CHAPTER 4

Legal Constructions of Body Work

Ann Stewart

Introduction

This chapter explores the ways in which intimate, embodied and sexualized labour is regulated within the law in the United Kingdom by considering how the relationships involved are understood within law and highlighting the limitations of the existing regulatory norms and frameworks. It takes two examples wherein the human body is used as the 'material of production'. The first example involves the commercial provision of sex, the second caring for the vulnerable, particularly the elderly, undertaken predominantly within the home. The labour processes under discussion are only marginally recognized by labour law. As a result, those involved are unable to make use of its normative frame of reference, which is in part based upon addressing the risks associated with unequal bargaining power. At present commercial sex is heavily associated with the criminalized discourse of 'prostitution' and trafficking. Domiciliary-based caring involves a range of work-related arrangements undertaken by persons defined as domestic workers, social care workers/personal assistants and, very importantly, unpaid carers. We find that the legal construction of unpaid carers is located primarily within social welfare law whereas other domiciliary workers are addressed through the potential violation of their human rights.

This chapter considers the wider implications of these different legal locations, in particular the forms of legal protection available to those involved, and explores the ways in which concepts of risk, vulnerability and mutuality affect body work relationships as they emerge within law.

A short history of labour law: employees, workers and 'employment'

Modern labour law emerged from a range of relationships associated with work in the nineteenth century (Deakin, 2007; Deakin and Wilkinson,

2005). At its heart is the common law contract of employment. Two autonomous parties, the employer and the employee, enter into a free and voluntary agreement whereby the employer owes a duty to pay for work undertaken whereas the employee owes a duty to be ready, willing to work, and to obey the lawful orders of the employer. Although constructed as a mutual agreement, Pateman (1988: 118) argues that the contract in general is a specifically modern means of creating relationships of subordination. Clearly, the employment contract reflects inequality of bargaining power in the market place, placing the worker in a position of subordination. This contract of service involves not only elements of mutuality and dependence, but also of continuity. Nonetheless, it replaced archaic legal distinctions between blue collar and white collar workers (Deakin, 2007) and by the 1950s provided the basis for the 'standard employment relationship' involving 'an ensemble of institutions, along with the vertically integrated enterprise, the industrial union, the male-breadwinner family, and the state as employer and provider of services, which served as the basis of an historical compromise between workers, employers, and governments' (Fudge, 2007: 2).

This Fordist employment relationship has three objectives: '(1) to protect employees against economic and social risks, (2) to reduce social inequality, and (3) to increase economic efficiency'. It provided 'stable, socially protected, dependent, full time jobs' for male breadwinners (Fudge, 2007: 2). In the UK, conditions were regulated primarily through a system of 'collective laissez faire' backed by strictly limited legal interventions that extended protections for employees (Kahn-Freund, 1972).

While labour law provides the dominant frame of reference for the regulation of relationships for those involved in paid work, it is generally recognized to be struggling conceptually to cope with the changes that have occurred in the global economy since the 1970s. There are a wide range of problems. One such is territoriality. State laws based upon local traditions of industrial relations are not best placed to deal with the way in which multinational enterprises organize their relations of production on a global scale or with flows of migrant workers. Here, however, we are concerned with two other challenges. The *first* comes from feminist labour lawyers who question the way in which the boundaries between production and social reproduction are set and the consequential gendered impact on access to the labour market. Since the 1970s, they have been pointing out that this employment model largely ignores the ways in which women engage with the market and offers little protection to women who work in 'non-standard' ways. As more women joined the labour force, women's organizations in the UK campaigned for legal rights to ensure women's equality at work, resulting in the legislation which tackled access to and segregation within the labour market

and equality of pay. A framework developed to cover pregnancy and maternity discrimination and benefits and prohibitions on sexual harassment. Some of these measures have had their origins within the European legal framework. There is an uneasy conceptual relationship between measures introduced to tackle discrimination and those incorporated within employment protection, leading to some highly complex legal issues relating to the precise scope of protection, which continues unabated (Freedland and Kountouris, 2012; McCrudden, 2012).

