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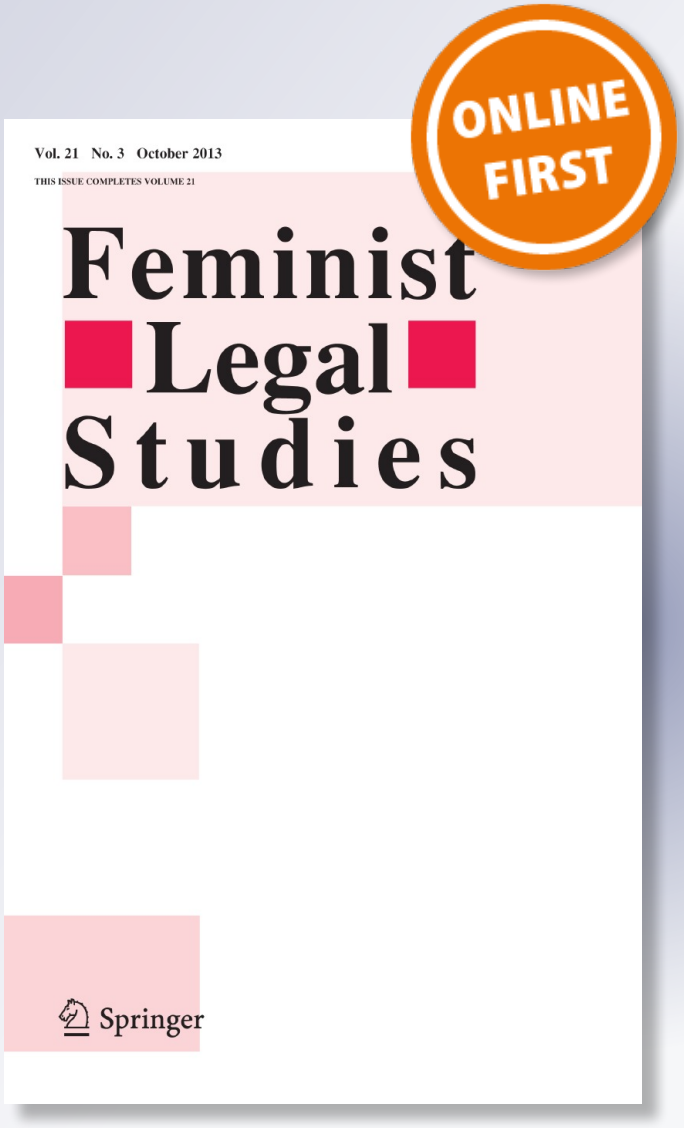
Feminist Legal Studies

ISSN 0966-3622

Fem Leg Stud
DOI 10.1007/s10691-014-9256-2



Springer

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Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction

Judy Fudge

Abstract Drawing on feminist labour law and political economy literature, I argue that it is crucial to interrogate the personal and territorial scope of labour. After discussing the "commodification" of care, global care chains, and body work, I claim that the territorial scope of labour law must be expanded beyond that nation state to include transnational processes. I use the idea of social reproduction both to illustrate and to examine some of the recurring regulatory dilemmas that plague labour markets. I argue that unpaid care and domestic work performed in the household, typically by women, troubles the personal scope of labour law. I use the example of this specific type of personal service relation to illustrate my claim that the jurisdiction of labour law is historical and contingent, rather than conceptual and universal. I conclude by identifying some of the implications of redrawing the territorial and personal scope of labour law in light of feminist understandings of social reproduction.

Keywords Labour law · Care · Domestic work · Gender · Work · Social reproduction

Introduction

The erosion of the standard employment relationship, the male-breadwinner and female housewife gender contract, the vertically integrated firm, and trade unions' economic and political power has 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 (Davidov and Langille 2011). In the developing world, labour law's capacity to provide a stable

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Published online: 25 February 2014

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 (Fudge 2012a). 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 and domestic labour, has developed, and feminist approaches to law have moved 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 (Fudge 2013). 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 (Conaghan and Rittich 2005). 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 revitalize our thinking about labour law for a post-industrial and globalized world.

Drawing on feminist labour law and political economy literature, I argue that it is crucial to interrogate the personal and territorial scope of labour law in light of the recurring dilemmas that are deepening as local labour markets face new pressures from globalization, privatization, and austerity (Fudge 2011a; Tucker 2010). Focusing on how gender has figured in the construction of labour markets and employment relations, feminist labour law scholars have emphasized the importance of including caring and domestic labour, whether paid or unpaid, performed in a private household within the domain of labour law, and have been at the forefront of grappling with the specific dynamics governing affective or embodied labour. They (we) have also questioned "who" labour law is for—who are the normative workers for whom labour law was designed. While traditional accounts of labour law have emphasized the inequality between labour/workers and capital/employers, increasingly labour law scholars are attending to distributional cleavages amongst working people (Davies 2012; Mundlak 2011). This concern about the distributional assumptions and consequences of labour law has become even more pressing as many of "the structural causes of many injustices in the globalizing world, including financial markets, offshore factories, investment regimes, and global media, are not located within the territory and authority of the nation state" (Fraser 2009, 23). Labour law has traditionally been a product of actors that operated at the scale of the nation state, and labour law's jurisdiction has been linked to the nation state. The partial de-territorialisation of labour law (Mundlak 2009), which is most advanced in the European Union, but made visible across the world by the large presence of migrant workers, challenges feminist and other labour law scholars to develop normative foundations for labour law that are not confined to conceptions of national citizenship.

