

FIRST ANNUAL LECTURE IN THE
LAWS OF SOCIAL REPRODUCTION



VISIBILITY AND VALUE AT WORK

The Legal Organisation of Productive and Reproductive Work

by Kerry Rittich



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“What legal scholars of a critical bent would highlight, indeed relentlessly investigate, is how much is going on with the distribution of power and resources at the level of legal rules, practices and institutions, and how indirect yet extensive their impact can be on questions of social reproduction. Whether it concerns private law rules, family and commercial laws, criminal, administrative, tax law and beyond, our task is to trace, expose and explain how complex, even counter-intuitive, their effects, positive as well as negative, can be. This way, we can figure out what matters, where to move things.”

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Feminists have long troubled the status of reproductive work, arguing for the recognition of its value and the sharing of its burdens. International initiatives like the new ILO Domestic Workers Convention seek to de-exceptionalise domestic work by giving presence, voice and power to millions of 'invisible workers', while support for unpaid work is now identified as a target of the Sustainable Development Goals. Yet the simultaneous endorsement of policies and practices of market entrepreneurialism, favoured to advance development and gender empowerment, risks intensifying distinctions between paid and unpaid workers, along with the economic and political inequality that travels with it. In this context, we need to shift our gaze to how differences between productive and reproductive work are made and maintained. Here, I discuss four ways to think about legal rules: as behavioural incentives; as devices to allocate resources, risks and powers; as tools to (re) shape the domains of home and work; and as norms that legitimate hierarchical social and economic arrangements. Examining law in this way reveals how the flow of risks and resources, burdens and benefits is organised across home and market and provides a window on the mechanisms by which productive and reproductive work are distinguished, shaped and valued. Making a wide range of economic as well as social laws and policies visible as part of the law of social reproduction, this legal analysis provides a bridge to the work of activists and scholars in other disciplines and helps identify perils and chart future possibilities for those engaged simultaneously in unpaid and market work.



SPEAKER:

Professor Kerry Rittich, *University of Toronto*

Kerry Rittich is Professor of Law, Women and Gender Studies, and Public Policy and Governance at the University of Toronto. She writes in the areas of labour law, international institutions and global governance, law and development, and gender and critical theory. Her publications include *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (Kluwer Law International, 2002); (with Joanne Conaghan), *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford University Press, 2005); 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social' in David M. Trubek and Alvaro Santos (eds.) *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006); 'Black Sites: Locating the Family and Family Law in Development' (American Journal of Comparative Law, 2010); 'The Right to Work and Labour Market Flexibility: Labour Market Governance Norms in the International Order' in V. Mantouvalou (ed.) *The Right to Work: Legal and Philosophical Perspectives* (Hart, 2015). She has been the Mackenzie King Visiting Professor of Canadian Studies at Harvard University, Visiting Professor at the Watson Institute for International Studies at Brown University, and Professor and Academic Director of the Centre for Transnational Legal Studies, London.



CHAIR AND MODERATOR:

Professor Bina Agarwal, *University of Manchester*

Bina Agarwal is Professor of Development Economics and Environment at the Global Development Institute at the University of Manchester in the United Kingdom. She has previously been Director and Professor, Institute of Economic Growth, Delhi, India; President, International Society for Ecological Economics; President, International Association for Feminist Economics; and Vice President, International Economic Association. Bina's 16 books and over 86 papers cover varied subjects: property and land rights, agrarian change, environmental governance, law, and poverty and inequality; primarily written from a political economy and gender perspective. Her prize-winning book *A Field of One's Own* (Cambridge University Press, 1994) placed women's land rights on the global policy agenda. In 2005, she also led a successful civil society campaign to address the gender inequalities of India's inheritance law, as applied to Hindus. Her many awards include a Padma Shri from the President of India in 2008; the Leontief Prize 2010 'for advancing the frontiers of economic thought'; the Louis Malassis International Scientist Prize 2017; and the International Balzan Prize 2017.

Introduction

Feminists have long highlighted the labour we call 'reproductive', how it remains hidden in plain sight even as it is central to all of social, economic and cultural life. Although Covid-19 is bringing the centrality of reproductive work 'home', as it were, even to those with no independent interest in these questions, a central issue remains: Why is it so hard to make this work visible, how is it not the work that matters, why does it materialise as an issue only when, and to the extent that, it affects the work that does count? And why do marginal forms of work like sex work and care work become things either to be ignored or transformed into 'real' work?

In a series of recent talks and papers, Nancy Fraser has attempted to locate the dilemmas of reproductive work in the crises and contradictions of capitalism, specifically, capitalism's relentless drive to accumulate surplus value. In fact, she locates reproductive work at the centre of the contemporary feminist agenda. As she and her coauthors Cinzia Arruzza and Tithi Bhattacharya put it in their manifesto, *Feminism for the 99%*, "Gender oppression in capitalist societies is rooted in the subordination of social reproduction to production for profit" (Arruzza et al, 20), and any feminism that is antiracist and anti-imperialist must, perforce, be anti-capitalist too (Arruzza et al, 42). We do indeed appear to be at a crucial juncture in the organisation of economic processes and relations: think massive inequality and its spillovers. And there is no doubt that gendered hierarchies at work are deeply intertwined with, and in some senses incomprehensible apart from, colonial histories and practices of racism.

