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**ARTICLE TITLE:** Labour Law and Feminist Method

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**ABSTRACT**

This article explores the application of feminist method in the context of contemporary scholarly efforts to reclaim and/or refashion labour law as a discipline and field of study. The central methodological importance of gender as a category of analysis is highlighted and common critical techniques deployed by feminists to advance gender-inflected analysis identified and illustrated. A core insight the article seeks to advance is that because mainstream labour law scholars tend to approach feminism as animated solely by gender equality concerns, they overlook the broader analytical and conceptual contribution that feminist scholars can and do make to tackling and resolving key challenges and concerns arising from the social organization of work and its regulation.

## 1 INTRODUCTION\*

The social organisation of work, and the sexual division of labour in particular, has long been a focus of feminist scholarship and activism.<sup>1</sup> Sustained feminist engagement with labour law is more recent, corresponding broadly with the rise of feminist legal studies as a distinct field of scholarship in the closing decades of the twentieth century, a period coinciding with my own academic and intellectual development.<sup>2</sup> When I first studied labour law in the mid-1980s, gender did not register as a category of relevance at all. This came as some surprise as it seemed to me so obvious that the world of work was not only relentlessly gendered but also deeply implicated in women's disadvantage. This was a time when legal concepts of discrimination were in their infancy and any conflict between work and family perceived to be a natural and inevitable consequence of women's engagement with paid labour.<sup>3</sup> Yet it was also a time of profound change, both in the economic and industrial landscape and in gender and family relations. Feminist scholarship came to labour law just at a moment when the 'male breadwinner/female caregiver'<sup>4</sup> family model was breaking down, laying visible the gendered underpinnings of the social organization of work under industrial capitalism. Early feminist scholars trod carefully through terrain already mapped, mediated and maintained by a normative regime which subordinated gender concerns to those of a homogenized labour class, enacted and expressed in the collective power of trade unions, in turn locked in a relation of inexorable conflict with their capitalist counterparts. This bifurcation of industrial relations left little room for gender-inflected interventions in the field, fostering an unreceptive academic environment for feminist work, traces of which

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\* I would like to thank Guy Davidov, Michael Ford, and Tonia Novitz, as well as the anonymous reviewer, for their very helpful comments on an earlier draft of this article.

<sup>1</sup> The term 'feminism' is thought to have emerged in the late nineteenth century, derived from the French *feminisme*, and coined by utopian socialist, Charles Fourier (*Oxford Companion to Philosophy* T. Honderich ed (Oxford U. Press 1995) 270. From the 1890s onwards, 'feminism' was increasingly deployed in Britain and the US to denote the promotion of equal and political rights for women although obviously 'feminist' ideas and activism predate the use of the term.

<sup>2</sup> Feminist legal scholarship emerged in the 1980s virtually simultaneously in Canada, the US, Britain, Australia and Scandinavia. Numerous overviews of feminist legal scholarship have since been produced and a cluster of journals has emerged to support this literature. For a collection of recent essays charting the scope and direction of contemporary feminist legal engagement, see *The Ashgate Research Companion to Feminist Legal Theory* (M. Davies & V. E. Munro eds, Ashgate 2013). Early feminists engagements with labour law include J. Conaghan, *The Invisibility of Labour Law: Gender-Neutrality in Model Building*, *Intl. J. Sociology of Law* 377 (1986); R. Hunter, *Representing Gender in Legal Analysis: A Case/Book Study in Labour Law* 18 *Melbourne U. Law Rev.* 305 (1991); and M. Crain, *Feminism Labor and Power* 65 *So. Calif. Law Rev.* 1819 (1992).

<sup>3</sup> Classically captured in *Clymo v. Wandsworth London BC* [1989] IRLR 241 (a claim for indirect sex discrimination based on an employer's refusal to agree to a job share to facilitate a woman's caring responsibilities) where Wood J commented: '... in every employment ladder from the lowliest to the highest there will come a stage at which a woman who has family responsibilities *must make a choice...*' at 248 (my emphasis).

<sup>4</sup> The 'male breadwinner/female caregiver' model derives from social theory and expresses a particular form (descriptive or normative) of social organization predicated on a gendered division of labour in which men engage in paid work and bring home a 'family wage' while women carry out unpaid labour in the home. For elaboration, application and critique, see eg N. Fraser, *After the Family-Wage: Gender, Equity and the Welfare State*, 22 *Political Theory* 591 (1994); J. Lewis, *The Decline of the Male Breadwinner Model: The Implications for Work and Care*, 8/2 *Social Politics* 152 (2001); J. Fudge, *A New Gender Contract? Work/Life Balance and Working Time Flexibility* in *Labour Law, Work and Family* (J. Conaghan and K. Rittich eds, Oxford U. Press 2005) 261.

remain today. Feminist labour law scholarship has nevertheless flourished and now comprises a rich compendium of work which is multi-jurisdictional, interdisciplinary and theoretically diverse. An impressive canon of texts has accumulated, spanning the globe and penetrating virtually every aspect of labour regulation and policy.<sup>5</sup> It is increasingly difficult to ignore this literature or contain it within parameters which ensure its disciplinary marginalization. It is timely rather to confront it and assess its full potential within the context of the broader challenges facing labour law.

The object of this article is to aid this process of (hopefully) collaborative confrontation by exploring the operation of feminist method in labour law. Within legal scholarship, matters of method do not always attract the attention they deserve. One reason for this lack of attention is that 'orthodox' legal method, the application of techniques of legal reasoning, is a largely taken-for granted aspect of legal studies. Doctrinal legal scholars are rarely called upon to give an account of their approach because within the genre, the adoption of a particular methodological stance is itself understood to define what constitutes legal scholarship. However, as the scope and range of legal scholarly engagement has expanded, encompassing methods and approaches which go beyond the traditional resolution of doctrinal dilemmas, methodological questions demand more explicit attention.

What do we mean by method / methodology here? In simple terms, we mean the approach espoused to answer or explore a research question. Suppose we ask the question - what should the category 'employee' include? Method is the means employed to answer the question, the mode as opposed to the object of enquiry. Legal scholars may draw upon a variety of tools, techniques, processes - methods - here. The choice of method will usually be informed by a methodology, a principled account of our research practices located within the broader theoretical frame(s) which ground our scholarship. Feminists, for example, may employ a multitude of methods to interrogate labour law - empirical, doctrinal, textual, and so on. What makes an approach distinctly feminist, however, is the underpinning methodology, the theory or rationale which gives the enquiry shape and focus. Even then, the methodology may be shared with other critical theoretical approaches. Much of feminist legal scholarship, for example, draws on social constructivism which is in turn located within the broad tradition of sociological theories of knowledge.<sup>6</sup>

The concern then is not to assess the substantive contribution of feminist scholarship to labour law theory and practice but to explore how feminists go about researching the field, the research techniques they deploy and the theoretical frames which support those techniques. It remains wise though to approach this distinction between method and

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<sup>5</sup> Among the many significant feminist labour law texts, see eg S. Fredman, *Women and the Law* (Clarendon Press 1997); *Working Women and the Law* (A. Morris & S. Notts eds, Routledge 1991); *Feminist Perspectives on Employment Law* (A. Morris & T. O'Donnell eds, Cavendish Press 1999); Conaghan & Rittich, n 4 above; *Work, Family and the Law* (J. Murray ed, Federation Press 2005); *Precarious Work, Women and the New Economy* (J. Fudge & R. Owens eds, Hart Publishing 2006); *Families, Care-giving and Paid Work: Challenging Labour Law in the Twenty-first Century* (N. Busby and G. James eds, Edward Elgar 2011); N. Busby, *A Right to Care: Unpaid Care Work in European Employment Law* (Oxford U. Press 2011); L. Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* (Oxford U. Press 2010). See also J. Fudge, *From Women and Labour Law to Putting Gender and Law to Work* in Davies & Munro eds, n 2 above, 18 for an excellent analysis of the evolution and current direction of feminist labour law scholarship.