While a legal framework to provide women with substantive equality was developing in the UK, the labour market was restructuring. By the 1980s, new forms of flexibility were required to tackle decreasing productivity and to reposition the economy within the global market. Public services were privatized. Generally, employment relations were commercialized through the introduction of precarious forms of working, which attracted little or none of the protections offered to those categorized as employees under the Fordist model (Conaghan et al., 2002; Fredman, 2006). The male family wage disintegrated, requiring women to work to maintain household living standards.

The *second* problem, therefore, for labour law results from its basis within a Fordist model of commodity production in economies now organized around the provision of services (Albin, 2010). The commercialization of employment relations associated with the rise of a service economy, through self-employment, subcontracting and franchising, fit uneasily, if at all, into a conceptual framework based upon the contract of employment, a bilateral contract of service between an employer and an employee. A service economy draws together production and consumption in such ways that the processes of consumption affect those of production. It is a world of tripartite relationships between employers, workers and customers/clients organized through contracts for services.

What can seem like esoteric debates, relating to the distinctions between a contract of service and a contract for services, matter greatly to those involved. Organized labour has fought to limit the exploitation of employees, those with contracts of employment, backed by state legislative protections. Entrepreneurs, freely selling services in a market place, are located within a different understanding of power relationships and legal frameworks relating to contract, commercial and consumer law. Clear, if fine, conceptual distinctions between employees, workers and those trading services, disappear in the messy world of working relationships but still result in many workers having far fewer protections.

Women's work is concentrated in the service sector, which is associated with the sort of flexible working that is underpinned by commercialized relationships wherein services are freely traded. However, they tend not to

be in the vanguard – the free floating knowledge workers, the independent risk takers who, it is argued, can subvert traditional relations of power through the skilful deployment of their human capital (Albin, 2010). Instead, the majority work in traditional service sectors – still closely associated with socially reproductive activities which can at the extremes hark back to pre-modern forms of relationships and where work is low skilled, commands poor wages, is provided informally and is associated with very different relations of power and risk allocation.

Since the 1980s, there have been attempts to recapture territory for labour law. In the 1990s, the Labour government utilized the language adopted within European law to provide employment-related protections based upon the concept of a worker rather than an employee (Ashiagbor, 2006). This category extended the scope of measures such as the minimum wage and working time limits to those who did not qualify as employees because they were not operating under a contract of employment or because they lacked the continuity necessary to qualify for protective measures. The European framework more generally has had significant effects through the extension of its reach in relation to anti-discrimination measures.

Additionally, the discourse of human rights with its origins in international and regional rights frameworks such as the European Convention on Human Rights has become more significant. Labour law norms as previously discussed recognize inequalities in power and the need to protect workers from economic and social risks. The normative base for anti-discrimination and human rights roots inequality within status categories (sex and disability, for example). While human rights discourse increasingly informs labour law there is an uneasy relationship.

There is a widely held view among labour lawyers that there is a need for the construction of a new employment normative base, which does more than resolve the complexities that have developed around definitions of employees, workers and the somewhat different employment definition used in relation to some anti- discrimination measures (Albin, 2010; Davis, 2007; Freedland, 2006; Fudge, 2006). The aim would be to breathe new life into its distinctive contribution, 'which is to strengthen the bonds of social solidarity against the fragmentation of the market' (Fudge, 2007: 18) and to reassert the progressive norms associated with this form of regulation (Freedland, 2003, 2006).

Body work in a service world: commercial sex services, exploitative relationships and dangerous consumers

The weakening of the ideological assumption that sexual relationships are more appropriately undertaken outside the market place in a consumer-based

society has led to the 'normalization' of market satisfaction of sexual desire and the proliferation of services (Hardy et al., 2010). Market provision is however normatively contested, and this is reflected in the legal construction of prostitution and trafficking (O'Connell Davidson and Anderson, 2006). The focus here is on the provision of intimate sexual services, whether on or off street, fully recognizing that there can be a range of contexts in which these services take place reflecting different power relationships.

We can frame this labour process within labour law terms of reference. If the woman works for an employer for wages in an establishment, we would look for a contract of employment upon which to base employment protection rights. She may pay a fee, or other form of consideration, to use premises; she may provide her services via an agency and use her own premises. We would need to know how she works, part-time for how many hours, on a casual basis and so on to assess her employment status and the extent to which she is entitled to employment rights or discrimination protection. Is she working under a contract of service or a contract for services? Is she employed or self-employed?

