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A new vocabulary and imaginary for labour law: Taking legal constitution, gender, and social reproduction seriously

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The woman question is one of the organisation of society as a whole.[1]

Introduction

The erosion of the standard employment relationship,[2] the male breadwinner and female housewife gender contract, the vertically integrated firm, and trade unions' economic and political power have combined with globalising economic relations to create a crisis for labour law in the developed world as labour law's norms have been weakened and its ability to protect workers has been undermined.[3] In the developing world, labour law's capacity to provide a stable framework for production and social protection for workers has long been in question since the majority of workers in countries like India are in informal employment.[4] Feminist researchers in labour law and political economy have made important theoretical contributions to how 'labour' and the 'labour market' are conceived and about how 'law' is understood. A distinctively feminist approach to labour, one which extends the boundaries of the field beyond paid work to unpaid caring labour, has developed, and feminist approaches to law have moved

1 Edward Aveling and Eleanor Marx Aveling, 'The Woman Question' (Marxists.org, 1886, transcribed 2000) <https://www.marxists.org/archive/eleanor-marx/works/womanq.htm> accessed 27 October 2014.

2 A standard employment relationship consisting of full-time, full-year continuous employment providing both a family wage and a range of social entitlements, stabilised this working-time regime. It was based on a male breadwinner–dependent wife model for allocating time between paid work and leisure. See J Fudge and L Vosko, 'Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law and Policy' (2001) 22 *Economic and Industrial Democracy,* 271–310.

3 See, for example, G Davidov and B Langille (eds.), *The Idea of Labour Law* (Oxford University Press, 2011).

4 J Fudge, 'Blurring Legal Boundaries: Regulating Work' in J Fudge, S McCrystal, and K Sankaran (eds.), *Regulating Work: Challenging Legal Boundaries* (Hart, 2012).

from an instrumental to a more complex approach that recognises the normative, institutional, and discursive dimension of law and its dynamic and contradictory relationship with the social.[5] However, despite the conceptual advances made by feminist labour law scholars, within the mainstream of labour law scholarship, feminist concerns have tended to be treated as matters of morals or ethics, engaging issues of inequality, subordination, or devaluation, and relegated to the margins of the discipline. While the normative dimension of feminist legal scholarship is important, greater attention to the conceptual contributions of feminist labour law scholarship can, I argue below, be used to revitalise our thinking about labour law for a post-industrial and globalised world.

In this chapter I will make three linked arguments about how feminist legal scholarship and feminist conceptions of work and the labour market can be used to inspire our thinking about new ways to regulate work.[6] First, I will argue that it is important to appreciate law's constitutive (or constructive) power instead of simply thinking of the law either as an instrument that acts upon social relations or as a purely symbolic force that projects social values.[7] What I mean by legal constitution is that legal institutions simultaneously channel social relations and activities and attribute different kinds of value to them.[8] I will illustrate my claim that law is constitutive by focusing on the advent of industrial capitalism, the resulting separation of paid and unpaid work, and the concomitant institutionalisation of a specific gendered division of labour. My claim is that legal institutions and legal norms did not simply reflect natural differences between the sexes but, instead, were deeply implicated in gendering different forms of work. By using the term 'gendering' I am emphasising the constructed and interconnected nature of social categories and social relations, such as class, race, religion, ethnicity, and migrant status.[9] The separation of paid and unpaid work by and through legal institutions shaped women's labour force participation and the type of employment arrangements to

5 J Fudge, 'From Women and Labour Law to Putting Gender and Law to Work' in M Davies and V Munro (eds.), *A Research Companion to Feminist Legal Theory* (Ashgate, 2013).

6 This chapter draws upon some of my earlier research, in particular, J Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in G Davidov and B Langille (eds.), *The Idea of Labour Law* (Oxford University Press, 2011); J Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction,' (2014) 22(1) *Feminist Legal Studies* 1–23.

7 Freedland and Kountouris develop the ideas of legal construction and normative characterisation in *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011). My view of legal constitution owes much to their account of legal construction and normative characterisation.

8 Fudge, 'Feminist Reflections on the Scope of Labour Law' supra n. 6, 15–20.

9 Diamond Ashiagbor, 'The Intersection between Gender and "Race" in the Labour Market: Lessons for Anti-discrimination Law' in A Morris and T O'Donnell (eds.), *Feminist Perspectives on Employment Law* (Cavendish, 1999).

which women were relegated, as well as the value attributed to these different kinds of work. In these ways legal institutions such as the contract of employment have constituted (or constructed) work arrangements and norms that are deeply gendered.

My second argument is that it is important not only to recognise that care and other types of unpaid domestic work performed for others in the household are valuable, but that they are critical components of labour markets and essential to the operation of societies.[10] Drawing on feminist labour law and political economy literature, I argue that the concept of social reproduction helps us to theorise labour supply as an essential component of labour markets, one that is institutionally shaped and regulated. Instead of seeing labour markets as exchanges, they are better understood as instituted processes, which help to mediate, although never fully resolve, a number of linked and recurring dilemmas integral to capitalist labour markets. I argue that recent labour law scholarship that has sought to widen the ambit of the field of labour law beyond the contract of employment to encompass the labour market more generally has failed to be sufficiently attentive to the range of social processes and institutions involved in fashioning work relations.