The paper proceeds in three sections. The first section focuses on how the shift in the gendered division of labour between paid employment and domestic work from the traditional male breadwinner and female housewife model to the dual

breadwinner model in developed economies has illuminated the significance of care work to sustaining societies. I concentrate on the "commodification" of care and draw attention to how this process leads to increased reliance on migrant care workers. In the second section I turn to global care chains to argue that our scale of analysis must not only move from the national to the transnational, but also begin to appreciate the extent to which different scales of regulation are mutually constitutive. I also discuss the relationship between care and body work, and why I think that the broader concept of social reproduction is more helpful argue for identifying and examining some of the recurring regulatory dilemmas that plague labour markets (Tucker 2010; Fudge 2011a). The example of migrant domestic workers is used in this section to illustrate both the links between different scales of regulation and the different concepts deployed—care, body work and social reproduction—to analyse global care chains. The legal treatment of migrant domestic workers also serves to expose the conventional limits to labour law, which I explore in the third section, where I go on to question why unpaid care work performed in the household, typically by women, falls outside labour law's jurisdiction. Here I consider Mark Freedland and Nicola Kountouris's discussion of legal construction and their notion of personal service relation in their book *The Legal Construction of Personal Work Relations* (2011). I have chosen their work because they offer a constitutive, rather than just a regulatory, account of labour law and they argue for an extensive scope for labour law that is sensitive to how women's disproportionate responsibility for unpaid care work for others results in precarious employment over their life-cycle (Fredman and Fudge 2013). Probing why they do not include unpaid care work performed in the household for others in their account of personal service relations, I argue that the notion of jurisdiction, which I use to refer to regulatory contexts or domains within which legal construction occurs, functions as a cognitive map. Frederic Jamieson (1991, 51) describes a cognitive map as "a situational representation on the part of the subject to that vaster and properly unrepresentable totality which is the ensemble of the society's structure as a whole".[1] My proposal that unpaid care work be located within the personal scope of labour law is designed to provide a critical perspective on the process of legal characterisation and the concept of legal jurisdiction that highlights the position of women within employment (Weeks 2011). It is also intended to disturb our conventional understanding of the appropriate regimes of regulation or jurisdictions for care work, whether or not it is paid. I conclude by identifying some of the implications of redrawing the territorial and personal scope of labour law to include unpaid care and domestic labour within private households.

Gender and the Commodification of Care

Instead of treating what had traditionally been seen as women and men's different roles as an evitable consequence of biology, feminists treat it as socially constructed

[1] Jamieson's notion of cognitive mapping draws upon Althusserian understandings of ideology as common sense.

and dependent on social norms and material conditions. Drawing upon the work of feminist historians, some of whom were influenced by postmodernism (Scott 1986), feminists have deployed the concept "gender" to capture how what are traditionally conceived of as "female" and "male" activities, roles, and values are not natural outcomes of biological differences but are socially constructed. Gender is the social process by which significance and value are attributed to sexual difference through symbols, concepts, and institutions (Fudge 1997a, 253). Gender discourses naturalise sexual differences through family relations, sexuality, state institutions, and work practices that organize procreation and maintain the population (Lerner 1997; Scott 1986). Labour markets, because they "operate at the intersection of ways in which people make a living and care for themselves" (Elson 1999, 612), have the ability to transmit socially created preferences efficiently (Williams 2010), and, thus, are bearers and reinforcers of gender. What the concept of gender does is provide an explicitly historical, relational, and dynamic understanding of how inequality in the labour market is configured, refashioned, and challenged.

Feminist legal scholars have deployed the concept of gender to probe the permeable and changing boundary of what counts as work at different times and in different places and to show how that boundary is intertwined with other social relations such as age, class, ethnicity, race, and migrant status. Beginning in World War II, work has been almost exclusively identified with employment and self-employment. This focus on paid work was possible because of the post-war gender contract in the developed world. This contract rested upon a sexual 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.[2] 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 (Becker 1976), with the result that potential conflicts between the members are ignored. Characterizing 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" (Becker 1976, 89, quoted by Federici 2012, 42).

The weakening of the gender contract, which was caused by a range of economic (the dismantling of tariff walls, changes in technology, the growth of the public services, the deterioration in men's wages, and women's mass entry into paid employment) and social (women's education, falling fertility rates, and marital breakdown) factors has revealed the extent to which employment norms rested on

[2] The idea of a gender contract blends Carole Pateman's (1988) notion of a sexual contract with the idea of a social contract, a concept that aims to capture, social, legal, and political norms surrounding the exchange between breadwinning and caregiving, protection and freedom, and public and private responsibility (Fudge and Vosko 2001; Vosko 2010). Gender relations and discourses are inscribed with processes of racialisation. For example, the gender contract of male breadwinner and female housewife did not pertain to Black women in the UK, who were much more likely to be employed full-time that their white counterparts (Ashiagbor 1999).

an unpaid, full-time caregiver. Good jobs with career paths tend to be confined to the standard employment relationship (full-time, full year, highly regulated, and providing a range of benefits) and are not easily compatible with caring responsibilities, which is why women tend to be overcrowded into non-standard and precarious work (Crompton 2002, 550). These non-standard jobs provide employers with numerical and functional flexibility and enable them to shift employment costs on to individual workers and their families. They also allow women to combine employment with caring responsibilities because they are flexible (Crompton 2002, 544). The problem is that these jobs also confine many women and their children either to partial economic dependence upon a man or to poverty (Fudge and Cossman 2002; Fudge and Owens 2006, 15). The difficulty in balancing paid work and care work explains why so many lone parents, the vast majority of whom are women, live on low incomes (Fudge and Cossman 2002).

As women with young children have increasingly entered the labour force, the reconciliation of paid work to unpaid care has become a "pressing problem … facing labour law" (Busby 2011, 1). Feminist labour law scholars have also drawn attention to the broader implications of the ways in, and extent to, which the gender contract has been destabilised (Conaghan 2005, 40; Fudge 2005, 266). This instability in the current gender contract presents an opportunity for a more egalitarian division of unpaid domestic and paid labour. At the same time, it also contributes to the deepening of intra-gender and transnational conflicts as women in the global North employ women from the global South to perform the bulk of their household's domestic and care work. It is this second "solution" to the problem of work-life conflict upon which I will focus.