The demands of pursuing such a convergentist project are considerable. I am going to come at these large questions from a different starting point, suggesting that we attempt to dislodge and denaturalise the distinction between productive and reproductive work. My sense is that if the task is recognition of the value of the work of social reproduction, countering the devaluing of those who do it at the same time, our continued attachment to its distinctiveness is now as much a burden as a benefit.

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The premise is that not only are reproduction and production deeply intertwined, but that differences between them are made as much as they are found. Furthermore, any settlement of the boundary between them – what we think of social reproduction, what we think belongs to the world of economic production – is moveable and contestable.

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The distinction detaches the dilemmas of social reproduction from some of its important roots in the 'productive' economy. It permits crucial players, those whose main concern is economic growth, to avoid engagement with social reproduction – its benefits, costs, and structure – even as their decisions generate continual problems for those who do its work. And it leaves legal and institutional projects which matter to the organisation of work of all kinds out of view. Bottom line – the investment in separate domains risks supporting a range of practices in the realms of governance and production that we may want to disrupt and dismantle.

Although I share certainty that the organisation of economic activity is critical to social reproduction, and vice versa I want to go beyond and trouble the distinction between production and reproduction itself. The premise is that not only are reproduction and production deeply intertwined, but that differences between them are made as much as they are found. Furthermore, any settlement of the boundary between them – what we think of social reproduction, what we think belongs to the world of economic production – is moveable and contestable. It is historical – a matter of settled practice. But it is also ideological and institutional, how we think about the world, but also how we design the world through organisations and practices – an important realm of which is legal. I will reflect on how we make reproductive work, how we (de)value it, and how we do so through law. Covid-19-provoked crises of care, the Black Lives Matter movement, and the confirmation of deep, persisting ethnic and racial fissures in the workplace all serve as reminders of the pressing need for such an investigation.

I will suggest four propositions or properties of law – by extension, four ways of thinking about the work of law – as a path to exploring how we make, value, distinguish and change productive and reproductive work. I will further suggest that we take a very broad definition of law – looking not just at formal rules and institutions but at other practices and mechanisms through which reproductive work is effectively governed. Because of analytic and observational parallels in fields like sociology and economics, my sense is that this investigation provides a natural bridge to interdisciplinary work, as well as a way to think about strategy and change at the practical and political levels. Let me set the stage by looking at the transnational landscape around development, gender empowerment, and work, along with legal initiative to regulate domestic work.

Social and Economic Development: The Path of The Market

I find it helpful – well, essential – to situate questions around social reproduction within current visions of development and their associated social projects. This is an unfolding landscape in which greater entrepreneurialism fuels both growth and social progress. Planners and policymakers at every level, domestic and international, are filled with dreams of transforming their citizens into high-value market actors, or at least entrepreneurial workers, all part of their aspiration to foster development by connecting populations and markets to transnational circuits of production, investment, transaction and consumption.

As everyone knows, empowering women and the feminisation of labour markets are now at the centre of these dreams. At the same time, for over two decades, development technocrats have sought to address poverty and other ‘social’ dimensions of development by market-centred techniques such as formalising labour markets and empowering the poor through financial inclusion, microcredit schemes and the extension of the rule of law (Rittich, 2006; Commission on Legal Empowerment of the Poor, 2008). The feminisation and formalisation of labour is, we are told, at once the salvation of women, the catalyst to greater gender equality, and the royal road to modernisation, the way to increase growth while simultaneously reducing levels of ‘dependency’.

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Flourishing undisturbed behind these initiatives is the enduring image of the unencumbered worker. The shadow expectation remains that women, like men, will direct their primary attention to paid work, that reproductive tasks both can and will be subordinated to such work, and that any necessary household tasks will be arranged – through some combination of family labour and the purchase of market services, or perhaps by magic – to enable household members to maximise returns in the market.

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This reciprocal socialisation of economic development projects and economisation of social welfare objectives is, I think, an important part of the backdrop of any discussion about the future of social reproduction. The merger of social justice with economic objectives has placed the figure of the entrepreneurial woman at the centre of development, but it has simultaneously problematised the work of social reproduction. Flourishing undisturbed behind these initiatives is the enduring image of the unencumbered worker. The shadow expectation remains that women, like men, will direct their primary attention to paid work, that reproductive tasks both can and will be subordinated to such work, and that any necessary household tasks will be arranged – through some combination of family labour and the purchase of market services, or perhaps by magic – to enable household members to maximise returns in the market. And whether the subject is gender equality, increasing jobs or advancing innovation at work, the policy prescription is almost always the same: more legal entitlements to empower the private sector (World Bank, 2012; World Bank, 2013; World Bank, 2019).

For example, the Sustainable Development Goals (United Nations Department of Economic and Social Affairs), the world's global social project, propose that to “achieve gender equality and empower all women and girls”, Goal 5, we “recognise and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household”. Yet consider how this goal might intersect with Goal 8, which aims to promote “sustained, inclusive and sustainable growth, and full and productive employment and decent work for all”. More specifically, look at the targets, by which the goal is to be achieved:

- “Sustain per capita economic growth in accordance with national circumstances and, in particular, at least 7 per cent gross domestic product growth per annum in the least developed countries.”
- “Achieve higher levels of economic productivity through diversification, technological upgrading and innovation, including through a focus on high value added and labour-intensive sectors.”
- “Promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalisation and growth of micro-, small- and medium-sized enterprises, including through access to financial services.”

As these targets make clear, the engine of progress – and remember this is social

progress, the future of work – is the inclusion of more and more people in high-value, high-productivity, market activity. In other words, *not* the work of social reproduction.