<sup>6</sup> P.L. Berger & T. Luckmann, *The Social Construction of Reality* (Random House 1966).

substance with some caution. The mode and object of enquiry are not always easy to disentangle: the methodological approach is likely to influence the choice of research question and the choice of research question inevitably places limits on method selection and application. Take, for example, traditional legal method which is predicated upon a series of normative priorities including deference to tradition and correspondence with norms of generality, consistency and coherence. Doctrinal analysis does not operate neutrally in an already demarcated legal field; in effect, it *produces* the field, adopting a stance to the identification and systematization of content and scope which is already normatively imbued.<sup>7</sup> Method and substance collude here in a dynamic and iterative process to produce particular knowledge outcomes. In this way, legal knowledge is constructed not revealed, the field of enquiry designed rather than discovered.<sup>8</sup>

Given this close relation between method and knowledge production, a preoccupation with method has been a recurring feature of feminist legal scholarship.<sup>9</sup> It is the fate of feminist scholars to operate upon fields of knowledge in which gendered relations of power and subordination have long been subsumed. It follows that an important methodological starting point of any feminist intervention is to approach established knowledge fields - labour law included - with a critical eye. Because the subordination of women is historically inscribed in processes of knowledge production and validation, there can be nothing comfortable or reassuring about feminist scholarship; its core object and central concern must be to probe and unsettle disciplinary orthodoxies.

## 2 GENDER AS A CATEGORY OF ANALYSIS

It has already been noted that feminist labour law scholarship developed during a period of intense global economic restructuring, inter alia, transforming the world of work as traditionally conceived by labour law scholars.<sup>10</sup> Inevitably then feminism has become associated with critique of traditional labour law models, coming firmly to the fore in the context of contestation over the nature, scope and purposes of labour law as a discipline

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<sup>7</sup> P. Schlag, *The Enchantment of Reason* (Durham U. Press 1997). This is not of course how legal exposition is viewed from within its own methodological premises.

<sup>8</sup> Again the epistemological approach here is broadly social constructivist. For a comprehensive exploration of feminist engagements with epistemology, see A. Tanesini, *An Introduction to Feminist Epistemologies* (Blackwell 1999).

<sup>9</sup> Feminist legal engagements with method include K. Bartlett, *Feminist Legal Methods*, Harvard L. Rev. 100 (1990); M. J. Mossman, *Feminism and Legal Method: the Difference it Makes in At the Boundaries of Law: Feminism and Legal Theory* (M. A. Fineman & N. S. Thomadsen eds, Routledge 1991) 283; R. Graycar & J. Morgan, *The Hidden Gender of Law* 2<sup>nd</sup> ed (Federation Press 2002 especially Ch 4); J. Conaghan, *Law and Gender* (Clarendon Press 2013); M. Davies, *Law's Truths and the Truths about Law: Interdisciplinary Refractions* in Davies & Munro, n 2 above, 65.

<sup>10</sup> A profusion of publications have emerged since the early 2000s tracking the implications for labour law of major economic restructuring worldwide. See eg K. Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (Kluwer Law International 2002); *Labour Law in an Era of Globalization* (J. Conaghan, R. M. Fischl & K. Klare eds, Oxford U. Press 2002); *The Future of Labour Law* (L. Ryan, C. Barnard & S. Deakin eds, Oxford U. Press 2004); *Boundaries and Frontiers in Labour Law* (G. Davidov & B. Langille eds, Hart Publishing 2006); *The Idea of Labour Law* (G. Davidov & B. Langille eds, Oxford U. Press 2011); *Challenging the Legal Boundaries of Work Regulation* (J. Fudge, S. McCrystal, & K. Sankaran eds, Hart Publishing 2012); *The Future Regulation of Work: New Concepts, New Paradigms* (D. Brodie, N. Busby & R. Zahn eds, Palgrave 2016).

and field of regulation.<sup>11</sup> In fact, the convergence of gender and labour has never been more marked, with gender issues bursting forth virtually from every fold and seam of contemporary labour law debate. Gone are the days when gender could be consigned to a specialist sub-field of labour law, for example, 'protective' legislation or anti-discrimination law. We have moved from the 'male norm'<sup>12</sup> to the 'feminization of work',<sup>13</sup> from the male breadwinner to the dual-earner, yielding a radically transformed labour market supported by a proliferation of non-standard forms of employment in which women are disproportionately represented.<sup>14</sup> The rise of these new forms of, often precarious, work is increasingly acknowledged to be a 'deeply gendered phenomenon',<sup>15</sup> which challenges existing legal norms and frameworks and threatens the very fundamentals of labour law as a discipline. Recurring questions have arisen about the future role of trade unions given the increasingly fragmented and heterogeneous nature of work relations.<sup>16</sup> Doubts have been expressed about the fitness for purpose of the contract of employment, once the centrepiece of modern labour law.<sup>17</sup> The emergence of globalised labour markets has undermined the traditional territorial scope of labour law<sup>18</sup> while the convergence of work and family concerns consequent upon the new dual earner imperative has brought care considerations directly within the sphere of labour law and policy.<sup>19</sup> In all these contexts, issues of gender slip easily to the surface of enquiry. Their significance, however, is not

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<sup>11</sup> See eg J. Conaghan *Women, Work and Family: A British Revolution* in Conaghan, Fischl & Klare, n 10 above, 53; K. Rittich, *Feminization and Contingency: Regulating the Stakes for Women* *ibid* 117; J. Conaghan, *Work, Family and the Discipline of Labour Law* in Conaghan & Rittich, n 4 above, 19; J. Fudge, *Labour Law as a 'Fictive Commodity': Radically Reconceptualizing Labour Law* in Davidov & Langille 2011, n 10 above, 120; J. Fudge, *Feminist Reflections on the Scope of Labour law: Domestic Work, Social Reproduction and Jurisdiction* 22 *Feminist Legal Studies* 1 (2014); J. Fudge, *A New Vocabulary and Imaginary for Labour Law: Taking Legal Constitution, Gender and Social Production Seriously* in Brodie, Busby & Zahn, n 10 above, 9.

<sup>12</sup> Understood as the configuration of workplace norms and practices around the biographies and lived realities of male workers; see further Fredman, n 5 above.

<sup>13</sup> The 'feminisation of work' is a term variously deployed to denote the intensification of women's participation in paid labour, the decline of industry and manufacturing (and the corresponding rise of the services sector), and the emergence of new forms of flexible work closely resembling women's working patterns. See further *Feminization of the Labour Force: Paradoxes and Promises* (J. Jensen, E. Hagen & C. Reddy eds, Polity Press 1988).

<sup>14</sup> Fudge & Owens, n 5 above; Vosko, n 5 above. For a helpful overview of forms of non-standard employment, along with global incidents and trends, see *Non Standard Forms of Employment: Report for Discussion of meeting of Experts MENSFE/2015* (ILO 2015); for exploration of the interaction of non-standard employment and labour exploitation, see J. Fudge & D. McCann, *Unacceptable Forms of Work: A Global and Comparative Study* (ILO 2015).

<sup>15</sup> Fudge & Owens, n 5 above, 3.

<sup>16</sup> H. Arthurs, *Labour Law after Labour* in Davidov & Langille 2011, n 10 above, 13.