She is providing an intimate service in which the customer plays a key role. The customer may share employing functions, but more generally it is clear that customers affect her employment conditions and her position at work. The demands of customers are likely to influence both 'hiring and firing'. Meeting the demands and expectations of the 'fantasizing consumer' for particular body images and identities is paramount in this consumer-based industry. Customers need to be 'enchanted' rather than concern themselves with the 'toiling worker' (McDowell et al., 2007).

Therefore, within this discourse we could illustrate the challenges presented by this service work and reflect on similarities to the way in which customers influence labour relations within the wider hospitality industry. Are tips to be seen as contributing towards the minimum wage? To what extent must employers take responsibility for sexual or other forms of harassment by 'third parties' (customers)? Can employers impose dress (broadly defined) codes? We would also need to consider the impact of personal relationships within consumer service provision. Many such services are provided through informal, personal relationships wherein it is difficult to establish a legal basis for worker protection. Working in informal settings, close to employers in a domestic or small establishment, may raise particular issues such as 'on call' time. This issue arises often when a presence is needed at night, for instance in a hospital, or for residential or domiciliary-based care. Is the worker entitled to be paid for such time? Realizing any protection is also very difficult. Workers tend to 'exit' rather than use 'voice' processes (Albin, 2010). Such settings are not conducive to unionization, which makes challenging decisions in appropriate fora even more unlikely.

These issues can be used to support the need to reconfigure labour law to ensure that it functions appropriately in a service-based consumer economy, not only to support economic objectives but also to recognize power relationships and to offer protections to workers.

This, of course, is not the way in which commercial sex services are discussed. Instead, they are placed beyond the margins of labour law. We see the aims of protecting employees and ensuring economic efficiency transposed into the criminal law and to a lesser extent, human rights discourse. These discourses construct the relationships in terms of dominance. The economic objective is to suppress, not facilitate the market while customers are recognized as contributing substantially to power relationships. In the trafficked body, we see recognition of the way in which particular bodies are constructed within law through their work.

Although 'prostitution' in practice can involve a contract for services, it is not legally recognized for reasons of public policy. No employment relationship is recognized in the criminal provisions which regulates relationships[1]. The employer is recast as someone causing or inciting for gain or controlling activities for gain. Providing a place of work is criminalized as the provision of a brothel. The person seeking to sell her services is impeded by crimes against soliciting and advertising. The international aspects of trading are tackled through anti-trafficking measures that criminalize the processes involved.

The normative justification for this criminalization has shifted over time, from protecting against immorality, then prohibiting public nuisance, to, in recent times, an explicit attempt to disrupt and suppress the market because of the unacceptable levels of exploitation involved, which in the case of trafficking are seen as clear violations of fundamental human rights to liberty. There has been a policy shift from constructing the service provider as a dangerous woman to seeing her as vulnerable, as a victim of exploitation who needs protection of her right not be bodily violated and exploited. We have transposed the danger on to the customer, along with those who are cast in the 'employer' role such as traffickers.

The key provision which illustrates many of these issues is Section 53A of Sexual Offences Act 2003.

Paying for sexual services of a prostitute subjected to force etc

(1) A person (A) commits an offence if
  (a) A makes or promises payment for the sexual services of a prostitute (B),
  (b) a third person (C) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and

(c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).

(2) The following are irrelevant
(a) ....
(b) whether A is, or ought to be, aware that C has engaged in exploitative conduct.

(3) C engages in exploitative conduct if
(a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or
(b) C practices any form of deception.

We see here that tripartite relationships are recognized. The consumer and his power is placed centre stage. In an attempt to suppress demand, to reassert not just recognition of the toiling worker but the exploited victim, the fantasizing consumer is denied the legitimacy of agency. His desires are recast as an obligation to recognize the particular identity of the service provider – not stunning Albanian beauty, but raped and abused victim, made vulnerable by her economic location within the global economy. The potential abuse of the worker by the client and the assumed abuse by the 'employer' figure are emphasized. The interdependence of the parties is clearly recognized but wholly outside labour law.