What assumptions about unpaid work travels with this vision? That people – families, women – can do it all, if only unpaid work is shared by men (Bedford, 2009)? That enhanced public services will relieve or compensate the burdens of non-market work? That some forms of work should just be abandoned? These are risky propositions, especially as legal rules, institutions and social policies designed to lessen the burden of securing market income have been distinctly out of fashion. Indeed, policies to advance growth and innovation might aggravate the dilemmas of social reproduction, undercutting the gender ‘empowerment’ that is its promise.

Production and Reproduction: Troubling the Distinction

This heightened visibility of women within the circuits of global production has had opposing effects, both liberating and disciplinary. It has reset the horizon of possibility; women can, in theory, do many activities that were formerly closed to them. But in the name of development and now empowerment too, women are subject to policy interventions nudging, or coercing, them to become ever (more) productive market actors. All this has made the *actual* work that women do, both inside and outside the market, in households and in informal settings, paradoxically more difficult to see.

Labour at the edges of and beyond the market poses immense conceptual and taxonomic challenges: challenges of characterisation (is it work, care or leisure?), valuation (because there may be no market price, or because it is part of a grey or illicit market) and measurement and scope (because there may be no clear borders with other activities such as household consumption). Although it is often ignored or undervalued as a result, the very presence of women at the centre of markets calls into question precisely how and why this ‘reproductive’ work should still be distinguished from productive work. And it raises the question, whose purposes does this distinction serve?

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I propose we start by dismantling the distinction. Here’s the point of entry: there is no natural, necessary, non-normative, transhistorical or pre-political distinction between production and reproduction (Rittich, 2002). While the terms often track the distinction between household and market labour, even within industrialised societies the case of domestic labour confirms that this is not invariably true. Production and reproduction don’t refer to fixed domains or social spaces, nor do they encompass specific tasks. Despite recognizable – even monotonous – similarities across contexts, work arrangements and the allocation of tasks are subject to a lot of variation. At the end of the day, their classification only matters to the extent that it contributes to how work is organised and its burdens and benefits are distributed. The track record so far is not good.

Feminist economists, sociologists, social theorists and activists have made an ironclad case that reproduction and production are functionally entwined, documenting how much productive activity depends on the functioning of the 'reproductive' economy, providing food, looking after the kids, maintaining the house, etcetera, and how much labour is involved (Dalla Costa and James, 2012; Picchio, 1992; Elson, 1990; James, 2012; Federici, 2012). They have also observed that, despite hopes and claims to the contrary, gendered norms in respect of unpaid/reproductive work are notably sticky: women continue to do much or most of it, even when they are engaged in 'productive' work.

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...economic rules may encode, or advance, visions and forms of social life, and by allocating resources and powers among economic actors, profoundly reshape 'reproductive' tasks and burdens as well.

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What would critical legal scholars add? That the disadvantages now associated with reproductive work are neither natural nor inevitable; rather we have made them, in and through law (Conaghan and Rittich, 2005). I would go still further: we make the distinction itself through law and policy. It is time to insist not just on the value of care work but to flip the lens and make institutional arrangements around productive work – such as the rules designed to advance growth and efficiency in the market – central to the question of social reproduction. Reproductive work is complexly nested within larger economic arrangements, and macro level reforms often drive change lower down (Rittich, 2002; Rittich, 2010). This means we have to equally resist the bifurcation of laws and policies, their classification as either 'economic' or 'social'. If social reproduction is part of realm of production, then we need to see economic rules and policy as part of social policy too. The argument for doing so is basic: economic rules may encode, or advance, visions and forms of social life, and by allocating resources and powers among economic actors, profoundly reshape 'reproductive' tasks and burdens as well. If we need to place production and reproduction within a common frame, finding ways to disrupt present categories at the same time as we trace the work that they do, one way of doing so is to notice how much present arrangements are a result of prior decisions of law and policy. Let me get into this topic by briefly discussing a form of work that is emblematic of reproductive work yet, because it is also market work, problematic: domestic work.

ILO Convention on Domestic Work

Although international agreements on contentious issues at work do not fare especially well at the moment, a landmark agreement was concluded in 2011 at the International Labour Conference in Geneva, the Domestic Workers Convention. Domestic work is marked simultaneously by its magnitude – millions, mostly women, are engaged in this work, and have been for a long time; strange invisibility, despite its daily, indeed familial, presence; significance, to human, social and cultural life but to broader economic life as well; and legal exceptionalism, defined as normative and symbolic differentiation that generates material and symbolic disadvantage for the workers involved (Halley and Rittich, 2010). This exceptionalism is related to the routine denial that domestic work is in fact 'work' like any

other. Domestic work is also marked by specificity – it is ‘work like no other’. It occurs in ‘privatised’ locales, the home; it is covered by its own normative codes; it subjects workers to unusual isolation; and it confers on their employers’ extraordinary amounts of control, which domestic workers experience as unparalleled constraints both within and beyond their working lives. Finally, it is marked by status degradation: in most if not all states, domestic work is a site at which racial, ethnic, and gender differentiation, discrimination and disadvantage all converge.

