

Invisible labour: legal dimensions of invisibilization

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Abstract

This article brings a legal perspective to bear on debates about invisible labour. It argues that we can better understand the causes and implications of invisible labour and its relationship with gender equality by engaging, first, with the law's role in constituting human labour as work, and, second, with how this role influences the way in which the law comes to conceptualize that work for the purposes of regulating it. The article focuses on two categories of invisible labour: reproductive labour, performed predominantly on an unpaid basis in the home, and invisible work, labour that is procured through a wage relation and produces a surplus for firms/organizations, but that is not recognized as such for the purposes of legal regulation. It identifies different dimensions of these categories of invisible labour, explaining them by reference to distinctive features of legal doctrine, while teasing out their socio-economic, and often gendered, implications.

1 | INTRODUCTION

Feminist scholarship has long emphasized that capitalism acknowledges only one of the forms of human labour that are essential to capital accumulation as 'work': productive labour for the

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market. As a result, all of the ‘reproductive labour’ performed in homes and communities and required to reproduce and sustain workers is rendered invisible; it is ‘naturalized’ into non-existence. This means that the practices and capacities associated with it tend to be seen and treated as if they are natural and innate to the persons who perform it, ‘freely provided’ rather than something in which society and individuals should invest, and for the benefit of which they should pay. In this way, reproductive labour in capitalism becomes a form of ‘invisible labour’. Given that it is women who have historically performed the greatest share of this reproductive labour, moreover, and that it is with female gender norms that capacities for ‘care’ – emotional, aesthetic, and affective capacities – have been associated, the invisibility of this labour is something that has particularly significant implications for women.

In recent years, several scholars have sought to identify a number of other forms of invisible labour that are important, in one way or another, to the reproduction of capitalist social relations. These include the various forms of unpaid labour, as prohibited by Article 4 of the European Convention of Human Rights, that are historically and currently important to capital accumulation, but also labour that is performed as work through a paid employment relationship but not institutionally acknowledged as such in the context of that relation.¹ Beginning with the pioneering work of Hochschild, for example, scholars have revealed the significance to employer’s profit-making strategies in personal service industries of the time and effort expended by workers on managing their emotions and controlling their feelings in order to perform their jobs (‘emotional labour’).² However, this time and effort is rarely acknowledged as work in formal job descriptions or contractual duties, nor does it tend to be taken into account in evaluations of skill.³ Other scholars have built on this work to show how different capacities associated with reproductive labour are increasingly being harnessed by firms/organizations to support profit making, without, however, being legally or institutionally recognized as part of the work for which individuals are hired. Thus, in the service sector, for example, it has been shown that employers are extremely dependent on being able to present a particular corporate image and to create a particular experience for consumers, something that not only requires that their employees smile and appear friendly and amenable, but also that they look, dress, and sound ‘right’ as well – whether in conformity with the employer’s brand or merely with social prejudices about respectability.⁴

These observations speak to an observation of autonomist Marxism – namely, that non-work activities, and the identities, appearances, and habits that are formed through everyday practices, are increasingly being harnessed by capital with a view to imbuing products with additional value,

¹ M. Briziarelli, ‘Invisible Play and Invisible Game: Video Game Testers or the Unsung Heroes of Knowledge Working’ (2016) 14 *tripleC: Communication, Capitalism & Critique: J. for a Global Sustainable Information Society*, at <<https://www.triple-c.at/index.php/tripleC/article/view/684>>; M. Crain et al. (eds), *Invisible Labor: Hidden Work in the Contemporary World* (2016); J. Dubbell, ‘Invisible Labor, Invisible Play: Online Gold Farming and the Boundary between Jobs and Games’ (2015) 18 *Vanderbilt J. of Entertainment & Technology Law* 419; M. A. Wichroski, ‘The Secretary: Invisible Labor in the Workworld of Women’ (1994) 53 *Human Organization* 33.

² A. R. Hochschild, *The Managed Heart: Commercialization of Human Feeling* (2003, 20th anniversary ed.).

³ J. Payne, ‘Emotional Labour and Skill: A Reappraisal’ (2009) 16 *Gender, Work & Organization* 348.

⁴ S. Walls, ‘“Are You Being Served?” Gendered Aesthetics among Retail Workers’ (2007) PhD thesis, Durham University, at <http://etheses.dur.ac.uk/2446/1/2446_457.pdf>; T. Dalikeni, ‘Exploring Perceptions on Aesthetics and Emotional Labour Experienced by Women Working in Two Different Clothing Retail Shops in Port Elizabeth and Grahamstown’ (2016) Master’s dissertation, Rhodes University, at <<https://core.ac.uk/download/pdf/145036736.pdf>>; R. Hall and D. van den Broek, ‘Aestheticising Retail Workers: Orientations of Aesthetic Labour in Australian Fashion Retail’ (2012) 33 *Economic and Industrial Democracy* 85; J. C. Karlsson, ‘Looking Good and Sounding Right: Aesthetic Labour’ (2012) 33 *Economic and Industrial Democracy* 51; C. Warhurst and D. Nickson, *Aesthetic Labour* (2020).

and that practices and capacities associated with the reproductive sphere are being exploited to support capital accumulation *directly*, rather than simply as a by-product of their effect on the supply of labour.⁵ That these practices and capacities are rarely institutionally acknowledged as a form of valuable, productive work suggests that capital is directly profiting from the subordinate status that the practices and capacities have been assigned, as a result of their association with the reproductive sphere, and as a result of a related consequence of this – namely, the relative abundance of such capacities outside the market.

The reproductive sphere is often associated with women, and female gender norms, because of their historically dominant role as consumers and as unpaid carers.⁶ This suggests that invisible work might have particularly significant implications for women, drawing attention to the relationship between capitalism's tendency to devalue certain forms of labour relative to others, and the relations of gender oppression that feminist scholars have long recognized to be complexly integrated within the capitalist system. Before now, however, little attention has been paid to the role of the law in these processes of invisibilization, nor in the processes by which the effects of this invisibilization come to be experienced unequally by men and women. As this article seeks to show, however, an engagement with the role of the law in constituting human labour as work, and in regulating that work in a particular way, can actually shed important light on the nature, existence, and implications of invisibilization, as well as the various forms in which it manifests in practice.

In bringing a legal perspective to bear on discussions about invisible labour, this article argues that there are a number of different categories, or forms, of invisible labour, the relationship between which, and the role of the law in relation to which, have not yet been fully theorized. Exploring two of these different categories and relating them to the law's role in constituting and regulating work helps us to appreciate some of the different ways in which the law contributes to invisibilization, and how different categories of invisible labour can produce their own distinct distributive and gendered effects. In this regard, the article distinguishes between invisible labour, the reproductive labour that sustains work, and thus profit making, and that tends to be predominantly performed outside the market; and invisible work, labour that is performed through a wage relation and that, as a result, comes to produce a surplus for firms/organizations, but that is not recognized as work for legal purposes.

In taking this perspective, this article contributes to our understanding of the law's relationship with gender inequality, and the relevance to this of discussions of invisible labour. It also, however, contributes to our understanding of the law's relationship with the processes of invisibilization that facilitate capital's attempts to increase the amount of labour extracted from the wage-dependent population, and the potential, society-wide problems that this creates when it comes to capitalism's sustainability and stability.

The article proceeds as follows. Part 2 focuses on the first category of invisible labour, reproductive labour, and the law's role in securing its structurally subordinate status. Part 3 turns to consider the second category of invisible labour, invisible work, explaining this category by reference to the constraints that the law's role in constituting human labour as work places on its capacity to conceptualize that work for the purposes of regulating it. This part goes on to explain

⁵ M. Lazzarato, 'Immaterial Labor', trans. P. Colili and E. Emery, in *Radical Thought in Italy: A Potential Politics*, eds P. Virno and M. Hardt (1996) 133; S. Yanagisako, 'Immaterial and Industrial Labor: On False Binaries in Hardt and Negri's Trilogy' (2012) 64 *Focaal: J. of Global and Historical Anthropology* 16.

