

Gender and the Idea of Labour Law

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The production and reproduction of immediate life ... is ... of a twofold character. On the one hand, the production of the means of subsistence, of food, clothing and shelter ... on the other, the production of human beings themselves, the propagation of the species. The social institutions under which men of a definite historical epoch and of a definite country live are conditioned by both kinds of production... (Engels 2010/1884, 35).

Every society has some sort of division of tasks by sex (Rubin 1997).

The sexual division of labour is a widely recognized phenomenon which, anthropologists tell us, occurs in some form in virtually all societies. Given such apparent universality, it is tempting to assume that the social allocation of tasks by sex is a reflection of biological difference, to conclude that the sexual division of labour arises naturally and inevitably from the brute facts of human existence. Certainly, this is the assumption which underpins many of the classic analyses of women's social position, for example, Engels' *Origin of the Family, Private Property, and the State* (2010/1884) or Mill's *The Subjection of Women* (1869). The tendency of such analyses is to locate the causes of gender inequality in the conditions of primitive human existence suggesting an egalitarian solution that neatly aligns with processes of human evolution and civilization. And yet, this supposed correspondence between equality and evolution is far from assured. As Juliet Mitchell wryly observes, 'no primates distinguish between the sexes as assiduously as humans do' (1984, 84). The determining influence of human biology on the social organization of work is cast into further doubt

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when one considers the enormous variation in the gendered allocation of tasks in any given society (Levi-Strauss 1971, 347). Put simply, while a gender division of labour is a common feature of social organization, the particular forms that division takes will be temporally and spatially bound.

Given the historical specificity of sex-based systems of socially organized labour, what can we say about the relationship between a sexual division of labour and socially constituted sex difference?

Again anthropologists tell us that while labour is not the only significant site of the social construction of sex roles – the kinship system, for example, is widely regarded as central in this respect (Levi-Strauss 1971) – the social organization of work is nevertheless strongly implicated in the social constitution of sex/gender (Rubin 1997). There is clearly an interconnection between how we understand gender roles, attributions, and relations and how we approach the allocation of socially necessary tasks. This is manifest not only in the material realities of people's lives in which men and women must learn to navigate the structural and relational constraints imposed by deeply gendered working arrangements but also in the realm of socio-cultural and/or symbolic expression where gender and labour often coalesce in processes of value and meaning conferral, making labour a signifier of gender and vice-versa. Thus understood, gender and labour interact symbiotically to mutually constitute and reinforce one another.

With such a degree of co-dependence, one might expect gender to feature prominently in labour law, that branch of law which purports to govern labour relations. Indeed, one might anticipate that the near universal incidence of a gender division of labour would register as a factor of significance in the context of labour law analysis and theorizing. Remarkably though and outside the field of feminist labour law scholarship (see Fudge 2013), gender has remained conspicuous by its absence from labour law as a category of analytical worth. It plays no (formal) role in the constitution and mapping of the discipline and makes no (acknowledged) conceptual contribution to the core analytical frame. From the perspective of labour law scholarship, gender is part of the empirical

reality upon which labour law acts but it is not a defining or determining part. It is to be found in the bricks and mortar of labour law, not in the overall architectural design.

Granted labour lawyers are far more aware of gender issues today than they once were. Major changes in the economic and political landscape in recent decades have, *inter alia*, brought about seismic alterations in the gender composition of employment, contributing to the 'feminization of work' and exposing the interdependence of the productive and reproductive realms in constituting and maintaining the necessary social arrangements to support economic activity. A normative ideal premised upon a sexual division of labour which comprises a male breadwinner and female caregiver has been forced to give way to new and unstable configurations of work and family in order to satisfy the voracious appetite of post-industrial capitalism for flexible labour. The pursuit of policies of labour market activation directly targeting women in a period of intense welfare retrenchment has rendered all too visible the traditional reliance of workplace arrangements upon a social infrastructure in which the bulk of caring work is carried out by women in the home. The assumption that work and family occupy separate and autonomous realms which collide only in the context of 'choices' exercised by individual women seeking to access the labour market has been revealed to be untenable as the pursuit of 'family-friendly' strategies has moved from the margins to the mainstream of regulatory and policy agendas (Conaghan and Rittich 2005).