Feminist economists have identified two types of limits to the commodification of care work; the first has to do with the relational and affective dimension of care, and the second underscores the economic constraints in paying for care. Referring to work of the economist Jean Gardiner (1997), Linda McDowell (2001, 460) has argued "those aspects of domestic provision that entail the giving of care are particularly resistant to commodification as the relations of exchange are not susceptible to monetary evaluation." Care is embedded in personal relationships of love and obligation, and it is a crucial part of identity formation (Busby 2011; Fudge 2011a, 132). Owing to its relational and affective nature, care is more than a task that can be performed in exchange for wages. It is also possible to acknowledge another limit to the commodification of care that does not run the risk of overemphasizing and, perhaps, romanticizing its affective dimension (Cooper 2007). Drawing upon William Baumol's (Baumol 1993; Baumol and Bowen 1966) analysis of sectors, such as performing arts, health care, and education, in which labour is not only an input but also an output, Susan Himmelweit (2013) argues that there is little scope for raising productivity while retaining the quality of care.[3] This constraint exists because it is not possible to substitute capital for labour or to introduce (major) technological improvement when labour is an output measured by

[3] The original study was conducted for the performing arts sector. However, the analysis has also been used to describe consequences of the lack of growth in productivity in public services such as public hospitals and state colleges. Another implication of the analysis is that public sector production is more dependent on taxation level than growth in the GDP.

time spent in the activity. Care of a given quality is an example of what has become known as Baumol's "cost disease", which, as Himmelweit (2013, 8) explains, occurs "as a country's standard of living rises due to increasing real wages, costs in industries in which productivity cannot be increased rise relative to those of more 'progressive' industries, where labour-saving technical progress is possible". A consequence of the rising costs of providing paid care (whether for profit or as a public service) relative to other costs in developed economies is, as Fiona Williams (2011, 30) notes, "care workers' wages are always being forced down by strategies such as employing those with the least bargaining power". The use of migrant workers is one strategy to reduce the costs of care.

Feminist political economists have emphasized the connection between migrant care work, globalisation, and the commodification of care, and they have stressed the distributional impact of the transfer of care work from women in the global North to women in the global South (Fudge 2012b). They note that many of the women who leave the South to work in the North or contiguous countries in the South are temporary migrant workers who do not enjoy either the right to become permanent residents in their host country or the right to circulate freely in the labour market. Given the basic gender division of labour in destination countries, women migrants are often restricted to traditionally "female" occupations—such as domestic work, care work, nursing, work in the domestic services, and sex work—that are frequently unstable and marked by low wages, the absence of social services and poor working conditions (Antonopoulos 2008, 38).

Transnational Care/Body Work Chains and Social Reproduction

Arlie Hochschild (2000, 131) coined the term the "global care chain" to refer to "a series of personal links between people across the globe based on the paid or unpaid work of caring". Global care chains are transnational networks that are formed for the purpose of maintaining daily life. These networks comprise households that transfer their caregiving tasks across borders on the basis of power axes as well as employment agencies, governments and their departments, and other agents, institutions, and organisations (Orozco 2009). Nicola Yeates (2005, 8) identifies the different dimensions of care and draws our attention to the spectrum of different institutional settings in which it is performed. She explains that care encompasses

> services as diverse as domestic cleaning, family care, health care, sexual care, educational care and religious/spiritual care, provided in a wide range of settings such as the home, hospitals, hospices, churches, schools and brothels and in a wider range of contexts such as individualized private settings and institutionalized state and non-state settings.

To add to the complexity, the agents and institutions involved in constructing and maintain global care chains operate across a number of scales and in a number of different jurisdictions. So, too, does the governance regime; global care chains are regulated by a patchwork of international, transnational, national, and subnational and institutions (Fudge 2011b).

Within feminist political economy literature care is broadly defined to include "nuturant care and other social reproduction activities", which also includes "forms of household and domestic labour" (Mahon and Robinson 2011, 1). Evelyn Nakano Glenn (2010, 5) 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". Another, narrower, perspective focuses on the labour process of bodies working on bodies. Carol Wolkowitz (2006, 8) defines body work 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." Stewart (2011, 21) argues that the benefit of body work as a frame is that it extends the inquiry beyond affective-oriented care work to more mundane physical tasks that comprise domestic (or household) labour and, thus, allows for an analysis of different types of paid care work that is sensitive to the different statuses of care work—those closer to the messiness of the body have a lower status. It also "captures the range of power inequalities that emerge when such work is undertaken in the Global North consumer economies by migrants (predominantly women) from poorer economies" (Stewart 2011, 22). Body work helps us to chart how care labour markets are segmented and stratified by class, sex, and race, and it reveals the intra-gender distributional conflicts.

Both care and body work capture a broad range of activities that are involved in social reproduction, a concept which encapsulates a "wider landscape of activities and sites" than either care or body work (Kofman 2012, 144). Three aspects figure in most definitions of social reproduction: biological reproduction, stressing motherhood; reproducing, in terms of provisioning, educating, and training, the labouring population; and tending to human beings' caring needs (Bakker 2007, 541; Strauss 2012, 3). Different disciplines adopt different approaches to social reproduction (Bezanson 2006; Strauss 2012), and they emphasize different levels (micro, meso, and macro) of analysis.[4] Strauss (2012) explains that the concept has been used as "a theoretical approach to the analysis of social relations, as a materialist ontology of capitalism, and as a framework for describing, categorising and theorising activities related to the perpetuation over time of individual and communal life." These differences in approach help to explain why some feminists have complained about the lack of conceptual clarity in the term (Bezanson 2006, 25; Jenson 1986; Luxton 2006). However, it is possible to be more precise in how social reproduction is being used by specifying the approach and level of analysis.