<sup>17</sup> Disenchantment with the contract of employment as the primary mechanism for delivering employment protection has been around for some time; see eg B. Hepple *Restructuring Employment Rights* 15 *Industrial L. J* (1986). Recent years however have seen more active efforts to theorise alternatives: See in particular M. Freedland & N. Kountouris, *The Legal Construction of Personal Work Relations* (Oxford U. Press 2011). For a feminist take on Freedland & Kountouris's influential analysis, see S. Fredman and J. Fudge, *The Legal Construction of Work Relations: A Gender Perspective* 7 *Jerusalem Review of Legal Studies* 112 (2013).

<sup>18</sup> Presaged in Harry Arthurs' classic work, *Labour Law without the State*, 46 *University of Toronto L. J* 1 (1996); see also *id*, *Reinventing Labour Law for the Global Economy* 22 *Berkeley J. Employment & Labour law* 271 (2001).

<sup>19</sup> Busby, n 5 above.

always fully recognized. This is because labour lawyers are inclined to view gender as incidental, that is, as part of the social context in which labour law acts but not fundamental in terms of getting to grips with what is really going on. Gender tends to be positioned as external to law, carrying empirical and distributional, not conceptual or theoretical, significance. What is distinct about feminist labour law scholarship is that it apprehends the place of gender differently. Feminists approach gender as analytically central, indeed as deeply constitutive of labour law fundamentals. To adopt a feminist approach is to do more than simply take account of gender; it is to assume its analytical relevance, to subscribe to a position in which gender features as category of significance in relation to (critical) legal enquiry.<sup>20</sup> This foregrounding of gender constitutes the methodological core of feminist scholarship. It is a conscious reversal of what might be said to be a standard operating presumption in legal scholarship, namely that gender is *not* analytically relevant, except in so far as it revealed to be so through the application of conventional legal analytical techniques. By approaching law through a gendered lens, feminist scholarship is not committing itself to a position that gender is *always and necessarily* a category of significance; rather it proceeds on the hypothesis that it likely to be to see what insights this may produce. The near universality of a gendered division of labour should give us pause enough for thought in relation to the absence of gender as a category of significance in labour law. And yet, it is only with the application of a feminist gaze that we come to view this absence as problematic and demanding explanation.

In a now seminal article, Joan Wallach Scott extols the benefits of gender as a category of analysis in relation to historical enquiry.<sup>21</sup> Attention to gender, she argues, shifts the focus of feminist concern away from women as a sub-category of historical actors to engage human activity more comprehensively: feminist enquiry should not be confined to women alone. A focus on gender also promotes an understanding of sexual difference based on social construction rather than biological determinism. Drawing on the deployment of gender in grammar, that is, 'as a socially agreed-upon system of distinctions rather than an objective description of inherent traits',<sup>22</sup> Scott highlights the contrived nature of gender classifications. Adopting gender as a category of analysis carries no presumption that sexual categories - man, woman, and so on - are fixed and determined, no necessary commitment to the idea that gender distinctions are natural and immutable or gender categories permanently inscribed. If we think of the etymological origins of gender, from the old French *gendre*, and the Latin stem, *genus*, meaning 'kind or sort',<sup>23</sup> we get a better sense of how gender operates as a principle of social ordering, a category which supports processes of systematization and the institution of hierarchies. There can be little doubt that gender is a central organizing principle in virtually all societies. However, how gender is apprehended, how gendered subjects are formed, gender relations established and regulated, varies significantly over time and space. Moreover, gendered social arrangements do not emerge and take form in isolation from other social relational markers such as race and class. Indeed our apprehension of gendered subjects or relations in any given context may be significantly filtered and mediated by and through these other markers. This interaction of

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<sup>20</sup> See generally Conaghan n 9 above, 17-25.

<sup>21</sup> J. W. Scott, *Gender: A Useful Category of Historical Analysis* 91/5 *American History Rev.* 1053 (1986).

<sup>22</sup> *ibid.*

<sup>23</sup> R. Barnhart, *Chambers Dictionary of Etymology* (1988).

gender with other categories of social ordering is expressed in the feminist concept of intersectionality which offers a theoretical and methodological grounding for an approach to inequality as complex and multidimensional.<sup>24</sup> Embracing intersectionality does not preclude the deployment of gender as a category of analysis but does place limits on how it is used. Consider, for example, domestic work, defined somewhat quaintly in English law as the employment of a 'domestic servant in a private household'.<sup>25</sup> Domestic work is plainly gendered in conception, valuation and actualization; but it is also classed, and in the context of global labour markets, raced. Any serious interrogation of the regulatory and normative challenges posed by domestic work must take account of these intersecting dimensions, the way in which gender, race and class collude in the creation of relations of exploitation which labour law struggles to recognize, let alone, address.<sup>26</sup>

Judy Fudge offers an account of the trajectory of feminist labour law scholarship which mirrors Scott's account of and aspirations for feminist interventions in history. Fudge begins by tracking the historical development of feminist labour law since the 1980s, identifying a key conceptual move 'from women and labour law to putting gender and law to work'.<sup>27</sup> The direction of feminist travel, Fudge explains, has been away from instrumental deployments of labour law to secure women's equal access to paid work towards a more 'complex and multi-dimensional understanding of the 'relationship between law and society' in which gender features as a ,constructed, contested and differentiated social relationship'.<sup>28</sup> In a later article, Fudge goes on to suggest that because mainstream labour law scholars are disposed to treat feminist concerns 'as matters of morals or ethics',<sup>29</sup> that is, as normatively driven and contained within the frame of equality considerations, they have not registered this critical feminist move. Consequently, they do not fully appreciate the analytical and conceptual contribution that feminist scholarship can and does make to wider debate about the nature, purpose, and potential(s) of labour law in a post-industrial world. In other words, a tendency to contain feminist scholarship within the narrow confines of women and equality concerns leads labour lawyers to miss what is in fact a much broader engagement with shifts and trends in the social organization of work in contemporary societies. This is what Fudge means when she talks about 'putting gender to work'.

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<sup>24</sup> See further J. Conaghan, *Intersectionality and UK Equality Initiatives*, 23 *South African J. Human Rights* 317 (2007); A. McColgan, *Reconfiguring Discrimination Law* Public Law 74 (2007); S. Fredman, *Intersectional in EU Gender Equality and Non-Discrimination Law* (European Network of Legal Experts in Gender Equality and Non-Discrimination, European Commission, May 2016 accessed at <http://ohrh.law.ox.ac.uk/new-report-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-by-professor-fredman/>).

<sup>25</sup> Working Time Regulations 1998, Reg 19 (excluding domestic workers from key WTR provisions).

<sup>26</sup> Unsurprisingly, domestic work has attracted significant feminist and labour law attention. Among the many excellent analyses, see B. Anderson, *Doing the Dirty Work: The Global Politics of Domestic Labour* (Zed Books 2000); E. Albin, *From 'Domestic Servant' to 'Domestic Worker' in Challenging the Legal Boundaries of Work Regulation*, J. Fudge, S. McCrystal & K. Sankaran eds (Hart 2012) 231; J. Fudge & K. Strauss, *Migrants, Unfree Labour and the Legal Construction of Domestic Servitude in Migrants at Work*, C. Costello & M. Freedland eds (Oxford U. Press 2014) 160; V. Mantouvalou, *Human Rights for Precarious Workers: the Legislative Precariousness of Domestic Labour*, 34 *Comparative Labour Law and Policy Journal* 133 (2012).

<sup>27</sup> Fudge, *From Women and Labour Law* n 5 above.

<sup>28</sup> *Ibid* 322.

<sup>29</sup> Fudge, *Feminist Reflections*, n 11 above, 2.