How have these developments impacted upon labour lawyers' understanding of their field? At first glance, not a lot. Persistent calls by feminist legal scholars (see, for example, Conaghan and Rittich 2005; Busby 2011; James and Busby 2011; Fudge, McCrystal and Sankaran 2012) to redraw the boundaries of labour law to take proper account of unpaid caregiving work appear for the most part to have fallen on deaf ears. There is no evidence of a great rush by labour lawyers to confront the implications of social reproduction for the conceptual coherence and normative legitimacy of their field although there is a widespread acknowledgement that the field is in the midst of a conceptual and normative crisis (Davidov and Langille 2011, 1). There is also recognition that the traditional

boundaries of the discipline are under serious threat (Arthurs 2011) and that those boundaries are the product of historical circumstances, possessing limited general applicability (Weiss 2011, 43). Surely this is a prime moment for labour lawyers to take the concerns of feminists seriously: to think through the implications for the discipline of reconceiving labour in terms which really *do* reach 'beyond employment' (Supiot 2001) to encompass, inter alia, the significance and implications of unpaid care work for the regulatory field as a whole. Such an approach would arguably bring into better focus the social foundations upon which work is organized, the drivers and imperatives which shape the regulatory agenda, and the normative stakes to which current developments in the world of work give rise. Take, for example, the pursuit of labour market activation policies, now a central plank of social and economic policy at both the national and supra-national level. Activation policies call into question the foundational underpinnings of labour law in a number of respects. While labour law has traditionally focused on the employer-employee relationship, activation makes the relation between the citizen and state the central policy and regulatory focus. Similarly, while labour law has been typically conceived in collective and conflict-based terms, the rhetoric of activation is heavily reliant upon ideas of individual responsibility and social cohesion. In addition, activation policies cannot help but erode the boundaries which have contained labour law, both as a field of regulation and as an academic discipline, by bringing into direct consideration spheres of social activity such as the family, and spheres of legal regulation such as social insurance,¹ which have not until recently been on the labour lawyer's radar. The expectation at the heart of activation ideology – that everyone should engage in paid work – simultaneously reveals and disrupts the gendered social arrangements for the provision of care which have hitherto underpinned legal and social

¹ The inclusion of social insurance within the discursive parameters of labour law is, and arguably always has been, a matter of debate. In launching the discipline of labour law in the context of the Weimar Republic, founding father Hugo Sinzheimer, considered social security law to be an 'inseparable part of labour law' (Weiss 2011, 44). His position notwithstanding, the idea of labour law which eventually took form in the twentieth century was for the most part tied to the employment relationship. In recent years however, labour lawyers have begun to recognize the need to take broader account of labour market regulatory mechanisms, including welfare-to-work and other activation strategies (see in particular Deakin and Wilkinson 2005) although the gender implications of this proposed broadening of the field have not been fully recognized.

constructions of the world of work and the role of a complex nexus of gender, work and care in the constitution and maintenance of labour law's conventional boundaries is rendered visible just at the point when its continued viability is in serious question (Conaghan 2009).