⁶ On women as conspicuous consumers and the target of advertising, see for example B. E. Duffy, *(Not) Getting Paid to Do What You Love* (2018).

how, and why, these constraints impact unequally on women and men. Part 4 then explores different dimensions and manifestations of this latter category of invisible labour in more depth, relating them back to distinct aspects of the law's conception of work and the wage relation. Part 5 concludes.

2 | REPRODUCTIVE LABOUR

Feminist scholars have long drawn attention to the various forms of invisible labour that are performed in contemporary capitalism – labour from which capital benefits but for which it does not pay.⁷ For the most part, they focus their discussions on the reproductive labour without which capital accumulation, and the wage labour on which it depends, would not be possible and sustainable, but that capitalism tends to devalue and invisibilize, treating it as a natural resource that is freely available rather than as something for which it should pay.⁸ Performed in the 'private' domain of the household and not treated as work for the purposes of the payment of wages, reproductive labour's contribution to the economy is rendered invisible,⁹ and so it tends not to be taken into consideration when decisions are made in the labour market, or when comparative economic performance (such as gross domestic product) is assessed.¹⁰ The result is that resources tend to be systematically diverted *away* from this important reproductive activity, and towards the profit-making and value-producing activity that, nonetheless, depends on its performance.

The socially subordinate role afforded to reproductive labour in capitalism and the gendered implications of this role are inherently bound up with the process by which the majority of the population were excluded from access to the means of subsistence. It is this that brought about the 'mediation' of social relations by the market, and thus the opportunity, and indeed the necessity, for individuals to devote the majority of their time to wage earning: to performing work through a wage relation. The result was a complete reorganization of human labour, with a new split emerging, for the majority of the population, between the time that must be devoted to wage earning and that as a result contributes directly to profit making and capital accumulation, and the time that must be devoted to reproducing the labour power required to sustain wage earning: all of those practices of care and consumption that make profit making and capital accumulation possible and sustainable. This new organization of human labour not only separates the functions of production and social reproduction, it also subordinates the latter to the demands of the former.¹¹ This it does, in part, by forcing wage-earning individuals to prioritize the wage-earning activities that are a precondition for purchasing the goods and services without which neither waged nor unwaged labour, and thus neither consumption, reproduction, nor leisure, would be possible. This not only means that the majority of social resources tend to be allocated to wage earning, and thus profit making and value production are prioritized above reproductive labour; it also means that the

⁷ S. Ferguson, *Women and Work: Feminism, Labour, and Social Reproduction* (2019); T. Bhattacharya (ed.), *Social Reproduction Theory: Remapping Class, Recentring Oppression* (2017).

⁸ Even when reproductive labour is performed through public-sector institutions, individual firms/organizations do not pay for that labour directly; rather, the costs of that labour are partly socialized through taxation.

⁹ J. Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction' (2014) 22 *Feminist Legal Studies* 1, at 6.

¹⁰ D. DeRock, 'Hidden in Plain Sight: Unpaid Household Services and the Politics of GDP Measurement' (2021) 26 *New Political Economy* 20.

¹¹ Ferguson, *op. cit.*, n. 7.

latter comes to be shaped by the demands, rhythms, and orientations of the former – performed at times and in spaces not dominated by paid work, and thus made to adapt to the demands of accumulation.¹²

Because it is women who have historically been responsible for performing the greatest share of society's reproductive labour,¹³ they suffer disproportionately due to its subordination and invisibilization. As feminist scholars have explained, however, the assignation of women to the role of unpaid care provider did not arise naturally;¹⁴ rather, it is a product of power relations – relations that have, moreover, been profoundly shaped and reinforced by the law. Thus, as Mies has shown, the role of women as unpaid care givers is complexly related to the way in which the patriarchal structure of the pre-capitalist household empowered men to take advantage of the new opportunities for profit making that opened up with the development of trade and markets, and to limit the opportunities available to women to gain access to money, making possible the extraction from them of the unpaid caring labour without which men's money-making activities would not be sustainable.¹⁵ By securing a near monopoly over access to money, men were able to reinforce their superior position, harnessing the law to further restrict women's social and economic activities, and thus their opportunities to obtain their subsistence independently from the men for whom they were now expected to provide unpaid care. Importantly, this gendering process was complexly bound up with processes of racialization, because the separation of production and reproduction, and the economic subordination of women that this entailed, depended very much on the practices of colonialization and slavery that made possible the production of the cheap subsistence goods required to sustain the wage-dependent population and, simultaneously, to support the accumulation and concentration of the wealth on which men's superior power was based.¹⁶ Colonialization and slavery not only contributed to improving the living standards and conditions of the British middle class, facilitating the withdrawal of women from productive work; they also provided the basis for middle-class women, now responsible for managing entire households, to shift some of the less pleasant, 'dirtier' reproductive labour onto paid domestic servants, who were almost exclusively poorer and often Black and/or immigrant women, thereby establishing a racial hierarchy within this gendered labour hierarchy.¹⁷

The establishment of this gendered division of labour profoundly shaped prevailing gender norms by limiting the institutional domains to which women and men had access and the sort of activities in which they tended to regularly engage.¹⁸ It thus began to support a view of reproductive labour as 'women's work', making the capacities associated with that labour appear as expressions of an innate femininity, rather than as acquired skills in which individuals and society ought to invest. At the same time, masculine gender norms came to be associated with the ability to earn money in the labour market and to extract, or be the beneficiary of, the unpaid care

¹² Id., ch. 1.

¹³ For a history of women's relationship with reproductive labour, see M. Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* (2014).

¹⁴ S. Federici, *Caliban and the Witch: Women, the Body, and Primitive Accumulation* (2004).

¹⁵ Mies, op. cit., n. 13.

¹⁶ Id.; Ferguson, op. cit., n. 7, p. 18; Federici, op. cit., n. 14, p. 100; N. Fraser, 'Expropriation and Exploitation in Racialized Capitalism: A Reply to Michael Dawson' (2016) 3 *Critical Historical Studies* 163.

¹⁷ E. N. Glenn, *Forced to Care: Coercion and Caregiving in America* (2012). This was also the case in the UK. National Archives, 'Black Presence: Work and Community – Servants, Ayahs and Alternative Employment' *National Archives*, at <https://nationalarchives.gov.uk/pathways/blackhistory/work_community/servants.htm>.

¹⁸ L. Davidoff and C. Hall, *Family Fortunes: Men and Women of the English Middle Class 1780–1850* (2003).

lovingly provided by women in the home. These gender norms were profoundly influential in the early nineteenth century, when it became clear that a crisis of social reproduction was emerging within the working class, as men, women, and children had been drawn into industrialized wage work in increasing numbers, creating a deficit of care and no one, and no time, to fill it.¹⁹ This crisis manifested in struggles by wage earners for limits on the length of the working day and protections against unfair competition – struggles that were harnessed by the ruling classes to support the introduction of measures designed, most specifically, to further limit the labour market opportunities of women, with a view to ensuring that their labour and their time could be relied upon to provide the unpaid reproductive labour on which wage earning was now recognized to depend.²⁰

The result was that gender norms that had come to be taken for granted within the middle class were harnessed in order to institute within working-class households a gendered division of labour that placed the responsibility for performing unpaid caring labour on women's shoulders.²¹ However, it did this without providing male wage earners with the means to secure the regular, well-paid work that would be required if this division of labour was to be sustainable. Consequently, new demands were made of women in terms of the provision of unpaid care, while many women were still required to engage in wage earning to supplement the household income, having to do so in the few occupations to which they now had access: those forms of industrial homework and care-based occupations deemed to be compatible with their unpaid caring obligations and consistent with their 'feminine' capacities.²²

It was only in the mid-twentieth century that steps were taken to secure to working-class households the sort of family wage that would be required to sustain the gendered division of labour that had been imposed on, and expected of, them since the mid-nineteenth century. This took the form of supports for collective bargaining and institutions of social insurance and labour regulation, which, in combination, sought to ensure that those who devoted themselves to full-time regular work for a single employer could receive in exchange a wage sufficient to support their families and, in turn, certain protections against social and economic risk.²³ This system, associated with the idea of the 'welfare state', was, however, rooted in what Fudge refers to as a 'gender contract',²⁴ in the sense that the full-time regular work to which this wage and these entitlements were linked presupposed the provision of unpaid caring labour by women in the home, which was only possible if women retreated from the labour market on marriage and motherhood.²⁵

¹⁹ N. Fraser, 'Contradictions of Capital and Care' (2016) 100 *New Left Rev.* 99.

