Social Charter. Currently, in most European countries even the freedom to choose one's work (Article 1, ESC) is not applicable to sex workers as sex work is not considered work. If sex work were classified as work, several important ESC rights would be accessible, including the right to just working conditions (Article 2), the right to health and safety at work (Article 3) and sufficient pay for a decent standard of living for themselves and their families (Article 4).

Particularly for migrant sex workers and women at risk of human trafficking, the extension of the right to work in other Council of Europe Member States (Article 18) and the right of migrant workers and their families to protection and assistance (Article 19) to sex work and other reproductive labour would certainly improve their bargaining position vis-à-vis employers.

Equally, the classification of sex work as work would give both current and former sex workers access to 'the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex' (Article 20). The applicability of Article 20 would enable sex workers to address gendered stigma faced by women sex workers and former sex workers.

However, current labour rights do not fully encompass the reality of sex workers, even in countries that theoretically acknowledge sex work as a type of labour. Therefore, details of existing labour rights, such as 'reasonable daily and weekly working hours' (Article 2.1), 'safety and health regulations' (Article 3.2) and maternity leave (Article 8) would have to be adjusted to the sex industry by consulting with sex workers on their needs.

Equally, some core labour rights such as the right to freedom of association (Article 5) and collective bargaining (Article 6) have limited applicability to sex workers and other reproductive workers, as they often work in private household. Thus, labour law may need to devise alternative mechanisms to protect the collective interests of these workers.

The proposed intersectional feminist labour law approach could create the possibility for improved access to labour rights for residents and migrant workers already present in destination countries. However, it can only serve to improve migrants' situation in the migratory process, those moving back and forth between countries and for those still to embark on their migratory journey under certain circumstances: Governments in destination countries would not only have to acknowledge reproductive labour, including sex work, and as work that has meaningful and implementable labour rights attached to it, but they would also have to acknowledge the demand for this labour in their communities. Consequently, they would have to create migration regimes in order to satisfy such a demands, while also contemplating the societal structures that disproportionately burden women and particularly migrant women with the demand of embodied work.

A rethinking of labour law that takes into account the value of women's work, both paid and currently unpaid, is relevant for women's work and women's equality both at home and in the workplace everywhere, and

especially so for the most vulnerable workers. Bringing together the strands of anti-trafficking approaches, labour law protections and feminist re-conceptualisations of labour offers a new perspective, which renders a rights-based approach possible for the most vulnerable workers. Additionally, it moves away from the notion that human trafficking is a separate phenomenon that should—or even could—be approached without taking into accounts other forms of exploitative labour. Approaching the phenomenon by looking at the working conditions and the value attached to the work of one of the most vulnerable groups of workers, women sex workers, links the issue to other feminist concerns about labour. Approaches to human trafficking thus not only need to acknowledge that trafficking interrelates with other types of exploitation, but also link to other feminist labour issues, such as how to compensate for work women perform outside the realm of wage labour, as well as questions of the validity of the notion of wage labour as such.[75] In this, the reconceptualisation of feminised work as work worthy of validation, compensation and protection is in itself a worthy cause.

5. CONCLUSIONS

An intersectional labour rights approach, which encompasses the need for access to labour rights for all workers and sets minimum standards, including for women in prostitution, is the only way to truly address the issues of exploitative labour which currently fall under the category of human trafficking. Accepting traditional women's labour, including prostitution, as true labour is a prerequisite for creating access to labour rights in ways which apply to all workers, as well as to create the possibility for structured and safe migration into these fields of work.

As this article has shown, both counter-trafficking legislation and labour law instead reinforce arbitrary categories of acceptable and unacceptable amounts of labour exploitation as well as equally arbitrary notion of what does or does not qualify as work. Combined with labour regulations that systematically exclude women from rights-based protections, these notions of 'real work', instead create exactly the vulnerabilities which anti-trafficking

[75] For a discussion of materialist feminist alternatives to wage labour, see K. Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics and Postwork Imaginaries* (Durham, NC: Duke University Press, 2011); C. Pateman, 'Democratizing Citizenship: Some Advantages of a Basic Income' (2004) 32 *Politics and Society* 89–105; Cruz (n.15).

legislation subsequently half-heartedly and unsuccessfully attempts to remedy.

Both rendering feminised labour valuable and thereby detaching women from their historical role as property, and attaching value to skills perceived as 'naturally' female, as well as creating access to labour rights and migrants' rights, particularly for 'deviant' women, may just not be in the interest of legislators and policymakers. The acknowledgment of such rights would render these 'deviant' women full persons, which would certainly constitute a paradigm shift. In the current political climate, governments may be reluctant to grant such rights and attempt to restrict them to those already working in exploitative conditions in the so-called destination countries. Nonetheless, joining efforts for the protection of trafficked persons with broader feminist labour approaches to reforming labour law could create momentum to protect the most vulnerable.

In the context of exploitative conditions in the sex industry, the effects of patriarchal societal structures require a minimum threshold that not only validates sex work as work and enshrines labour protections for sex workers, but also takes into account the embodied nature of sex work, the particular vulnerabilities of sex workers and the societal conditions that maintain these vulnerabilities. Thus, reconceptualising sex work as work and working towards the applicability of existing labour protections is an important step, but there is need for rethinking the validity and applicability of the existing labour rights paradigm for not only the most vulnerable groups of workers, but also all women workers.

A labour paradigm that adequately protects reproductive workers would thus not only have to overcome the 'sacredness' of the private sphere, but also take into account that existing societal structures continue to consider the undue burdens placed on women in the form of unpaid reproductive labour to be 'natural'. These burdens exist in women's unpaid roles as caregivers, homemakers, at-home sex workers and emotional labourers, which are perceived as 'normal', as well as in the sexualised and racialised demands on workers in the hospitality and service sectors, care workers and sex workers.

By reconceptualising current approaches to human trafficking and labour exploitation, and bringing them together with feminist concerns about the accessibility of existing labour rights, the intersectional feminist labour law approach opens up new avenues for making labour rights accessible for the most vulnerable workers.