My third argument builds upon this expanded conception of the labour market in order to free our understanding of the role of labour law from its tether to the contract of employment, which is a historically and spatially specific institution for resolving some of the recurring dilemmas of capitalist labour markets. The goal is not to expand the scope of labour law so that unpaid work is simply brought within it; rather the idea is to develop a new imaginary of labour law which draws upon a more inclusive characterisation of the social processes and institutions that constitute a labour market and a more robust conception of social justice which is grounded in a notion of democratic equality. I propose a constellation of integrated policies, comprising a guaranteed minimum annual income, a reduced work week, and a right to care, as transformative reforms with the potential to address subordination in the process involved in institutionalising the supply and demand sides of the labour market.

Labour law as a gendering process: Separating paid and unpaid work

In Britain, prior to the development of markets for labour the relationship of subordinated labour was treated as one of status. According to William Blackstone's authoritative 1765 treatise, *Commentaries on the Laws of*

10 N Busby, *A Right to Care: Unpaid Care Work in European Employment Law* (Oxford University Press, 2011).

England, the relationship of master and servant, along with that of father and child and wife and husband, was marked not by equality and freedom, but by paternalism and dependence.[11] Throughout the history of the poor law, married women were treated as economically dependent upon their husbands, with little independent access to poor relief.[12] With the advent of large-scale industrialisation, master and servant status relations gradually (and incompletely) gave way to contract as the predominant legal device for regulating the allocation and control of labour.[13] The household began to be separated from the worksite, and the wage became the key source of income for those who did not own property. This process of marketisation simultaneously undermined older forms of protection and emancipated workers from paternalism.[14]

The concept of contract was crucial for the development of markets. The gradual extension of civil rights to propertyless men in the eighteenth century enabled them to enter into contracts and to enforce their promises. The employment contract became the primary means for men to obtain access to the means of subsistence. However, married women were incapable of entering into contracts. As Blackstone explained,[15]

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called … a *feme-covert*. …

The legal doctrine of coverture ensured that status and patriarchy continued as the form of regulation for the 'private, intimate and affective space of the home'.[16] Outside the household in the market the new legal taxonomy for 'productive work' – the employment contract – complemented

11 W Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769* (University of Chicago Press, 1979).

12 S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford University Press, 2005), Chapter 3; Sandra Fredman, *Women and the Law* (Oxford University Press, 1997), Chapters 2 and 3.

13 Deakin and Wilkinson, supra n. 12, 107, explain 'from a juridical point of view, the result of this process of change was not a general model of the contract of employment which was capable of being applied to all wage-dependent workers, but instead a hierarchical model of service, which originated in Master and Servant Acts and was gradually assimilated into the common law.' These status-based distinctions continued until collective bargaining and social legislation extended their influence over the employment relationship in the 1940s.

14 N Fraser, 'A Triple Movement? Parsing the Politics of Crisis after Polanyi' (2013) 81 *New Left Review* 119–132.

15 Note 11 ibid.

16 J Halley and K Rittich, 'Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism' (2010) 58 *The American Journal of Comparative Law* 753–775, 757.

and partially supplanted master and servant law. Unlike men, who as servants or employees surrendered their capacities only temporarily, married women were permanently dependents, as they were not considered to be 'proprietors of their own capacities' and therefore dependent upon the 'wills of others'.[17]

The separation of family and household from the market and from politics is central to classical contract theory. Women were not parties, but subject, to the social contract. Carol Pateman argues that the social contract constituted a sexual contract in a dual sense; not only was it patriarchal in terms of establishing men's political right over women, but it was 'also sexual in the sense of establishing orderly access by men to women's bodies'.[18] Although the marriage contract is seen as a 'free' agreement, women's unequal legal, and later economic, position 'forces them to consent to their own subordination'.[19]

In the late nineteenth and early twentieth century, as men's wages improved through collective economic and political action, laws, regulations, and workplace practices excluded women from paid employment, confining them to the household, where they were responsible for domestic labour.[20] Moreover, 'as wages became the dominant mode of recognising and rewarding labour, women's unpaid domestic contribution began to disappear as real work'.[21] Despite the abolition of coverture in the late nineteenth century, the embrace of more intensive production techniques along with 'Taylorist' organisation of labour processes made it increasingly difficult for women to combine childbearing and childrearing with paid work. Middle-class norms of marriage, family, and domesticity gained social currency, and the family and household came to be associated with love while the workplace was associated with money, obscuring the extent to which marriage and cohabitation with men was an economic necessity for most women and the degree to which legal inequality was inscribed within marriage and the family. The home and family were normatively, if not actually, constructed as a haven from work and the market, governed by affective relations.[22] The assumption, which was not necessarily borne out in practice, was that there was equal sharing within the household.[23]

17 U Gerhard, T Knijn and J Lewis, 'Contractualization', in B Hobson, J Lewis and B Siim (eds.), *Contested Concepts in Gender and Social Politics* (Edward Elgar, 2002), 105, 108, quoting John Locke, Two Treatises of Government [1690], (Cambridge University Press, 1970), section 79, 337–8.
18 C Pateman, *The Sexual Contract* (Polity Press, 1988), 2.
19 Gerhard, Kijn and Lewis, supra n. 17, 109.
20 Pateman, supra n. 18.
21 W Seccombe, *A Millennium of Family Change* (Verso, 1992), 244.
22 K Silbaugh, 'Turning Labor into Love: Housework and the Law' (1996) 91 *North Western University Law Review* 1–86.
23 G Becker, *The Economic Approach to Human Behavior* (University of Chicago Press, 1976).