²⁰ While the imperative to engage in wage work limits individuals' capacity to engage in self-care, the inherently relational nature of human society is such that individuals are always to some extent dependent on others, and others' caring labour. While the law presupposes that non-work time is time during which the worker reproduces their labour power, therefore, this process is an inherently collective one, and it is this collective dimension that is obscured by the way in which the law constitutes work.

²¹ A. Clark, *The Struggle for the Breeches: Gender and the Making of the British Working Class* (1997).

²² S. Fredman and J. Fudge, 'The Contract of Employment and Gendered Work' in *The Contract of Employment*, eds A. Bogg et al. (2016) 231; S. Fredman, *Women and the Law* (1998).

²³ On the significance of this social compact and the gender contract implied in it, see N. Busby and G. James, *A History of Regulating Working Families: Strains, Stereotypes, Strategies and Solutions* (2020).

²⁴ Fudge, *op. cit.*, n. 9.

²⁵ This gender contract was profoundly embedded in racial hierarchies, however, with Black women much more likely to contribute full time to wage earning throughout their life course, and therefore to experience much more acutely the burdens of combining that wage earning with unpaid care. See D. Ashiagbor, 'The Intersection between Gender and "Race" in the Labour Market: Lessons for Anti-Discrimination Law' in *Feminist Perspectives on Employment Law*, eds A. Morris

In this sense, then, the crisis of social reproduction that emerged in the nineteenth century had been contingently ‘solved’ or ‘stabilized’ only as a result of the way in which female economic dependence was partially engineered through the legal framework on which the welfare state was itself constructed, and the way in which it had been sustained by the promise, implicit in the idea of the welfare state, of full-time work and family wages.²⁶ The forms of work organization that became dominant during this period, and the vertically integrated business forms in which they were rooted, provided the foundations on which modern statutory labour law was built, with the result that statutory labour law itself came to presuppose the very gendered division of labour that had made these business forms, and forms of work organization, possible and sustainable in the first place.

Labour law scholars such as Fudge have documented how, because of various legal, economic, and cultural shifts, the gender contract on which this temporary stability was based has broken down. They explain how the post-1970s period has been characterized by increased female labour market participation and a decline in wages and levels of protections associated with full-time employment.²⁷ In a context in which few families can survive on a single male wage, and there are a growing number of single-parent families, the necessity for women to combine their unpaid reproductive labour with full- or part-time wage work has increased; however, at the same time, opportunities for them to do so are becoming increasingly limited. The growing tensions that this has created between women’s waged and unpaid labour has produced a situation in which those who can afford to very often choose to hire others to perform reproductive labour, in order to free them up for wage work. Indeed, for many professional women, this is the only way in which they can hope to compete with their male peers in increasingly competitive occupations. The problem, however, is that this trend towards externalizing reproductive labour has simply facilitated capital when it comes to its attempts to generate profit *from* the forms of reproductive labour that it has historically devalued.²⁸

Today, much of this ‘commodified’ reproductive labour is provided by women coming to the United Kingdom (UK) and other advanced capitalist economies from the Global South, using the wages that they earn to support their families back home.²⁹ By taking advantage of the (legally engineered) precarious status of these workers,³⁰ moreover, employers have been able to harness their labour at low cost, further exacerbating the tendency for reproductive labour to be seen as inherently low value and low skilled. In addition to the emergence of these ‘global care chains’,³¹ the many women who cannot afford to pay others to perform reproductive labour face a predicament in which the scope of the unpaid caring obligations expected of them has increased, because of widespread disinvestment in public services, while the demands made of them in relation to

and T. O’Donnell (2013) 139. A further consequence of this gender contract, moreover, was that it tended to invisibilize the many unmarried women who were sole breadwinners and for whom the opportunity of retreating from the labour market simply did not exist. On single mothers and the problems that they posed for the law and policy in particular, see Busby and James, op. cit., n. 23.

²⁶ A. Orloff, ‘Gender in the Welfare State’ (1996) 22 *Annual Rev. of Sociology* 51.

²⁷ Fudge, op. cit., n. 9, p. 6.

²⁸ Fraser, op. cit., n. 19.

²⁹ Id.; H. Lutz, ‘At Your Service Madam! The Globalization of Domestic Service’ (2002) 70 *Feminist Rev.* 89.

³⁰ V. Mantouvalou, ‘Legal Construction of Structures of Exploitation’ in *Philosophical Foundations of Labour Law*, eds H. Collins et al. (2018) 188.

³¹ A. R. Hochschild, ‘Global Care Chains and Emotional Surplus Value’ in *Justice, Politics, and the Family*, eds D. Engster and T. Metz (2015) 249.

paid wage work have increased too – something only exacerbated by the proliferation of zero-hours contracts, which vastly increases the amount of unpaid time that workers have to devote to performing their contracts.³² This has produced a situation in which women have become concentrated in forms of work organization that lack the stability and security of ‘standard’ employment relations, because these are often the only forms that are relatively compatible with their unpaid caring obligations.³³ Because these forms of work are low paid and often excluded from the scope of core legal and social protections, however, this situation simply legitimizes women’s status as secondary wage earners, further limiting the opportunities available to them to improve their economic position.

Given that women continue to perform the greatest share of society’s reproductive labour, moreover, firms/organizations actually have a positive incentive to recruit women in occupations in which reproductive capacities – those affective, aesthetic, and emotional capacities discussed in the introduction – are integral, because, in doing so, they need not invest directly in the cultivation of these capacities. Instead, women can be expected to have developed these capacities outside the market, in the context of their unpaid caring activities. This situation not only contributes to occupational segregation, concentrating women in occupations to which reproductive labour is central; it also devalues and invisibilizes the capacities and practices integral to them, by allowing firms/organizations to treat such capacities and practices as natural resources that are free and abundant, rather than as economically valuable skills requiring investment or as providing distinctive benefits requiring payment.³⁴

3 | INVISIBLE WORK

The previous part emphasized that the material basis of gender oppression in capitalism is the differentiation of production and social reproduction, and the subordination of the latter to the former, which comes about as a result of the legal and political processes through which the direct producers came to be excluded from access to the means of production. It was this process that brought about the necessity for most of the population to devote the majority of their time to wage earning, a situation that created a deficit of care that, with the assistance of the law, came to be ‘met’ by the unpaid reproductive labour of women. This same process gave rise to the distinctive structural power relations that make it possible for human labour to function as work: to be procured through a formally equivalent exchange in conditions in which that labour could be harnessed to produce a surplus. This is possible because of the way in which generalized wage dependence renders the wage-earning population dependent on capital, a situation that can be harnessed by firms/organizations to influence the terms on which labour power is sold, as well as how it is used, or deployed, in the production process. By creating in the wage-dependent population a situation of economic vulnerability, in other words, this ‘structural separation’ empowers firms/organizations to ensure the existence of a ‘gap’ can exist between the wage that they pay for labour power in the market and the value of the benefit that is extracted from workers in the production process.

³² A. Adams et al., ‘Legitimizing Precarity: Zero Hours Contracts in the United Kingdom’ in *Zero Hours and On-Call Work in Anglo-Saxon Countries*, eds M. O’Sullivan et al. (2019) 41.

³³ J. Fudge and R. Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (2006).

³⁴ On the relationship between constructions of skill and emotional labour, see Payne, op. cit., n. 3.