If labour law as a discipline is in crisis and *if* the foundational implications of a sexual division of labour for labour law are coming more and more clearly into view, why do more labour lawyers not take up the gender baton offered by feminists and run with it? And why, in particular, do so few scholars directly confront the challenge posed by feminist calls for labour law to take better account of unpaid caregiving? The contemporary field of scholarship displays an ecstasy of angst about the idea of labour law, its purpose(s), function(s), and future direction. Speculation about the 'death' of labour law has been rife since at least the late 1980s (Ewing 1988; see also Davis 2002). There has been a surfeit of projects devoted to 'redefining' labour law (Mitchell 1995) or 'transforming' it (Conaghan, Klare and Fischl 2002); to redrawing its boundaries and objectives (Davidov and Langille 2006); and generally to speculating about its future direction (Ryan, Barnard and Deakin 2004). Among the most influential recent contributions to this now rather long-running debate is a collection of 25 essays edited by Guy Davidov and Brian Langille in which the 'very idea' of labour law is subject to extensive examination (Davidov and Langille 2011). That this question is on the table attests to the depth of the crisis of identity which labour lawyers currently experience, eliciting what can only be described as a 'back to basics' soul-searching exploration of the field. This interrogation of labour law fundamentals includes questions such as: What is labour law? What is it for? How do we justify its existence and operation? Or, as the editors of the collection ask at the outset: 'is the idea of labour law a timeless one, an outdated one, or ... a new idea whose time has now come' (Davidov and Langille 2011, 2). To which I would add a further question which, while not generally explicitly articulated, is nevertheless present in some of the essays (see in particular Fudge 2011) and in others lurks unacknowledged in the discursive interstices of the text. It is this: has the

moment arrived to embrace a new, significantly more expansive 'imaginary for labour law' (Fudge 2011, 135) which is capable of recognizing and encompassing the regulation of social reproduction?

To answer this question, let us return for a moment to the alleged crisis of identity with which labour law is said to be afflicted. The nature of that crisis is perhaps best expressed in Harry Arthurs' opening chapter in the Davidov and Langille collection: is labour law, he asks 'a legal field with arbitrary but variable boundaries and non-inherent content or purpose' or does it possess 'a distinctiveness, coherence, and even ... functional and conceptual autonomy' as Arthurs, among others, would like to believe (Arthurs 2011, 15). In other words, is 'labour law' simply a convenient tag we attach to an indiscriminately arranged collection of regulatory mechanisms pertaining to the world of work or does it exist in some more fundamental sense – as a coherent and unified field with its own internal aims and purposes?

Arthurs' conclusions on this matter are ambivalent, acknowledging at one and the same time both the historical specificity of labour law:

'Labour law' is labour law because within a particular configuration of historical circumstances we choose to apply that particular taxonomical label to a body of rules, a cluster of professional practices, and a field of scholarship (ibid, 16)

and its uniqueness and importance:

Labour law is different from other legal fields ... [it] is neither non-law nor a mutant form of law, but law incarnate, an experiment in social ordering that reveals the true nature of the legal system in general (ibid).

This ambivalence is echoed by many of Arthurs' co-contributors as well as by other labour lawyers reflecting upon the current state of things. At its heart lies a deep affection for the discipline which may make it more than usually difficult to let go of the past and move on. While recognizing the lack

of correspondence between the conventional model of labour law and the new external realities of working life (Mitchell 2010), while accepting the current inadequacy both of the core conceptual tools of the discipline (expressed in the primacy of the contract of employment) and the traditional normative underpinnings (the inequality of bargaining power between capital and labour), there remains a widespread commitment among labour lawyers to upholding what Hugh Collins once described as ‘the vocational character’ of labour law (Collins 1989), to ground the discipline’s legitimacy in some virtuous pursuit by retaining its close historical connections with ideas of social justice and economic democracy (see e.g. Langille 2011; Deakin 2011). The gloomy alternative is to accept, as Alan Hyde does, that labour law can no longer serve ‘as a source of inspiration’; rather must be regarded (horrific thought) as no more than ‘a technical branch of regulation, like securities or banking’ (Hyde 2011, 96).