The Convention seeks to end the longstanding invisibility and exceptionalisation of paid domestic work, bringing domestic workers in from the cold, as it were, and under the tent of labour and employment law. The fundamental aim is simple: to standardise the terms of work and improve them, by ensuring that domestic workers enjoy basic or ‘core’ labour rights (ILO, Declaration on Fundamental Rights at Work, 1998) and have access both to ‘normal’ workplace rules and remedies and to protections that are responsive to characteristic predicaments and abuses, such as subjection to violence and exploitation by their employers. A reading of the terms of the Convention confirms that for domestic workers, even the most basic workplace rights are in doubt, namely the entitlement to know the actual terms of work and the right to have those terms enforced where the work is performed (Articles 7 and 8). In specifying the right to reside, move freely, and keep control of passports and identity documents (Article 9), the Convention also confirms the extent to which such workers are effectively unfree.

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The Convention represents a victory at multiple levels, not least because of the central role played by domestic workers in its design and promulgation. Yet it is well-recognised by workers and their advocates that domestic work is only partly regulated by formal law, with the ‘real law’ of household work often expressed in informal norms and codes.

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The Convention represents a victory at multiple levels, not least because of the central role played by domestic workers in its design and promulgation. Yet it is well-recognised by workers and their advocates that domestic work is only partly regulated by formal law, with the ‘real law’ of household work often expressed in informal norms and codes (Blackett, 2019). The fundamental question – will domestic workers be better or worse off as a result – turns on myriad rules, policies and practices that the Convention itself does not touch. For everywhere, domestic work turns out to be nested in other social and economic arrangements, its terms and conditions affected by domestic workers’ other income-generating options as well as the circumstances and resources of those who employ them. Those arrangements, in turn, are related to, and affected by, a wide range of other laws, policies and practices, formal and informal, domestic as well as international.

The pervasive claim that domestic workers are ‘one of the family’ that their employers are not really employers throws into sharp relief the troubled, unstable border between work and care (anything but real work here!), signposting a general, unsolved issue surrounding the ‘incomplete revolution’ of the feminisation of paid work (Standing, 2009).

The Convention does not touch unpaid domestic work. Like all non-market work, such work remains beyond the reach of labour law, even though it is well-recognised that the status of *paid* domestic work is inseparable from its unacknowledged value outside the market. So *where* are the rules regulating social reproduction, and what do they have to do with its recognition and value? This complex, interesting and critically important question takes us to very basic questions about law.

Locating Law in Social Reproduction

One standard view sees legal norms and institutions as setting the ground rules of exchange among market actors. Labour standards and employment laws, for example, modify otherwise neutral private law rules for the exchange of labour services by setting the minimum standards for employment contracts. Associational rights and collective bargaining laws protect workers' rights to aggregate their power and thus enhance the chance that the resulting bargains will work more in their favour. Other laws, such as human rights law, seek to place certain forms of labour such as forced labour and child labour out of bounds altogether, while setting norms of non-discrimination in hiring and the terms and conditions of work. We could include in the list of relevant laws criminal, vagrancy and licensing laws that allow authorities to police economic activities falling into the grey or illegal zone. Others might see the organisation of social reproduction as part of the underlying class structure or an expression of the relations of production of a given society. Under either view, law is external to questions of social reproduction. The fundamental source of these relations lies elsewhere, in society, culture or political economy, for example.

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The picture looks different through a critical lens; many of these assumptions are reversed. Critical feminist legal scholars share the suspicion, if not certainty, that the liberal commitment to human rights will not – cannot – on its own perform the hard work of restructuring economic arrangements that the recognition of social reproduction entails. Instead, drawing both on current research and on a long tradition of legal thought developed during earlier moments of economic and social convulsion (Davis and Klare, 2019), all catalysed by industrialisation and the consolidation of market power not unlike the present moment, we take it as axiomatic that legal rules don't just set the ground rules for social and economic arrangements in neutral fashion; instead, they are central to the very construction of the disparate powers of social actors. Figuring out precisely how they configure those powers and with what effects in different contexts is indispensable to uncovering the laws of social reproduction (Conaghan and Rittich, 2005).

Law is an important part of how we constitute – and alter – the spheres of production and reproduction (Rittich, 2002). Put differently, law is a somewhat independent variable

within political economy, including the economy of social reproduction. Legal rules are how we distinguish production and reproduction, how we value (and devalue) different activities, and how we empower, and disempower, actors within the economies of the household and market. Think of law as organising the powers of actors and the flows of resources within the market and the household and across any boundaries between them. For this reason, legal rules are deeply implicated in the *making* of those boundaries.

Let me try to distil this into four propositions about what legal rules do, all of which have a significant bearing on the terms and organisation of social reproduction. By making visible what is acting on the work of social reproduction, these insights help open up the possibilities of reorganising it. Thinking about legal rules from these different angles helps move beyond the usual proposals to address paid and unpaid work: more labour standards, more human rights, more criminal law, or even more publicly provided childcare. This exercise also suggests how legal entitlements that are mostly ignored might turn out to matter to questions of social reproduction. This, in turn, helps illuminate where plans to promote more market engagement for women might run up against the burdens and benefits of social reproduction, especially if we don't seriously rethink how these burdens and benefits operate at the same time.

A) Legal Rules as Behavioural Incentives

Legal rules are not just social norms backed by the power of the state. Depending on how they are set, they act as incentives to engage in some behaviour and desist from other. They set both penalties and benefits for action and inaction; as Oliver Wendell Holmes observed in his 'bad man' theory of the law, prohibiting some activities, they effectively license others (Holmes, 1897).

