



Conaghan, J. (2018). Gender and the Labour of Law. In H. Collins, G. Lester, & V. Mantouvalou (Eds.), *Philosophical Foundations of Labour Law* (pp. 271-286). Oxford University Press.

Peer reviewed version

[Link to publication record in Explore Bristol Research](#)
PDF-document

This is the author accepted manuscript (AAM). The final published version (version of record) is available via Oxford University Press . Please refer to any applicable terms of use of the publisher.

University of Bristol - Explore Bristol Research

General rights

This document is made available in accordance with publisher policies. Please cite only the published version using the reference above. Full terms of use are available:
<http://www.bristol.ac.uk/red/research-policy/pure/user-guides/ebr-terms/>

GENDER AND THE LABOUR OF LAW

© Joanne Conaghan (pre-publication version; finished chapter to appear in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds) *Philosophical Foundations of Labour Law* (forthcoming 2017))

INTRODUCTION

A fundamental assumption which has underpinned labour law since its inception as a discipline is that the 'labour' of labour law signifies labour that is remunerated. While debate may thrive over the varied forms which paid working arrangements can take, there remains wide agreement that the field of labour law corresponds with the field of paid work and that unremunerated labour carried out in the home or community is outside its scope.¹ Challenges to this widely shared consensus occasionally arise, increasingly so as feminist scholars acquire a (still tenuous) grip on the discipline.² Nevertheless, such challenges rarely if ever disturb the core assumption that paid labour is a distinct domain of social activity inviting a distinct normative and regulatory response. So engrained is this assumption in the labour law psyche that feminist exhortations to expand the reach of labour law to encompass unpaid domestic labour are generally met with polite bewilderment.³ They are off the spectrum of serious consideration.

The purpose of this paper is to trouble this consensus by excavating the material and philosophical roots of the distinction between paid and unpaid labour. It is important to remember that, like any conceptual framing, the paid/unpaid labour distinction is no more than an intellectual contrivance which may or may not correspond at any time or place with the material realities it seeks to represent. Labour law, as we know it, is a historical creation. It takes its form and purpose from the social concerns thrown up by industrial capitalism,⁴ reflecting a paradigm of industrial relations in which the central protagonists, capital and labour, are invariably at odds. It is the inevitability of industrial conflict in the context of sharp asymmetries of power in the individual employment relationship which gives labour law its purpose: 'The main object of labour law' Kahn-Freund declares, 'has always been and I venture to say always will be, to be a countervailing force to counteract the inequality of bargaining power which is inherent, and must be inherent, in the employment relationship'.⁵ There are reasons to think that notwithstanding the absolute and universal terms in which Kahn-Freund cast his pronouncement, the employment relationship - and the contract of employment which underpins it - is no longer the lynchpin anchoring labour law in the early twenty-first century.⁶ Many questions have been raised about labour law's reach and

¹ The assumption that labour law correlates with paid work is generally taken for granted rather than explicitly stated but cf Matthew Finkin, 'The Death and Transfiguration of Labor Law' (2011) 33 *Comparative Labor Law and Policy Journal* 171, 177 (where Finkin reasserts the historical and contemporary linkage between labour law and 'the institution of waged work').

² My own engagement with the disciplinary parameters of labour law can be found in Joanne Conaghan, 'Work, Family and the Discipline of Labour Law' in *Labour Law, Work and Family*, Joanne Conaghan & Kerry Rittich eds (Oxford, OUP, 2005) 26. For an excellent analytical overview of feminist labour law scholarship, see Judy Fudge, 'From Women and Labour Law to Putting Gender and Law to Work' in *The Ashgate Research Companion to Feminist Legal Theory*, Margaret Davies and Vanessa Munro eds (Farnham, Ashgate, 2013) 321.

³ Finkin, n 1 above, 173. For a rare example of scholarship engaging directly with the notion that labour law extend beyond 'nonmarket work', see Noah Zatz, 'The Impossibility of Work Law' in *The Idea of Labour Law*, Guy Davidov & Brian Langille eds (Oxford, OUP 2011), 234.

⁴ Bob Hepple, 'Factors Influencing the Making and Transformation of Labour Law in Europe' in Davidov and Langille, n 3, 30, 31-32; Harry Arthurs, 'Labour Law after Labour' *ibid*, 13.

⁵ Otto Kahn-Freund, *Labour and the Law* 2nd ed (London, Stevens & Sons, 1977) 6.

⁶ See eg Mark Freedland and Nicola Kountouris, *The Legal Construction of the Personal Work Relation* (Oxford, OUP, 2011).

scope,⁷ troubling the notion that labour regulation is solely or even predominantly concerned with what goes on in workplaces. Increasingly it is acknowledged that the regulatory field encompasses and/or engages broader efforts to manage labour markets and to mitigate the risks (for workers and employers) to which market-governed interactions frequently give rise.⁸ An unprecedented degree of uncertainty surrounds the object, concerns and bounds of the discipline proper as old concepts and certainties collapse in the face of new ideas and possibilities.⁹

It is within the context of what many agree is a disciplinary crisis that the predication of labour law on a paid work paradigm comes under enhanced scrutiny. Radical changes in the gender demographics of paid work participation have highlighted the extent to which the social organisation of work in industrial societies is historically reliant on a gendered configuration of productive and reproductive activities that has become increasingly untenable.¹⁰ The interpenetration of the domains of work and family in legal and social policymaking, encapsulated in concerns about 'work/life balance' or the 'reconciliation of work and family responsibilities'¹¹ also contributes to a discursive environment in which questions about the relation between paid and unpaid labour inevitably arise. How then did the distinction come about and how does it map onto broader ideas of political and social order? It is important to situate this enquiry against the background of a wider set of issues to which the slow but steady collapse of the paid work paradigm gives rise. Some of these issues are normative, raising concerns about how work is distributed and rewarded and how patterns of power relations - gender, race, and class - mediate these processes of distribution and reward. However, it is a recurrent misapprehension of labour law scholars to assume that the feminist focus on unpaid work is animated solely by egalitarian or justice-seeking aspirations. In fact, the feminist foregrounding of unpaid work is equally driven by concerns as to the value and utility of the analytical and conceptual frames through which labour law is commonly apprehended.¹² It is with these primarily analytical concerns in mind that I embark upon a genealogical exploration of the emergence of the distinction between paid and unpaid work, with a view to historicising and denaturalising what continues to be a critical disciplinary frontier.¹³

MATERIAL ORIGINS

Modern labour law emerged as a response to the problems occasioned by industrialisation.¹⁴ Its particular history varies from jurisdiction to jurisdiction but its essential forms and categories reflect the specific social and economic requirements of the transition from feudalism to capitalism: the shift from rural to urban living; the rise of a market economy; the separation of production from consumption and of workers from ownership and/or control of the means of production; and the

⁷ Guy Davidov usefully summarises these concerns in 'Setting Labour Law's Coverage: Between Universalism and Selectivity' (2014) OJLS 543, 546-550.

⁸ Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford, OUP, 2005).

⁹ See essays in Davidov & Langille, n 3 above.

¹⁰ Deakin & Wilkinson, n 8 above, vii, 17; Judy Fudge, 'The New Dual Earner Gender Contract: Work-life Balance or Working Time Flexibility' in Conaghan & Rittich n 2 above, 261, 266-269.

¹¹ Eugenia Caracciolo di Torella and Annick Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Basingstoke, Palgrave Macmillan, 2010).