Fortunately, Hyde’s loss of faith is not widespread and considerable effort is now being devoted to ensuring that labour law remains tied to some nobler calling. As Langille boldly pronounces, ‘labour law has always had, and always will have, a theory of justice’ (Langille 2011, 102). Approaches here tend to take one of two possible paths. On the one hand there are those who seek to hang onto a ‘basic idea’ of labour law (Goldin 2011), to articulate ‘a generalizable core’ which holds true for ‘the regulation of work relations in all types of capitalist economy’ (Dukes 2011, 57), to embrace, in other words, a notion of labour law as transcendent (Davidov and Langille 2011, 2). On the other hand there are those who concede – albeit to varying degrees – that the old conception no longer has purchase, that new analytical categories are required (Freedland and Kountouris 2011a; 2011b) and new normative bases in need of articulation (Arthurs 2011; Langille 2011; Collins 2011). These concerns – about the utility of core concepts and the adequacy of normative foundations – also pertain to questions about the scope of labour law, about where its frontiers should lie. Few labour lawyers contend that the boundaries of labour law, as traditionally expressed in an industrial

pluralist model of the working world, still hold. There is something close to a consensus that the boundaries must widen, but to include what and subject to what limitations remains undetermined.

The challenge to labour law's traditional boundaries has come from a variety of sources. Most notably, there has been a marked decline in most developed industrialized countries of collective worker organization and supporting regulatory mechanisms, along with the corresponding rise of individual, largely statute-based approaches to workplace justice (Hepple 2011, 39-40). 'Labour law' has thus expanded to include an increasingly complex array of legislative provisions concerned with allocating individual rights and responsibilities. Another significant factor in labour law's expanding boundaries has been the advent of globalization, *inter alia*, prompting the decentring of the state and the rise in prominence of supra-national forms of regulation (Arthurs 1996). Yet again, the decline of standard employment and the rise of new forms of flexible working which lack the formal characteristics of subordination traditionally associated with the contract of employment but which can be every bit as (if not more) exploitative have forced labour lawyers to rethink the centrality of the employment relationship both in a theoretical and policy context and to develop new, more encompassing conceptualizations of 'personal work relations' (Freedland and Kontouris 2011b).

Additional pressure significantly to widen the scope of labour law has come from the increasing intersection of labour and migration concerns as well as the widespread adoption, already noted, of labour market activation policies. In the latter context, labour law has become repositioned as a market-focused mechanism in which its primary goals have become more explicitly aligned to market objectives. Inevitably informal labour markets have also caught the attention of labour law scholars so that the implications of a working world operating outside the scope of formal regulation are now being explored (Caruso 2002). Interestingly, the more labour law moves away from standard employment relationships and the more it ventures into the territory of unregulated, precarious work, the more likely it is to encounter working arrangements in which gender is a feature of significance. The plight of domestic workers, the ramifications of global care chains, the

ambivalent status of sex workers, the problems presented by human trafficking, and the outsourcing of sweated labour from developed to developing countries – these are all contexts in which the distributive stakes for workers are significantly mediated by gender roles and relations. It is therefore no surprise that they have come within the vision of labour law largely as a consequence of gender-inflected interventions (see, for example, Mundlak 2005; Sankaran 2011).

What all this portends is the potential dissolution of labour law as an autonomous field of regulation as the once solid lines which separated it out from criminal law, social security law, immigration law, international human rights law, and even family law begin to fade. It is no wonder labour lawyers are in such a state about boundaries. How in such circumstances, speculates Brian Langille, does labour law ‘carve itself from off from the rest of the legal world? How do we know what issues are labour law issues, what materials to read, what subject matters go on the syllabus?’ (2011, 102). Of course as labour law expands in ever-increasing circles, the problems, as Langille goes on to observe, are more than just practical and logistical. What must also be confronted is whether or not there is *anything*, normative or conceptual, which can be said to unite labour law as a field of scholarly endeavour; anything to make it whole and/or to render it coherent.