### 3 MAPPING FEMINIST MOVES IN LABOUR LAW TERRAIN

At the heart of feminist method, I have argued, is the application of gender as a category of analysis to a field of knowledge in order to generate new questions capable of informing and transforming research agendas. In this context, the peculiar power of gender as a tool of enquiry lies in the fact that while centrally socially pervasive, it is historically absent from most knowledge producing enterprises; hence its ability to disrupt and destabilize established discourses and disciplinary norms. This methodological foregrounding of gender is in turn associated with a number of recurring feminist techniques, most of which are well evidenced in feminist labour law scholarship. In particular, the application of a gender lens works to: (1) expose the operation of gender bias and neglect; (2) destabilise the normative and conceptual infrastructure; and (3) historicise and contextualise the field. In all these instantiations, the methodological stance is one of critique, manifest in an approach which is philosophically reflective, theoretically-informed, and particularly attentive to the conditions in which knowledge and meaning are produced.

#### 3.1 Exposing gender bias and neglect

An account of labour law in terms of gender bias and neglect takes shape and form in the context of two distinct, albeit related, areas of feminist scholarly endeavour. The first is anti-discrimination law, and in particular the development and application of techniques associated with the concept of indirect discrimination.<sup>30</sup> By focusing attention on the disparate gendered impact of apparently neutral norms and practices, indirect discrimination has instigated the cultivation of a number of useful analytical moves in the context of legal interrogation: it invites the application of a gender lens to a seemingly genderless space or operation; it brings the social<sup>31</sup> directly into the sphere of formal legal consideration to expose the distributional effects of a regulatory regime; and it helps to flush out any hidden norms lurking unacknowledged behind a gender-neutral façade. Consider the adoption by employers of a new shift system<sup>32</sup> or the application of qualifying conditions to the access of employment rights.<sup>33</sup> In neither of these situations is gender formally implicated; yet both, as we know, are likely to produce disparate gendered impacts, specifically, distributional effects which disadvantage women. Nor is this disadvantage 'accidental'; it is not just that women inadvertently suffer from the application of apparently neutral employment norms; it is that the employment norms themselves - as it turns out - *are* gendered; however, gender is so deeply embedded in the normative fabric it goes unnoticed and unacknowledged.<sup>34</sup>

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<sup>30</sup> On the legal origins of the concept of indirect discrimination, see C. McCrudden, *Institutional Discrimination* 2 Oxford J. Legal Studies 303 (1982) and generally S. Fredman, *Discrimination Law* 2<sup>nd</sup> edition (Clarendon Press 2010) ch 4.

<sup>31</sup> This particular move typically relies on empirical evidence to demonstrate the discriminatory impact of 'neutral' laws. It can be viewed as part of a broader legal methodological approach which we recognise as 'law in context' or 'law in society'. See text accompanying nn 81 & 82 below.

<sup>32</sup> *London Underground v Edwards (No 2)* [1998] IRLR 364; *London Underground v. Edwards* [1995] IRLR 355.

<sup>33</sup> *R v. Secretary of State for Employment, ex parte Seymour Smith & Perez (No 2)* [2000] ICR 244 (HL).

<sup>34</sup> As traditionally applied, indirect discrimination (certainly in its UK manifestation) has not required the applicant to show that gender (or any other protected characteristic) is implicated in the norm other than as a statistical disparity. Once this is shown, the burden falls on the employer to explain or justify the norm notwithstanding its disadvantageous effects. However, recent UK case law evidences a shift away from this

That gendered patterns of workplace disadvantage are not just the accidental and unanticipated outcome of gender-neutral norms and practices is illustrated in our norms of working time. Concepts such as ‘part-time’, full-time’ or ‘overtime’ work are not self-evidently meaningful: they are intelligible only by reference to temporal norms which derive shape and form from specific social arrangements. Thus, the standard employment model, captured in full-time continuous employment over a life-time, is the historical expression of male patterns of employment under industrial capitalism. While increasingly anachronistic, this male norm continues to be privileged in most employment protection regimes notwithstanding its lack of correspondence with the contemporary realities of working life.<sup>35</sup> Our operative conceptions of working time thus remain cognitively entrenched in a gendered division of labour which reflects the social, spatial and conceptual separation of work and family life.<sup>36</sup> This separation, while deeply embedded in our collective psyche, is nevertheless a product of historical circumstances. As feminist historians have shown, the demarcation of work and family, productive and reproductive activities, emerged in the course of the transition from feudalism to capitalism and is neither natural nor inevitable but a response to particular economic and social needs of the period.<sup>37</sup> The ideal worker of traditional labour law, unencumbered by responsibilities of care and sustenance, and ‘free’ to engage in employment according to the temporal requirements of his employer,<sup>38</sup> is revealed to be a historical creation, and, moreover, one which has probably outlived its economic usefulness. Application of the mode of analysis associated with the concept of indirect discrimination has contributed to exposing the operation of this normative ideal and the gendered effects of its regulatory embodiment. By calling into question taken-for-granted assumptions that inform our apprehension and shape our interpretation of working life, indirect discrimination contributes to the advancement of feminist knowledge in ways which go far beyond the formal application of any particular manifestation of its legal form.<sup>39</sup> It is in its intellectual structure, that is, in the analytical moves the concept dictates, that indirect discrimination arguably holds the most promise as an equality-enhancing tool.

A second strain of feminist scholarship helping to cast light on gender bias and neglect in law stems from a more general critique of formal methods of legal reasoning and analysis. The

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approach towards requiring the applicant to show a causal relation between the protected characteristic and the disadvantageous outcome (see eg *Naeem v Secretary of State for Justice* [2015] EWCA 1264). This significantly narrows the equality-enhancing potential of indirect discrimination precisely because any relation between the suspect norm and the protected characteristic is likely to be embedded deep within the conceptual infrastructure. See further S. Fredman, *The Reason Why: Unravelling Indirect Discrimination* 45 *Industrial L. J.* 231 (2016).

<sup>35</sup> Fredman n 5 above; Vosko n 5 above.

<sup>36</sup> For a fuller exploration of the gendered dimensions of working time norms, see J. Conaghan, *Time to Dream: Flexibility, Families and the Regulation of Working Time in Precarious Work, Women and the New Economy* (Fudge & Owens n 5 above) 101.

<sup>37</sup> S. Federici, *Caliban and the Witch: Women, the Body and Primitive Accumulation* (Autonomedia 2014) 61-132.

<sup>38</sup> On the ‘unencumbered worker’ see S. Berns, *Women Going Backwards: Law and Change in a Family-Unfriendly Society* (Ashgate 2002).