¹² Judy Fudge, 'A New Vocabulary and Imaginary for Labour Law: Taking Legal Constitution, Gender and Social Reproduction Seriously' in *The Future Regulation of Work*, Douglas Brodie, Nicole Busby and Rebecca Zahn eds (London, Palgrave MacMillan, 2016) 9; Joanne Conaghan, 'Labour Law and Feminist Method' (2017) 33 *International J of Comparative Labour Law and Industrial Relations* 93.

¹³ For an exploration labour law's 'frontiers', see *Boundaries and Frontiers of Labour Law*, Guy Davidov and Brian Langille eds (Oxford, Hart Publishing, 2006).

¹⁴ Deakin and Wilkinson n 8 above, especially ch 2.

demarcation of work and family into distinct spheres of activity. These are all well-documented historical phenomena giving rise to the forms of social organisation we apprehend today.¹⁵

Let's dwell for a moment on one aspect of this broad package of social changes, the demarcation of work and family into distinct spheres of activity. Imagine a world where workplaces, as we understand them, did not exist, or did not constitute the living experience of most ordinary people. In the subsistence economy of feudalism, peasants lived and worked the land of their lords, bound in a relationship of asymmetric obligations and undisguised hierarchy.¹⁶ For most people, home and work were one and the same, with men and women working together to support their families and communities: 'Feudal relations of production tied the whole household rather than the individual to socially productive labour'.¹⁷ It would be wrong to romanticise this world as one of unabashed gender equality. Feudal society was characterised both by a sexual hierarchy and division of labour.¹⁸ Responsibility for feeding, caring and nurturing family and community generally fell upon women but women also contributed to working the land and serving the lord and his family.¹⁹ The lives of peasants were hard, the lives of women particularly so; but what was not in doubt was that women *worked*; the labour they performed was critical to the survival of the family and community.²⁰ In an economic and social world where, for most people, subsistence was a daily struggle, the value and importance of women's contribution to the household economy was not in question.

In the course of the transition from feudalism to capitalism, a process characterised in Marxist terminology as 'primitive accumulation'²¹ and in England broadly corresponding with the 14th through to 17th centuries, this way of life broke down: Feudal privileges were repeatedly challenged and economic life became increasingly monetarised as money-rent replaced the old obligations to render labour services to feudal lords.²² This was a period in which economic inequalities deepened,²³ and for women the shift from a subsistence-based to monetary economy was largely detrimental. With limited access to income or land and deepening patterns of gender stratification

¹⁵ There is a significant literature on the transition from feudalism to capitalism particularly within Marxism where debate has focused on the precise causes and drivers of economic and social change. See eg Maurice Dobb, *Studies in the Development of Capitalism* (London, Routledge & Kegan Paul, 1946); Rodney Hilton (ed) *The Transition from Feudalism to Capitalism* (London, Verso, 1978); T H Aston & C H E Philpin (eds) *The Brenner Debate: Agrarian Class Structure and Economic Development in Pre-Industrial Europe* (Cambridge, CUP, 1985); Ellen Meiksins Wood, *The Origins of Capitalism* (New York, Monthly Review, 1999). (The latter provides an incisive overview of Marxist debate as well as her own analysis of the dynamics of transition).

¹⁶ Silvia Federici, *Caliban and the Witch: Women, the Body and Primitive Accumulation* (New York, Autonomedia, 2004) 21-50.

¹⁷ Michele Barrett, *Women's Oppression Today* 3rd ed (London, Verso, 1984) 177. There is a rich feminist literature on the pre-capitalist 'family economy' in which all family members engaged in the necessary labour to sustain the household. See especially Louise Tilly and Joan Wallach Scott, *Women, Work and Family* (Hove, Psychology Press, 1987) chs 1-3; Bridget Hill, *Women, Work and Sexual Politics in Eighteenth Century England* (London, Routledge, 1989) chs 3 & 4.

¹⁸ Chris Middleton, 'The Sexual Division of Labour in Feudal England' *New Left Review* 1-113-114 January-April 1979 147.

¹⁹ Ibid.

²⁰ Ibid. Within the family economy, women did both work we would characterise as housework (domestic labour) and work we would classify as production, ie making goods and produce for use and/or exchange (see further Hill n 17 above, 24-25).

²¹ Karl Marx, *Capital* Vol 1, Part VIII (London, Lawrence & Wishart, 1983).

²² Federici, n 16 above 28-30 and 72-75.

²³ Chris Middleton, 'Patriarchal Exploitation and the Rise of English Capitalism' in Eva Gamarnikow, David Morgan, June Purvis and Daphne Taylorson (eds) *Gender, Class and Work* (London, Gower, 1983) 11.

in wage labour,²⁴ women became increasingly economically dependent on men.²⁵ Displaced people flocked to towns which operated as commercial centres supported by craft guilds but also created wage labour opportunities. In the early social chaos following the breakdown of serfdom, opportunities for women sometimes arose.²⁶ However, in general the social and economic restructuring process accompanying the transition to industrial capitalism closed down rather than opened up opportunities for women and, indeed, for most working men.²⁷

The historian, E P Thomson, tracks the social disciplining of the working class into new working habits centred on the needs of industrial production. He documents the transition from 'task-oriented time', structured around the cyclical activities of rural life, to 'timed labour', in which a labourer's time became the measure of his wage, which was in turn dependent upon his employer's needs.²⁸ In a production-for-use economy, where subsistence, not profit, governed social and labour activities, the household was the centre of activity and 'social intercourse and labour [were] intermingled'.²⁹ With the rise of a production-for-exchange (markets), 'productive' labour moved out of the household and into the mills and factories so that a cleavage between 'home' and 'work' emerged.³⁰ Working patterns changed and the idea of the working day – of working to time not task – took hold. It was clearly in the interests of employers to secure as much of workers' time as possible and, not surprisingly, the process of industrialisation witnessed intense class struggle over working time, culminating in the nineteenth century Factory Acts and associated measures.³¹ In the early stages of industrialisation, women as well as men were drawn into the mills and factories.³² At the same time, social reproductive work – feeding, caring for, and reproducing labour – still needed to be done. Indeed, in a context in which labour was perceived as the prime source of economic

²⁴ Middleton, n 18 above, 159-162.

²⁵ Federici, n 16 above, 74: 'As soon as land was privatised and monetary relations began to dominate economic life, [women] found it more difficult than men to support themselves, being increasingly confined to reproductive labour at the very time when this work was being completely devalued'.

²⁶ Martha Howell, 'Gender in the Transition to Merchant Capitalism' in Judith Bennett and Ruth Mazo Karras (eds) *The Oxford Handbook of Women and Gender in Medieval Europe* (Oxford, OUP, 2013) 561; Federici, n 16 above, 31.

²⁷ Early feminist studies of women's work took diverging approaches to the question of whether women's status and position improved or declined as a consequence of capitalism. Alice Clark, writing in 1919 (*The Working Life of Women in Seventeenth Century England* (London, Frank Cass & Co, 1968)) thought women were better off in the pre-industrial era whereas Ivy Pinchbeck, in her classic work, *Women Workers and the Industrial Revolution 1750-1850* (London, Virago, 1981, first published 1930) viewed industrialisation as providing greater opportunities for women to engage in waged labour. This divergence continues to resonate in feminist histories of women's work although recent analyses are more nuanced and equivocal, acknowledging both continuity and change in women's working lives under capitalism. See collected essays by Pamela Sharpe, Bridget Hill and Jean Bennett in P Sharpe (ed) *Women's Work: the English Experience 1650-1914* (London, Arnold, 1998) Part 1.