While legal scholars have rightly emphasized the significance of contract in constituting labour as work, they have often mischaracterized the role that it plays in this context, suggesting that it is the contract itself that enables the extraction of surplus labour from workers, rather than the wider structures in the context of which that contract is concluded.³⁵ In fact, however, while the legal institution of contract is integral to capital accumulation, as it enables employers to appropriate the product of workers' labour power and thus any surplus that is produced, it is the structural context in which that contract is concluded – a context that the law helps to bring into being – that explains how that surplus can be produced in the first place. This is because it is this structural context that systematically empowers firms/organizations to influence workers' decisions and actions, and thus how, how much, and with what intensity they work. The reason that this mistake is problematic is that it creates a tendency for legal actors, including the courts and the legislature, to see the contract as the source of the power imbalance between workers and employers, and to which labour law is deemed to respond. This leads to a narrow conception of the wage relation that conflates it with just one of the contractual forms through which it might be, and has historically been, structured: a contract of employment in which contractual rights of control and contractual obligations of subordination and obedience are implied.³⁶ This excludes from the scope of the legal system's conceptualization of the wage relation, and thus from the scope of protective labour law, all of those wage relations structured as contracts for services and/or contracts for the sale of a finished product (for example), such as those relations that exist between a wage-dependent author and the publisher to whom they ultimately license their manuscript in order to earn an income from the creative labour that was expended on its production.³⁷

This observation is extremely important when we go on to consider the significance of the way in which the law conceptualizes the wage relation and work when it comes to their regulation – that is, when it comes to the effectiveness of those mechanisms that have evolved to keep the extraction of surplus labour within sustainable limits.³⁸ After all, the effectiveness of that regulation is dependent on its capacity to identify the existence of those wage relations, and thus to be able to identify work and measure the law's scope. That the law tends to conceptualize work and the wage relation through the lens of just one of the legal forms through which it might be structured thus creates a risk that work will be performed, and wage relations will exist, outside labour law's scope – in other words, that there will be work that is performed but that is rendered legally invisible. As Rose's work explains, moreover, this situation is not simply something that is liable to affect legal outcomes in specific cases; rather, the constitutive role of the law is such that its invisibilizing of certain forms of work can profoundly influence actors' beliefs about, and orientations towards, those forms of work, shaping their behaviour, and in this way have a much more generalized impact on socio-economic outcomes.³⁹

³⁵ For a wider discussion of this problem, see Z. Adams, 'One Step Forwards for Employment Status, Still Some Way to Go: The Supreme Court's Decision in *Uber v. Aslam* Under Scrutiny' (2021) 80 *Cambridge Law J.* 221.

³⁶ This observation is elaborated in Z. Adams, 'Labour Law, Capitalism and the Juridical Form: Taking a Critical Approach to Questions of Labour Law Reform' (2021) 50 *Industrial Law J.* 434; Z. Adams and H. G. Ruse-Khan, 'Work and Works on Digital Platforms in Capitalism: Conceptual and Regulatory Challenges for Labour and Copyright Law' (2020) 28 *International J. of Law and Information Technology* 329.

³⁷ For a discussion of this example, see Adams, *id.*

³⁸ For a discussion of this perspective on labour law's function, see Z. Adams, *Labour and the Wage: A Critical Perspective* (2020).

³⁹ E. Rose, 'Reinterpreting Law's Silence: Examining the Interconnections between Legal Doctrine and the Rise of Immaterial Labour' (2020) 47 *J. of Law and Society* 588. On the law's constitutive role generally, see Adams, *id.*

While some feminist scholars have alluded to the narrowness of the law's conception of work, they have rarely systematically linked this observation with wider discussions about invisible labour, but nor have they adequately explained the structural basis of this narrowness either; that is, they have not identified the structural reasons why the law might invisibilize certain forms of work and why, in certain conditions, this invisibilization might have specific gendered effects.⁴⁰

As the Marxist scholar Pashukanis explains, commodity exchange is predicated on assumptions of equality and autonomy: the equal capacity of all to engage in exchange free from coercion.⁴¹ These assumptions are only sustainable, however, if and to the extent that power is monopolized outside the market, and if and to the extent that that power is exercised in a way that is compatible with, and presupposes, this basic equality and freedom. The practices and relations of capitalist society thus impose certain legitimacy conditions on the existence and exercise of institutionalized power, and this profoundly shapes that society's dominant mode of social regulation: the law. In capitalism, then, the law comes to regulate socio-economic relations as an embodiment of the will of an autonomous state. This state is seen as the representative of the general interest, enjoying a monopoly on power. When it exercises that power, therefore, in the form of social regulation, that regulation is expressed in such a way as to abstract the individuals to whom it is addressed from the wider structural context in which they exist.⁴² Hence, in law, the structural inequality between labour and capital that explains practices of commodity production and exchange is abstracted away, and the existence of power relations, such as the wage relation, comes to be explained by reference to the actions and decisions of autonomous subjects, thereby obscuring the very basis for firms/organizations' power over workers and thus their capacity to extract a surplus.

This abstract, astructural conception of the wage relation and the power dynamic that is intrinsic to it helps us to explain how and why the law conceptualizes and identifies work as it does, and can also help us to begin to understand how and in what contexts this might have particular implications for women. Rather than seeing work as human labour that comes to function in a particular way because of the unequal structures through which it is procured, the law conceptualizes work by reference to rights and obligations that are deemed to have their origins in contract. Thus, in the law, work is not seen as time spent that is influenced by workers' dependence on capital to live, and thus by the necessity for workers to do everything they can to please their employers (and/or potential employers) to secure both their immediate survival and their more medium- and longer-term employment and/or promotional prospects; rather, work is seen as time that is subject to the authority conferred by the contract – that is, time that is contractually constrained, and thus time spent that produces a benefit that can be explained by reference to express contractual duties, workplace rules, and/or employer directions. This also explains why non-work comes to appear as the opposite, as time that belongs to, and is under the exclusive control of, the worker, thereby obscuring both the structural constraints that exist on how that time

⁴⁰ Fudge's work comes closest to doing so, although it tends to focus more on specific aspects of labour law doctrine than on issues of legal form more generally. See, however, Fudge, *op. cit.*, n. 9; J. Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in *The Idea of Labour Law*, eds G. Davidov and B. Langille (2011) 120.

⁴¹ E. Pashukanis, *Law and Marxism: A General Theory* (1987).

⁴² For more detailed discussions on legal form, see Adams, *op. cit.*, n. 36; R. Knox, 'Marxism, International Law, and Political Strategy' (2009) 22 *Leiden J. of International Law* 413; G. Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (2019).

must be spent *and* all of the unpaid caring labour performed by others, without which that work would not exist.⁴³

While there are systemic reasons for this abstract, astructural conception of work and the wage relation, we gain an important insight into the gendered implications of the conception by looking at the historical contexts from which it actually developed.⁴⁴ After all, it is one thing to say that the law conceptualizes work as contractually constrained time⁴⁵ and the wage relation as arising from contracts in which contractual rights of control are implied,⁴⁶ and another to identify the complex historical processes, struggles, and conflicts from which those conceptions were developed.

To understand the factors that have, over time, come to be associated in the law with work and the wage relation, therefore, we need to have regard to the contexts in which those factors were initially identified, and by reference to which they have subsequently been refined. The starting point in this respect is the context of the factory debates and the nineteenth-century struggles over legislative limits on the length of the working day. What distinguished factory work from other forms of wage work was its centralization in large factories and the domination of the labour process by machines. As a result, when the law began formulating its conception of the wage relation and work for the purposes of early labour regulation, it came to look for evidence of the control associated with each in the existence of physical constraints on the worker's body, their presence within employer-owned/controlled spaces, and/or their subjection to the physical compulsions of employer-owned/-controlled machinery.⁴⁷

These highly ritualistic and physical assumptions about work became influential in shaping the legislative definitions and judicial interpretations of work and the wage relation as new forms of protective labour legislation were introduced throughout the late nineteenth and twentieth centuries.⁴⁸ As such legislation expanded to new contexts, however, and wage labour was increasingly dominated by less physical and more 'intellectual' and thus 'intangible' forms of production, the

⁴³ W. Seccombe, 'Patriarchy Stabilized: The Construction of the Male Breadwinner Wage Norm in Nineteenth-Century Britain' (1986) 11 *Social History* 53.

⁴⁴ The necessity of building into the analysis a historical perspective means that many of these observations are specific to the UK. However, given the common conditions facing many capitalist societies throughout their development, some are also applicable, to a greater or lesser extent, to other legal systems.