Androcentric views of work and contribution were entrenched in work and social security legislation.[24]

Women's economic dependency upon men was reinforced by laws that excluded married women from certain types of work (such as the civil service) and discriminatory practices by male co-workers and employers.[25] In turn, married women's economic dependence on men's wages reinforced male privilege and power within the household. Simultaneously, 'marriage and family law codified wives' duty to provide domestic services' and 'social welfare provisions for dependent disabled individuals traditionally assumed that family members, particularly wives and mothers, had primary responsibility for providing unpaid care'.[26]

The contract of employment, which is layered upon duties derived from master and servant law, was the primary device for dealing with issues pertaining to labour demand such as allocation and discipline. Collective bargaining law developed to address collective conflicts between workers and employers. Combined, they comprised the field of labour law, a legal jurisdiction that has its own assumptions, primarily that the power imbalance between employers and employees should be diminished and that conflict between them should be minimised at the same time that productive activity should be promoted, and its own techniques, such as collective bargaining and minimum standards legislation. The contract of employment, which is a very specific legal format for subordinated labour that depends on a series of institutional linkages forged in specific places and at specific times, has come to be seen as the (exclusive) foundation for the legal regulation of conflicts over labour allocation and control that both endure and change over time. The iterative and dynamic development between regulation and labour markets means that it is difficult to distinguish the object of regulation (a labour market problem of some kind) from the means of regulation (a particular institutional response).[27] Regulatory dilemmas relating to labour supply were treated as falling outside the ambit of labour law.

In developed economies after World War II, employment and the family were sharply separated and regulated by their own distinctive technologies. The boundaries between home/market and public/private became deeply inscribed in contemporary legal doctrines, discourses, and institutions such

24 Fredman, supra n. 12.

25 Despite the Sex Disqualification (Removal) Act 1919, which forbade discrimination in employment against married women, judicial interpretation led to the exclusion of women in the civil and other purposes from the statute's protection. Fredman, supra n. 12, 80–2.

26 E Nakano Glenn, *Forced to Care: Coercion and Caregiving in America* (Harvard University Press, 2010), 91.

27 J Peck, *Workplace: The Social Regulation of Labour Markets* (The Guilford Press, 1996), 26.

that the initial jurisdictional classification appeared natural and inevitable and not political and ideological. The background legal rules – tax, labour, tort, family, and welfare law – that shaped and maintained (constituted) specific family structures receded into the background, and the jurisdiction of family law came to be regarded as a uniquely appropriate way of dealing with the 'special' relations of family.[28] A particular form of the family (male breadwinner with a dependent housewife) was regarded as a natural artefact outside of law; a view expressed by the noted labour lawyers Otto Kahn-Freund and Bill Wedderburn, who wrote: 'the normal behavior of husband and wife or parents and children toward each other is beyond the law – as long as the family is healthy. The law comes in when things go wrong'.[29]

With the adoption of key elements of the Beveridge Report after World War II, married women's economic reliance on their husbands was actively constructed by law through a combination of carrots (the male breadwinner wage) and sticks (married women's disentitlement to unemployment insurance).[30] With the erosion and repeal of the formal and informal bars on the employment of married women in the 1940s and 1950s, the participation rate of married women increased. However, married women's employment differed from that of men or their unmarried female counterparts since it was much more likely to be part, instead of, full-time. Women's part-time work 'did not threaten to disrupt the patriarchal status quo in the household, since a married women working part-time could still perform the full range of domestic tasks'.[31] Nor did it upset the assumption that married women were economically dependent on a male breadwinner.[32] Moreover, women, regardless of their marital status, were channelled into jobs and occupations that were separate and distinct from those of men.

The power imbalance between men/husbands and women/wives was treated as natural and inevitable, and not political and ideological, until well into the 1970s, when laws (like equal pay and maternity leave) designed to promote women's equality in employment were enacted.[33] However, since women's disproportionate share of unpaid domestic and care work was treated as a private matter resulting from the choices of

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28 Halley and Rittich, supra n. 16, 757.
29 O Kahn-Freund and W Wedderburn, 'Editorial Foreward' in John Eekelar (ed.), *Family Security, and Family Breakdown* (Penguin, 1971), 7, quoted in AR Barzilay, 'Labor Regulation as Family Regulation: Decent Work and Decent Families,' (2012) 33 *Berkeley J. Emp. & Lab. L.* 119–51.
30 Fredman, supra n. 12; Deakin and Wilkinson, supra n. 12, 157 ff.
31 S Walby, *Patriarchy at Work: Patriarchal and Capitalist Relations in Employment* (Minnesota University Press, 1986), 207.
32 Deakin and Wilkinson, supra n. 12, 174.
33 Sex Discrimination Act 1975.

individual women and men, employment law ignored this initial distribution of paid and unpaid labour. Despite married women's massive increase in participation in paid employment since the 1970s, there has been no matching rise in men's participation in unpaid household work. The legacy of this unequal division of labour, which was shaped and channelled by legal and social institutions, continues to influence women's employment arrangements. So, too, does the legacy of sex-based job segregation and pay scales.