²⁸ E P Thompson, 'Time, Work-Discipline and Industrial Capitalism' in *Customs in Common* (Harmondsworth, Penguin, 1991) 352, 358.

²⁹ *Ibid*, 358.

³⁰ Or, as Thompson puts it, between 'life' and 'work' (*ibid*). For a feminist reading of Thompson's analysis of working time, see Joanne Conaghan, 'Time to Dream? Flexibilities, Families and the Regulation of Working Time' in Judy Fudge and Rosemary Owens (eds) *Precarious Work, Women and the New Economy* (Oxford, Hart Publishing, 2005) 101, 1-6-110.

³¹ See Marx, n 21 above, Ch XVII on the importance of working time to the extraction of surplus value. On the gender dimensions of 19th century working class struggle to limit the length of the working day, see Sylvia Walby, *Patriarchy at Work* (London, Polity Press, 1986) 97-134.

³² There is evidence that in early industrialisation women workers dominated certain manufacturing sectors such as textiles and weaving (Maxine Berg, 'What difference did women's work make to the Industrial Revolution?' in Sharpe n 27 above, 149).

value,³³ never more so. Thus, most working women's lives tended to comprise both work to support the family income, in the form of waged labour, alongside the many activities typically required to sustain and reproduce labour power.

This is the historical and material context in which a notion of labour equating with *paid* labour took shape and form: The advent of industrial capitalism triggered a reconfiguration of the labour process which split 'domestic' and 'industrial' labour, affecting perceptions of the character and value of the work performed.³⁴ With productive and reproductive work no longer temporally and spatially aligned, their distinctiveness became more pronounced, assuming a tangible visible form, which intensified and naturalised the sexual division of labour.³⁵ Productive labour became spatially associated with a place of work - a workplace - while reproductive labour became the province of family life, physically located in the home, which also served as a retreat from the demanding rigours of the production line. Reproductive work became less valued, in part because it was performed by women within a context of social intensification of sexual difference, but also because it was no longer seen to be contributing economically: it did not generate a wage.³⁶ Although reproductive work remained equally essential to the survival of the family unit, in a world in which money now measured value, it did not appear so.³⁷

During the nineteenth century the bourgeois 'cult of domesticity', expressed in the idea that women's place is in the home, gradually spread its tentacles to encompass and define working class aspirations.³⁸ This dominant ideology of the Victorian period conjured up a social vision in which women devoted themselves to the 'private' sphere of home and family while men occupied the 'public' world of market and politics.³⁹ Such a sharp delineation of gender roles was always more ideal than real, particularly for working class women, most of whom continued to engage in wage labour to some degree as a matter of economic necessity⁴⁰ but there is no denying that, during the nineteenth century, women's access to paid work became an increasing focus of social and political conflict: Among bourgeois women the primary concern (in the face of strong male resistance) was access to the professions and related occupations;⁴¹ within the working class, women's employment became a significant focus of capitalist-labour conflict over matters such as sex-based wage differentials and the length of the working day.⁴² By the twentieth century, with the development of

³³ This was a period when the labour theory of value was gaining traction (see especially the work of David Ricardo and later, Karl Marx).

³⁴ Wally Secombe, 'The Housewife and her Labour under Capitalism' *New Left Review* 1 83 January-February 1974, 3, 5-6.

³⁵ Much of 19th century debate concerning restrictions on women's employment drew upon notions of women's 'natural' duty to care for their families and the moral and social harm occasioned by their inability to do so while they were engaged in paid work. See Walby, n 31 above, 112-116.

³⁶ Domestic work carried out by servants did command some form of remuneration (generally including board and lodgings) although it was low paid and often deeply exploitative (Hill, n 17 above ch 8). During industrialisation, domestic service became the main form of employment for young working-class women; moreover, women vastly outnumbered men as domestic servants (ibid 125-126). On the history of domestic work regulation, see Einat Albin, 'From Domestic Servant to "Domestic Worker"' in *Challenging the Legal Boundaries of Work Regulation*, J Fudge, S McCrystal & K Sankaran eds (Oxford, Hart, 2012) 231.

³⁷ Changes in how domestic labour was perceived and valued occurred gradually over a lengthy period; there is evidence that in early capitalism women's contribution to the household was still regarded as economically essential (Middleton, above n 23, 21-24).

³⁸ Joanna Bourke, 'Housewifery in Working Class England 1860-1914' in Sharpe n 27 above, 332.

³⁹ Pamela Sharpe, Introduction' in Sharpe, n 27 above, 1, 10.

⁴⁰ See eg Amanda Vickery 'Golden Age to Separate Spheres' in Sharpe, n 27 above, 294 critiquing the idea of separate spheres as a characterisation of working class women's lives in the Victorian era.

⁴¹ Candida Ann Lacey (ed) *Barbara Leigh Smith Bodichon and the Langham Place Group* (London, Routledge & Kegan Paul, 1987).

⁴² Walby n 31 above.

the welfare state, a distinct social model had emerged to support the organisation of work in the industrial world: the male breadwinner/female caregiver model⁴³ was an unequivocally gendered order based upon a sharp distinction between work and family life and the promise - or myth - of a 'family wage'.⁴⁴ Within this social imaginary, work and family appeared to operate autonomously, serving different social functions and meeting different human needs. Care work became the province of family; no longer viewed as a necessary economic contribution to social well-being, it attracted no wage and was conceived as freely given and naturally expressive of relations of affect and intimacy. Paid work took place outside the family realm; it was visibly economic in character and expressed in formal legal relations of mutuality and exchange. Of critical importance, the world of paid work, now spatially aligned with the 'workplace', was predicated on the assumption that 'workers' were exclusively available for the duration of the period they were contracted to work, unencumbered by care work which was carried out elsewhere. Thus, while industrial production remained materially reliant upon unpaid care work to ensure, on a daily and generational basis, that labour was reproduced, this reliance, was obscured both by the physical and conceptual separation of work and family and the naturalisation of distinct gender roles. The old world in which productive and reproductive activities appeared inextricably entwined in material life processes had disappeared.

PHILOSOPHICAL UNDERPINNINGS

The brief account offered above cannot pass for a proper exploration of what was unquestionably a huge transformation in social and economic life, taking place over a lengthy period and the product of complex, often conflicting forces and demands. Nevertheless, it serves for our purposes to identify a notional moment when production and reproduction materialised as separate and distinct realms of social activity. The analysis so far has focused on the material dimensions of this process of separation but it is important too to highlight the contribution of philosophical ideas to a worldview in which gender and labour became simultaneously aligned (in the naturalisation of a sexual division of labour) and dissociated (in the reconfiguration of the labour process to exclude women's reproductive work). Philosophy does not emerge in a vacuum. While philosophical texts are often read as if they speak across time and space, philosophical ideas take their shape and substance, their concerns and preoccupations, within specific social, economic and political contexts. Inevitably then, philosophical ideas connect at some level with the historical conditions from which they arise.