⁴⁵ A good example can be seen in *South Holland v. Stamp*, where the tribunal stated expressly that 'time spent by the respondents when they are not carrying out the contractual duties required of them cannot be counted' as work. *South Holland v. Stamp* [2003] All ER (D)19 EAT, at [37]. It is also a function of the way in which the requirement that a worker must be at the employer's disposal has been interpreted. See for example Case C-344/19 *DJ v. Radiotelevizija Slovenija* [2021] IRLR 479; Case C-303/98 *Sindicato de Médicos de Asistencia Pública (SIMAP) v. Conselleira de Sanidad y Consumo de la Generalidad Valenciana* [2001] ICR 1116; Case C-266/14 *Federacion de Servicios Privados v. Tyco Integrated Security* [2015] ICR 1159, which have been followed in the UK, such as in *Addison Lee v. Lange* [2021] EWCA Civ 594.

⁴⁶ Emphasizing that control can be an implicit term, see *Christa Ackroyd Media Ltd v. Revenue and Customs Commissioners* [2019] UKUT 326 (TCC). Control is also a function of the implied duties of co-operation and obedience. More generally, see *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497, at 516–517B.

⁴⁷ Z. Adams, *The Legal Concept of Work* (forthcoming). See for example Section 52 of the Factory Act 1844, which provides a list of circumstances that can be taken as evidence that an individual is employed for the purposes of calculating working time (where working time is equated with employment in a factory). These circumstances expressly include presence in employer-owned/-controlled spaces, while excluding time in public spaces and at home.

⁴⁸ For good overviews, see É. Genin, 'Proposal for a Theoretical Framework for the Analysis of Time Porosity' (2016) 32 *International J. of Comparative Labour Law and Industrial Relations* 280; G. Vallée and D. Gesualdi-Fecteau, 'Setting the Temporal Boundaries of Work: An Empirical Study of the Nature and Scope of Labour Law Protections' (2016) 32 *International J. of Comparative Labour Law and Industrial Relations* 344; A. C. L. Davies, 'Getting More than You Bargained For? Rethinking the Meaning of "Work" in Employment Law' (2017) 46 *Industrial Law J.* 477.

courts began to look for evidence of the employer's power over the worker's time in the existence of the sort of contractual and bureaucratic constraints that were gradually becoming common within the vertically integrated firms/organizations in which manual, clerical, and managerial workers increasingly worked side by side.⁴⁹ This was particularly so from the mid-twentieth century when, as we saw in the previous part, much wage work was being procured through standard employment relationships in the context of vertically integrated firms/organizations. In such contexts, in addition to relying on evidence of the worker's presence within an employer-owned/-controlled workplace, the law began looking for evidence of contractually mediated rules concerning where and/or how the work was performed, as well as of the individual's subjection to managerial processes and procedures. The result of these developments was to narrow the legal conception of work to that sub-set of time that was expended in employer-owned/-controlled spaces, for the purposes stipulated by the employer, and as required by the contract, including, therefore, the authority that that contract was deemed to confer on employers to issue directions.⁵⁰

While the law has slightly adapted this understanding of work to new contexts, it remains the dominant definition and interpretation of the concepts of work and working time that are central to both the UK Working Time Regulations 1998 and the National Minimum Wage Act (NMWA) 1998 and associated Regulations.⁵¹ In the context of these regulations, therefore, time is not classed as work, and is not paid, if it is not time expended as a result of contractually mediated obligations, linked with formal job descriptions and/or contractual duties and performed in employer-owned/-controlled spaces.⁵²

A similar interpretation also frames the way in which the wage relation is defined and conceptualized for the purposes of determining the scope of labour law, as circumscribed today by Section 230(3) of the Employment Rights Act 1996 and cognate provisions.⁵³ In this context, for example, the courts require that there exists a contractual relationship, consisting of an exchange of personal work/service for remuneration. Such an exchange is only said to exist, however, where the benefit that the putative employer receives is one that can be explained by reference to contractual rights of control, where it can be said to have been procured by the employer. What this means in practice is that to fall within the scope of labour law, it is not enough that a firm/organization comes to benefit from the way in which individuals expend their time, if the manner in which they do so is not attributable to some exercise, by the employer, of their contractual rights.⁵⁴ Instead, if there exists an apparently 'intrinsic' motivation for the provision of that benefit (such as the

⁴⁹ For example, Section 15 of the Shops Act 1934 defined working hours as 'time during which the persons employed are at the disposal of the employer'.

⁵⁰ For a similar analysis, see E. Rose, 'The New Politics of Time' (2018) 34 *International J. of Comparative Labour Law and Industrial Relations* 373; Genin, op. cit., n. 48. For the seminal analysis of the distinctiveness of conceptions of time in the industrial period, see E. P. Thompson, 'Time, Work-Discipline, and Industrial Capitalism' (1967) 38 *Past & Present* 56; B. Adam, *Timewatch: The Social Analysis of Time* (1995).

⁵¹ The NMWA provides a right to be paid the minimum wage for a variety of categories of work. They each define 'work' as work done 'under the contract' and relate work either to time or output within the framework of that contract.

⁵² This is subject only to specific exceptions in the minimum wage regulations that allow certain periods of time not ordinarily classed as work to be categorized as such for minimum wage purposes. See for example Regulations 30 and 32.

⁵³ See for example the discussions in *Quashie v. Stringfellows Restaurants* [2012] EWCA Civ 1735, at [19], [28]; *Varnish v. British Cycling Federation* [2020] UKEAT/022/20/ILA, at [38]–[42].

⁵⁴ This comes through particularly from the interpretation of the 'wage-work bargain' in cases concerning claims for employment status by apprentices/interns, professional athletes, and 'volunteers', as well as in the case of *Quashie*, where the firm that benefitted from a lap dancer's services argued that the benefit derived was purely incidental to an arrangement in which the lap dancer alone controlled how and how much she danced, with a view to earning money from the

worker's desire to please, the worker's devotion to customers, and/or the worker's passion for the job) or if that benefit is one in which the worker shares (such as deriving pleasure from its production and/or acquiring skills or experience), the benefit will rarely be conceptualized as work and/or the relationship itself will simply not be classed as within the scope of labour law (unless that benefit is deemed to be purely incidental to some other 'genuine' or 'legally recognized' work).

As suggested above, engaging with the historical contexts by reference to which the law's conception of the wage relation and work were forged is extremely important for appreciating the potentially gendered implications of invisible work. This is because, as we saw in the previous parts, these contexts – industrial manufacture and vertically integrated firms/organizations dominated by full-time, regular work at a stable salary – were also contexts that presupposed the availability to workers of a flow of unpaid caring labour. This was a situation that presumed women's economic dependence and subordination to men, and that was actively engineered and supported by the law. These were also contexts that involved forms of work from which women were excluded and/or to which there existed institutional barriers to entry, and that were thereby adapted to the interests and conditions of men.⁵⁵ Most importantly, perhaps, such contexts were also dominated by the production of mostly material commodities, and from which caring labour was largely externalized, performed predominantly on an unpaid basis within the home or by hired domestic servants still not seen as persons to whom the emerging systems of protective labour legislation were relevant.⁵⁶

The fact that caring labour was not widely performed within the organizations by reference to which the law's conception of work was initially fashioned is extremely important when we consider what scholars have shown about the distinctiveness of caring labour and the capacities required to perform it. Thus, as Ferguson, Hayes, and Fudge have argued, caring labour's entire temporality and rationality is distinctive because it is oriented towards the maintenance of life and social bonds rather than the production of commodities.⁵⁷ It is not, then, readily commodifiable in the sense that it cannot be easily reduced to quantitative metrics such as time, effort, and output; in other words, when it comes to care, what matters is not how much labour or how quickly it is provided, but *how*, and with what subjective effects. Because caring labour is inherently unpredictable, open ended, and interactive, moreover, it cannot be readily reduced to the clear contractual prescriptions and prior scheduling and direct management that the law has come to associate with work, given the prevalence of such forms of labour control in factories and vertically integrated firms/organizations. This is simply compounded by the fact that the motivations for performing caring labour, and doing so in a particular way, assume an extremely complex and multi-faceted form; because the work itself implies selflessness, an ability to prioritize the needs of the care recipient, it is deemed inimical to the sort of 'extrinsic' motivations associated with work, which are linked in the law with ideas of employer control.⁵⁸

club's customers. See *Edmonds v. Lawton* [2000] EWCA Civ 69; *Varnish v. British Cycling Association*, id; *X v. Midlands Citizens' Advice Bureau* [2011] EWCA Civ 28; *Quashie v. Stringfellows Restaurants*, id.