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In the realm of social reproduction as in the world of production, it is useful to think of legal rules as bargaining endowments. Parties are making deals with each other, settling arrangements about how things will work at home and at work – who does what, who gets what, what they must put up with, and where they can push back – and they are doing so all “in the shadow of the law” (Mnookin and Kornhauser, 1979). That is, they are bargaining with a view to their exit options and to what will happen if they don't reach an agreement – think divorce or job loss. Who will be in a stronger position in the course of negotiations, who can hold out for a better deal is not only a matter of whose position will be backed up by law. It is also related to their other options, options that are also structured by law. Take the home: if you have a domestic partner, what do they contribute in the way of labour and resources? This will likely affect whether you stay or go. At work: if work is bad, can you generate income by other means? Do you have constraints that will prevent you from taking

up different work? For example, do you have to look after the kids? Would you have to move, or be away from home?

B) Legal Rules as Devices to Allocate Powers, Immunities, Risks, Benefits

There is a web of rules acting on these decisions and choices, all of which have something to do with who gains and who loses; as we say, legal rules have distributional properties and generate distributional consequences. One reason is that all factor endowments are also legal endowments: put simply, resources derive their value, in part, from the legal entitlements that are attached to their acquisition and use. Even when they are in the background and not visible at all, those rules can profoundly affect the terms of the deal. (This is why, in the end, economic rules can turn out to be social policy too.) For example, property law, criminal law and tax law all might affect the value of your business, influencing whether you operate your business formally or informally. They might also affect where you set up your business – close to, or in, your house, for example, or in a separate locale. They may affect how much time you devote to your business and thus how ‘productive’ (or not) you can be.

Foreground rules, those acting directly on your work or business, of course matter too. If you decide to become an ‘entrepreneur’, for example, can you deduct the costs of your childcare as a business expense? Or, as the Supreme Court of Canada determined (*Symes v. Canada*), will this be treated as an individual or household expense for tax purposes? It may well make a difference to your decision. Do you have access to job-protected maternity or parental leave, and is such time ‘off work’ covered by employment insurance or otherwise compensated? This may affect everything from the number and timing of your children to whether you work in the labour market in the first place. Can your employer classify you as an independent contractor and avoid the costs otherwise associated with employment, a huge issue as employers seek more ‘flexible’ work arrangements in the name of efficiency and greater productivity? If so, your deal will look different; again, depending on your options, you may make other decisions about both home and work.

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...every time a legal right or entitlement is recognised or created, the law is putting a thumb on the scale of one of the parties in a dispute.

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A good way to begin to unpack the distributive properties of law is with the observation that legal rules are relational; reciprocal effects are inherent in their structure and operation. As Hohfeld explained in his classic taxonomy of ‘jural relations’ (Hohfeld, 1913), legal entitlements work in pairs: to give someone a legal right, power or freedom to do something, including an immunity from liability or prosecution, is to place some other party under a legal disability, constraint or obligation: the law either creates a duty to that person or curtails others’ ability to stop the person from doing something that may harm them. For to give one party the power to act or legal protection from some harm or event is to create legal exposure or risk for others to that very thing. Put simply, every time a legal right or entitlement is recognised or created, the law is putting a thumb on the scale of one of the parties in a dispute.

The key, the thing to remember here, is that entitlements are not given in nature, nor

are they inherent in the rule of law. Rather, who should have what entitlements, and to what extent, are often the very questions to be answered (Singer, 1988). Some rules will seem obviously problematic – as when women don't have the right to hold property. But formally equal access to rights is not the end of the story; how rights are designed and who they empower may matter just as much.

As a rule, employers or buyers of labour services set the terms of the bargain. Put otherwise, there is no real 'bargaining' going on between the parties.

One main argument for property rights, for example – 'property rights must be protected' to encourage investment – says nothing about how property entitlements should be set. We may not see the way that property and contract laws currently allocate freedoms, immunities, powers, and exposures as a problem (although we might). But even where we see the legal rules as basically neutral – that is, we don't see them as tilting one way or the other in general – or necessary, for example to secure the basis of economic growth, there are contexts in which they are 'part of the problem', and one of those contexts is work. It has long been known that as a rule, employers or buyers of labour services set the terms of the bargain. Put otherwise, there is no real 'bargaining' going on between the parties (Smith, 1776). Why? This turns out to be related to property law.

Property law sets the terms of access to resources. A property owner can normally deny those who need resources on their land or under their control – water, food, shelter and beyond – whether s/he needs or uses those resources or not, 'for good reason, for bad reason, or for no reason at all', that is, without explanation, without justification, and without regard to the interests of anyone else; they can also normally determine the price of that access. For those without resources, this law is the source of the compulsion to work for others (Hale, 1923; Cohen, 1927).

This state of affairs is also a well-known recipe for bad work. It's not a surprise that when the legal powers as well as the resources are on one side, options on the other side are limited, there is no effective voice or input by the worker and the resulting terms of work arrangements are poor; consider who does domestic work but also other forms of low-paid service and production work. One way to change that balance of power is by changing the allocation of legal entitlements, as labour and employment rules are designed to do; they typically either set minimum terms of work or they compel employers to bargain with workers as a group. But as we saw, those rules only apply to market work. For much of the work of reproduction, we have to look elsewhere for the relevant law: other rules may well be in play, affecting the balance of power, and by extension who does what and who gets what, in negotiations around work.