At which point we return to the values and allegiances which mobilize labour law scholarship. As Richard Mitchell observes, ‘Our loyalty is surely to *labour* as a class, not to “labour law”’ (2010, 20). What does this mean in the context of the new social and empirical realities which characterize the world of work? Taking Otto Kahn-Freund’s famous pronouncement as the normative starting point, namely that: ‘The main object of labour law has always been, and we 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’ (Kahn-Freund 1977, 6), the question currently being confronted is whether, and to what extent, labour law has moved away from this core constituting narrative and what, if any alternative legitimating discourse, might serve in its place (see, in particular, Langille 2011). To this there have been a number of responses. Again, Arthurs’

survey of the terrain provides one of the most insightful accounts of how things stand. He identifies three possible answers to this critical question. In one vision, labour law is reconfigured as part of a broader schematic of fundamental human rights (Arthurs 2011, 23-24); in another it is reconceived as a facilitating worker empowerment through the accumulation of human capital (ibid, 24-26).

Arthurs' third and final response to the question of what should constitute the animating purpose of labour law is that that purpose should remain unchanged, that is, that labour law should continue to 'enable workers to mobilize to seek justice in the workplace and the labour market' (ibid, 27).

Although Arthurs does not formally express a preference for one or other of these visions, his brief attempt to sketch out new approaches to worker mobilization and his oblique warning against breaking the 'connection to quotidian workplace relations' (ibid, 29) suggest that his heart at least lies with retaining labour law's originary aims. At the same time, Arthurs accepts that whichever route the discipline eventually takes, things can never be the same: 'in each of these three new possible instantiations' he remarks 'labour law may well lose some of its unique character' (ibid).

Clearly the extent of the loss varies. Reflecting upon the merits of reconceiving labour law as a branch of human rights, Arthurs rightly notes the radical implications of this move in terms of decentring the capital-labour relationship and erasing the particularity of work-based disputes (ibid, 24). Collins too is sceptical about the prospect of recasting labour law within a universal human rights framework (2011). Arthurs' second vision of labour law in terms of the development of human capital is taken up by Brian Langille who deploys Amartya Sen's 'capabilities' approach (Sen 1999) to articulate a new normative framework for labour law based on the idea of maximizing human freedom. According to Langille, the 'old' framework premised upon the structural inequality of the employment relation is 'out of date' (2011, 105). He attributes the anxiety that labour lawyers currently experience to their attempts to hang on to old ways of thinking, recommending Sen as a form of 'therapy' to cure them of their neuroses (ibid, 109). What this entails, Langille continues, is acceptance of an account of labour law as a means of regulating 'human capital deployment; its

motivation is both the instrumental and immediate end of productivity and the intrinsic and ultimate end of the maximizing of human freedom' (ibid, 115).

Not all labour lawyers are as keen on this therapy as Langille. His fellow editor, Davidov, takes the firm view that labour law is and should be about protecting workers from the vulnerabilities to which work relations can give rise (Davidov 2007; 2011). Other scholars too rush to the defence of the originary narrative (or some version thereof), denying the need for any radical change of normative orientation. Of particular significance here is the status of the traditional rallying cry 'labour is not a commodity' which has not only served as a core political underpinning for the labour movement but has also been invoked as a primary justification for legally instituted worker protection (Collins 2003, 1-26). How does the adoption of this principle impact upon the demarcation of labour law as a field? Clearly, it is expressive of the Kantian imperative to treat men as ends not means; in this sense, it is consistent both with a human rights approach to labour law and with an idea of labour law based on human dignity. It is also consistent with an idea of labour law conceived in terms of facilitating worker mobilization. However, does it also suggest that the limits of labour law lie at the outer boundaries of *paid* employment? If the concern is with labour as a commodity, does that not preclude a conception of the field in which formally non-commodified labour, for example, housework, is included? Some scholars would say yes. For example, Manfred Weiss premises his argument against a change in the core paradigm of labour law on precisely this point (2011, 46). Weiss goes on to insist that 'labour law is not to be misunderstood as a tool to compensate the position of the weaker party everywhere' (ibid, 49) and furthermore that 'labour law should not be mixed with law for other subsystems of society which all do have their specific patterns of regulation. Labour law should not be misunderstood as an overarching category for all cases in societies where the needs of the weaker parties to be met' (ibid, 56). One way of reading this is as an obliquely couched critique of feminist arguments in favour of bringing unpaid care work into the ambit of labour law. This reading is supported by Weiss's insistence that 'employment'

should be understood 'in its broadest sense' (ibid) and by his inclusion of 'family law' within the subsystems from which labour law is necessarily to be distinguished (ibid, 49).