It is no coincidence that amidst the social disruption wrought by early capitalism, radical new ideas appeared about the proper ordering of government and society, ideas which challenged the absolutism of monarchs and championed notions of freedom and formal equality.⁴⁵ During the seventeenth century, in particular, a new political imaginary gained currency, crafted by political theorists such as Thomas Hobbes and John Locke and framed in terms of an idealised 'social contract'⁴⁶ which seemed to offer a justification for political authority more attuned to the economic

⁴³ Jane Lewis, 'The Decline of the Male Breadwinner Model' (2001) 8/2 *Social Politics* 152; Nancy Fraser, 'After the Family Wage: A Postindustrial Thought Experiment' in *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (New York, Routledge, 1997) 41.

⁴⁴ Michele Barrett and Mary McIntosh, 'The "Family Wage": Some Problems for Socialists and Feminists' in Terry Lovell (ed) *British Feminist Thought in the Second Wave* (Oxford, Blackwell, 1990) 134, 139.

⁴⁵ Ellen Meiksins Wood & Neal Wood, *A Trumpet of Sedition: Political Theory and the Rise of Capitalism 1509-1688* (London, Pluto Press, 1997).

⁴⁶ The term 'social contract' derives from Jean Jacques Rousseau's essay of the same title (*Du Contrat Social*) published in 1762. However, social contract theory has earlier origins and is closely associated with the writings of Thomas Hobbes (*Leviathan* (1651)) and John Locke (*Two Treatises of Government* (1689)) a century before.

and social needs of a market-based economy.⁴⁷ At the heart of this new political framework (from which we can glean the origins of modern liberalism) was an insistence that all men are by nature equal and free to pursue their own interests and that political authority derives from the free consent of the governed.⁴⁸ Such a vision contrasted radically with traditional notions of political power, predicated on the assumption that the authority of the monarch was absolute and divinely ordained and that the organisation of society simply reflected a status-based, deeply hierarchical natural order.

At first glance, such challenges to old assumptions about nature and the social order seem promising in terms of their potential to disrupt traditional notions of gender roles and relations. As seventeenth century feminist philosopher, Mary Astell, expostulated, 'If all men are born free how is it that all women are born as slaves?'⁴⁹ Unfortunately, and notwithstanding this visible tension, the emancipatory benefits of these innovative political ideas were not extended to women; indeed, the rise of liberal thought in the seventeenth and eighteenth centuries coincided with an intensification of gender discrimination (understood in the multiple senses of the word).⁵⁰ Nevertheless, while the view that women were properly subject to the authority of men persisted, it did present problems for radical political thought. As Andrea Nye observes, 'this was treacherous ground: if nature was allowed to dictate women's subordination it might also dictate other forms of subordination'.⁵¹ Matters were further complicated because the main argument raised against social contract conceptions of political authority invoked the notion of patriarchal authority to defend the divine right of kings.⁵² How could social contractarians, at one and the same time, conjure up a state of nature in which everyone was assumed to be free and equal while simultaneously endorsing the gendered hierarchy of the family?

The answer to this is complicated and, most scholars concur, not terribly satisfactory. In particular, while Hobbes and Locke both seemed to concede women's equality in a state of nature,⁵³ neither adequately explained how and why women go on to 'agree' to be subject to male authority.⁵⁴ Much

⁴⁷ Wood and Wood, n 45 above, ch 1.

⁴⁸ For a useful summary of the origins and key features of social contract theory, see G D H Cole Introduction' to Jean-Jacques Rousseau, *The Social Contract and Discourses* (London, Dent & Sons 1973) xi, xvii-xxii.

⁴⁹ Mary Astell, Preface to the 3rd edition of *Some Reflections upon Marriage* (1706).

⁵⁰ Teresa Brennan and Carole Pateman, "'Mere Auxiliaries to the Commonwealth": Women and the Origins of Liberalism' (1979) *Political Studies* 163, 196-7; Merry Wiesner-Hanks, *Women and Gender in Early Modern Europe* (Cambridge, CUP, 2008) (on intensification of legal restrictions on women); and Thomas Laqueur, *Making Sex: Body and Gender From the Greeks to Freud* (Cambridge, Harvard University Press, 1990) ch 5 (on changing ideas of gender difference in the Enlightenment period).

⁵¹ Andrea Nye, *Feminism and Modern Philosophy* (New York, Routledge, 2004) 52-53. The institution of slavery presented similar problems for social contract theorists.

⁵² The most famous exponent of patriarchal theory in this period was Robert Filmer, whose *Patriarcha* (1680) was the focus of extended critique by Locke in the first of his *Two Treatises*. According to Filmer, God gave the first father (Adam) absolute monarchical power which was then passed on via procreation to Adam's sons. Filmer also argued that Eve was placed by God in a position of natural subordination to her husband (see further Locke's *Two Treatises*, I: II).

⁵³ Hobbes considers the position of women in the state of nature in two key texts, *De Cive*. *The English Version entitled in the first edition Philosophical Rudiments Concerning Government and Society* (1651) and *Leviathan* (1651) in both of which he is at best ambiguous about the equality of the sexes. See further Gabriella Slomp, 'Hobbes and the Equality of Women' (1994) *Political Studies* XLII, 441. Given limits of space and time, I concentrate primarily on Locke's philosophical writing here.

⁵⁴ There are significant differences between Hobbes and Locke in their portrayal of women's position in the state of nature but ultimately neither theorist is really interested in troubling the notion that women should be governed by men (see further Brennan & Pateman n 50 above).

feminist ink has been spilt probing the philosophical texts here⁵⁵ and the best that can be said is that the logic and rationality upon which these great philosophers placed such value appears to have been sacrificed on the altar of expediency when it comes to accounting for women's position.⁵⁶ It is true that in *Two Treatises of Government*, Locke tried to counter the patriarchal challenge by drawing a distinction between 'political' power, on the one hand, and 'paternal' power, on the other. Political power he argued, resided in the sphere of 'civil government' and included, inter alia, 'the right of making laws with penalties of death... and of employing the force of the community in the execution of such laws'.⁵⁷ Paternal power encompassed the authority exercised by parents over their children and which arose from 'that duty which is incumbent on [parents] to take care of their offspring during the imperfect state of childhood'.⁵⁸ Because political and paternal authority were of *different* kinds, Locke's argument ran, the family could not be presented as a model for political power, as Filmer and others suggested.⁵⁹ Note that Locke speaks here of parents not fathers; mothers he concedes have 'equal title' to paternal power.⁶⁰ At the same time, Locke is never in doubt that ultimate parental jurisdiction lies with fathers. This is not really explained other than in vague allusions to men's natural superiority over women.⁶¹ It seems that Locke's concept of parenting is *already endowed* with gendered features, creating distinct categories of 'mother' and 'father' which carry naturally differing roles. Social characteristics, in other words, have been inexplicably grafted onto the natural state. It is fathers, Locke observes, who 'ordinarily' have the power 'to bestow their estates on those who please them best'.⁶² In this sly elision of paternal and property rights, Locke inadvertently reveals himself; for the freedom to acquire and dispose of property is a critical feature of his political vision, a natural right to which all in theory are entitled but which women, by virtue of their sex, social role, and, not least, legal status, are not in a position to exercise.⁶³

Let's now begin to track the links between these emerging ideas about the proper ordering of government and the family and the material transformation of work relations during the rise of capitalism. First, one sees in Locke's distinction between paternal and political power the re-inscription of a much older divide between public and private spheres.⁶⁴ The precise correlation of public and private with spatial and/or conceptual boundaries is ambiguous; in some contexts, home or family signifies the realm of the private in contrast to the public world of market or commerce; in

⁵⁵ The classic feminist critique of social contract theory is Carol Pateman, *The Sexual Contract* (Cambridge, Polity Press, 1988). On Hobbes and/or Locke specifically, see Slomp, n 53 above; Brennan & Pateman, n 50, above; Nye, n 51 above, ch 3.