C) Law's Constitutive Properties: Constructing Home and Work

Laws don't just 'regulate' society and economy, they literally make them. Put otherwise, markets and households are legal constructs. They do not exist or operate apart from the rules that define the actors within them and confer upon those actors' legal powers and

protections. Notice the reversal of perspective here: law is inside, not outside, economy and society. It doesn't make sense to speak of 'the market' apart from the rules which define which resources are protected, and by how much; set out the powers of asset holders; govern the terms of exchange; determine the penalties for breach of contractual arrangements; and define whether an agreement is legal at all (Davis and Klare, 2019); the same observations hold true of 'the family'. Notice the result: there are many different possible types of families and markets, and they can and do change in response to the legal regimes by which they are governed. Notice also that the boundary between families and markets, as well as the activities within them, will shift (in part) according to how and where law draws that line.

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We can see this by looking at activities or tasks that are both productive and 'reproductive' because they are both paid for and performed 'for free'; put otherwise, they don't come already classified as one or the other (again, think about domestic work). Here's the thing to watch: what goes on in one place affects what does, and does not, go in in the other. And whether activities are attached in some way to the home or to work in the market is often a matter of law and policy.

Here are a few illustrative examples. When employees are entitled to paid leave from work by law – through mandated maternity leave, family leave, emergency or medical leave – not only do they continue to receive employment income. The nature of their time and work changes too. What would otherwise be unpaid work, the labour of care, is converted through the operation of the legal rule into paid work. At the same time, the boundary between home and work changes: caregiving is no longer purely a family or 'private' matter; it is part of the terms of work in the market too. And once such tasks are wrapped into the employment bargain, they are likely to change how paid work is organised as well, sometimes in far-reaching ways: consider that employers may have to hire more workers, reorganise schedules, or otherwise change norms around working time and space. The process of course can also work in reverse. When laws are changed to give employers more 'flexibility' or enable them to become more 'efficient' in their use of labour, the border between home and work may be pushed back in the other direction. Unless wages rise to compensate, which rarely occurs, at this point the zone of unpaid work is likely to expand.

Another example is health care. We could think of all the activities associated with the maintenance of health as either 'reproductive' or 'productive, part of realm of care or part of the service economy of the market. But health care is a perfect example of where the distinction is neither stable nor helpful. Instead, *whether* care is recognised as work is the result of decisions: how should health care be organised? When, and where, should it be professionalised and compensated? In every country, some forms of health care, for some people, will be compensated, which means they will count as part of the 'productive'

economy, while others will not. But which activities, and by how much, are up for grabs; what is left over falls into the domain of the reproductive economy. Wherever that line is drawn, it is drawn (in part) by law. A few people of course can buy an unlimited amount of health services. But for most of us, how much care we get and how much is provided 'for free' – by family or community members, usually at home – is directly related to whether some party other than the one directly using the services is paying for it. If one of those parties is the employer, as is the case for many people in the US, then the laws and policies governing work matter immensely! Are you an employee? Do you have health benefits available through work? If so, can you afford them? Are they mandatory in the employment contract? Are there alternatives in the community or available through the state for example? All these factors will determine not just the level of care received, but where it occurs and if it is compensated. Whether you engage in 'self-care' while you are sick – that is, stay home from work – will also depend on these things. Are you entitled to sick leave? If not, you may go to work ill, because otherwise you stand to lose your job. There may be no health care for you – paid or unpaid – until you become too sick to work.

Consider public expenditures on health care: they can either expand the zone of care that falls on the market side or radically contract it. As experience with structural adjustment policies and recent fiscal austerity drives have underscored, the correlative effect of cutbacks is to expand the domain of unpaid reproductive work (Elson, 1992). It is worth emphasising that there is no closed list, or settled agreement, as to what falls on one side of the market divide or the other. Examining the line and how it moves, observing which rules push it in one direction or another, is key not only to the construction of unpaid work. It is part of the distributive question: who wins, who loses, and by how much.

Finally, take the case of childcare. It can be provided at work and literally wrapped into the employment bargain. It can be paid for by the employer, in full or in part, or paid for or directly provided by the state in publicly supported institutions. Under any of these arrangements, the costs fall not only on the individual or family; instead, we all pay (as we do for public education). For example, some version of such childcare arrangements was standard in the Soviet Union and Eastern bloc countries for the simple reason that women were assumed to be engaged in paid work. Many, if not most, such arrangements were eliminated in the 'transition' from plan to market economies after 1989 on various theories: that enterprises should concentrate on 'core' functions; that such expenditures contributed nothing to production; or that they made firms uncompetitive. Bottom line: they simply weren't accepted by market reformers as 'normal' parts of the world of production. But the idea that markets *require* certain lines between production and reproduction is merely conventional, even ideological (Olsen, 1983; Rittich 2002), and there are good reasons for challenging it.

We can think of the relation of reproductive work to productive work as a case of what economists refer to as 'externalities': good or bad effects on third parties for which compensation is neither paid nor received. Recall two points. First, unpaid work creates huge benefits for others. Reproductive work is essential to productive work, to the economy, to life writ large; employers collectively depend on the labour involved in producing current and future workers and they are in the (very large) category of those who benefit from that labour. Second, the performance of unpaid work is notoriously maldistributed: women do vastly more of it in all known societies. Not only does this have well documented consequences in the market – the capacity to be 'entrepreneurial' at work, for example. Women are perceived to be less available and committed to work, and because of informal

norms around the performance of care, they may indeed be the ones who put aside paid work in a crisis at home. If employers can treat the fact that workers also have unpaid work obligations – of care, of food preparation, childcare, cleaning – as irrelevant, then they can derive the benefit of that work for free. Many others will benefit too – consumers of products and services, for example. The people that do this labour must then do it either on top of paid work or instead of paid work; either way, it is both a disincentive to paid work and a ‘tax’ on income (Palmer, 1995) – a disadvantage. Those who do unpaid reproductive work may be indirectly excluded from paid work and compelled to derive support from someone else, in the household, the community or possibly the state.