⁵⁵ J. Williams, *Unbending Gender: Why Family and Work Conflict and What to Do about It* (2001).

⁵⁶ See E. Albin, 'From "Domestic Servant" to "Domestic Worker"' in *Challenging the Legal Boundaries of Work Regulation*, eds J. Fudge et al. (2013) 231.

⁵⁷ Ferguson, op. cit., n. 7; L. J. B. Hayes, *Stories of Care: A Labour of Law: Gender and Class at Work* (2017); Fudge, op. cit., n. 9.

⁵⁸ L. J. B. Hayes, 'Work-Time Technology and Unpaid Labour in Paid Care Work: A Socio-Legal Analysis of Employment Contracts and Electronic Monitoring' in *Law and Time*, eds S. M. Beynon-Jones and E. Grabham (2018) 179, at 183.

Taken together, therefore, what this and the previous part suggest is that, in addition to the role that the law plays in invisibilizing reproductive labour generally (something that has important consequences for women both inside and outside the labour market), this role itself influences the way in which the law comes to conceptualize work for the purposes of its regulation, producing a distinctive category of invisible work – one that has its own class, and also potentially gendered, implications. While these implications are inseparable from the structurally subordinate role assigned to reproductive labour in the context of capitalism generally, they are also intimately linked with the structural constraints that exist on the capacity for legal discourse to adequately conceptualize and define the social relations that it regulates. So too is it attributable to the nature of a legal process whose individualistic and self-referential lens serves to embed historical assumptions and beliefs within the framework of juridical doctrine that can long outlive the conditions of their emergence.⁵⁹ In this way, gender norms, inequalities, and relations of oppression that have animated forms of work organization in the past are able to exert an enduring influence on the present, even when the initial conditions underpinning them, such as formal restrictions on female labour market participation, have been transcended. In the next part, we explore in more depth how these historical assumptions and beliefs influence the different dimensions and manifestations of invisible work, relating this back to our discussion of existing scholarly contributions to the literature on invisible work in the introduction.

4 | INVISIBLE WORK: DIMENSIONS OF INVISIBILITY

This part explores the category of invisible work in more depth, exposing the different contexts and forms in which it might manifest. While the part's focus is on the implications of this category for society in general, and on the labour market groups with which certain forms of invisible work are associated, it also explains how and why this category can very often have particularly significant implications for women, relating this back to the discussion in the previous part.

4.1 | Invisible work outside employment

The first category of invisible work to consider is work that takes place through forms of working arrangement that, because they lack some of the features traditionally associated with work and the wage relation in the law, tend not to be classed as working relationships for the purposes of labour law.

The first example of such invisible work is 'aspirational work'. This refers to time that is expended for the benefit of firms/organizations not in exchange for a promise of payment but in the hope that it will help to improve one's prospects for paid employment in the future.⁶⁰ This includes a variety of practices, from unpaid internship arrangements⁶¹ to fashion blogging,

⁵⁹ S. Deakin, 'Evolution for Our Time: A Theory of Legal Memetics' (2002) 55 *Current Legal Problems* 1.

⁶⁰ R. Johnke, 'Social Production as Authentic Assessment: Wikipedia, Digital Writing, and Hope Labour' (2020) 45 *Studies in Higher Education* 1015; A. Alacovska, 'Informal Creative Labour Practices: A Relational Work Perspective' (2018) 71 *Human Relations* 1563; K. Kuehn and T. F. Corrigan, 'Hope Labor: The Role of Employment Prospects in Online Social Production' (2013) 1 *The Political Economy of Communication*, at <<https://polecom.org/index.php/polecom/article/view/9>>.

⁶¹ As noted below, an internship is not a legally recognized arrangement. However, for an example of legal treatment of an internship-style arrangement, see *GE Caledonian Ltd v. McClandiss* [2011] Appeal No. UKEATS/0069/10/BI.

video-game modification, and YouTube videography. While none of these examples constitute work inherently,⁶² they are often characterized by the same form of structural economic compulsion that underpins employment, and so assume the form of work in an increasing number of cases. In effect, the structural position of the putative worker is such as to place the firm/organization benefitting from their activities in a position in which they can exercise over workers the unique social power that they enjoy because of workers' wage dependence, in ways that enable them to control the production process and thus to extract a surplus. The legal problem with these arrangements, however, is that they involve what appears to be a 'voluntary' agreement to provide the benefit of one's time for no payment. Unless the courts engage with the structural context in which such agreements are made, therefore, any benefit provided will not be characterized by the sort of compulsion associated in the law with work.

In the context of an increasingly precarious labour market, firms/organizations can, and have increasingly sought to, make obtaining unpaid work experience a condition of future paid employment, empowering other firms/organizations to extract unpaid labour from workers by offering apparently beneficial 'opportunities' to individuals to undertake training and/or obtain experience that will facilitate their access to paid employment in the future. Through these arrangements, these firms/organizations effectively gain access to free labour, and can influence the activities of the individuals providing that labour precisely because they are so highly dependent on these firms/organizations to obtain the experiences/skills that they need to earn money at some point in the future. Yet the highly abstract, astructural lens through which the law conceptualizes work, and identifies the existence of the wage-work bargain that is a prerequisite for recognizing the relationship as involving work, prevents it from taking these wider structural factors into consideration.

A good example of this attitude can be found in the court's approach to unpaid internships. Building on an approach developed in the context of common-law apprenticeships – a context, however, in which the master had historically been under obligations to maintain the apprentice, making questions of wage regulation far less significant than is the case today – the courts have persistently emphasized that any benefit provided to a firm/organization under an arrangement for training and/or education cannot be said to involve work because that benefit cannot be explained by reference to any contractual rights of control enjoyed by the firm/organization, nor to the worker's dependence on that firm/organization to earn the money that they need to live.⁶³ Because there is often no right to payment in the context of many training/internship arrangements, therefore, and because firms/organizations can rely on the subordinate and highly precarious position of interns/apprentices, who are often in competition for a small number of 'privileged' jobs, to influence their behaviour, in the absence of direct contractual rights of control, these arrangements tend not to be conceptualized in the law as involving work, with the result that the benefits that firms/organizations derive from these arrangements are rendered invisible and/or are devalued.

Another manifestation of work that, not being procured through contracts in which contractual rights of control can be implied, tends to be excluded from the scope of labour law are the licensing and royalty agreements concluded in the cultural industries. In these industries,

⁶² S. Jaffe, *Work Won't Love You Back: How Devotion to Our Jobs Keeps Us Exploited, Exhausted and Alone* (2021); Adams and Ruse-Khan, *op. cit.*, n. 36; Jihinke, *op. cit.*, n. 60; K. Allan, 'Volunteering as Hope Labour: The Potential Value of Unpaid Work Experience for the Un- and Under-Employed' (2019) 60 *Culture, Theory and Critique* 66.

⁶³ *Dunk v. George Waller* [1970] 2 QB 163, at [168]; *Edmonds v. Lawton*, *op. cit.*, n. 54; *Revenue and Customs v. Jones & Others* [2014] ICR D43.

firms/organizations have long expected creators to spend considerable time developing a portfolio of work and cultivating a professional profile before they are willing to invest in them and thus pay them for the benefit of works that they will then seek to commercially exploit. In this context, there is thus a temporal gap between the expenditure of the time from which the firm/organization benefits, the performance of productive activities, and the conclusion of the contract by which the benefit of those activities is captured. Despite the fact that these firms/organizations are in a position to take advantage of the unique structural pressures to which wage-dependent creators are exposed in order to extract unpaid labour, depressing creators' pay, this is not an arrangement that the law has recognized as work, because there exist no contractual rights of control over the performance of the productive activity and thus no legal relationship at the point at which work is performed. The law tends to constitute the putative worker as economically independent, because the abstract, astructural lens through which it conceptualizes socio-economic relations cannot recognize the way in which firms/organizations take advantage of structural pressures to influence both the wage that is paid and the value of that which is procured.⁶⁴ The effect of this is to open the door to a devaluation of creative work, as it becomes possible to procure creative work at low cost while at the same time shifting risk and costs onto the shoulders of workers and the various third parties on whom creators are often dependent for practical support. Once again, while both men and women participate in creative work and thus both suffer the disadvantages associated with its invisibilization, because creative work can often be performed at home and on the basis of flexible work schedules, it is a form of work that has become particularly attractive to women seeking to earn a living in a way that is compatible with their unpaid caring obligations.