In the labour market, law operated as a gendering process, constituting 'male' and 'female' subject positions and contributing to identity formation. It is one of a range of practices, like education, 'through which gender is acquired, a *process* of which gender and gender differences are an *effect*'.[34] The terrain of work is legally constituted and regulated through the creation and deployment of distinctions such as public and private, work and family, production and reproduction.[35] Once these distinctions are in place, the history of their active construction melts into air, and the legal institutions, such as the contract of employment, which are central to constituting different forms of work, come to be seen as neutral devices that facilitate voluntary choices. Women are seen as choosing to assume domestic responsibilities as wives and mothers, rather than being channelled into these roles through the lack of alternative options. If women work for wages, employers are under no obligation to design employment arrangements to accommodate their 'private responsibilities'. Part-time and casual work enable married women to engage in waged employment, but these arrangements, which are often poorly paid and insecure, reinforce their economic dependence on men. The fundaments of the contract of employment are designed for workers who do not have to shoulder the bulk of care responsibilities, and the fact that women's employment arrangements deviate from the 'standard' employment contract is regarded as justifying their different, and detrimental, treatment.

Care work, domestic labour, and social reproduction: Expanding our conception of the labour market

Since World War II, in countries with developed economies, work has been almost exclusively identified with either employment or self-employment. This focus on paid work was possible because of the post-war gender

34 J Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 *Journal of Law and Society* 351–85.

35 J Conaghan and K Rittich, 'Introduction: Interrogating the Work/Family Divide' in J Conaghan and K Rittich (eds.), *Labour Law, Work, and Family: Critical and Comparative Perspectives* (Oxford University Press, 2005), 3.

contract, which rested upon a gendered division of labour in which women had the primary responsibility for socially necessary, but generally unpaid, labour within the household, and men had the primary responsibility for providing income for the family principally through the wages they earned. Because this 'domestic' activity was performed almost exclusively by women in the private domain of the household it was not treated as work and its contribution to the economy was rendered invisible. Indeed, neo-classical economists treat the household as a single welfare unit,[36] with the result that potential conflicts between the members are ignored. Characterising unpaid domestic labour for others that takes place in the home, which he calls 'homemaking', as 'productive consumption', Gary Becker notes that it has a 'bandit-like existence in economic thought'.[37]

Within feminist political economy literature, 'care' is broadly defined to include 'nurturant' activities care as well as 'forms of household and domestic labour'.[38] Evelyn Nakano Glenn describes caring labour as involving 'three kinds of intertwined activities': direct caring for the person, 'maintaining the immediate physical surroundings/milieu in which people live', and 'fostering people's relationships and social connection'.[39] Another, narrower, perspective focuses on bodies working on bodies, or body work, which is defined as 'the paid work that takes the body as its immediate site of labour, involving intimate, messy contact with the (frequently supine or naked) body, its orifices or products through touch or close proximity'.[40] One of the benefits of the idea of body work is that it extends the inquiry beyond affective-oriented care work to more mundane physical tasks that comprise domestic (or household) labour as well as paid sex and surrogacy work, which is often either criminalised or left in a legal 'vacuum'.[41] Body work is a useful supplement to analyses that emphasise women's care work because it captures the hierarchy of values associated with different forms of work (those closer to the messiness of the body have a lower status), helps us to chart how care labour markets are segmented and stratified by class, sex, and race, and reveals intra-gender distributional conflicts pertaining to paid and unpaid work.[42]

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36 Becker, supra n. 23.
37 Becker, supra n. 23, 6, 89, quoted by S Federici, *Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle* (Automedia, 2012), 42.
38 R Mahon and F Robinson, 'Introduction,' in R Mahon and F Robinson (eds.), *Feminist Ethics and Social Policy: Towards a New Global Political Economy of Care* (University of British Columbia Press, 2011).
39 Nakano Glenn, supra n. 26, 5.
40 C Wolkowitz, *Bodies at Work* (Sage Publications, 2006), 8.
41 A Stewart, 'Legal Constructions of Body Work,' (2014) 4 *Feminist@law* and P Kotiswarme, 'Abject Labours, Informal Markets: Revisiting the Law's (Re)Production Boundary,' (2014) 4 *Feminist@law* <http://journals.kent.ac.uk/index.php/feministsatlaw/issue/view/10> accessed 26 October 2014.
42 Wolkowitz, supra n. 40, 21.