<sup>39</sup> The practical value of indirect discrimination provisions depends upon how they are crafted and applied, and as a tool in judicial hands, they have often disappointed. See eg K Lee Adams, *Indirect Discrimination and the Worker Carer: It’s Just Not Working* in Murray, n 5 above, 18 and Fredman, n 34.

broad thrust of this body of literature<sup>40</sup> has been to challenge key assumptions about the operation of legal reason, for example, that the application of legal rules is a logic-driven process producing objectively determinable answers and/or that the conceptual structures and categorical schemes which support law are value-neutral, the purely intellectual product of disembodied minds.<sup>41</sup> Feminist legal scholars, along with critical legal scholars generally,<sup>42</sup> approach legal reason as a more loosely structured process, characterized less by logic and more by evaluation. They assert that legal reasoning - and particularly so in common law contexts - allows considerable room for difference of opinion as well as opportunity to determine legal outcomes in accordance with one's own values and preferences.<sup>43</sup> Viewed in this way, law emerges not as a scientific process through which the messy complexities of everyday life are reduced to abstract problems which are subject to objective resolution but as a deeply contentious enterprise in which struggles for power and meaning - including gender struggles - are constantly taking place, albeit within the constraints of shared legal conventions and discursive practices.<sup>44</sup>

A particular consequence of the abstract formulation of doctrinal dilemmas apparently divorced from the social norms, practices and relations in which they are moored is that it deflects our attention away from the extent to such considerations nevertheless exert an influence on the legal decision-making process. For example, does a change in the pattern of working hours give rise to a redundancy situation?<sup>45</sup> In answering this question in the early years of English redundancy pay law, Lord Denning determined that a change in working hours did not produce the cessation or diminution of 'work of particular kind',<sup>46</sup> taking the view that 'an employer is entitled to reorganize his business so as to improve its efficiency...to propose to his staff a change in their terms and conditions; and to dispense with their services if they do not agree'.<sup>47</sup> The two claimants, Mrs Johnson and Mrs Dutton, were thus denied redundancy pay notwithstanding that they could not comply with the new working time requirements on account of their family responsibilities. Of course we would now approach this case differently, not least because it precedes the introduction of the Sex Discrimination Act 1975 and, with it, the concept of indirect discrimination which, as we have seen, can boast some success in challenging gender discriminatory aspects of working time norms.<sup>48</sup> The two claimants might also enjoy the tenuous benefits of the right to request flexible work.<sup>49</sup> What is significant for our purposes, however, is the extent to which

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<sup>40</sup> See eg L. Finley, *Breaking Women's Silence in Law: the Dilemma of the Gendered Nature of Legal Reasoning* 64 *Notre Dame L. Rev.* 886 (1989); Mossman, above n. 9 above; R. Graycar and J. Morgan, *Legal Categories, Women's Lives and the Law Curriculum or: Making Gender Examinable*. 18 *Sydney L. Rev.* 431 (1996); J. Conaghan, n 9 above ch 6.

<sup>41</sup> *ibid.*

<sup>42</sup> See eg Schlag, n 7 above.

<sup>43</sup> R Graycar, *The Gender of Judgments: Some Reflections on 'Bias'* (1998) 32 *U. of British Columbia L. Rev.* 1.

<sup>44</sup> For a detailed exploration of such conventions and practices, see Conaghan, n 40 above.

<sup>45</sup> *Johnson v. Nottinghamshire Combined Police Authority* [1974] ICR 170.

<sup>46</sup> Redundancy Payments Act 1965, s 1(2)(b). The definition of redundancy is now enshrined in the Employment Rights Act 1996, s 139.

<sup>47</sup> *ibid* at 176F-G (per Denning LJ).

<sup>48</sup> See nn 32 & 33 above and accompanying text.

<sup>49</sup> See ss 80F-80I ERA 1996, the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 (SI 2002/3236) and the Flexible Working (Procedural Requirements) 2002 (SI 2002/3207)

particular assumptions about the managerial prerogative, producing an easy alignment of the judicial and managerial point of view, were incorporated into the judicial reasoning process at the time as if they flowed naturally from the mechanical application of relevant legal rule. That these assumptions would now be far more contested is indicative not just of changes in the law but also of social and cultural shifts in the way in which we view the work relationship and the proper balance to be struck between employer and employee interests.<sup>50</sup> *Johnson* looks dated now precisely because the unarticulated values which informed the decision no longer go undisputed in legal and policy discourse; time has exposed the partiality of a position which, contemporaneously, would have been viewed as the uncontroversial application of judicial common sense.<sup>51</sup>

A key feature of feminist scholarship is to highlight such processes of unacknowledged importation of values, assumptions and beliefs into law and policy-making.<sup>52</sup> Underpinning this critique is an apprehension of law, legal rules and doctrines in particular, as far less certain in their application than we are encouraged to believe, significantly reliant upon 'open concepts, replete with internal puzzles, many of which can only be resolved by resort to values and policies which are external to law'.<sup>53</sup> The trick of course is to present such appeals to values and policies as internally determined, that is, as inexorably derived from the dictates of doctrine. *Johnson* exemplifies perfectly how law and legal processes invoke, authorize and enshrine values and beliefs reinforcing aspects of a deeply gendered social world. Feminists strive to be attentive to these ideological operations and, moreover, to find ways of challenging and/or unsettling them, including within the formal constraints of legal reasoning and decision-making.<sup>54</sup>

### 3.2 Destablising the Normative and Conceptual Infrastructure

It must be said that the infrastructure of labour law was under severe strain well before feminist scholars entered the frame. Kahn-Freund's crystallisation of the regulatory approach to British industrial relations, expressed in the concept of collective laissez-faire, has proved remarkably short-lived in its explanatory power, though its normative influence

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<sup>50</sup> Contrast the deferential approach to managerial decision-making in *Johnson* with the far more interrogatory judicial stance taken in *Compton Ltd v Ruddy* [2006] IRLR 171, involving a claim based on the right to request flexible work.

<sup>51</sup> Interestingly, even today, *Johnson* remains good authority in English law for the proposition that altering the hours in which work is performed does not normally effect the kind of change in working arrangements giving rise to a redundancy situation.

<sup>52</sup> Pioneering examples of the application of this approach to labour law include: F. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform* 96 Harvard L. Rev. 1497 (1983); V. Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation on the Job* 103 Harvard L. Rev. 1749 (1990); J. Conaghan, *Pregnancy, Equality and the European Court of Justice* 3 Intl. J. Discrimination & Law 115 (1998); C. McGlynn, *Ideologies of Motherhood in European Sex Equality Law* 6 European L. J. 29 (2000).

<sup>53</sup> Rittich, n 10 above, 133.

<sup>54</sup> For an excellent example of the application of this approach in action, see *Feminist Judgments from Theory to Practice*, R. Hunter, C. McGlynn & E. Rackley ed (Hart 2010), which takes a series of canonical cases and rewrites the judgments from a 'feminist' perspective while remaining faithful to the norms and tenets of judicial practice.

lingers still.<sup>55</sup> More broadly, the fragmentation of working arrangements and the decline of unionisation across the industrialised world in the closing decades of the twentieth century have rendered problematic the core paradigm of industrial relations – characterized by Klare (drawing on Kahn-Freund) as ‘countervailing workers’ power’ (‘CVWP’) - upon which most post-war labour law frameworks were premised.<sup>56</sup> Profound economic and industrial restructuring, new technologies of production, extensive managerial innovation, the globalization and flexibilisation of labour markets, the increasing juridification of workplace relations have all colluded to bringing about the destabilisation of key categories and concepts upon which labour law was traditionally reliant: the contract of employment, collective bargaining, the sovereignty of the nation state and so on.<sup>57</sup> Such has been the degree of consternation about the state of things that many leading commentators are pronouncing labour law ‘dead’, ‘in crisis’, or otherwise indisposed.<sup>58</sup> There is a veritable ecstasy of concern about the future of the discipline producing repeated calls for the generation of new concepts, frames and paradigms.<sup>59</sup>

The role of feminism here has been at once destructive and constructive. It cannot be denied that feminist interventions have contributed to the instability and uncertainty that currently afflicts labour law scholarship. Feminists have cast doubt on the efficacy of collective bargaining mechanisms, highlighting the historical failure of trade unions to represent and advance the interests of women workers.<sup>60</sup> They have shown how legislative reliance on the contract of employment as the gateway to accessing employment protection has contributed to the gendered hierarchisation of employment rights.<sup>61</sup> They have relentlessly interrogated discourses of flexibility, exposing the growing incidence and operation of new forms of precarious working arrangements which draw upon the fault lines of gender, race and class to exploit vulnerable workers.<sup>62</sup> Perhaps most significantly, feminists have contested the boundaries of labour law as traditionally conceived, in particular the spatial and conceptual separation of home and work and the commitment to an idea of the workplace as a largely autonomous and self-contained social and legal

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<sup>55</sup> See further J. Conaghan, *Feminism and Labour Law: Contesting the Terrain* in Morris & O’Donnell, n 5 above, 13.