Body work in a service world: caring

The exclusion from labour or commercial contract law in the previous example results from an explicit policy decision not to recognize the relationships. The present one concerns difficulties with fitting 'legitimate' relationships within the framework. Forms of 'care', particularly when provided in informal, domestic, personalized contexts within a network of relationships, struggle to be recognized as a work relationship or worthy of protection. Much paid care work, particularly for the elderly, is associated with irregular hours, multiple job holding, agency provision and bogus self-employment – factors which mitigate against protection within labour law. Unpaid caring by 'carers' is beyond such protection.

Labour law is not the only legal domain which organizes the relationships involved and addresses issues of risk, vulnerability and exploitation. The work relationship involving family members is constituted within social welfare law. It grants the status of 'carer' and some rights, derived through this work relationship, although these do not provide labour law forms of protection. Some paid relationships, marginalized by labour law, are now being recognized in terms of rights. The power relationship can

also attract a dominance discourse within criminal law similar to that of trafficking.

Exploitative relationships and dangerous employers

For the discourse of labour law, the margin is constituted through debates over domestic workers, which in this context include those providing paid care within informal familial settings. Feminist labour lawyers, joined now by human rights activists, have highlighted the position of such workers, who occupy a no woman's land between legal regimes organized around concepts of production and those organized in relation to social reproductive activities. Domestic work is hard to regulate but 'prone to precariousness for social (gender, race, migration and social class), psychological (intimacy and stigma) and also economic reasons' (Albin and Mantouvalu, 2012: 69).

They point to the current UK position whereby domestic workers are often excluded from the protections provided to 'workers' such as over regulation of working time, health and safety legislation, partially (if provided with accommodation) or wholly (if treated as family members domestic workers) from minimum wage requirements. Such workers cannot access anti-discrimination and equality provisions (Albin and Mantouvalu, 2012: 70–71).

Legal migrant domestic workers are even less likely be included in any protective labour law measures. Illegal status denies all employment protections. The plight of migrant domestic workers has surfaced within international labour and human discourse in recent times because of the sheer size of this group worldwide (Stewart, 2011). A discourse based upon violations of human rights, similar to that of women trafficked for the purposes of sexual exploitation, has emerged within various settings. One of which has made use of an underused article, Article 4, of the European Convention on Human Rights that prohibits slavery, servitude, forced and compulsory labour. It was invoked to expose the inadequacies within the French criminal legislation to deal with the 'servitude, forced and compulsory labour' experienced by the applicant. This ruling against the French state recognized 'modern slavery' and prompted the UK to adopt new legislation (section 71 of the Coroners and Justice Act 2009; Mantouvalou, 2006, 2010).

Slavery, servitude and forced or compulsory labour

(1) A person (D) commits an offence if
  (a) D holds another person in slavery or servitude and the circumstances are such that D knows or ought to know that the person is so held, or
  (b) D requires another person to perform forced or compulsory labour and the circumstances are such that D knows or ought to know that the person is being required to perform such labour

The position of domestic workers has also been recognized by the International Labour Organisation. The Convention on the Rights of Domestic Workers 2011 is seen as a 'landmark moment for the international labour law regime' because it addresses a specific sector of activity now clearly identified as work and incorporates a human rights approach into international labour law discourse (Albin and Mantouvalou, 2012: 67). Its provisions cover both 'civil rights, like access to justice and privacy, and social and labour rights, like working time and minimum wage' (Albin and Mantouvalou, 2012: 73). The UK government abstained in the voting on its adoption. Albin and Mantouvalou (2012: 77) quote the views of the UK representative: 'we do not consider it appropriate, or practical, to extend criminal health and safety legislation, including inspections, to cover private households employing domestic workers. It would be difficult, for instance, to hold elderly individuals, who employ carers, to the same standards as large companies'.

This quotation is illuminating: first because employed 'carers' are identified as falling within this category of worker and second because elderly clients are, by implication, seen to be particular types of employer. The suggestion here would seem to be that such a caring relationship involves competing vulnerabilities and uncertain distributions of power between the employer/client and the worker.

To understand more, we need to consider the nature of caring relationships within this 'non-standard' or marginal work context and the way in which the discourse from another area of law, associated with the fixing of social responsibility for care, constructs such relationships and addresses the associated risks.