⁵⁶ See *ibid* commenting that Locke 'asserted women's independence when it helped his case. He resorted to nature to preserve her domestic status' (55).

⁵⁷ Locke, *Two Treatises*, II:I.

⁵⁸ *Ibid*, II:VI:58.

⁵⁹ *ibid* II:VI:71: 'But these two powers, political and paternal, are so perfectly distinct and separate, and built upon so different foundations and given to so different ends...'

⁶⁰ *Ibid*, II:VI:52.

⁶¹ See *eg* II:VII:82: 'But the husband and wife, though they have but one common concern, yet having different understandings, will unavoidably sometimes have different wills too. It therefore being necessary that the last determination (i.e. the rule) should be placed somewhere, *it naturally falls to the man's share as the abler and stronger*' (my emphasis).

⁶² *ibid*, II:VI:72.

⁶³ Under the doctrine of coverture which governed married women's status in England until the late nineteenth century, married women could not own, receive or transfer property as, on entering marriage, their legal personhood merged with and became absorbed in that of their husbands. Thus, when Locke was writing about property-owning, it was within a frame of legal reference in which married women could not hold property. See generally William Blackstone, *Commentaries of the Laws of England*, Vol 1 ch XV.

⁶⁴ On the 'ancient origins' of the public / private dichotomy, see *eg* Margaret Thornton, 'The Cartography of Public and Private' in *Public and Private: Feminist Legal Debates*, M Thornton ed (Melbourne, OUP, 1995), 2.

others, private relations encompass both home and market ('private enterprise') while the relationship between individuals and the state is designated public.⁶⁵ Thornton, among others, argues that 'public' and 'private' are best understood not as distinct realms or sites but as a particular mode of thinking which permeates political and legal thought, serving multiple, sometimes conflicting purposes.⁶⁶ Among those purposes, designations of public and private are often used to signify difference and/or to assign value.⁶⁷ Locke's implicit invocation of the public/private divide, expressed in his distinction between political and paternal power, serves both functions: It constitutes family and society/state as different in kind and thereby allows the latter, not the former, to seize the attention of political philosophy. The family, relations and activities therein, are placed outside the sphere of political contemplation.

How does wage labour fit into this picture? Locke famously viewed labour as self-owned; the capacity to work constituted a form of property which was alienable just like any other market commodity. Locke in particular placed great theoretical weight on the notion that 'every man has "property" in his own "person"'⁶⁸ as this formed the justification for property-owning more generally: 'The "labour" of his body and the "work" of his hands we may say are properly his. Whatsoever then he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property'.⁶⁹ Labour then was a source of value. The process of 'mixing' one's labour with the resources bestowed by Nature *produced* something the labourer was entitled to appropriate; similarly, if one sold one's labour to another and that labour was applied in this way, the thing produced would belong to the person who had purchased the labour. Locke's conception of wage labour was necessarily contractual because it was only through voluntary agreement that one's labour could be appropriated by another: 'A free man makes himself a servant to another by selling him for a certain time the service he undertakes to do in exchange for the wages he is to receive'.⁷⁰

This contractual model was only partially mirrored in law. Writing less than a century later, Blackstone made clear that the master and servant relationship, while created by contract, was far from determined by free agreement in all its particulars.⁷¹ Once the service relationship came into being, the obligations between the parties – and these varied depending on the type of service contracted for⁷² - derived from the formal status the parties had assumed and the law now determined. Contract was merely the mechanism for bringing into being a status-governed relationship.⁷³ Although the later stages of industrialisation witnessed an intensification of freedom of contract rhetoric in political discourse, it was not until the late nineteenth century that the statutory framework governing master and servant law was dismantled.⁷⁴ Even then, the status elements of the service relationship were not so much displaced by as submerged within an

⁶⁵ Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard L Rev* 1497. Note that within law, the term 'private law' generally encompasses both home and market while 'public law' relates to the sphere of government.

⁶⁶ Thornton n 64 above.

⁶⁷ *Ibid.*

⁶⁸ Locke, *Two Treatises*, II:V:26.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, II:VII:85.

⁷¹ Blackstone, n 63 above, Vol 1 ch XIV.

⁷² Blackstone identifies four kinds of service relationship: 'menial' or 'domestic' servants; 'apprentices'; 'labourers'; and 'superior servants' (*ibid.*, I).

⁷³ The situation regarding menial servants must be further qualified as Blackstone comments that: 'all single men between twelve years old and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, are compellable by two justices to go out to service' (*ibid.*, I:1). In other words, working people could be *forced* into contracting.

⁷⁴ Deakin & Wilkinson, n 8 above, 61-86.

overarching contractual frame incorporating common law implied terms.⁷⁵ Indeed, the retention of a significant status element to the labour contract proved critical to the transition to a mature industrial society, providing a means of disciplining workers and facilitating the restructuring of traditional working habits.⁷⁶ Thus, notwithstanding that wage labour took a contractual form, the nature of the relationship was (and arguably remains) essentially one of subjection: 'there can be no employment relation without a power to command a duty to obey'.⁷⁷

Let's turn now to marriage in social contract theory: this too was conceived as contractual: 'conjugal society' Locke observes 'is made by a voluntary compact between man and woman'.⁷⁸ Moreover, like the labour contract, marriage created a relationship of subjection: 'it can be no other subjection than what every wife owes her husband'.⁷⁹ What then of a wife's labour? In his discussion of the property-producing value of labour, Locke makes no formal distinction between men and women's labour although not infrequently he speaks of the putative property owner as a 'man and his family'.⁸⁰ His assumption is that men acquire property to support and benefit their families but that families themselves lie beyond the sphere of production and property acquisition, constituting a separate 'little commonwealth' comprising 'a master of a family with all these subordinate relations of wife, children, servants and slaves'.⁸¹ In this account, women and the labour they typically perform is implicitly distanced from productive activities, consigned to a separate and autonomous realm of activity with its own peculiar mode of governance and social order.

The reality of the times was rather different. At the time Locke was writing (the late seventeenth century), the process of separation of economic production from the household was still at a relatively early stage. Most women of the labouring classes engaged not just in what we would now perceive as 'domestic' duties but also in the family business or trade; they were a visible part of economic life.⁸² The model of work and family described by Locke was very much an ideal, supporting his vision of a property-owning society of atomic individuals contracting freely in the marketplace. Locke himself was employed by the Earl of Shaftesbury who was strongly aligned with Parliamentarians in seventeenth century conflicts with the Crown: Many argue that Locke's *Two Treatises* was written as a political manifesto for parliamentary government. Thus, the interests to which Locke addressed himself were not those of working people but the propertied classes; Locke spoke to the concerns of property accumulators.

We have seen that during the course of the seventeenth century and thereafter, opportunities for women to be economically independent progressively diminished.⁸³ This was part of a broader process of restructuring of work relations under industrial capitalism but was also a product of working class resistance to the deleterious consequences that industrialisation visited upon working lives. Working men challenged women's employment in part because women's wages undercut men's but also because the quality of their lives and the well-being of their families were seriously threatened by the harsh material conditions in which working people lived and worked.⁸⁴ By the

⁷⁵ Alan Fox, *Beyond Contract, Work, Power and Trust Relations* (London, Faber & Faber, 1974) 181-190.