<sup>56</sup> K. Klare, *Horizons of Transformative Labour Law* in Conaghan, Fischl & Klare, n 10 above, 7, drawing on O. Kahn-Freund, *Labour and the Law* 2<sup>nd</sup> ed (Stevens & Sons 1977) 6: ‘The main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent, and must be inherent in the employment relationship’.

<sup>57</sup> These themes are extensively explored in the literature cited n 10 above.

<sup>58</sup> See essays in Davidov and Langille (2011) n 10 above.

<sup>59</sup> Brodie, Busby & Zahn, n 10 above.

<sup>60</sup> Conaghan, n 2 above; A. Morris, ‘Workers First, Women Second? Trade Unions and the Equality Agenda’ in Morris & O’Donnell, n 5 above 183; G. Lester, *Towards the Feminization of Collective Bargaining Law* 36 McGill L. J. 1181 (1991); M. Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labour* 89 Michigan L. Rev. 1155 (1991); A. Blackett & C. Sheppard, *Collective Bargaining and Equality: Making Connections* 142 International Labour Rev. 419 (2003); L. Hayes, ‘Women’s Voice’ and Equal Pay: Judicial Regard for the Gendering of Collective Bargaining in *Voices at Work; Continuity and Change in the Common Law World*, A. Bogg and T. Novitz eds (Oxford U. Press 2014) 35.

<sup>61</sup> J. Ross, *Marginal Notes? Gender and the Contract of Employment* in Morris & O’Donnell, n 5 above, 89; S. Fredman & J. Fudge, *The Contract of Employment and Gendered Work* in *The Contract of Employment* ed M. Freedland (Oxford U. Press 2016) 231.

<sup>62</sup> *Ibid*: Fudge & Owens, n 5 above. See also D. McCann, *Regulating Flexible Work* (Oxford U. Press 2008).

entity.<sup>63</sup> The notion that labour law might extend beyond the boundaries of work, thus understood, to encompass, for example, unpaid labour carried out by women in the home has not made much headway beyond the frame of feminism but is beginning to attract at least some attention, albeit minimal and broadly dismissive, within the mainstream literature.<sup>64</sup>

This systematic feminist dismantling of the concepts and parameters which give labour law its focus and identity is not an act of wanton destruction; there is method and purpose here. The *method* presupposes the socially constituted nature of knowledge which, mediated by relations of power, produces epistemically privileged discourses which appear to define and delimit the conditions of possibility in particular contexts.<sup>65</sup> Thus, within the current conceptual frame of labour law, it does not seem possible to incorporate unpaid labour carried out in the home; the conceptual apparatus we deploy to navigate the field of knowledge simply does not permit it.<sup>66</sup> At the same time, by drawing attention to that conceptual apparatus - and the work that it does - we render it both visible and contestable. This then is the *purpose* behind the method: the application of a gender lens to labour law helps to expose the conceptual and normative architecture supporting the field of knowledge, thereby inviting its (critical) scrutiny.

Judy Fudge's analysis of Freedland and Kountouris's conception of 'personal work relations' is an excellent example of this technique in action.<sup>67</sup> While acknowledging the commendable breadth of their conception of personal work relations, which goes well beyond the traditional limits of the contract of employment to encompass, at least potentially, 'kinds of work ... whose place in the firmament of labour law is either denied or contested, and which therefore interfaces with other legal domains in which labour law is not the primary source or kind of legal obligation',<sup>68</sup> Fudge criticises Freedland and Kountouris for failing to offer an adequate account of why, when their conception allows it, they nevertheless choose to exclude from their typology of personal work relations unpaid work carried out in the home.<sup>69</sup> Fudge concludes that Freedland and Kountouris defer to disciplinary convention in setting the limits as they do, thus undermining the power and conviction of their analysis. In other words, at a certain point, they allow the conceptual frame to reassert itself, notwithstanding that the effect of their critique has been to weaken it, perhaps fatally.

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<sup>63</sup> Rittich, n 10 above, 182-200; Conaghan, n 11 above; Fudge n 11 above.

<sup>64</sup> See eg N. Zatz, *The Impossibility of Work Law* in Davidov & Langille (2011) n 10 above, 234; G. Davidov, *Setting Labour Law's Coverage: Between Universalism and Selectivity* 34 Oxford J. Legal Studies 543 (2014).

<sup>65</sup> M. Foucault, *The Order of things: Archaeology of the Human Sciences* (Routledge 2011).

<sup>66</sup> For the same reason, labour law struggles even to recognize *paid* labour carried out in a home or family context; see further G. Mundlak, *Bringing Together or Drifting Apart: Targeting Care Work as 'Work Like No Other'* 23 *Canadian J. Women & Law* 289 (2011); Albin n 26 above.

<sup>67</sup> Freedland & Kountouris, n 17 above, considered by Fudge, *Feminist Reflections* n 11 above, 12-18.

<sup>68</sup> Freedland & Kountouris, n 17 above, 35, quoted in Fudge, *Feminist Reflections*, n 11 above, 15. Freedland & Kountouris define the personal work relation as 'a connection or set of connections, between a worker and another person or persons or an organisation or organisations, arising from an engagement or arrangement or set of arrangements for the carrying out of work or the rendering of service or services by the workers personally, that is to say wholly or primarily by the worker himself or herself' (Freedland and Kountouris, above n 17, 31, quoted in Fudge, *Feminist Reflections*, n 11 above, 14).

<sup>69</sup> *Ibid*, 16.

The work of Freedland and Kountouris shows that it is not only feminists who are tearing down the walls of labour law. However, in so far as there is a destructive dimension to their critique, there is clearly a project of construction in train; so too is it with feminist scholarship. Many of the most significant debates in contemporary labour law address concerns which, wholly or partly, have engaged the attention of labour lawyers because feminists have brought them to light. A multitude of issues spring to mind: the regulatory and distributive problems presented by migrant domestic work,<sup>70</sup> the emergence of an increasingly complex legal apparatus to support family-friendly working arrangements,<sup>71</sup> the economic, legal and political challenges posed by precarious work,<sup>72</sup> or the intersectional dimensions of social inequality and the problems this presents for equality-seeking legal initiatives.<sup>73</sup> Not only do these concerns now occupy a central place on labour law agendas worldwide, they have generated a raft of new concepts, themes and frames through which labour law discourse is now being conducted and mediated. Consider ‘decent work’, ‘domestic work’, ‘care work’, ‘global care chains’, ‘work/life balance’, ‘precarious work’, ‘vulnerable workers’, ‘multiple discrimination’, all familiar terms in labour law discourse. Note too the sly shifts in linguistic usage: the growing tendency to preface the term ‘work’ with ‘paid’ or ‘unpaid’, if only to ensure complete clarity of meaning; the declining purchase of the term ‘workplace’ in an era in which much work (paid and unpaid) is performed outside the confines of a bounded physical space. While these changes in language, concepts and themes cannot be attributed solely to feminist interventions, they do signal the promise and potential of feminist scholarship to aid the refashioning of a field widely acknowledged to be disarray. The methodological corollary to normative and conceptual *destruction* must be *construction*.