I am using the concept social reproduction to examine the labour market and the emergence and decline of the male breadwinner and female housewife gender contract from 1940 to the contemporary period of post-industrial globalism, and I am focusing on the developed world. In doing so, I adopt a feminist political economy approach that draws upon, but goes beyond, classical political economy, in

[4] Meg Luxton (2006) points out that apparent limits to the concept of social reproduction in part stem from the imprecision with which it can be deployed as a rubric under which all manner of tasks performed by women are collected. Jane Jenson (1986) points out the elision in the concept between different levels of analysis.

which social reproduction refers to the social processes and labour that go into the daily and generational maintenance of the population (Picchio 1992). Feminist political economists stress the mutual articulation of production and social reproduction, and the centrality of class and other relations of subordination, such as gender and race. 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" (Picchio 2003). Spike Petersen (2003) emphasizes the material and symbolic processes involved in the socialisation of human beings. Some feminists confine social reproduction to biological reproduction, unpaid production in the home of both goods and services, and the reproduction of culture and ideology, identifying the family/household and community as key sites (Rai et al. 2013, 23). By contrast, I adopt a broader conception that includes education, training, and immigration. This conception also involves the state and markets as sites because it allows me to examine how the state attempts to resolve the recurring dilemmas that bedevil labour markets in advanced capitalist social formations and the role labour law plays in resolving these conflicts (Fudge and Cossman 2002; Fudge 2011a).

Social reproduction includes a range of activities, of which body and care work are crucial components, and social processes that can be organised by different agents across a wide array of sites and institutions, some of which cross state borders. Meg Luxton (2006, 38) explains that "the allocation of responsibility for social reproduction 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". With industrial capitalism, urbanization, and the growth of factories the provision of subsistence shifted from the household and families to the wage (Federici 2004, 75) 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, is also crucial to social reproduction. It not only provides a source of labour supply, immigration also helps to regulate national labour markets (Bauder 2006; Fudge 2012c).

Increasingly, feminist political economists have linked changes in social reproduction in advanced capitalist states to attempts to transfer the provision of care from public services to either the market or to families in order to reduce costs (Fudge and Cossman 2002). This privatisation of social reproduction has been an important driver of the demand for migrant care and body workers, whereas structural adjustment policies imposed on the global South have, amongst other things, created a supply of women workers (Federici 2012, 71; Fudge 2012a). However, the transnationalisation of social reproduction is not likely a sustainable solution to the growing tension and contradictions caused by the simultaneous privatisation of social reproduction and austerity-driven public policies. The employment of migrant women to perform care work in the receiving countries of the North is an individual fix for the broader problem of combining paid work with unpaid care work, a solution which is simply not an option for families who cannot

afford it. Moreover, as Lourdes Benéria (2008, 11) points out, "the employment of migrant women from the South might contribute to a vicious circle in the host country, in which private solutions delay collective efforts to search for appropriate public policies". This strategy for dealing with work-life conflict in developed countries also intensifies the burden on the individuals who assume the roles of the women in the family who have migrated for paid work (Benéria 2008, 11). Rhacel Salazar Parreñas (Parrenas 2005, 15) has demonstrated how, in the case of the Philippines, the export of women's labour results in a "depletion of care resources" (see also Rai et al. 2013). Since it is mostly women who assume the family care-giving roles of migrant women, there is a growing need for reconciliation and equality policies in the South (Benéria 2008, 11). While women's decisions to migrate can increase their financial autonomy and increase their financial contribution to their household through remittances, their absorption into the care markets of the North tends to reinforce the gendered nature of care as well as racialised understandings of body work (Federici 2012, 71–72).

Transnational migration directly troubles "who" labour law is for in ethical terms (Fudge and Mundlak 2013). Lucie Williams (2002, 95) argues "privileging nation-state waged work as the site for redistributive politics ignores and devalues the needs and concerns of millions of low and non-waged workers in a globalized economy". Feminist legal scholars who concentrate on global care chains are challenging the nation state as the appropriate frame of labour law and the methodological nationalism with which it is associated order to see how risks and rewards are distributed across national boundaries (Wimmer and Schiller 2002; Fudge 2011b; Stewart 2011). Public policies in developed countries that emphasise increasing women's employment rates without simultaneously stressing the obligations of men to engage in care activities are likely to perpetuate global care chains in which women from poor countries migrate to richer countries to perform care work (Fudge 2012b; Stewart 2011). Immigration controls, such as visa restrictions, reinforce the gendered nature of care work, which are often based upon racialised understandings of body work (Federici 2012, 76). Global care chains illustrate how processes of social reproduction cross a wide range of territorial jurisdictions, which suggests that any effective form of regulation will likely also have to be multi-scalar.

Legal Construction and Jurisdiction: Regulating Domestic Work

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 realization 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. Polanyi (1944) understood that labour was an instituted process. However, his analysis of the social construction of markets has important gender-related consequences that he did not take into consideration (Benéría 2003, 74). Like William Beveridge, Polanyi treated the traditional gendered division of labour—male breadwinner and female unpaid caregiver—as natural, and both were inattentive to unequal relations within the household.

Attention to the processes of social reproduction illuminates the social character of labour and the recurring regulatory dilemmas involved in treating it as a commodity to be sold in the marker (Peck 1996). There is the problem of incorporating labour into the labour market since the market neither governs the supply of labour nor creates labour. Instead, families determine the quality and quantity of labour, albeit influenced by state policies, and by the state directly though immigration policies. Although the wage plays a role in establishing living standards and family size, the market does not directly govern family composition and relations. The embeddedness of labour markets in a dense network of social relations creates recurring dilemmas that require regulation. 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.