⁷⁶ *Ibid*; see also Deakin & Wilson, n 8 above, 70-71.

⁷⁷ Kahn Freund, n 5 above, 7.

⁷⁸ Locke, *Two Treatises*, II:VII:78.

⁷⁹ *Ibid*, I:V:48.

⁸⁰ *Ibid*.

⁸¹ *Ibid*, II:VII:86.

⁸² Anne Laurence, *Women in England 1500-1760* (London, Phoenix, 1994) chs 8 & 9.

⁸³ *Ibid*, ch 18; Hill, n 17 above, ch 14.

⁸⁴ J Humphries, 'Class struggle and the persistence of the working-class family' (1977) 1/3 *Cambridge J of Economics*.

nineteenth century, Locke's domestic ideal was one to which all consciously aspired⁸⁵ and an archetype of the property-owning individual and his family cut from the cloth of social contract theory was visibly embodied in the lives of a burgeoning middle-class. This 'possessive individual', as C B MacPherson describes him, was proprietor of his own person and capacities, independent of the will of others and entering agreements only in so far as they served his own interests.⁸⁶ At the same time, as MacPherson goes on to point out, the theoretical assumptions underpinning the possessive individual (which MacPherson derives primarily from Hobbes and Locke) were undermined in practice by the reality of capitalist exploitation 'in which full individuality for some was produced by consuming the individuality of others'.⁸⁷

For MacPherson, possessive individualism was flawed because the very conditions which gave rise to this ideal eventually destroyed it by eroding social cohesion (through the development of class consciousness) and (re)embedding inequality in social relations.⁸⁸ He concludes: 'the greatness of seventeenth century liberalism was its assertion of the free rational individual as the criterion of the good society; its tragedy was that this very assertion was necessarily a denial of individualism to half the nation'.⁸⁹ For MacPherson, the 'half the nation' denied was the exploited working class who failed to benefit from the liberal promise of the social contractarian vision. Yet, how much more starkly denied were women, who struggled even notionally to meet the criteria for possessive individualism. Women were not self-owners; they were effectively the property of their husbands, reflected not just in Locke's imaginary of 'the little commonwealth' of subordinate relations but also in the common law doctrine of coverture by which a woman's person was absorbed in that of husband at the point of marriage, her basic civil rights, including her right to contract or hold property wholly extinguished.⁹⁰ Even a woman's body belonged to her husband conferring a right of sexual access regardless of her will or preference.⁹¹ Together these laws ensured that a woman's labour was at the disposal of her husband and master; it was, for all intents and purposes, his.

Although these patriarchal laws dated back to the Norman conquest, their practical impact intensified as changes in the social and economic organisation of labour further weakened women's status and autonomy.⁹² Women's gradual exclusion from forms of employment previously open to them, along with the collapse of the family economy heralding the spatial separation of productive and reproductive activities, generated new social conditions for the operation of coverture laws. In particular, workers' increasing dependence on wage labour sat uneasily alongside a legal regime which denied women the right to their own earnings. It is true that in practice, the effects of coverture were primarily the concern of the propertied classes. As Joan Perkin observes, working women's earnings, though technically their husband's property, would go directly into feeding the family; moreover, working-class men were without the means to enforce the law.⁹³ At the same time, there is some contemporary speculation that the laws governing married women's earnings actively discouraged women from engaging in paid work.⁹⁴

⁸⁵ 'By the middle of the nineteenth century, to have a wife as a full-time housewife, had become the goal for husbands of all respectable classes', Pateman, n 55 above, 130.

⁸⁶ C B MacPherson, *The Political Theory of Possessive Individualism* (Oxford, OUP, 1962) 263.

⁸⁷ *Ibid*, 261.

⁸⁸ *Ibid*, 272-277.

⁸⁹ *Ibid*, 262.

⁹⁰ See n 63 above.

⁹¹ Barbara Leigh Smith Bodichon, *A Brief Summary of the Most Important Laws Concerning Women* (London, Chapman, 1854).

⁹² Hill, n 17 above, 201-202. Their impact would also have been more widely felt when marriage was legally regularised in the mid-eighteenth century (*ibid*, 202-220).

⁹³ Joan Perkin, *Women and Marriage in Nineteenth Century England* (London, Routledge, 1989) 6.

⁹⁴ Hill, n 17 above, 201-202,

It is time now to pull the threads of the argument together: how does all this relate to the distinction between paid and unpaid labour and the exclusion of the latter from the field of labour law? We have first a process of economic and social restructuring in which productive and reproductive activities become spatially and conceptually separated from one another and firmly entrenched along gender lines. The social and economic consequences of this process for working people are generally bad, for women doubly so. Then we see the emergence of a political philosophical outlook which promotes the rights and freedoms of the possessive individual, self-owning acquisitive and economically driven. This is a vision in which economic activity becomes the purpose of political power and economic success the measure of political worth. At the same time, the sphere of politics is formally distinguished from that of the family, captured in Locke's distinction between political and paternal power. The distinctiveness of these realms is essential to Locke's argument for it explains why the natural hierarchy governing family life should not also serve as a model for political governance: 'that the power of a magistrate over his subject may be distinguished from that of a father over his children, a master over his servant, a husband over his wife...'⁹⁵

Women's subjection to men within the construct of the family is taken outside the realm of political consideration; the labour they perform therein formally distanced from the economic world of property accumulation. The actual work that they do in the home may be very productive; they may weave or craft, cook or sew, plant or harvest. However, the social relations which govern this productive process are distinct from those that govern the market; they do not command a wage and are not viewed as economic in character. The construction of work and family as separate and distinct realms of governance presents no difficulties for men who straddle the two spheres with ease. Women however struggle and are increasingly encouraged to confine themselves to hearth and home. It is here that we begin to glimpse the interdependence of the social contractarian ideal and a particular gendered order which denies women the privileges of free individuals, placing them in a formal relation of subjection to men. Carol Pateman explains this by invoking the notion of the 'sexual contract'. She argues that the original social contract of class contract theory, in which free men come together and agree to be governed in their collective interests, presupposes a sexual contract taking the form of a 'patriarchal' or 'sex-right' which allows men to exercise power over women.⁹⁶ This power is perceived as necessary not least because marriage and primogeniture served as a primary mechanism for the accumulation and transmission of property rights within families.⁹⁷

The sexual contract, Pateman argues, is a 'repressed' dimension of social contract theory but one which nevertheless explains the many ambiguities and confusions which inhere in social contractarian accounts of women's social and political status. Critical to Pateman's argument is the way in which sex difference is utilised to explain and justify capitalist social relations: 'capitalists can exploit workers and husbands can exploit wives because workers and wives are constituted as subordinates through the employment contract and the marriage contract'.⁹⁸ In other words, although contract is conceived as a means of expressing and assuring individual freedom, it actually serves as a mechanism for the creation of relations of domination and subordination.⁹⁹ The worker by agreeing to sell his labour places himself in a position of subjection to his master, the wife by agreeing to marriage becomes subject to her husband; her person is his property, the worker's labour the property of his master. It is property, not contract, which is the critical concept here.

⁹⁵ Locke II:I:2.

⁹⁶ Pateman, n 55 above.

⁹⁷ Perkin, n 93 above, 51-53.

⁹⁸ Pateman, n 55 above, 8.

⁹⁹ *ibid* 118: 'contract is the specifically modern means of creating modern relationship of subordination, but because civil subordination originates in contract, it is presented as freedom'.