Other labour law scholars however seem more open to the possibilities of bringing unpaid care work carried out in the home into their field of vision. Harry Arthurs, for example, sees it as pertaining to issues of worker mobilization. He argues that 'In response to innovative forms of worker mobilization, labour law scholarship will have to extend its reach to all policy domains that influence work relations or labour market outcomes' and that in this context, that reach should encompass 'all non-participants whose activities impinge on the dynamics of labour markets, including unemployed workers, workers in the informal sector, and workers engaged in the non-waged tasks of social reproduction' (Arthurs 2011, 27). Similarly, Brian Langille, in embracing an account of labour law anchored by a principle of maximizing human freedom, comments:

This is an account which is much deeper and broader than the old received wisdom about the scope and purpose of labour law ... if we see labour law as underwritten by the idea of human freedom, we not only have a set of reasons for traditional labour law – but also for non-contractual approaches to work relations (informality, for example) and for other non-traditional labour law subjects (unpaid work, education, child care, and so on (Langille 2011, 114).

Langille also argues that the prevailing understanding of 'labour is not a commodity' is too narrow and has been unnecessarily confined by its close association with the idea of inequality of bargaining power (ibid, 106). Instead Langille argues for an expanded understanding of the non-commodification principle positively linked to the idea of human freedom (ibid, 111).

In both the analyses of Langille and Arthurs, the sphere of social reproduction is brought within the field of labour law's vision, albeit for different reasons. For Langille, the normative re-orientation of labour law around human freedom means that matters relating to the structuring and deployment

of human capital, including capital required for social reproductive tasks, move to centre stage. For Arthurs, the concern is less with human capital (although he does acknowledge this as a possible normative underpinning for labour law), but with developing new forms of worker mobilization which reach beyond the formal confines of the 'workplace', thus reflecting the changing realities of the working world. Even Manfred Weiss, although sceptical about the need for any radical redrawing of labour law's boundaries, recognizes the gendered aspects which characterized traditional working arrangements and at least some of the gendered implications presented by current developments. He observes: 'the male "breadwinner" model belongs to the past. Balance of work and family obligations thereby, has become a serious problem' (Weiss 2011, 46). Thus, notwithstanding his insistence that labour law should not be misconceived as a mode of regulation which encompasses any and all kinds of vulnerability arising in the context of work relations, questions relating to the gendered allocation of labour have moved within the realm of Weiss's contemplation. Slowly but surely, perhaps less with a bang than with a whimper, mainstream labour law is beginning to take cognizance of unpaid work.

Of particular significance here is Noah Zatz's contribution to the Davidov and Langille collection. In 'The Impossibility of Work Law', Noah Zatz (2011) finally picks up the gauntlet tossed into labour law terrain long ago by feminists and for the most part lying idly in a corner gathering dust. In so doing, Zatz is among the first non-feminist-identifying labour lawyers directly to address the question of whether and to what extent labour law should include 'nonmarket work as an object of study and regulation' (ibid, 234). While the overall thrust of his argument leans against such inclusion, or at least against a reconceptualization of labour law within the broader parameters of a homogenized 'work law', Zatz's analysis is particularly useful in highlighting the link between the collapse of labour law's traditional boundaries and an increasing willingness among labour lawyers to consider the full range of work relations, including those which operate in non-market contexts. At the same time, Zatz is adamant that differences between distinct kinds of work relations and the varied institutional

settings in which they arise are of core analytical and policy significance. It is for this reason that he argues against '... any uniform system of work regulation. Different forms of work must be treated differently' (ibid, 248).