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 (1979), the relationship of master and servant was, along with that of father and child and wife and husband, marked not by equality and freedom, but by paternalism and dependence. Throughout the history of the poor law, married women were treated as economically dependent upon their husbands, with little independent access to poor relief (Deakin and Wilkinson 2005, Chapter 3). 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 (Deakin and Wilkinson 2005). This process of marketisation simultaneously undermined older forms of protection and emancipated workers from paternalism (Fraser 2013). The household began to be separated from the worksite, and the wage became the key source of income. 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 (Pateman 1988). 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 (through coveture, for example) was inscribed within the 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 (Silbaugh 1996). Androcentric views of work and contribution were entrenched in work and social security legislation.

Labour law developed as the regulatory regime or jurisdiction for dealing with the problems relating to labour control and labour allocation. It has its own assumptions, 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 it utilises specific techniques, such as collective bargaining and minimum standards legislation. Regulatory dilemmas relating to labour supply and social reproduction were treated as matters of family and social welfare law, outside the ambit of labour law. Married women's economic dependence on their husbands was actively constructed by law, initially though the disciplinary function of poor law and later, with the embrace of the Beveridge Report after World War II, through a combination of carrots (the male breadwinner wage) and sticks (married women's disentitlement to unemployment insurance) (Deakin and Wilkinson 2005, 157 ff). The power imbalance between men/husbands and women/wives, despite its active construction in and though law, was treated as natural until well into the 1970s.

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 that the initial jurisdictional classification appeared natural and inevitable and not political and ideological. In this context, paid domestic work performed (generally by women) in other people's homes troubles conventional maps of jurisdiction (Fudge 1997b; Fudge 2011b). The location of this paid work within the home and in proximity to the family is the source of the anxiety. Whether this work is considered as a matter of the private sphere and family or related to the public sphere of work has long been contested (Albin 2012). Demarcating the boundaries of work and home has historically been, and continues to be, a key function and effect of labour law (Fudge 1999).

In 2011, the International Labour Organizations (ILOs) adopted a Convention concerning decent work for domestic workers that placed the regulation of paid domestic work squarely into the domain of labour law.[5] Despite this international standard, nation states differ over where labour law draws the boundary between the private sphere of the household and the public sphere of employment when they explicitly interface (Albin 2012). In England, the Working Time Regulations provide that domestic workers employed in a private household are not entitled to, among other standards, maximum weekly working time, limits on the length of night work, and a weekly rest period.[6] Domestic workers are also specifically excluded from the coverage of key European Union instruments, such as the Working Time Directive and the Pregnant Workers Directive, that regulate working

[5] In 2011, the International Labour Conference adopted a Convention (No. 189) concerning decent work for domestic workers (Entry into force: 05 Sep 2013); Geneva, 100th ILC session (16 June 2011) that indicates that recently paid domestic work is being treated as a matter of employment and not family relations.

[6] Regulation 19, Working Time Regulations 1998 (No. 1833 of 1998).

conditions (McCann 2012, 116).[7] Under the Minimum Wage Regulations in England, if domestic workers are considered part of the family, then they are not entitled to receive the minimum wage.[8] A recent review of the pattern of the laws, regulations, and judicial decisions excluding domestic workers from labour law found that the greater the personal work relationship resembles a family relation, the less likely the worker is to enjoy the protection of human rights law (Mullally and Murphy 2014). These legal characterisations, in turn, influence whether the work is seen as producing value or consuming it.

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) (Peck 1996, 26). This difficulty is at the basis of a problem that plagues the contemporary debate about the role and scope of labour law. The contract of employment, which is a very specific legal format for subordinated labour that depends on a series 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.

Legal Construction and Personal Work Relations

In *The Legal Construction of Personal Work Relations*, Mark Freedland and Nicola Kountouris manage to avoid identifying the contract of employment as the basis of labour law by carefully articulating their related ideas of legal construction and normative characterization. Legal construction is the shape or analysis that a legal system gives to work relations. They point out that this process is not simply classificatory; it is regulatory. Legal construction forges the link between legal character and incidents and normative characterisation expresses this integral combination. They explain normative characterisation as the creation of a microsystem in and by which legal character and legal consequences are interconnected. According to them, normative characterization "is a terminology

[7] Council Directive 92/85. These exclusions emerged from the political settlement that grounded EU working condition laws in the realm of health and safety; Member States decided to exclude private homes and domestic work from the scope of health and safety laws. Directive 89/391 on Health and Safety singles out domestic workers from exclusion.

[8] National Minimum Wage Regulations 1999 (No. 183 of 1998), Regulation 2:

(2) In these Regulations "work" does not include work (of whatever description) relating to the employer's family household done by a worker where the conditions in sub-paragraphs (a) or (b) are satisfied.

(a) The conditions to be satisfied under this sub-paragraph are–

(i) that the worker resides in the family home of the employer for whom he works,

(ii) that the worker is not a member of that family, but is treated as such, in particular as regards to the provision of accommodation and meals and the sharing of tasks and leisure activities;

(iii) that the worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, in respect of the provision of the living accommodation or meals; and

(iv) that, had the work been done by a member of the employer's family, it would not be treated as being performed under a worker's contract or as being work because the conditions in sub-paragraph (b) would be satisfied.

which seeks to capture the essential connectedness between identifying the legal character of a given personal work relation and making normative propositions about the relation" (Freedland and Kountouris 2011, 6). They argue that the process of linking legal character to legal consequences in the construction of personal work relations has its own particular political and forensic dynamics, which forms part of the regulatory context. Each regulatory context (or jurisdiction) also has its own complex internal structure and dynamic made up of different layers and scales of legal principles, doctrines, and institutions. Normative characterisation, the linking of legal character to legal consequence, takes place within a specific regulatory context. Freedland and Kountouris develop a theory of multilayer regulation that seeks to account for the extent to which different layers of regulation—from constitutional norms, through specific statutes, to the contract of employment—are integrated into each other. They also acknowledge that there is extensive and multi-faceted regulation of personal work relations involving different but related regulatory contexts. Since the process of normative characterisation not only classifies but forms or transforms personal work relations,

> it follows that formative or transformative acts of legal construction of personal work relations are highly *path-dependent* upon the particular path of evolution which has been followed within the regulatory context in question. Furthermore, that path-dependency may be an elaborate one, reflecting historical effects from various intersecting regulatory contexts (Freedland and Kountouris 2011, 9).