There is yet more to this story. What makes a man 'free' to sell his labour? What allows the capitalist to command a worker's time exclusively and without encumbrance? As Pateman, among many modern commentators, points out, 'the employment contract presupposes the marriage contract. Or to make this point another way, the construction of the "worker" presupposes that he is a man who has a woman, a (house)wife to take care of his daily needs'.¹⁰⁰ The new 'rhythms of industrial life'¹⁰¹ demanded not only that workers be disciplined into more regimented ways of working (in contrast to the irregular, subsistence-governed rhythms of pre-industrial life) but that as much of workers' time as could be provided was at the disposal of masters. Thompson puts it thus: 'What we are examining here are not only changes in manufacturing technique which demand greater synchronisation of labour and a greater exactitude in time-routines in *any* society... we are concerned simultaneously with time-sense in its technological conditioning and with time-measurement as a means of exploitation'.¹⁰² The primacy thus placed on workers' time required a form of social organisation which not only maximised their availability to work but also ensured that the labour so vital to productive activities was reproduced on a daily and generational basis. Social reproduction, 'the social processes and labour that go into the daily and generational maintenance of the working population',¹⁰³ became the province of the family and the responsibility primarily of women. Their domestic labour became vital to the process of paid labour exploitation; their sexual difference both the explanation and justification for their distinct and undervalued role. Excluded from the world of possessive individuals, confined to a sphere of 'natural' subjection, women's unfree status became formally enshrined in the grammar and assumptions of philosophical and political thought.

LABOUR LAW AND THE FUTURE OF THE PAID WORK PARADIGM

A close interrogation of the material origins of and philosophical justifications for the distinction between paid and unpaid labour, manifest in the spatial and conceptual separation of productive and reproductive activities and embedded, *inter alia*, in labour law theory and discourse, reveals that the distinction is not natural or inevitable but constructed and correspondent with the particular configuration of social and work relations which emerged with industrial capitalism. In its origins, justifications and applications, the paid/unpaid work distinction is also deeply gendered. Should we be worried that our discipline remains significantly reliant upon a distinction of problematic origins, dubious rationality, and systematically gender-disadvantaging effects? The answer is yes and for a number of pressing reasons properly the concern of labour law scholars. Chief among these is that the historically produced, economically compelled separation of work and family is breaking down, bringing into sharper focus their hitherto obscured interdependence.¹⁰⁴ The last half century has witnessed a period of major economic restructuring which Fraser describes as 'the death throes of the old industrial gender order with the transition to a new postindustrial phase of capitalism'.¹⁰⁵ Features of this brave new world include the steep decline of manufacturing, rise of flexible and precarious forms of work, technologically-driven transformation of working practices, demise of the family wage, shrinking of the welfare state, and increasing participation of women in paid labour, the latter generating a policy demand for the reconciliation of work and family

¹⁰⁰ *Ibid*, 131. This of course is the 'male breadwinner/female caregiver model' considered in text accompanying n 43 above.

¹⁰¹ Thompson, n 28 above, 369.

¹⁰² *Ibid* 382.

¹⁰³ Fudge n 10 above, 263.

¹⁰⁴ For further elaboration, see Conaghan, n 2 above, 26-30.

¹⁰⁵ Fraser, n 43 above 42. See also Leah Vosko, *Managing the Margins* (New York, OUP, 2010) and Fudge, n 10 above (tracking the demise of the 'old' gender contract).

responsibilities.¹⁰⁶ The drive to enhance productivity and economic competitiveness, aligned with the dwindling returns provided by social insurance, demand that women (as well as other 'dependents') should actively participate in paid labour.¹⁰⁷ The old normative order in which the male breadwinner was expected to engage in paid work while the female caregiver attended exclusively to domestic responsibilities has buckled under the weight of new economic and social priorities.

The sexual contract implicit in social contractarian thought is collapsing.¹⁰⁸ Gendered social arrangements which emerged from and took particular form within the context of industrialisation no longer serve the purpose of resolving the incipient tension between the imperatives of production and reproduction.¹⁰⁹ The emergence of work/life conflict in modern labour law is both a symptom of and response to the decline of the old sexual contract. While traditionally in labour law work and family were seen as antithetical, as two separate spheres which occasionally collided usually when women's employment was at issue, with wider social and economic changes work and family are now visibly interpenetrating; their gender-segregated boundaries are becoming blurred (witness the 'feminisation' of labour), their activities increasingly co-mingling.¹¹⁰ This is not just a product of the huge increase in female workforce participation over the last few decades,¹¹¹ generating new pressures for men to assume a greater share of domestic labour. It is also a result of unprecedented advances in communications and other forms of information technology, enabling work to be carried on outside a workplace under the continued surveillance and control of employers.¹¹² The old workplace - the factory, the mill, the office, is becoming redundant - the spatial separation of production and reproduction no longer economically required. We are not necessarily seeing the end of gender-based disadvantage in the social organisation of work – recall that a sexual division of labour pre-existed the economic transition to capitalism – but we are seeing the end of the old gender order.¹¹³ This brings both opportunities and risks. On the one hand, it makes it possible for women to aspire to the liberal promise, to become self-owning property accumulators through the commodification and alienation of their labour. On the other hand, it exposes them – and workers more broadly - to new forms of subjection and exploitation¹¹⁴ while, at the same time, throwing into serious question the adequacy of social reproductive arrangements which are reliant on the traditional family.

¹⁰⁶ Conaghan, n 2 above, 27; on economic transformation generally, see essays in *Labour Law in an Era of Globalization*, Joanne Conaghan, Karl Klare and R M Fischl eds (Oxford, OUP, 2003) especially Karl Klare, 'The Horizons of Transformative Labour and Employment Law' (3) and Massimo D'Antona, 'Labour Law at the Century's End: An Identity Crisis' (31).

¹⁰⁷ On the development of labour activation policies, see Amir Paz Fuchs, *Welfare to Work: Conditional Rights in Social Policy* (Oxford, OUP, 2008) ch 3; on their gender implications, see Joanne Conaghan, 'Gendered Aspects of Activation Policies' (Oxford, FLJS, 2009)

<http://www.fljs.org/sites/www.fljs.org/files/publications/Conaghan.pdf>

¹⁰⁸ Pateman, n 55 above.

¹⁰⁹ See text accompanying nn 100-3 above.

¹¹⁰ Joanne Conaghan and Kerry Rittich, 'Interrogating the Work/Family Divide' in Conaghan & Rittich, n 2 above, 1.

¹¹¹ This is a global trend, albeit varying in intensity depending on country/region (ILO, *Women at Work – Trends 2016* (Geneva, ILO, 2016) especially 6-7).

¹¹² A 2016 TUC study charts the rise of homeworking in the context of the advances in information and communication technologies (<https://www.tuc.org.uk/workplace-issues/home-working-fifth-over-last-decade-tuc-analysis-reveals>).

¹¹³ Fudge, n 10 above; Vosko, n 105 above.

¹¹⁴ See eg Judy Fudge and Kendra Strauss, 'Migrants, Unfree Labour and the Legal Construction of Domestic Servitude' in *Migrant at Work*, Cathryn Costello & Mark Freedland eds (Oxford, OUP, 2014) 160.