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This resulting picture is complex: the costs and benefits of arrangements will flow in many directions, including to women. There is usually some support or subsidy flowing to those engaged in reproductive work; there are many possible ways to both finance and compensate this work, coming from different sources, including the state; and how this compensation is organised will generate a range of consequences, desirable and not, that need to be considered. I want to leave aside all these complexities for the moment to make a very simple point: externalities such as unpaid care are *only* externalities because parties are entitled, by law, to treat them as free, costless, limitless and without consequences (Kennedy, 1998). Take the example of clean air and water. The minute that we impose a legal obligation not to pollute, clean air or water is no longer a free resource but becomes a cost of doing business: producers, and by extension the rest of us too, have to pay to clean it up – perhaps only part of the damage or loss, but something. The same thing is true of virtually every dimension of reproductive work: legal obligations, sometimes in operation with informal norms, determine the boundary between matters of home and work, and by extension, the costs of production as well as what comes ‘for free’. We can draw the boundary here in many places; lots of things are potentially part of the deal at work. Their exclusion may be simply a historical legacy of the bifurcation of home and work and the creation of waged labour organised around a male norm. We could even assume an ‘encumbered’ worker, that is, one with obligations of care (Fraser, 2013).

There are contexts, however, where it makes no sense – and provides no help to the workers involved – to approach the question this way; the distinction between reproduction and production may not be workable at all. The lives of workers may involve an inextricable mix of tasks, one that is impossible to separate (Beneria, 2015). There may be no employment relationship either, particularly in the Global South. Here, we would look at other legal and institutional arrangements, including various subsidies to productive activity, on the theory that they might be needed or might be the only real way to assist. They could include changes to a range of rules that organise the economy, including changes that alter the incentives and organisational choices of producers. The bottom line remains the same: as long as reproductive work remains outside the calculus of profit and economic growth, we are likely to disadvantage the workers who perform that labour for free. Just as important, others will be getting time, labour, resources at others’ expense.

D) Law As a Form of Legitimation

Although this idea is perhaps the easiest to grasp, it is worth rehearsing, nonetheless. When labour and employment rules exclude agricultural workers, or domestic workers or sex workers from their ambit, or when they provide such workers different, usually lesser, protections, those exclusions and exceptions don't merely deny those workers the protections afforded to other workers. The fact that they are *legal* norms, ratified by Parliament or the legislature, confirmed in the judgments of courts, conveys something more: that it is acceptable, that it is normal, maybe even natural or *required* that these workers be treated differently. Perhaps the ultimate message is that they are not even 'real' workers. Similarly, when jobs are not protected by pregnancy or parental leave, not only can women be fired for becoming pregnant. Powerful messages are conveyed as well. One is that the normal or ideal worker doesn't become pregnant – in other words, that the worker is male. Another is that producing human beings is a fundamentally 'private' matter, something for individuals or families to sort out however they can. So, to sum up, beyond setting basic norms and incentives concerning behaviour, legal rules play incredibly important roles in social reproduction. They are simultaneously: the source of bargaining endowments when it comes to household and workplace arrangements; a means of allocating powers and immunities, benefits and risks among family members and market actors; and devices for carving up the economy into distinct domains, thereby constructing the boundary between production and reproduction. Finally, legal rules ratify and legitimate social and economic arrangements... until they are successfully resisted and changed, when they ratify new ones!

It is worth mentioning two other things, at least briefly. The first is the place of informal norms. It is clear that informal norms and codes of conduct govern many aspects of work, for example who is a boss and who takes orders; whose pay must be high to induce them to work productively versus those who are subject to pressure from lower wage competitors. For some, such as domestic workers, the effective 'law' may be little other than the employer's sense of what they are entitled to demand. But if informal norms make an imprint on the terms of waged work, so do normative ideas of the family. For example, the standard employment relationship, the benchmark around which labour standards were built, was organised on the assumption that wages should be adequate to permit a male breadwinner to support a female caregiver and their children, until that assumption was eroded by the feminisation of the labour force. The Draft Wage Code recently passed in India specifies that the minimum wage should be set with reference to a standard list of household expenditures as well as a model family (Ministry of Labour, India). All these norms and benchmarks are rightly the subject of critique. The point is that the family is *there* in the terms of work, and social as well as legal norms are in play determining what those terms should be. That means that the field of struggle for a different settlement around reproductive work, including a redrawn boundary between home and work, is already in place.

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Things have value not just 'in nature' but because of, and to the extent of, their legal recognition; without legal recognition it can be very difficult to make that value visible and to make it 'count' (Waring, 1988) – this is the fundamental problem with reproductive work!”

Informal norms also play a role in determining whether work is valuable or not. Detailed attention to the range and reach of informal norms, including how they interact with formal law, is essential to reconstructing the gendered and racial contracts in operation across the world of work. There will be no way to understand, let alone alter, the tightly woven relationship between race and caste and the way that work is organised and (de)valued (think again of the status of domestic work) without coming to grips with long histories of servitude and the extent to which informal, often unspoken, racial, ethnic and caste norms continue to operate on work, whatever the state of formal law (Nakano Glenn, 2009; Blackett, 2019). Put simply, formal and informal norms are in close interaction as well.