Care and body work describe a range of relations and activities that form part of a 'wider landscape of activities and sites' captured by the concept of social reproduction.[43]

The political economist Antonella Picchio defines social reproduction to include 'the provision of material resources (food, clothing, housing, transport) and the training of individual capabilities necessary for interaction in the social context of a particular time and place'.[44] Her concern was to understand the mutual articulation of production and social reproduction, and especially how the state attempts to resolve the recurring dilemmas that bedevil labour markets in advanced capitalist social formations.[45] This conception of social reproduction includes biological reproduction, unpaid production in the home of both goods and services, the reproduction of culture and ideology, education, training, and immigration, and these activities are organised by different agents across a wide array of sites. Responsibility for social reproduction is allocated 'between the different spheres and the standards or quality of life produced vary in different historical periods and in different societies in response to struggles over economic, political, and social priorities'.[46] For example, with industrial capitalism, urbanisation, and the growth of factories the provision of subsistence shifted from the household and families to the wage,[47] and the state took on an important role in managing the population as individuals progressed through their life cycle. Education, health, and care for children, elderly, and the poor have been either provided directly for or paid for by the state. Immigration, a process that is controlled by the state,

43 E Kofman, 'Rethinking care through social reproduction: Articulating circuits of migration,' (2012) 19 *Social Politics* 142–63, 144. While different disciplines adopt different approaches to social reproduction and emphasise different levels of analysis, three aspects figure in most definitions: biological reproduction, stressing motherhood; reproducing, in terms of provisioning, educating, and training, the labouring population; and tending to human beings' caring needs, see I Bakker, 'Social Reproduction and the Constitution of a Gendered Political Economy' (2007) 12 *New Political Economy*, 541–56, 541. For a discussion of how the concept figures in different literatures, see K Strauss, 'Unfree Again: Social Reproduction, Flexible Labour Markets and the Resurgence of Gang Labour in the UK' (2012) 45 *Antipode,* 180–97.

44 A Picchio, 'A macroeconomic approach to an extended standard of living,' in A Picchio (ed.), *Unpaid Work and the Economy: A Gender Analysis of the Standard of Living* (Routledge 2003). See also A Picchio, *Social Reproduction: The Political Economy of the Labour Market* (Cambridge University Press, 1992).

45 J Fudge, and B Cossman, 'Privatization, Law and the Challenge to Feminism' in B Cossman, and J Fudge (eds.), *Privatization, Law and the Challenge to Feminism* (University of Toronto Press, 2002); Fudge, Labour as a 'fictive commodity', supra n. 6.

46 M Luxton, 'Feminist Political Economy in Canada and the Politics of Social Reproduction' in Kate Bezanson and M Luxton (eds.), *Social Reproduction: Feminist Political Economy Challenges Neo-liberalism* (McGill-Queen's University Press, 2006), 38.

47 S Federici, *Caliban and the Witch: Women, the Body and Primitive Accumulation* (Automedia, 2004), 75.

is also crucial to social reproduction. It not only provides a source of labour supply, but also helps to regulate national labour markets.[48]

One of the key benefits of the concept of social reproduction is that it emphasises the distinctive nature of labour as a commodity. Political economists such as Karl Marx and Karl Polanyi have long described labour as a 'fictive commodity' since it is neither produced as a commodity, nor is its production governed by an assessment of its realisation on the market. Labour cannot physically be separated from its owner. Although allocated through the market and institutionally treated as a commodity, labour power is embodied in human beings who are born, cared for, and tended to in a network of social relations that operate outside the direct discipline of the market. Moreover, human beings have the capability to act strategically both on an individual and collective basis, and they can purposefully resist the compulsion of the market.

Four social processes illuminate the distinctive character of labour, which distinguishes it from other commodities.[49] The market does not govern the supply of labour; instead families determine the quality and quantity of labour, albeit influenced indirectly by the state through tax and social policies, and directly though immigration policies. Nor is labour allocated exclusively by price. Institutions and practices, including job labelling, labour market segments, internal labour markets, and glass ceilings, play a large role in labour matching, and they tend to perpetuate discrimination against women and certain racial groups. The partial commodification of labour – human beings sell their capacity to work, not themselves – means that the problem of labour control is endemic. Cooperation is essential to the success of any enterprise, and this cooperation is based upon a blend of coercion and consent. And finally, there is the fundamental question of the reproduction of labour. The embeddedness of labour markets in dense networks of social relations creates recurring dilemmas that require regulation.[50] If the labour market is understood as an instituted process, then regulation is necessary to constitute it, not simply to adjust it. The specific form that regulation takes at a specific place in time depends on the social, political, and cultural context as well as the balance of power between men, women, workers, employers, and different segments in the labour market.

48 H Bauder, *Labor Movement: How Migration Regulates Labor Markets* (Oxford University Press, 2006); J Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 34 *Comparative Labor Law and Policy Journal*, 101–37.