Although they do not dwell upon it, Freeland and Kountouris acknowledge the significance of intersecting regulatory contexts, what I refer to as different legal jurisdictions.

This account of legal construction and normative characterisation is an integral part of Freedland and Kountouris's institutional perspective on labour law. They attach special significance to labour market institutions and arrangements, adopting Colin Crouch's definition of institutions—patterns of human action and relationships that persist and reproduce themselves over time, independently of the identity of the biological individuals performing within them (Freedland and Kountouris 2011, 26 quoting Crouch 2005, 10). They claim that embedded institutions may have major normative effects that are wholly or partly concealed behind an appearance of technical neutrality (Freedland and Kountouris 2011, 47). The outcomes of legal characterisation not only interact with each other as normative legal constructs, but also interact with the patterns and constructions with which those involved in the making of personal work relations, both workers, and, perhaps even more significantly, employing organisations or entities, place or seek to place their own dealings or arrangements. The process of legal construction has real ideological and material effects on how social actors organise their relations and activities. Freedland and Kountouris provide a constitutive approach to labour law in that they show how labour law does more than classify and regulates work arrangements but promotes and channels specific types of personal work relations.

This emphasis on legal construction and the adoption of an institutional approach provides the basis for a conceptually rich account of the labour market as an

instituted process that does not reduce work relations to simple exchanges, but understands that a variety of formal and informal institutions are involved in sustaining work engagements and arrangements. It also allows for system subjectivity or path dependency by emphasising the distinctiveness of particular constellations of formal, including legal, and informal institutions at specific moments and in specific places. Given the potential for their analysis to comprehend the labour market as an instituted process, it is illuminating to understand why Freedland and Kountouris stop short of stretching labour law to include the regulatory problems associated with reproducing labour and incorporating it in the labour market.

Freedland and Kountouris develop a series of related concepts with an eye to constructing a critical taxonomy of personal work relations. The personal work relation is defined 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" (Freedland and Kountouris 2011, 31). This conception is narrower than work since there must be a relationship and not simply an activity, and it requires that the worker be personally involved in performing the work.

Personal work relations are composed of a personal work nexus, which is the internal structure of personal work relations that constitute the connections that make up the relationship. These connections can be primary, for example between an employer and employing entity, or secondary, such as those between a trade union and members or, in certain circumstances, between two co-workers. The process of normative characterisation makes a complex and iterative link between the personal work nexus and the personal work relationship.

Before presenting their taxonomy of personal work relations, Freedland and Kountouris add the idea of a personal work profile, which brings the dimension of time to their conception of personal work relations. The temporal dimension is crucial for the analysis as it captures the changes in a person's personal work situation over her or his working life. Here they introduce a soft tripolar typology—relations or profiles of secure work, autonomous work, and precarious work—in order to depict the salient differences in work profiles. This typology is empirical, and none of the poles is hard edged. The concept of personal work profile functions to highlight the extent to which regulation eases or impedes the transition from one personal work situation to another and how it constructs precarious working lives.

The final step in their argument is to add an empirical typology of personal work profiles to the legal taxonomy of personal work relations and the personal work nexus. They acknowledge that in making this move from a legal taxonomy to an empirical typology they are encroaching on a domain usually inhabited by economists and sociologists. They are not, however, daunted by the fear that they are stepping beyond the bounds of their expertise. Instead, for them "a greater problem is that a labour lawyer when suggesting such a typology, rather than straying too far from his or her own legal discipline, will not stray far enough—that is to say, will remain entrapped within the legal frame of reference, and will propose

a typology which simply reflects the legal categories from which the very aim of the exercise is to break free" (Freedland and Kountouris 2011, 347).

What is remarkable is the extent to which Freedland and Kountouris's analysis has broken free of dominant legal categories. Moreover, their analysis provides a major contribution upon which feminists can develop labour laws in ways that meet some of the problems faced by precarious women workers (Fredman and Fudge 2013). However, there is one point at which they remained tethered to conventional or traditional understanding, and that is their understanding of the domain of labour law, which, in turn, influences how they conceive of the personal work relationship. In essence, they accept, rather than challenge, that the appropriate legal jurisdiction for regulating unpaid caring and domestic labour is family, and not labour, law.

Freedland and Kountouris propose a relational defining of labour law 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. They adopt a middle position between anchoring the subject in the employment contract and detaching the conception to range free through the world of work (Freedland and Kountouris 2011, 21).[9] They are aware of the fine balance between the purpose of labour law and its scope, what they prefer to call the relational defining function. Instead of addressing the inequality between employees and employers, they think that cultivating personality at work should be the purpose of labour law, the essential idea of which is "to maximize the dignity accorded to workers in personal work relations and to optimize their capabilities in and through those relations while recognizing the need to attribute some degree of stability to all personal work relations" (Freedland and Kountouris 2011, 21).