In this respect, perhaps the most powerful and potentially far-reaching conceptual and normative move made by feminist scholars is to introduce into labour law discourse the notion of social reproduction. This is an idea which derives from social theory, finding early expression in the work of Friedrich Engels in his famous exposition of *The Origins of the Family Private Property and the State*.<sup>74</sup> Adapted, inter alia, by feminist political economists, the concept of social reproduction can be narrowly or widely conceived, but broadly speaking encompasses any or all of the institutions, processes and practices which ensure the reproduction of the social, including child-bearing and child-rearing, the daily reproduction of the material conditions that sustain life, the care of the old and the

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<sup>70</sup> See eg Fudge & Strauss, n 26 above; Anderson, n 26 above.

<sup>71</sup> See eg G. James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge 2009); E. Caracciolo di Torella & A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan 2010).

<sup>72</sup> Fudge & Owens, n 5 above; Vosko n 5 above.

<sup>73</sup> Fredman, n 24 above.

<sup>74</sup> F. Engels, *Origin of the Family, Private Property and the State* (Penguin Classics 2010, originally published 1884):

‘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’ (35).

disabled, the cultivation of communities and other social institutions which support social order and well-being, including but not confined to the nation-state.<sup>75</sup>

Within this conceptual frame, the distinction between paid and unpaid work is elided within a broader conceptualisation of labour which supports social reproduction. The demarcation of work and family emerges as a function of social reproduction, a particular, historical expression of the social organisation of work which also happens to rely upon a gendered division of labour. This is not to suggest that the historical separation of production and reproduction in early capitalism gave rise to a gender division of labour which hitherto did not exist, but rather that it produced the particular gendered configuration which in its modern form we come to recognise as the male breadwinner/female caregiver social model.<sup>76</sup> The concept of social reproduction is of particular value because it enables us to see the relation between 'work' and 'family' as interdependent and more importantly, inter-constitutive. It enables us to grasp both the socially constructed nature of the two spheres and the extent to which they derive their content, meaning and significance by reference to each other. This allows for easy navigation of the terrain of work and family, bringing into clearer view, for example, the particular regulatory and normative challenges posed by the commodification of social reproductive work.<sup>77</sup>

Of course, the virtues or otherwise of social reproduction as a theoretical frame for the analysis of labour law remain a matter for future scholarly debate. What is significant for purposes here is the underlying methodological approach that it evidences, one which approaches the field of knowledge as a site of contestation over meaning and value, in which what is important is not so much what is said but what enables it to be said, and to be said authoritatively. The very idea of labour law is a 'claim to power', to adopt the language famously pioneered by Carol Smart in *The Power of Law*.<sup>78</sup> Ultimately, therefore, it is that very idea which commands feminist attention.

### 3.3 Historicising and Contextualising the Field

Feminists have no monopoly on history but feminist scholars have found it helpful to apply historical perspectives to legal terrain, both to understand how and why law has come to be implicated in women's disadvantage and to trouble any assertions that things could not be otherwise. What history does is render the present contingent so that arrangements which present themselves as natural and universally determined are revealed to be the contrivances of past processes and events, not timeless but time-bound, not necessary, but within particular temporal and spatial constraints perhaps, necessitated.

The value of history in this regard is well recognised by feminist labour law scholars. As Fudge argues, gender provides a useful tool of historical navigation of labour law, compelling

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<sup>75</sup> For a helpful elaboration of the concept of social reproduction, see Fudge, *Feminist Reflections*, n 11 above, 7-9. See also Anderson, n 26 above, 12-14.

<sup>76</sup> J. Lewis, *The Decline of the Male Breadwinner Model: the Implications for Work and Care* 8 Social Politics 152 (2001).

<sup>77</sup> As Anderson, among others has pointed, many of the conceptual tools of liberal legalism – contract, the public/private divide, citizenship, property in personhood – are inadequate to the task of theorising paid domestic work (n 26 above, ch 1).

<sup>78</sup> C. Smart, *The Power of Law* (Routledge 1989) 4.



an apprehension which is 'relational and dynamic',<sup>79</sup> an approach to labour law analysis and theorising which situates contemporary concerns within a frame of movement and change. The perceived 'conflict' between work and family responsibilities takes on a very different hue when viewed through the lens of history. It enable us to see how 'the boundaries between home/market and public/private became deeply inscribed in contemporary legal doctrines, discourses, and institutions such that the initial jurisdictional classification appeared natural and inevitable and not political and ideological'.<sup>80</sup> History also opens our eyes to processes of change, processes which may well be weakening the grip of jurisdictional classifications which have long held sway. Once we abandon the view that work and family are necessarily distinct spheres of social and legal operation, the current 'conflict' becomes a regulatory dilemma which politics requires us to solve. In this context, the dramatic increase in women's participation in paid work, the economic, social, and political imperatives propelling the creation of a new dual-earner social model, render the old conceptual and jurisdictional classifications increasingly out of date, opening up the way for new, more inclusive, and possibly more fit-for-purpose conceptual and legal frames.

Historicisation is one way to give context to labour law but it is far from the only way. Most legal scholars are familiar with the notion of 'law in context', the idea of approaching the study of law not from an internal perspective which confines itself to the discrete study of legal doctrines and the rules therein, but from an external perspective which maps the content of law onto its practical operation, measuring the extent to which 'law in the books' corresponds with 'law in action', the effects of law match up with law's intent.<sup>81</sup> This kind of scholarship, also known as socio-legal or 'law in society' work, makes wide use of social science research methods, generating or invoking empirical studies to track the application and effects of law in particular social contexts.<sup>82</sup>

Within feminist legal scholarship, feminist labour law in particular, there has been plenty of demand for such work. The gap between the promise of sex equality law, for example, and the continued reality of gender inequality, including a stubbornly resistant gender pay gap, attracts no shortage of attention.<sup>83</sup> Similarly, and notwithstanding an increasingly complex regulatory network of legal rights associated with pregnancy and parenting, pregnant woman not only continue to experience discrimination at work but encounter a host of problems in efforts to enforce their rights.<sup>84</sup> Such instrumental engagements with law fit comfortably within the traditional contours of labour law scholarship which has always been attentive to context and the gap between rights and remedies. However, for the same reason, there is a tendency among labour law scholars to define and/or confine feminist scholarship within this milieu, in particular to view feminist labour law as solely concerned

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<sup>79</sup> Fudge, *Feminist Reflections*, n 11 above, 4.

<sup>80</sup> *Ibid*, 11.

<sup>81</sup> See generally W. Twining, *Law in Context: Enlarging a Discipline* (Oxford U. Press 1987). The theoretical roots of law in context lie in American legal realism, see R. Pound, *Law in Books and Law in Action* 44 *American L. Rev.* 12 (1910).

<sup>82</sup> See further *Theory and Method in Socio-legal Research*, R. Banakar & M. Travers eds (Hart Publishing 2005).

<sup>83</sup> See eg A. McColgan, *Just Wages for Women* (Oxford U. Press 1997); S. Fredman, *Reforming Equal Pay Laws* 37 *Industrial L. J* 193 (2008).

<sup>84</sup> James, n 71 above.

with remedying inequality or work/life issues<sup>85</sup> and not also as a mode of critical enquiry which has in its sights the fundamental premises and parameters of the discipline.

The scope and nature of feminist contextualisation extends well beyond the scrutiny of law in action to encompass, as we have seen, historical enquiry, engagements with questions of space and jurisdiction - feminist analyses of migrant domestic workers and global care chains are at the forefront of scholarship problematising the traditional territorial boundaries of labour law<sup>86</sup> - and also disciplinary contextualization, the alignment and interpenetration of labour law with contiguous legal fields, for example, migration, family or social security law. Again, contextualisation is a means here, not an end, enabling the acquisition of a better grasp of the regulatory frameworks which impinge upon work beyond the narrow specifications set by mid-twentieth century articulations of the field of enquiry. Moreover, this blurring of legal disciplinary boundaries is not peculiarly feminist: a push to expand the parameters of labour law beyond the regulation of the work relations<sup>87</sup> to encompass, for example, the regulation of labour markets,<sup>88</sup> has been detectable in the literature for some time.