The second is the importance of attending to the interaction of different legal regimes, and by extension, tracing the total ‘footprint’ of legal rules. Bina Agarwal has brilliantly illustrated how access to resources such as land and opportunities to earn income in the market affect the balance of power inside the family (Agarwal, 1997), influencing who does what in the way of household labour and who by contrast gets to enjoy leisure; who gets to expend household resources, and on what things: food and clothing, or toys and relaxation, for example. Recall that social and economic powers are also legal powers; factor endowments are also legal endowments. Things have value not just ‘in nature’ but because of, and to the extent of, their legal recognition; without legal recognition it can be very difficult to make that value visible and to make it ‘count’ (Waring, 1988) – this is the fundamental problem with reproductive work!

Add to this the fact that rules don’t stay in their boxes; their powers operate well beyond, something beautifully illustrated for feminist purposes by Mary Jo Frug (Frug, 1992). Recall here that property law doesn’t just dispose of property. It enables owners to exercise authority over others, authority that has been analogised to the sovereign power of states (Cohen, 1927). Property laws entitle owners to remove employees from their premises and informal squatters from their homes. They may allow owners to regulate the activities and livelihoods of tenants and by extension affect the balance of power at home. Similarly, family law doesn’t just govern the family: depending on how economic entitlements are set – what women are entitled to in the way of spousal support on marriage breakdown or whether they are entitled to anything at all – family law may very well affect their decisions to take up paid work, just as their family obligations will affect the terms and conditions on which they do it (Halley and Rittich, 2010).

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The effects of legal rules can be both indirect and powerful; sometimes they can be unexpected. The footprint of immigration and criminal law on working lives can be vast. For example, if the visas of migrant domestic workers compel them to work for specific employers, we can predict – it happens all over the world, in industrialised as well as developing countries – that at least some of those workers will end up in conditions of forced labour. That is, workers will have their passports confiscated, they will be unable to

leave their employment, and they will be working under terms and conditions they did not, and would not, agree to in advance. But even where the worst possibilities don't materialise, their precarious legal status will ensure that pay and working conditions remain poor, while the workers themselves lack both voice and autonomy. The most important 'law of work' in this context may not be labour and employment law but rather immigration and citizenship law.

Take domestic violence. Although almost every state has laws against violence against women – they are a signature part of every international gender equality initiative – it only takes a second to figure out why, under conditions of economic dependence, that violence might continue anyway and further, why some laws criminalising domestic violence, by removing a source of household income, might compel women to do more work, paid as well as unpaid, in some cases leaving them worse off. On the other hand, it turns out that the most effective way to curtail domestic violence might *not* be with the hammer of the criminal law (which women are often reluctant to invoke against their husbands) but by ensuring that women have independent access to resources. As we have seen, this immediately changes the balance of power between husbands and wives. But this returns us to *other* legal questions: do women have opportunities to generate income outside the household? How much and on what terms? What, in the way of law and policy, is operating on *those* opportunities? Violence too, its sources as well as its remedies, may be a more complex legal question than we think.

Finally, think about trade and investment laws: they too reach all the way down to the ground, ultimately touching on work in the household (Rittich, 2010; Alessandrini, 2022). Depending on what the rules permit or enable, competition from more efficient or subsidised foreign providers may disrupt local agricultural practices or eliminate local industries; entire forms of life may disappear as a result. Their effects may be indirect, they will interact with many domestic rules, but in the end, they may turn out to be the most consequential. The corollary of all this is that the *actual* law of household and workplace relations, the rules that govern reproduction as well as production, are found in many places, across different legal regimes and in their interaction.

Toward The Future

Many of these insights about the connections between production and reproduction are shared among feminist scholars and activists. What legal scholars of a critical bent would highlight, indeed relentlessly investigate, is how much is going on with the distribution of power and resources at the level of legal rules, practices and institutions, and how indirect yet extensive their impact can be on questions of social reproduction. Whether it concerns private law rules, family and commercial laws, criminal, administrative, tax law and beyond, our task is to trace, expose and explain how complex, even counter-intuitive, their effects, positive as well as negative, can be. This way, we can figure out what matters, where to move things.

The border between production and reproduction has been under active management and reconstruction for at least a generation. The vision of market-centred development fuelling all this activity has left a deeply troubling legacy on the lives of many women and poor workers. The Covid-19 pandemic is making clear that when it comes to the organisation of production and reproduction, we are on unsettled ground. Boundaries between home

and work, work and care, labour and pleasure or leisure are visibly shifting, under pressure from the changing geographies, space and time of work. The upside of these moments is that financial crises as well as social crises, induced by development projects, pandemics, revolutions in race relations and beyond, all provide opportunities for shifting priorities and new interventions, even more so when they overlap and converge. For at moments of transition and crisis like the present, we can often see the mechanics of social reproduction in unusually visible ways. It may be, at the end of the day, that we are on the precipice of some fundamental reorganisation of capitalism and its productive (and reproductive) relations. But even absent a total or systemic shift, many different settlements within this crucial domain can be forged. Some of the central tools will be legal. While all this is no guarantee of the success around any political struggles around social reproduction, thinking differently with law can change the terms of engagement and make the possibilities, and the stakes, clearer.

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