Freedland and Kountouris emphasise the relational nature of their boundary-setting concept, which makes it narrower than the activity of work, and the requirement that the work be performed personally. They illustrate the normative implications of the boundary concept of personal work relations by identifying "a number of kinds of work … whose place in the firmament of labour law is either denied or contested, and which therefore interfaces with other legal domains in which labour law is not the primary source or kind of legal obligation" (Freedland and Kountouris 2011, 35). This list includes informal or undocumented work relations, volunteer work, work in a public function or office, work as a trainee, and work for the benefit of a household or by way of care for dependents as a member of a household or family.

By contrast, the empirical typology of personal work relations that they draw up in Chapter 9 is much shorter than the above list (Freedland and Kountouris 2011, 348). While the personal work profiles of volunteers and those engaged as trainees or apprentices remain, informal and undocumented work relations and work for the benefit of a household or by way of care for dependents as a member of a household or family are not part of the seven-fold typology. Since, for example, care work performed by a member of a household for a dependent is both relational and

[9] Noah Zatz (2008, 2011), who I will discuss in the following pages, endorses an idea of work that focuses on the activity, not the relationship, and he adopt a narrower scope of labour law than do Freedland and Kountouris by confining it to employment. Like them, Zatz does not want to disrupt prevailing conceptions of the appropriate scope of labour law.

personal, the contraction of the list of relations broadly understood as involving work to the narrower typology of personal work relations must be because they adopt a conventional understanding of labour law.[10] Care work by a (typically female) family member for a dependent has conventionally denied a place in the firmament of labour law.

Why are some personal work relations that are contained in the taxonomy part of the typology and others are not? It is clear from both the definition and the typology that personal work relations do not require payment; in fact, the typology contemplates the personal work relations of volunteers. Why is unpaid work performed by volunteers included within the typology of personal work relations but the unpaid work performed by a mother for her children, wife for her husband, or daughter or son for an elderly parent not covered? Both are relational, socially valuable, and significant for the functioning of labour markets. The difference in treatment must be because the latter type of personal work relation falls within the domain of family law. When is it advisable to broaden the scope of labour law beyond its conventional domain? These questions are important not only for epistemic reasons, but also for normative reasons.

Freedland and Kountouris (2011, 439–446) offer mutualisation and demutualisation of risks, which can be vertical from employers and/or the state to workers, as a way of understanding both the direction of recent employment law policy in Europe and for operationalising their conception of personality in work. They also note a form of horizontal mutualisation of work-related risks amongst tertiary participants that includes family and household members (Freedland and Kountouris 2011, 440). Historically, it is clear that throughout most of Europe, the standard employment relationship was a way of mutualising risk vertically between employers and the state and workers. It was also a way, through its companion institution, the male breadwinner/female housewife gender contract (or traditional sexual division of labour), of mutualising risk on a horizontal basis between workers, one paid and the other unpaid. The problem with this form of horizontal mutualisation, however, is that it contributed to women's economic and political subordination.

It is also important to emphasise the significance of unpaid care work when it comes to understanding how personal work profiles become precarious. In their list of labour law interventions that can "functionally be linked together by the notion of regulation from the perspective of personal work profile" (Freedland and Kountouris 2011, 368), three of the five interventions (controls on atypical forms of employment, gender equality, and flexible or family-friendly work arrangements) are intimately tied to the disproportionate burden of unpaid care responsibilities for others that women shoulder. Women's disproportionate responsibility for the work necessary to sustain families and households helps to explain why women disproportionately have precarious personal work profiles (Fudge and Cossman 2002; Fudge and Owens 2006).

[10] Freedland and Kountouris (2011, 350) note that their analysis of personal work relations "is posed as a challenge to a generally accepted much simpler paradigm for the legal construction of personal work relations in which those relations are viewed as universally or nearly universally having the legal character of bilateral contract."

Why do we characterise the unpaid work that women perform in the household as a matter of family law? As noted above, industrial capitalism and the separation of the workplace from the household, where productive activity used to occur, led to a new legal taxonomy for "productive" work as master and servant dissolved and the employment contract grew, whereas status and patriarchy continued as the form of regulation for the "private, intimate and affective space of the home" (Halley and Rittich 2010, 757).[11] Wally Seccombe (1992, 244) explains, "as wages became the dominant mode of recognising and rewarding labour, women's unpaid domestic contribution began to disappear as real work." Simultaneously, it became increasingly difficult for women to combine childbearing and childrearing with paid work. 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. 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" (Glenn 2010, 91). 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 become to regarded as a uniquely appropriate way of dealing with the "special" relations of family (Halley and Rittich 2010, 757). A particular form of the family (male breadwinner with a dependent housewife) came to be seen as a natural artifact outside of law; a view expressed by the noted labour lawyers Otto Kahn-Freund and Bill Wedderburn (1971, 7), 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."

What this view of the distinction between the private realm of the family and home, on the one hand, from the public realm of work and the market, on the other, ignores is that demarcating these boundaries of has historically been a key function and effect of the law (Barzilay 2012; Zatz 2008). The processes of legal characterisation and legal regulation involve a prior choice of the appropriate regulatory context or jurisdiction for the social relations and social activities under consideration. While jurisdiction is typically identified with the "where" (territory) and the "who" (authority) of governance, it "also differentiates and organizes the 'what' of governance—and most importantly because of its relative invisibility, the 'how' of governance" (Valverde 2009, 144). The objects of governance—what is to be regulated—for example, whether domestic work is matter of family law or employment law, are associated with regulatory techniques (how the object should be governed), which, in turn, can be understood not only in terms of institutional capacities and rationalities, but also in terms of social and political norms and practices. Jurisdiction, which sets the boundaries of the process of legal

[11] Glenn (2010, 12–40) notes how slavery and indenture in the United States to forced women to care and imprinted domestic work as different from free wage labour.

characterisation and construction, is an outcome of social and political contestation. It functions as a mechanical sorting mechanism only during periods of equilibrium, which are punctuated by episodes of contestation when the question of appropriate jurisdiction and governance techniques are up for grabs.