In particular, with the demise of the old gender contract, the problem of care looms large. The social impact of global economic restructuring on women's capacity to engage in unpaid domestic labour along with the contraction of social care provision and rising life expectancy has generated a growing care deficit, leading to the increasing commodification and privatisation of care work supported by the transnational movement of workers to meet the care needs of the (more) privileged.¹¹⁵ The breakdown of social reproduction in the post-industrial world connects to a wide range of pressing concerns relating to human capabilities, from working conditions and quality of life, to education, health and well-being, wealth and income inequality, social and cultural cohesion. Women are no longer in a position to bear the weight of such problems, although to varying degrees they still do.¹¹⁶ Meanwhile, 'new' kinds of labour exploitation demand attention, from the legal (re)production of precarity¹¹⁷ to the regulatory and ethical complexities of global care chains,¹¹⁸ as novel configurations of race, sex and class based inequality take shape and form. The concern here is not just with developing appropriate regulatory norms to address the many and complex problems arising from the breakdown of the old gender contract, but to ensure too that we are not so invested in a disciplinary frame which has been historically blind to gendered operations as to fail to recognise that a new gender contract is currently under construction.

What form might such a contract take? Nancy Fraser suggests that to resolve the tension between productive and reproductive needs while at the same time ensuring gender equity, we must adopt a 'universal caregiver' model.¹¹⁹ Work relations must be reconfigured so that women's current life patterns (in which balancing work and family responsibilities tend to be central) become the norm for everyone.¹²⁰ This she argues is the only solution which will ensure both gender equality and go some way to meet the care deficit, particularly in a context in which people are living longer, pension pots are shrinking and the modern state no longer can or will assume a significant share of responsibility for care provision. Nicole Busby makes a similar intervention arguing that rather than responding to the care dilemma by extending *employment rights* to carers,¹²¹ we should promote *caring rights* for workers.¹²²

Both Fraser and Busby foreground social reproductive needs in their efforts to reimagine and/or reconstruct the world of work. This becomes their normative and regulatory starting point; but what kind of labour law might thus ensue? Busby sketches an outline of a legal right to care predicated on making carer status a protected ground of discrimination and imposing on employers a duty of reasonable accommodation.¹²³ Other scholars have proposed stricter regulation of working time; for example, Vicki Schultz and Alison Hoffman make the case for a shorter working week to ensure care work is performed *and* fairly distributed.¹²⁴ This latter suggestion also resonates with broader

¹¹⁵ Again, there is a burgeoning feminist literature on the political economy of care. See especially *Feminist Ethics and Social Policy: Towards a New Political Economy of Care*, Rianne Mahon and Fiona Robinson eds (University of British Columbia, 2011); *Global Variations in the Political and Social Economy of Care*, Shahra Razavi & Silke Staab eds (New York, Routledge, 2012).

¹¹⁶ *Time Use Studies and Unpaid Care Work*, Debbie Budlender ed (New York, Routledge, 2010).

¹¹⁷ Rosemary Hunter, 'The Legal Production of Precarious Work' in Fudge & Owens, n 30 above, 283; Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' in *Europe's Immigration Challenge: Reconciling Work, Welfare and Mobility* (London, Tauris, 2013), 185.

¹¹⁸ Arlie Hochschild, 'Global Care Chains and Emotional Surplus Value' in *On the Edge: Living with Global Capitalism*, Will Hutton and Anthony Giddens eds (London, Jonathan Cape, 2000) 131.

¹¹⁹ Fraser n 43 above, 59.

¹²⁰ *Ibid* 61.

¹²¹ The 'caregiver parity model' in Fraser's terminology (*Ibid*, 55-58).

¹²² Nicole Busby, *A Right to Care: Unpaid Care Work in European Employment Law* (Oxford, OUP, 2011).

¹²³ *Ibid*, 182-188.

¹²⁴ Vicki Schultz and Allison Hoffman, 'The Need for a Reduced Workweek in the United States' in Fudge & Owens, n 30 above, 131.

concerns about job contraction in the context of technological advances in robotics and artificial intelligence.¹²⁵

Making social reproduction a point of entry for labour law does not however entail extending existing labour laws to unpaid domestic workers, as is sometimes mistakenly assumed. This is no call for ‘a uniform system of work regulation’¹²⁶ applying to anyone engaged in ‘work’. The very point is to highlight that work relations take diverse forms, only some of which find recognition within the paid work paradigm of current labour law.¹²⁷ As Zatz points out, with unpaid domestic labour, there is no formal employer or market relationship and no proper demarcation of working time.¹²⁸ Indeed, the latter feature contributes to the legal problematisation of paid domestic work, particularly in a live-in context.¹²⁹ On the other hand, and as we have seen in our exploration of the material and philosophical underpinnings of the paid/unpaid labour distinction, there are certain formal resonances which unite the marriage and the labour contract : they are both conceived as the product of agreement; they both create relations of subjection; and, whether we recognise it or not, they are both sites of labour activity which together produce economic value. Each is, or certainly has been, indispensable to the other; they are co-dependent.

To require that labour law take account of unpaid domestic labour is simply to acknowledge this co-dependence in the context of the wider economic and social eco-structure - and to attend to the implications – normative and conceptual - to which it gives rise. To some extent this is already occurring in labour law scholarship. When Brian Langille calls for a new ‘constituting narrative’ for labour law, drawing upon Amartya Sen’s concept of human capabilities to connect labour law directly with the advancement of human freedom (understood in a rich developmental sense to encompass ‘the mobilization and deployment of human capital’),¹³⁰ he is crafting a normative foundation for labour law in which social reproduction – the social and labour processes which go into nurturing human capabilities - must be central. The risk is, however, that it will continue to be overlooked. It is here that gender comes back into play, not as a social justice concern (although it is clearly important to continue to engage with gendered aspects of social injustice) but as an analytical category¹³¹ which casts particular light on the social organisation of work. Sex almost invariably features in any society’s division of labour and it is sex, or more broadly gender, which enables us to see and trace both the historical divergence of productive and reproductive work, paid and unpaid labour, and its contemporary convergence in the context of the radical economic and social restructuring which is the hallmark of postindustrialism. My primary focus in this chapter has been to explore the process of divergence and to probe its seepage into the conceptual and normative architecture of political and legal thought. By excavating the material and philosophical roots of the paid/unpaid work distinction, I have sought to show that the current conception of ‘labour’ which underpins labour law is historically contrived and not universally prescribed; therefore, our continued allegiance to a paid work paradigm is neither necessary or inevitable. In the final section, I have offered some reasons why it might be timely to revisit that allegiance. No doubt an opportunity to pursue that line of thinking further will arise in due course.

¹²⁵ Zoe Williams, ‘If robots are the future of work, where do humans fit in?’ *The Guardian* 24th May 2016

¹²⁶ Zatz, n 3 above, 248.

¹²⁷ Other kinds of labour arrangements which, for various reasons struggle to find a foot in labour law include volunteer work, unpaid internships, prison work, workfare (compelled labour in exchange for welfare benefits) and live-in domestic work, some of which are discussed *ibid*.

¹²⁸ *Ibid*, 235-236.

¹²⁹ Guy Mundlak and Hilar Shamir, ‘Bringing Together or Drifting Apart: Targeting Care Work as “Work like no Other”’ (2011) 23 *Canadian J of Women and Law* 289.

¹³⁰ Brian Langille, ‘Labour Law’s Theory of Justice’ in Davidov and Langille, n 3 above, 101, 112.

¹³¹ On gender as an analytical category, see Conaghan, n 12 above.