There is however yet another important feature of feminist contextualisation which warrants some attention, namely the contextualisation of law within broader processes of social construction and governance, particularly in relation to gender norms. It is sometimes assumed that law is a mirror of the social, that it reflects the social world which is nevertheless external to it. This understanding of the relation between the social and the legal is at the heart of traditional conceptions of law as an autonomous, self-regulating field of operation; law may act upon the social and the social may properly inform the content of law but legal norms themselves take their shape, form and legitimacy independent from the social world from which they are drawn. Feminist scholarship rejects this account of the relation between the social and the legal and apprehends law as deeply implicated in the social, not just reflecting but actually constituting the social world, albeit in conjunction with other discursive modes, practices and institutions.<sup>89</sup> This has particular implications for gender because within such a frame law emerges as simultaneously *gendered* and *gendering*. Law is both a repository of values replicating and reinforcing wider social and cultural arrangements - including gender-based attitudes, practices, and beliefs - and also actively implicated in the construction and maintenance of such arrangements: Law contributes to processes by which gender and gender differences come into being and take effect. Legal rules and regimes, including those which comprise labour law, are perceived to have disciplinary effects on actual social relations, normatively re-inscribing certain patterns of sexed and gendered social behaviour. One way of putting this is to say that law is a

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<sup>85</sup> See here L. Hayes & R. Russell, *Women in Labour Law: the Use and Implications of Empirical Methods* in *New Frontiers of Empirical Labour Law Research*, A. Ludlow & A. Blackham eds (Hart 2015). Using the Industrial Law Journal as their sample data field, Hayes & Russell conducted a fascinating study of women in labour law scholarship over a 40 year period. They concluded that while women increasingly featured as subjects in labour law scholarship, this was predominantly in the context of marriage, motherhood and associated concerns.

<sup>86</sup> Fudge Strauss & n 26 above.

<sup>87</sup> Kahn-Freund, n 56 above.

<sup>88</sup> See eg P. Davies & M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (Oxford U. Press 2007).

<sup>89</sup> Conaghan, n 9 above.

gendering practice, that is, law acts—alongside and often in collaboration with other institutional discourses—to constrain and enable particular conceptions of gendered identity, behaviour, and selfhood, and to fashion and refashion gendered social forms.<sup>90</sup> An idea of law as constitutive of meaning and value is not of course the province of feminists. Freedland & Kountouris, for example, acknowledge the constitutive role of law in their analysis of personal work relations.<sup>91</sup> An understanding of law as a gendering practice can be contrasted with a conception of law as a neutral instrument which can be deployed for a variety of social and political purposes but is not inherently implicated in any. It is also distinguishable from a stance which attributes a strong and consistent masculine bias to law, in which the law-gender relation is conceived solely or predominantly in terms of male domination and female subordination.<sup>92</sup> The notion that law is a gendering practice is a way of capturing the conceptual fluidity and contestability of gender while at the same time drawing attention to law as terrain of some significance in the context of gender struggles. This more flexible depiction allows for the production of gendered regulatory regimes which are oppressive and exploitative but also enables and accommodates tensions and inconsistencies in law's approach. Such an approach prompts a much wider casting of the theoretical net in efforts to account for inequality and injustice; the retreat from a domination model of law paves the way for explorations of the intersection between gender and other factors which contribute to unjust social arrangements and outcomes, including race, class, and sexuality. The idea of law as a gendering practice also encourages an approach in which law's operations are viewed not in isolation but in conjunction with the operation of other practices (or discursive regimes) such as medicine, science, and so forth. Within such a frame law is always positioned in a broader context in which the boundaries of the legal are neither clear nor necessarily significant.

A good deal of feminist work in the field of labour law can be understood in these terms, that is, as explorations of the gendered effects and/or gendering operations of law. Consider, for example, the current political impetus to increase immigration controls in Britain post-Brexit. The tightening of immigration controls has well-documented effects on the operation of internal labour markets that go beyond restricting the external flow of labour. In particular, as Anderson, among others argues, they actually contribute to the creation of certain forms of labour relations, characterised by uncertainty, legal informality and institutionalised precarity.<sup>93</sup> In other words legal norms produce precarious work and precarious workers.<sup>94</sup> They also produce forms of exploitative work which are enabled and effected by relations of gender, race and class but this becomes a two-way process as the legal reification of exploitation in this and other regulatory contexts implicated in the production of precarious work, in turn constitutes subjects who are gendered, raced and/or classed. The precarious worker becomes a gendered subject position which we apprehend and read accordingly.

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<sup>90</sup> D E Chunn and D Lacombe (eds) *Law as a Gendering Practice* (Ontario: OUP, 2000); *Fudge Feminist Reflections* n 11 above.

<sup>91</sup> n 17 above.

<sup>92</sup> For a discussion of dominance theories in feminism, see V. Munro, *Law and Politics at the Perimeter* (Hart 2007) ch 4.

<sup>93</sup> B. Anderson, *Migrating Immigration Controls and the Fashioning of Precarious Workers* 24 *Work, Employment and Society* 300 (2010).

<sup>94</sup> R. Hunter, *The Legal Production of Precarious Work* in *Fudge & Owens*, n 5 above, 283.

#### 4 CONCLUSION

Feminism and labour law converge in two basic ways. They meet first at a point of enquiry into the nature and causes of gender inequality in which context work comes to the fore as a key site of women's historical oppression. They come together again in relation to efforts to track and explain contemporary changes in the way work is organised, and in particular, what counts as work for purposes of legal regulation. In the former case, gender equality is the primary object and workplace regulation the tool for achieving it while in the latter, gender features as a category of interrogation, an aid to critical enquiry into broader questions of labour organisation and regulation. In both contexts, the purpose and orientation is progressive: labour lawyers, feminist labour lawyers included, generally seek to promote fair and equitable working arrangements in which opportunities for exploitation are minimised. In this sense the two projects come together, gender equality becoming an expression of a broader aspiration to industrial justice. At the same time, proponents of industrial justice have, historically at least, been less than attentive to concerns of inequality other than as they arise in the formal context of the employer-worker relationship. Indeed, key tools for the promotion of industrial justice, for example, individual employment protection rights, have exacerbated inequalities among workers by placing certain types of working arrangements outside their protective scope, instituting a legal hierarchy which reflects and reinscribes in working life unequal relations of gender, race and class. This then is the dilemma and the challenge which feminist engagement with labour law poses: feminist perspectives both enhance labour law and undermine it; they add insight but, in so doing, threaten to destabilise the field. Like any critical approach, feminist labour law tends to be disruptive: it troubles categories, blurs boundaries, subverts meanings and contests normative priorities. However it does so with good intentions and to worthy ends. Feminist labour law scholars share with labour law scholars generally a belief in the centrality of work as a source of meaning and value.<sup>95</sup> It is that belief or commitment which animates their concern and propels their engagement in the field. While their purposes are progressive, their interventions may sometimes be experienced by the scholarly mainstream as regressive or partisan. The purpose of this article has been to aid the apprehension of feminist legal scholarship as a positive and constructive contribution to contemporary labour law debate. A focus on method has proved valuable in this context because it has helped to highlight the critical nature of feminist engagement and clarify the goals and ambitions which underpin it.

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<sup>95</sup> See further *The Right to Work: Legal and Philosophical Perspectives*, V. Mantouvalou ed (Hart 2015).