During periods of equilibrium, legal jurisdiction creates cognitive maps about how best to navigate our social world. Jurisdiction allocates social relations and activities into different legal domains or regulatory contexts, and in doing so "channels" them into "specific institutional forms and away from others" (Zatz 2011, 254). In relation to work, Noah Zatz (2011, 254) explains that such legal channeling "shapes how work gets done, not just the legal implications that follow". The process of assigning jurisdiction over specific activities and social relations gives them an identity that distinguishes them from other activities.

It is also important to recognise that jurisdiction is plural and overlapping. Tracing the legal treatment of care and domestic work performed by women for others within the household across a range of different legal disciplines or legal jurisdictions,[12] family law, welfare law, tax law, tort law, and labour law, Katherine Silbaugh (1996) shows how what she calls housework is not treated as productive work because it takes place within an affective and familial context. She does not deny the affective and relational dimension of this work, but what she does is emphasize the profound distributional consequences for women (and for men) of characterising housework as primarily a matter of family law governed by private norms of affection and intimacy.

Zatz (2008) provides a constitutive account of law and employment that is very similar to Freedland and Kountouris's account of legal construction. Moreover, like them, he also endorses a conception of labour law that excludes from its scope unpaid caring work performed by women with in the home, although his reasons are slightly different. While Freedland and Kountouris are clear that they are excluding these work relations because they do not want to depart too far from a conventional understanding of labour law, Zatz's (2011, 245) explains that "family labour occurs outside a conventional market relationship" and, thus, is inapposite for regulation via labour law.[13]

But what exactly is a "conventional market relationship"? Polanyi (1944) helpfully explained there are a number of distinctive markets—labour markets, financial markets, commodities markets, and markets in land, for example. Each of these markets has its own regulatory dilemmas and each is embedded in a dense network of social relationships. All markets are instituted processes, although the institutions differ from market to market, as well as across space and time. The conventional market relationship which is equated with an "arm's-length contract focused on mutual pecuniary gain by tightly linking payment and services" (Zatz 2011, 235) has much in common with the neo-classical model of the market, which strips the "commodities" exchanged of their distinctive characteristics and severs the exchanges from their social relations. Although Zatz insists on the relational

[12] I am using jurisdiction to refer to regulatory regimes that pertain to specific subject maters such as family law, tort law, contract law, tax law labour law.

[13] Another is that it lacks the conventional indicia of employment—control and an employer.

specificity of work in order to distinguish non-market family labour from market employment, it is not obvious why some relations are considered "social" and others are considered "market", unless the model of market he is using to contrast the social is a neo-classical one. It is important to emphasise Jamie Peck's (1996) point that attention to the processes of social reproduction illuminates the social character of labour and the recurring regulatory dilemmas involved in treating it as a commodity to be sold on the market. Feminist political economists regard the social relations and activities that Zatz characterises as non-market family labour as constituting part of the supply side of the labour market (Picchio 1992). The relational specificity of family labour and employment is, in part, the legacy of the prior assignment of jurisdiction and how these activities and social relations have been institutionalised. Over time, these jurisdictional choices have come to be seen as natural and inevitable, rather than constructed and contested, and they are used to make sense of our social world.

Conclusion

Currently, labour law depicts the question of work-related injustice in a particular way. It is part of a cognitive map that frames territorial jurisdiction in terms of the nation state, which makes it difficult to apprehend the transnational processes that subordinate migrant domestic workers, and that allocates the authority over social relations and activities to different regulatory contexts. Stretching the boundaries of labour law to include personal work relations that are performed in the private household by family members is resisted either because it commodifies 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.[14] However, it is possible to regard the demand to include unpaid care work within the scope of labour law as challenge to what the philosopher Elizabeth Anderson (1999, 311–312 footnote omitted) characterised as a "perfect reproduction of Poor Law thinking, including its sexism and its conflation of responsible work with market wage-earning".

In arguing that labour law be extended to include all of the processes of social reproduction, including unpaid domestic work provided in the home for others, I am not advocating that all of this work be covered by existing labour legislation, which was designed as a temporally and spatially specific organisation of work arrangements. Instead, my intent is to denaturalise the existing jurisdictional boundaries in order to cultivate a critical perspective on the relationship between "women's work" and the scope of labour law. My goal is to illuminate how the processes of legal construction and the creation of legal jurisdiction both creates and reinforces forms of social subordination that are entwined with gender, race, and migration status. As a demand (Weeks 2011), broadening the scope of labour law provokes us to consider why certain forms of subordination and segregation are acceptable and other forms are not, and how what we consider to be unacceptable

[14] The latter is Freedland and Kountouris' concern.

forms of subordination and acceptable methods to redress them change over time and across space. 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. Instead, working-time norms would be designed on the assumption that all workers engage in domestic labour for others and women would no longer be expected to shoulder the economic burden of unpaid care work. Similarly, 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. Migrant domestic workers would also be entitled to the labour protection to which other paid workers are entitled. These reforms would be small steps towards a utopian vision in which the negotiation over the division of domestic labour moves from the individual to the collective level. Here it bears pointing out that just because a vision is utopian does not mean that it is unrealistic. It is important to recall that the crowning achievement of labour law in developed economies after World War II was to transform individual conflicts over labour allocation and discipline into collective matters to be resolved through negotiations with workers' democratic representatives. What was once reality looks utopian to us today.

Acknowledgments I would like to thank Donatella Alessandrini, Kate Bedford, Emily Grabham, and Kendra Strauss for their very helpful comments and conversations on this paper or the topic more generally, and the Leverhulme Trust for providing the support for my visiting professorship at Kent Law School that made these conversations possible.

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