Zatz's analysis has much to commend it. However, there is a risk here of misstating or misunderstanding the nature of the concerns expressed by feminists about labour law's scope and content. The object is not to make a case for the inclusion of unpaid work within the parameters of labour law based upon some Aristotelian equation of like for like. In arguing that the notion of 'work' does and should encompass unpaid caring labour carried out in the home, the aim is not to erase all distinctions between different kinds of work relations and the different institutional contexts in which they arise. Rather the point is to recognize and map their connections, to acknowledge and take proper account of their conceptual, ideological, *and* regulatory interactivity. Judy Fudge encapsulates this well in the following remarks:

Disciplinary boundaries are both ideological and conceptual, and there are compelling ideological and conceptual reasons for expanding the scope of labour law to include all of the regulatory dilemmas that any attempt to govern the labour market must confront (Fudge 2011, 136).

This is not a recipe for a fully homogenized 'work law' nor is it a demand that labour law scholars put aside the key values and concerns which animate their discipline. It does however challenge us all to think more imaginatively and reflectively about what those values and concerns entail. As Fudge goes on to point out:

In societies that value paid employment as the primary path to 'citizenship', treating unpaid care work, the socially necessary labour predominantly performed by women, as a matter of social or family law, reinforces the idea that such work is not only a woman's natural role but also that in the social hierarchy it is of lower value than paid employment (ibid).

At the same time, there is more at stake here than ensuring a more gender egalitarian legal and regulatory framework though that of course is important. What is and has been extensively argued by feminist labour lawyers is that our field of scholarly endeavor cannot be properly grasped or interrogated, our values and goals cannot be adequately pursued or satisfactorily realized, without paying attention to gendered aspects of the social organization of work and to what Engels identifies as the ‘twofold character’ of processes of material subsistence (Engels 2010/1884, 35).

What would a labour law which recognizes that negotiating the work /family boundary is central to the regulatory challenges dictated by current economic and social conditions look like? How do we go about constructing the tools and techniques needed to navigate a working world in which key assumptions about the nature and operation of that world which have long informed our rules and grounded our theories no longer apply? This is not simply a question of ensuring a better match between labour law and the ‘external’ realities it purportedly governs. As Freedland and Kountouris (2011b), among others, point out, law does not just regulate the world of work, it *constitutes* the categories and concepts through which we see and interpret it. Thus, the emergence of the contract of employment at a particular time and place as a category with legal consequences has contributed to the construction and reification of an ideology of work relations in which that particular form is privileged. Similarly, the traditional reliance of labour law upon a discursive frame which insists upon a sharp distinction between paid and unpaid work not only facilitates the ideological privileging of productive over reproductive activities but, in the context of current labour market policies in particular, renders us virtually blind to key normative and distributive stakes.

In a recent review of Freedman and Kountouris’s much acclaimed monograph, *The Legal Construction of Personal Work Relations* (2011b), Sandra Fredman and Judy Fudge demonstrate how Freedman and Kountouris’s efforts to articulate a new legal classificatory system which captures the ambiguity, variety, and temporality of personal work relations provides a far better conceptual schema for recognizing the gendered particularities of labour market arrangements and the

structural and distributional implications thereof (Fredman and Fudge 2013). The construction of a new labour law imaginary then is already well underway. Once we accept, as it appears most labour lawyers now do, that the conventional parameters of the discipline are contingent and historically defined; once we acknowledge that the way in which we have traditionally conceived the field is but one possible way, so that we open ourselves up to other possibilities; and once we recognize that all this disciplinary self-realization is occurring at a time when the supposed separation of productive and reproductive activities is rendered increasingly fragile and permeable as a consequence of wide-ranging, far-reaching, economically-driven changes in the organization of work, the case for incorporating social reproductive concerns into labour law will no longer have to be made. It will have become self-evident.

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