4.2 | Invisible work inside employment

The second category of invisible work to be considered is work that is performed through a wage relation that is recognized as involving work and as falling within the scope of labour law, but where the scope of the work actually undertaken in the framework of that relation is systematically underestimated for the purposes of applying certain aspects of labour law regulation, such as working time or wage regulation.

The first reason that this might take place is linked to the contractual lens through which the employer's authority is interpreted, and the implications of this when it comes to obscuring the myriad ways in which employers can harness the structural pressures to which workers are exposed in order to encourage apparently 'voluntary' extensions of work, where the voluntary nature of that work tends to deprive it of its status as work in the law. As Gregg has shown, one particularly common way in which this manifests is in relation to corporate social events.⁶⁵ In this context, firms/organizations routinely offer to host various social events that employees are 'invited' but not 'required' to attend, but that function as a mechanism through which to develop professional relations and, ultimately, the sort of professional profile that is conducive to boosting profits and attracting business. Because many firms/organizations take such factors as 'being a team player' and demonstrating loyalty into consideration in recruitment and/or promotion

⁶⁴ *Varnish* supports this conclusion, insofar as the court suggested that no work was provided because what was done was optional. Similarly, in *Quashie*, the court refused to conceptualize the lap dancer's activities as work because the nightclub did not control how or when she worked. *Varnish v. British Cycling Association*, op. cit., n. 53; *Quashie v. Stringfellows Restaurants*, op. cit., n. 53.

⁶⁵ For examples, see M. Gregg, *Work's Intimacy* (2011).

decisions, the pressures on employees to agree to attend such events can be significant. Despite this, the apparently ‘social’ nature of the events and their close relationship with practices of leisure and consumption, as well as their apparently voluntary nature, are sufficient to exclude the time spent in attending such events from the scope of the work to which working time and wage-related obligations attach. The time and effort, or emotional labour, involved in maintaining a particular attitude or appearance, presenting the firm/organization in a positive light, and listening and responding to colleagues’ and customers’ queries and concerns is thus implicitly devalued because it is not recognized in the law as involving (economically valuable) work.

In other contexts, employers can take advantage of the law’s contractual conception of work to encourage workers to ‘agree’ to undertake apparently ‘voluntary’ work duties, effectively extending the scope of the work appropriated by the wage or salary. By framing requests for additional work as ‘opportunities’ for work experience, or by structuring the workplace in ways that encourage workers to undertake more work than is strictly contractually required, employers can appropriate work beyond the legal frameworks that exist to regulate it. One strategy that has become particularly common in the tech industries involves structuring the workplace in ways that encourage workers to spend more and more time at the office, and thus to devote more time to their work than is contractually required, without being instructed to do so by their employer. In the absence of robust employment protections, employers can in this way increase the workloads of their employees notwithstanding formal contractual or statutory working time limits, relying on workers to devote the extra time required to complete all of the work in an attempt not to appear lazy or inefficient to employers whom they are eager to please. A good example of this sort of strategy is that adopted by Google. In some of its offices, Google provides restaurant-quality food, free massages, laundry services, recreational facilities, and opportunities to socialize to its employees, effectively encouraging them to spend more time at their workplace, ‘voluntarily’ extending their working day. The company also provides transportation to and from work in Wi-Fi-enabled vans so that workers can log in and work while on the way to the office, encouraging them to devote time legally conceptualized as non-work to work-related tasks. These strategies thus allow for an implicit extension of the working day beyond the contractual boundaries recognized in the law and social practice, blurring the lines between work and non-work in ways that render much of the work appropriated by firms/organizations ‘invisible’, thereby devaluing it.⁶⁶

4.3 | Invisible work: the gap between contractual authority and legally recognized work

It is not simply that invisible work exists in the gap between the scope of the contractual authority recognized by the law and the scope of the structural power that employers can exercise over workers to influence the magnitude of the benefit that they procure through the wage relation. Invisible work also exists in the gap between the scope of the contractual authority that the employer exercises, and that the law allows employers to exercise, and the scope of the benefit captured by the employer that the law recognizes as work. As explained previously, while the law associates work with the scope of the control that the employer enjoys by virtue of contract, it looks for evidence of that control in highly particular, ritualistic, and reified ways. It thus equates work with activities

⁶⁶ J. A. English-Lueck and M. Lueck Avery, ‘Intensifying Work and Chasing Innovation: Incorporating Care in Silicon Valley’ (2017) 38 *Anthropology of Work Rev.* 40.

or tasks that are required expressly in the contract, formal job descriptions, or express directions; activities or tasks performed within employer-owned/-controlled spaces; and activities or tasks for which the nature and scope of the benefit can be explained entirely by reference to actions and decisions of the employer that are authorized by contract, rather than to any intrinsic motivations of the worker.

We thus saw in the introduction how many scholars have noted the importance, in contemporary capitalism, of workers managing their emotions while at work, listening and interacting with customers and clients, and responding to their concerns and questions.⁶⁷ Indeed, employers often discipline women workers if they fail to exhibit the right sort of attitude or demeanour towards customers, whereas this is not routinely the case with men.⁶⁸ At the same time, female workers are often relied upon to perform various forms of emotional labour that are essential for sustaining the profit-making activities of the businesses, such as listening and responding to concerns and complaints by customers and colleagues and/or offering advice – again, in ways that are not true of men.⁶⁹ Yet these activities are rarely reflected in formal job descriptions, nor are they something that employers schedule or direct in advance. As a result, they would not be acknowledged by the legal system or by employers as part of the work for which workers are paid, nor as part of the work that is taken into consideration when entitlements under the working time regulations are calculated.⁷⁰

Given the open-ended, unpredictable, and processual nature of caring labour, moreover, and its irreducibility to clear, discrete, contractual tasks, the law tends to overlook the true scope of the time and effort entailed by caring labour, reducing the scope of any rights to payment and, potentially, devaluing that work relative to types of work that can be better captured in these objective, reified forms. Thus, in *Cumbria County Council v. Dow*, Lord Justice Elias held that a female social carer could not make a valid equal pay comparison with a male worker in receipt of a productivity bonus (which she was denied) because care work is not a form of work that can be evaluated in terms of productivity at all, and so cannot be incentivized by a bonus calculated on the basis of such productivity.⁷¹ In effect, he argued that, because care work is not productive, it cannot be evaluated in the same ways as work commonly associated with, and/or numerically dominated by, men – in this instance, the work of road workers and grounds maintenance workers. He went on to argue that ‘[a] care worker who works properly is subject to the demands and requirements of the patient and cannot sensibly dictate the speed of working’.⁷² Because the law has developed its tools for evaluating and measuring work by reference to forms of work dominated by men, and from which care-related practices have largely been externalized, then, it tends to

⁶⁷ Hochschild, op. cit., n. 2; B. Rickett and A. Morris, ‘“Mopping Up Tears in the Academy”: Working-Class Academics, Belonging, and the Necessity for Emotional Labour in UK Academia’ (2021) 42 *Discourse: Studies in the Cultural Politics of Education* 87; R. J. Steinberg and D. M. Figart, ‘Emotional Demands at Work: A Job Content Analysis’ (1999) 561 *Annals of the Am. Academy of Political and Social Science* 177.

⁶⁸ Karlsson, op. cit., n. 4; A. Rafaeli et al., ‘Navigating by Attire: The Use of Dress by Female Administrative Employees’ (1997) 40 *Academy of Management J.* 9.

⁶⁹ E. J. Hall, ‘Smiling, Deferring, and Flirting: Doing Gender by Giving “Good Service”’ (1993) 20 *Work and Occupations* 452; S. M. Park, ‘Research, Teaching, and Service: Why Shouldn’t Women’s Work Count?’ (1996) 67 *J. of Higher Education* 46; M. Famborough, ‘Great Expectations: Women PhD Students with Women Faculty’ (1998) 7 *Women in Higher Education* 23.