Exploitative relationships and 'empowered' clients/consumers

Social welfare law delineates the responsibilities of the state for the welfare of vulnerable adults. The focus of legal attention here is the person in need of care who is situated within a network of relationships (Ungerson, 2000). This individual is being repositioned within a social market as *an independent consumer of care services*, as someone who chooses what they want rather than being the recipient of state-defined provision. As a consumer/client, they gain power, in theory, but given the nature of state responsibility for such care only the most intensely vulnerable are presently eligible for publicly funded services. In relation to whom does such a vulnerable consumer gain power? Their unpaid relatives, who within social welfare law are defined as 'carers'? The paid workers from whom they purchase services directly or indirectly?

Evolution of social/community care law and policy

Social responsibility for the care of the vulnerable, including the elderly, involves a range of actors, the state, market, voluntary sector and families, the relationship between which has changed substantially since its origins in the Poor Law 1834 (Lyon and Glucksmann, 2008: 111). The post-war welfare state excluded the provision of social care, viewed as residual, from the National Health Service. Local authorities were sanctioned under the National Assistance Act of 1948 to provide and to charge for specific services to those with identified forms of need. Such public assistance as was available to the elderly in general was institutionalized through provision of 'old people's homes', although those identified as having a particular need could be provided with a 'home help' who was directly employed by the local authority.

The restructuring of economic relations, which took place in the 1980s, resulted in a changed relationship between the state and the market. This involved the creation of a mixed market in welfare through splitting purchase and provision functions through compulsory competitive tendering for services. The result was privatization of services. By the end of the decade, social services departments had been recast as commissioners of state-financed, privately delivered services. Private residential homes developed rapidly, many of which were small, often family run businesses, dependent on publicly funded residents (Brown, 2010; Means et al., 2008).

More generally, there was a move in a service-based economy towards greater client choice through 'personalization' of services. Residential provision became not only prohibitively expensive for the state, but also seen as inappropriate. An increasingly effective disability rights movement lobbied for replacement of the dependency model to one based upon user empowerment and rights. Local authorities began to commission community care, particularly domiciliary-based services, which stimulated a market in agencies to provide these. This mixed market is now constituted by a large number of small businesses and voluntary organizations providing care homes, domiciliary services, and a small number of large providers. The sector remains under-capitalized, with small profit margins and high risk, deeply dependent on public funds (Stewart, 2012).

Employment relations within the social service provision have been reconfigured. State employed social workers operate as care brokers, buying packages of care (Ungerson, 2000). Social care workers (including personal assistants) undertaking body work are now located primarily within the private sector (70 per cent). This workforce is low skilled, low paid, predominately female (90 per cent), two-thirds of whom provide care for the elderly (Lyon and Glucksmann, 2008: 112). The commercialization of relations

has resulted in the predominance of 'non-standard' and precarious work arrangements. As we have seen, such workers attract few employment protection rights, enabling the economic risks associated with restructuring to be passed on to them.

There is another group of workers, invisible to labour law, who undertake 'social' care. Family law in the UK places no legal responsibility on adult children to support parents or other relatives. Nonetheless, the 1948 welfare system was predicated upon the assumption that such informal care would be provided within the dominant societal model of the male breadwinner/female homemaker model. Although this model has been superseded, the assumptions relating to the provision of informal care have not. Approximately six million people, now termed 'carers', undertake such work in the UK. It is estimated that if valued their yearly cost would be roughly equivalent to that of the NHS; without it the public systems would collapse (Buckner and Yeandle, 2007). The manifest tensions between paid work and care responsibilities coupled with the financial and social consequences of demographic changes, which see a significant rise in the proportion of very elderly people in the next decades, has spawned anxious debates over a crisis in care (Stewart, 2012).

The present legal and financial systems are generally recognized by policy makers as wholly unfit for purpose (Stewart, 2012). The Law Commission in 2011 made recommendations for a comprehensive new legal framework that forms the basis for forthcoming legislation. It places the individual client at the normative core of its proposals. While local authorities retain the responsibility for assessing individual needs within a framework which sets the eligibility criteria for the provision of services, the overall objective is to enable clients (or advocates on their behalf) to choose the services they want to ensure their well-being. There will be further development of the direct payments/individual budgets framework that enables the individual client to use public funds to buy services, leading to further commercialization in service provision. The Dilnot Commission, which also reported in 2011, tackled the highly contentious area of how to fund social care. Responsibility for funding a significant, but defined proportion of life-time caring costs is placed firmly on the individual.