49 Peck, supra n. 27.

50 The idea of labour market failure does not capture the systemic nature of these contradictions.

A new imaginary for labour law: Engendering democratic equality in the labour market

Currently, labour law depicts the question of work-related injustice in a particular way. It is part of a cognitive map that frames the conflicts in the labour market as requiring only temporary adjustments and as occurring primarily between workers and employers, and only secondarily as between employees.[51] Collective bargaining and minimum standards address the first conflict, whereas human rights law addresses the second. Today, however, there is increasing awareness that labour law in its traditional form is inapposite for growing numbers of workers and the types of work relationships in which they are engaged. Some scholars have argued that labour needs to be broadened to encompass either the law of labour market regulation or personal work relations.[52] But, precisely where to draw the line is contentious.

Stretching the boundaries of labour law to include personal work relations that are performed in the private household by family members is especially controversial, and it is resisted either because it is seen as commodifying non-market affective relations or because it transplants assumptions and techniques of regulation developed for one social field to another in which it is conventionally considered to be inappropriate.[53] Yet, it is but one, albeit acute, example of the deeper problem in demarcating the boundaries of labour law, a problem, as I have argued above, that is not conceptual but historical and ideological. Instead of dismissing the suggestion that labour law be redrawn to include unpaid care work performed for others as outlandish, it could be seen as a challenge to what the philosopher Elizabeth Anderson characterised as a 'perfect reproduction of Poor Law thinking, including its sexism and its conflation of responsible work with market wage-earning'.[54]

By arguing that labour law be extended to include processes of social reproduction, such as unpaid domestic work provided in the home for others, I am not advocating the extension of existing labour legislation to

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51 G Mundlak, 'The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers' in G Davidov and B Langille (eds.), *The Idea of Labour Law* (Oxford University Press, 2011); A Davies, 'Identifying "Exploitative Compromises": The Role of Labour Law in Resolving Disputes between Workers' (2012) 65 *Current Legal Problems*, 269–94.

52 R Mitchell and C Arup, 'Labour Law and Labour Market Regulation' in C Arup et al. (eds.), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 3; Deakin and Wilkinson, supra n. 12; Freedland and Kountouris, supra n. 7.

53 N Zatz, 'The Impossibility of Work Law' in G Davidov and B Langille (eds.), *The Idea of Labour Law* (Oxford University Press, 2011); N Zatz, 'Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships' (2008) 61 *Vanderbilt Law Review*, 857–958; Freedland and Kountouris, supra n. 7.

54 E Anderson, 'What is the Point of Equality?' (1999) 109 *Ethics* 287, 336.

these forms of work. Instead, my intent is to question why certain forms of subordination and segregation are acceptable (such as women's responsibility for the lion's share of unpaid and domestic care work for household members) and other forms are not, and how what we consider to be unacceptable forms of subordination and acceptable methods to redress them change over time and across space.

The normative basis for an expanded conception of labour law that would include all of the recurring dilemmas of capitalist labour markets is a commitment to democratic equality. The conventional normative justification for labour law – the inequality of bargaining power – is simply too thin, as it fails to specify which inequalities of bargaining power matter and why inequalities of bargaining power are unjust. By contrast, 'democratic equality' is based upon a political conception of equality, the goal of which is to overcome social relations of oppression and exploitation. Anderson provides a radical democratic interpretation of the norm of equal respect for and equal autonomy of all human beings, the goal of which is to abolish forms of social relationship in which some people dominate, exploit, marginalise, demean, or enact violence on others. Democratic egalitarians seek to live together in a democratic community, as opposed to a hierarchical one, and they are 'fundamentally concerned with the relationships within which goods are distributed and not only the distributions of the goods themselves'.[55]

The benefit of this approach to equality is that it applies to private relations, including those within families and households, and it has a transformative edge. According to Anderson, democratic equality entails that no one should be reduced to an inferior status because they fulfil obligations to care for others. However, as long as participating in paid employment provides greater status than performing socially necessary, but undervalued, care work, full equality may not be attainable simply through redistribution. Elizabeth Anderson's relational theory of equality aims to further what Nancy Fraser helpfully termed equality of recognition (status) and redistribution.[56] 'Equality may require a change in social norms, by which men as well as women would be required to share in caretaking responsibilities.'[57] Such a change in norms would likely require a profound reconfiguration of the prevailing working-time regime, which is rooted in the standard employment relationship and male-breadwinner and female-caregiver sexual division of labour. It would also require public support for, and recognition of, the social significance of care.

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55 Anderson, supra n. 54, 314.
56 N Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (Routledge, 1997).
57 Anderson, supra n. 54, 324 citing Fraser, supra n. 56, 73.