⁷⁰ A. Forrest, ‘The Industrial Relations Significance of Unpaid Work’ (1998) 42 *Labour/Le Travail* 199, at 208–209.

⁷¹ *Cumbria County Council v. Dow* [2008] IRLR 91.

⁷² *Id.*, at [145].

underestimate the scope of the time and effort involved in forms of work that are inherently open ended, interactive, and diffuse, such as care.

We see this approach in another aspect of the legal framework too, in the context of minimum wage regulation. In *South Holland v. Stamp*, for example, the court stated that when a carer is at home on call but sleeping, washing, entertaining, or carrying out domestic chores, the time does not qualify for national minimum wage payments.⁷³ This was so notwithstanding that the contract required a continuous 103-hour service, because ‘time spent by the respondents when they are not carrying out their contractual duties required of them under the contract cannot be counted’.⁷⁴ As Hayes argues, ‘this approach assumes that care can be stripped of the emotional labour which lies at its core since such labour is incommensurate with the idea of caring according to a predetermined list of tasks’.⁷⁵ This comes through only too clearly from the court’s dismissive comment in another minimum wage case, *Walton v. Independent Living Organization*, that, when not providing ‘active care’ – that is, the duties listed in the contract – the carer could ‘please herself as to what she would do’.⁷⁶

A more recent example of this problem can be seen in another minimum wage case, *Royal Mencap Society v. Tomlinson-Blake and Shannon and Rampersad & Another*.⁷⁷ Here, the court rejected the care workers’ claim for the minimum wage in relation to sleep-in shifts: shifts during which they were contractually required to be at the workplace, but where they were expected to sleep, and only wake and respond to the patients’ needs as/when required. While the court acknowledged that the employer did derive benefit from the workers being on the premises, it nonetheless refused to see such apparently inactive labour as work for the purposes of the national minimum wage. Instead, it argued that, had Parliament intended such shifts to have been covered by the regulations, it would have made this explicit.⁷⁸

Despite framing the outcome in terms of Parliamentary intention, this decision indicates a reluctance by the courts to class the sort of emotional labour involved in remaining attentive to the needs of others as work. Had it done so, these shifts would have come, relatively straightforwardly, within the scope of the core provisions relating to the payment of minimum wages for work. Instead, by excluding the possibility that time spent sleeping, in whatever context, might be work, the only other provisions that could bring the shifts within the scope of the regulations were Regulations 30 and 32, which provide for the recognition of certain forms of non-work as work for the purposes of claiming the minimum wage. For these provisions to apply, however, the worker must have been waiting for work, at or near the place of work, and awake for the purposes of working. The court argued that these provisions could not be interpreted to cover sleep-in shifts.

While this conclusion seems to follow straightforwardly from the statutory wording (which emphasizes the need for the worker to be awake), for the decision to turn on the interpretation of these provisions at all, the courts already had to have concluded that ‘keeping a listening ear out’ and remaining available to respond to what are inherently unpredictable needs was not work.

⁷³ *South Holland v. Stamp*, op. cit., n. 45.

⁷⁴ *Id.*, at [37].

⁷⁵ Hayes, op. cit., n. 57, p. 140.

⁷⁶ *Walton v. Independent Living Organisation* [2003] EWCA Civ 199, at [3].

⁷⁷ *Royal Mencap Society v. Tomlinson-Blake and Shannon v. Rampersad & Another (T/A Clifton House Residential Home)* [2021] UKSC 8.

⁷⁸ *Id.*, at [35].

Thus, as in *South Holland*, the court in *Royal Mencap Society* started from a narrow conception of work in terms of ‘active’ duties – those that could be predicted in advance and thus articulated as explicit requirements – rather than as something that may or may not be required, depending on the patients’ situation and how the circumstances evolve. In other words, the case turned on an implicit conception of work that could not account for the unique properties of care.

It is not only the time, effort, and capacities involved in managing and controlling emotions and tending to others’ needs that the law tends to obscure, however; the same is true of the time, effort, and costs⁷⁹ involved in maintaining a particular appearance – the sort of ‘aesthetic labour’ alluded to in the introduction. While these demands are made more often of women than men, even when they are made of both, they impose a greater burden on women, because they often involve meeting cultural appearance standards that presuppose that women, unlike men, have more time available to them to spend on their appearance. Despite the fact that employers’ expectations of female workers often impose on them financial, time, and effort demands far in excess of those applicable to men – such as purchasing and applying expensive beauty products, applying elaborate make-up, and purchasing certain brands of clothing⁸⁰ – the law tends not to recognize these demands as pertaining to work. As such, when female workers have sought to challenge as discriminatory the appearance demands made of them by their employers, such as when this required the regular application of nail varnish, the courts have simply dismissed this as ‘insignificant’ or ‘de minimis’, refusing to recognize that there was any detriment imposed on female workers, effectively obscuring the costs, time, and effort involved in meeting the employers’ appearance requirements.⁸¹

Similarly, despite the different social expectations relating to requirements of ‘smartness’ for men and women, the courts have also tended to assume that a requirement that an employee be ‘presentable’ or ‘smart’ applies equally to men and women,⁸² obscuring the additional costs, time, and effort that women must expend to uphold highly gendered, cultural standards concerning their appearance. The result of this attitude is that while maintaining a certain look that involves the careful application of make-up, styling of hair, and choice of clothes is often treated as an implicit job requirement for women in many sectors, and is often taken into account in evaluations of job performance, the time, effort, and costs involved are not recognized as work in the law, and so become something in respect of which women can be disciplined but for which they are not paid.⁸³

While the above constitutes just a small subset of the examples of invisible work that can be identified by reference to distinct aspects of juridical doctrine, they demonstrate the distinctive contribution that the law makes to the invisibilization of the forms of work identified in sociological literature as vulnerable to such a process. In doing so, the above can help us to appreciate the significance of the structure of legal discourse, and the historical assumptions embedded in it, when it comes to understanding how invisible work impacts upon socio-economic outcomes generally, and for women in particular.

⁷⁹ M. Isser, ‘The Grooming Gap: What “Looking the Part” Costs Women’ *In These Times*, 2 January 2020, at <<https://inthesetimes.com/article/grooming-gap-women-economics-wage-gender-sexism-make-up-styling-dress-code>>.

⁸⁰ Jaffe, *op. cit.*, n. 62, p. 108.

⁸¹ *Murphy and Anor v. Stakis Leisure Ltd* [1989] ET Case No. S/0534/89.

⁸² *Wilson v. Royal Bank of Scotland Plc* [2010] ET Case No. 27869/86.

⁸³ Forrest, *op. cit.*, n. 70, p. 208.

5 | CONCLUSION

This article has barely scratched the surface when it comes to exploring all of the forms of invisible labour that contribute to capital accumulation, or the complex ways in which the law facilitates the devaluation of certain practices and capacities and contributes to the gender and racial oppression that is complexly bound up with capitalistic relations of production. Having said this, by bringing a legal perspective to bear on debates about invisible labour, it has made at least three key contributions to the literature.

First, the article has shown the significance of the law to the process by which reproductive labour comes to be invisibilized, and how this not only disadvantages women but also serves to facilitate a diversion of resources (time and money) towards profit making and value production, and away from the life-sustaining practices required to support them.

Second, the article has illustrated how the law's role in providing the conditions in which labour can function as work – to produce a surplus for a firm/organization – places constraints on the way in which that work comes to be conceptualized for the purposes of regulating it, creating a distinct category of invisible labour – namely, invisible work. This category of invisible work not only produces its own distinct, gendered effects, it also exacerbates the inequality between labour and capital by increasing the amount of labour that can be appropriated as work relative to the amount of money that is allocated to its reproduction.⁸⁴

Third, in relating the different dimensions and manifestations of this category of invisible work to distinct aspects of the law's conceptualization of work and the wage relation, the article has allowed us to appreciate those aspects of the conceptualization that are structural and systemic, and those that are historical and contingent, as well as the complex interaction between them. In this way, the article can help to facilitate attempts to 'revisibilize' that work, and potentially, to develop techniques with a view to better recognizing it within the framework of labour law as well.

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⁸⁴ Fraser, op. cit., n. 19.