Social welfare law also recognizes that there is a relationship between this newly constituted client/customer and unpaid familial carers. We have seen the emergence of a new legal identity, the carer who is defined in legislation through this relationship. However, they are now attracting separated rights that recognize that this form of work affects them as quasi workers. Carers are entitled to be assessed for services based upon their separate needs such as for time off (to purchase respite care) and as individuals experiencing exclusion from full citizenship primarily derived through their inability

to undertake paid work or to participate in social life. Many carers, both working age and older, are impoverished because they cannot undertake any or enough paid work and/or because they are reliant on inadequate state welfare payments which are primarily derived through their relationship with the care recipient (Yeadle et al., 2007a, b, and c).

Because of their socially reproductive location, carers lack the indices for legal recognition of their body work as employment for the reasons discussed earlier. If a carer has a separate paid occupation that constitutes them as an employee they will attract similar rights to those offered to parents to 'balance' work and family (Employment Relations Act 1996). As workers who also care, they may also be able to rely on the anti-discrimination measures contained within the Equality Act 2010, which recognizes discrimination by association with someone with a protected characteristic (in this case disability; Stewart, Hoskins, and Nicolai, 2011).

Recognizing power relationships in body work

The elderly care recipient as customer/client in an era of consumerism is being provided with services through a range of legally constructed relationships. They may be provided with state funds to purchase (in theory) the care services they would like. The care recipient may employ a social carer or domestic worker. If supplied through an agency, there will be a contract for services with the agency but no direct employment relationship with the worker. If employed directly, there may be a contract of employment or the worker may be self-employed. A care recipient cannot use state-provided funds (direct payments) to pay relatives who live with them. They may be able to employ other family members in which case these family members may become their employees. Unpaid carers although attracting some citizen-based rights are not protected through an employment relationship despite often being the linchpin to the web of relationships necessary to meet the customer/client needs.

Who needs protection here and from what? The empowered client may be very frail and vulnerable, wholly dependent on the abilities of an agency to deliver agreed, but often meagre, services and the worker/employee to provide appropriate care. An agency worker is often under immense pressure to carry out the agreed service. They may work in difficult physical and social environments that require them to meet consumer desired, but agency prescribed, demands. They may face 'third party' harassment. Those working within bilateral arrangements, including migrant domestic workers, face similar consumer expectations without the protections potentially offered through their relationship with an agency. Determining and limiting working hours can be difficult.

Family carers are under no formal obligation to provide care, but in practice they can work very long hours, sometimes with continuous 'on call' time. More than 21 per cent of carers provide over fifty hours or more care per week (Lyon and Glucksmann, 2008: 111). They can experience harassment. At the same time, there is a rising expectation of what is involved in decent care, encouraging carers as well as care workers to acquire care skills (Dodds, 2007).

There is also growing anxiety over abuse of the elderly and vulnerable. The legal language used to address this issue varies but it is increasingly framed as a violation of human rights. As such, it places responsibilities upon the state to ensure that such abuses do not take place. It is however seen as perpetrated by both care workers and carers. Those within the sphere of labour law and, therefore, within the public realm are affected by the framework for the public regulation of care standards. Care workers are constructed as potentially dangerous workers requiring screening to alert employers/clients to this danger. Dangerous (private) carers are viewed differently (Galpin, 2010; Herring, 2009). Their abuse is absorbed into two possible policy frameworks, one analogous to child abuse, involving the language of safeguarding, the other seeing elder abuse as a continuation of domestic violence.

Conclusion

These two examples consider body work on the margins of recognition within labour law. In both instances the consumer/client is increasingly incorporated into the work–like relationships. In both cases, we see the exploitation and abuse which result from inequalities of power in working relationships being tackled through 'non-traditional' legal frameworks.