Having articulated the normative basis of a conception of labour law that encompasses the regulation of the recurring dilemmas of the labour market, I will delineate its personal and material scope. With respect to the personal scope of labour law, I endorse Mark Freedland and Nicola Kountouris' notion of personal work relation, which they define as

> a connection or set of connections, between a worker and another person or persons or an organisation or organisations, arising from an engagement or arrangement or set of arrangements for the carrying out of work or the rendering of service or services by the workers personally, that is to say wholly or primarily by the worker himself or herself.[58]

However, where I part company with Freedland and Kountouris is over the material scope of their conception of personal work relations.[59] While work for the benefit of a household or by way of care for dependents as a member of a household or family falls within the definition of personal work relations set out above, Freedland and Kountouris adopt a definition that is narrower, one that tries to capture the broad consensus among legal scholars and practitioners about the boundaries of labour law as a distinctive subject of study and practice.[60] The result of this reliance on conventional understandings of the types of relations that 'properly' constitute labour law is effectively to exclude from the definition of personal work relations all those relations that fall within the material scope of family law. The unpaid work performed by a mother for her children, wife for her husband, or daughter or son for an elderly parent is relational, socially valuable, and significant for the functioning of labour markets, but it is excluded from the ambit of labour law precisely because it falls within the domain of family law. The problem with using a conventional understanding of the appropriate methods of regulating certain kinds of social relations is that it tends to reify historically contingent and contested choices as ones that are inevitable and uncontroversial.

In my view, labour law should apply to all of the social processes that must be institutionalised in order for a functioning labour market to operate. I am interested in the distinctive nature of labour markets in capitalist social relations, since, as I have argued in the preceding section, they give rise to recurring dilemmas that must be mediated, although they can never be fully resolved. This view of the material scope of labour law is narrower

58 Freedland and Kountouris, supra n. 7, 31.
59 The term 'material scope' has a fairly settled meaning in EU law and refers to the situations in which the law applied. I have argued that the term 'jurisdiction' can also be used to capture this notion. Fudge, 'Feminist Reflections', supra n. 6.
60 See the extended discussion of their analysis in Fudge, 'Feminist Reflections', supra n. 6.

than that proposed by Harry Arthurs in a recent 'thought experiment', in which he argues that labour law should be reconceptualised as part of 'a comprehensive "law of economic subordination and resistance"'.[61] While I share his concern with the recurring crises of capitalism, I do not agree that the proposition 'labour is not a commodity' privileged workers when compared with other subordinated groups. What this slogan captures is the extent to which labour is a distinctive 'fictive' commodity. While land and money are also fictive commodities, what distinguishes labour from these other commodities is that human beings have the capacity for reflective and collective action. Labour markets differ from other markets, and as such the dilemmas that must be regulated are also distinct. Nor do I share Arthurs' conception of labour. While it is true that what has come to be understood as labour law (the contract of employment leavened by minimum standards and collective bargaining legislation) depended upon a specific form of mass industrial unionisation, there were always workers (labourers) who fell outside the norm. As production relations and the nature of advanced capitalist economies have changed, so too has the objective relations and subjective experience of class. Although the majority of working people do not identify with industrial unions, the majority of people continue to sell their ability to work and their time in order to access income. The problem with the conception of labour that dominated in the post-war period in which labour law began to flourish was that it was too exclusive.

The vision of labour law that I have sketched is intended to be a provocation, in the sense used by the political theorist Kathi Weeks, as 'at once a useful reform and a conceptual frame that could generate critical thinking and public debate about the structures and ethics of work'.[62] What kind of policies would be compatible with the vision of labour law that I have sketched? Three linked policies would help to address subordination in both the supply and demand sides of the labour markets in developed economies. The first is a guaranteed annual income, the second is the reduction in the work week, and the third is a non-gendered right to care that embodies incentives for men to take up this form of work.[63] These policies are designed both to provide a 'social wage' that is detached from notions of 'deserving' or 'worthwhile' activities that are rooted in the poor law and its function as a tool of labour market discipline, and to disrupt

61 Harry Arthurs, 'Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment' (2013) 34 *Comparative Labor Law and Policy Journal* 585, 601.

62 Kathi Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics, and Postwork Imaginaries* (Duke, 2011), 34.

63 In *The Problem with Work*, Weeks makes two political demands: for a guaranteed minimum for all (regardless of participation in waged work or 'socially useful' labour) and for a shorter work week (30 hours without a reduction in pay).

traditional, and constraining, gender roles. None of these policies is sufficient on its own either to displace traditional social norms that identify women as the appropriate and natural carers, or to compensate for the economic costs of exercising the right to care. Although these policies are not immediately achievable within the present ideological context and configuration of social relations, they are meant to be what Weeks calls a 'utopian demand', one which 'prefigures in fragmentary form a different world, a world in which the program or policy that the demand promotes would be considered as a matter of course both practical and reasonable'.[64]

The idea of a guaranteed annual income, sometimes known as a citizenship or basic income, has been discussed as a policy reform for over 30 years, and is widely advocated.[65] The two key design questions are the level at which the income is set and the method of funding it. In order to provide individuals with a real choice about whether or not to engage in waged work, the basic income must be set at a relatively high level, and it would act as a floor to the clearing wage and also help to ensure decent conditions of work. It would have to be coupled with highly progressive income and wealth taxes, which would function as a source of funding and a disincentive to the growing inequality that characterises developed economies.[66]

A 30-hour work week, without a reduction in pay, is a utopian proposal. But so, too, was the eight-hour day, a victory once achieved in much of the industrialised world. In order to cultivate true gender equality for women, and the freedom of people to live lives that they have reason to value, it is crucial to design working-time norms on the assumption that all workers engage in domestic labour for others. Individual workers should not be required to request accommodation. If unpaid, but socially necessary, reproductive work is considered to be as valuable as paid labour to individual and social development, employers would not be able to design jobs based on the assumption that it is the worker's private and individual responsibility to adapt their caring responsibilities to the temporal requirements of the job.

However, in order to ensure that it is not primarily women who continue to perform the bulk of unpaid care and domestic work for others it

64 Weeks, supra n. 62, 176. She identifies two general functions of utopias; one 'is to generate distance from the present', while 'the other is to provoke desire for, imagination of, and movement toward a different future', supra n. 62, 207.

65 Guy Standing, *Beyond the New Paternalism: Basic Security as Equality* (Verso, 2002); P Van Parijs (ed.), *Arguing for Basic Income: Ethical Foundations for a Radical Reform* (Verso, 1992); A McKay, 'Why a Citizens' Basic Income? A Question of Gender Equality or Gender Bias' (2007) 21 *Work Employment & Society*, 337–48; A Gorz, 'Critique of Economic Reason' in P Waterman and R Munck (eds.), *Labour Worldwide in the Era of Globalisation: Alternative Union Models in the New World Order* (Macmillan, 1999).

66 Thomas Piketty *Capital in the Twenty-First Century* (Harvard UP, 2013).

is necessary to develop a 'right to care' that helps to nudge men to take up this socially necessary work. Nicole Busby argues for implanting a feminist perspective in a revitalised conception of labour law by providing for a right to care.[67] She makes a compelling case that 'the provision of a right to care within the labour law framework would represent a substantial contribution to a new "boundary less" approach to labour market regulation which echoes the reformulation of working practices occurring within the labour market itself'.[68] Emphasising the need to bring men into the frame when it comes to parenting, Fredman shows the importance of breaking down the gender stereotypes associated with the idea of maternity rights and shifting to a conception of parental rights that does not level women down to that of men, but, instead, includes men within their ambit. She claims 'that the goal of equal participation of women in the workplace needs to be matched by equal participation of men in the home', and that this 'is only possible if the conception of equality is shaped by a conscious and explicit commitment to the social value of parenthood'.[69] If unpaid care work is considered to be as valuable as paid work, benefits provided to workers on maternity and parental leave would no longer be just a proportion of the worker's wage but equivalent to it. Such a policy would not only signal the equal value of this work with waged work, it would also chip away at the economic incentives that reinforce men's decisions, as, in most cases of heterosexual dual-income households, the higher income earner, to refuse to take parental leave.[70]

Conclusion

In this chapter, I have drawn upon feminist political economy and feminist legal theory to argue for a radical reconception of the scope and goal of labour law. Our current conception of labour law is built upon legal institutions and norms that historically constituted and presently reinforce a series of dichotomies between public and private and waged and unwaged work that systematically disadvantage those who engage in care and domestic work and reinforce traditional gender roles. By calling for the field of labour law to be expanded to encompass the regulation of all of the recurring dilemmas of capitalist labour markets and its normative

67 Busby, supra n. 10.
68 Busby, supra n. 10, 82 and 83, citing J Conaghan, 'Work, Family and the Discipline of Labour Law' in J Conaghan and K Rittich (eds.), *Labour Law, Work and Family* (Oxford University Press, 2005), 38.
69 Sandra Fredman, 'Reversing Roles: Bringing Men into the Frame' (2014) 10 *International Journal of Law in Contex*t 442, 457.
70 J Fudge, 'The New Dual-earner Gender Contract: Work-life Balance or Working-time Flexibility?' in J Conaghan and K Rittich (eds.), *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford University Press, 2005).

goal to be the achievement of democratic equality, I am embracing the utopian project of constructing new social imaginaries. Too much of labour law scholarship is nostalgic for the past, and simply seeks to tinker at the margins. It ignores the fact that

> what came to be called the 'standard employment contract' was the outcome of a changed balance between capital and labour that emerged in the Western hemisphere during the Cold War period. In essence it involved workers' compliant subordination to capital, in exchange for regular work and an adequate livelihood for them and their dependents.[71]

While it is important not to gainsay the achievements of social democracy, not only is this a past to which it is impossible to return, but even during the golden years of the Keynesian welfare states and Fordist entente there were important exclusions from social rights and limitations to the scope of social and industrial citizenship. Democratic equality is about emancipation, and not simply protection.[72] A reconceptualised labour law could be part of a social imaginary in which 'new modes of life beyond male and female roles'[73] are cultivated and the negotiation over the division of domestic labour moves from the individual to the collective level.[74] It could also be about challenging, rather than simply softening, the commodification of labour and subordination in the world of work.

71 Jan Breman, 'A Bogus Concept' (2013) 84 *New Left Review* 135.
72 Fraser, supra n. 14.
73 L Gonas, 'Balancing Family and Work: To Create a New Social Order' (2002) 23 *Economic and Industrial Democracy*, 59, 64 quoting U Beck, *The Risk Society: Towards a New Modernity* (Sage, 1992).
74 Just as after World War II conflict over the terms and conditions of labour in most developed capitalist countries moved from the individual to the collective level.