Both examples in different ways engage other areas of law to tackle issues of vulnerability, exploitation and abuse using different languages. The first locates the activity outside the realms of labour law, thereby denying its protection to those involved as workers. However, the form of regulation used, a combination of criminal and human rights discourses involving two different forms of state power, recognizes the impact of a global consumer/service economy on power relations associated with work. The law is being used not to facilitate economic relations while protecting workers against market risk, but rather it is being used to disrupt the market by criminalizing the client. The vulnerability of the worker constituted as a prostitute/trafficked person is protected through client-based interventions.

The caring example involves relationships on the margins of labour law. Many categories of workers in the informal context of home find themselves outside the protection of labour law. Those who employ 'modern

slaves' attract criminal penalties. At the same time, the international labour discourse is seeking to provide domestic workers with human and labour rights. Social welfare law is providing unpaid carers, who are wholly outside the discourse of labour law, with some form of rights that nevertheless recognize the impact of their work on their lives, including the risks to their health and well-being. These rights do not offer labour law type protections. Yet developments within the social market in care are reconstituting caring through love (and obligation). The reconstruction of the care recipient as a consumer/client who assembles care services limits recognition of the complex power relationships involved in these intense body work contexts, which characterize their relations with both unpaid carers and paid workers.

Labour law as presently constituted cannot tackle relationships constituted on the borders of production and social reproduction, and also struggles to recognize the influence of consumer/clients on work relationships. Resort to criminal sanctions and to the individualistic language of human rights to protect vulnerability in working relationships is not necessarily a positive development. The first creates a particular form of worker vulnerability while invoking direct state power, whereas the second denies the relational nature of power relationships within work contexts and reconstructs these as conflicting rights. The solidarity that underlies labour law protections is lost. We need to find a way of reconstructing labour law in a way which retains its understanding of work based *relationships* and its recognition of power differentials. It will need to encompass the range of relationships that now constitute work in a consumer society and recognize the role and influence of consumers (Albin, 2010). It is clear from the two examples discussed here that body work offers particular challenges to such a reconstruction.

Note

1 See Crown Prosecution Service guidance for more details: http://www.cps.gov.uk/legal/p_to_r/prostitution_and_exploitation_of_prostitution/#a14.

REFERENCES

Albin, E. (2010). Labour Law in a Service World. *Modern Law Review* 73(6): 959–84.

Albin, E. and Mantouvalu, V. (2012). The ILO Convention on Domestic Workers: From the Shadows to the Light. *Industrial Law Journal* 41(1): 67–78.

Ashiagbor, D. (2006). Promoting Precariousness? The Response of EU Employment Policies to Precarious Work. *In* J. Fudge and R. Owen (Eds) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms.* Oxford: Hart. Pp. 77–97.

Brown, K. (2010). The Older Person's Social Care and the Enabling Service. *In* K. Brown (Ed.) *Vulnerable Adults and Community Care,* 2nd ed. Exeter: Learning Matters.

Buckner, L. and Yeandle, S. (2007). *Valuing Carers: Calculating the Value of Unpaid Care.* London: Carers UK.

Conaghan, J., Fischl, R.M. and Klare, K. (Eds) (2002). *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities.* Oxford: Oxford University Press.

Davis, A.C.L. (2007). The Contract for Intermittent Employment. *Industrial Law Journal* 36(1): 102–18.

Deakin, S. (2007). Does the 'Personal Employment Contract' Provide a Basis for the Reunification of Employment Law? *Industrial Law Journal* 36(1): 68–83.

Deakin, S. and Wilkinson, F. (2005). *The Law of the Labour Market.* Oxford: Oxford University Press.

Dilnot, A. (2011). *Fairer Caring Funding*. The Report of the Commission on Funding of Care and Support (Dilnot Enquiry). Available at http://www.dilnotcommission.dh.gov.uk/our-report/.

Dodds, S. (2007). Depending on Care: Recognition of Vulnerability and the Social Contribution of Care Provisions. *Bioethics* 21(9): 500–10.

Fredman, S. (2006). Precarious Norms for Precarious Workers. *In* J. Fudge and R. Owen (Eds) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms.* Oxford: Hart. Pp. 177–200.

Freedland, M.R. (2003). *The Personal Employment Contract.* Oxford: Oxford University Press.

——— (2006). From the Contract of Employment to the Personal Work Nexus. *Industrial Law Journal* 35(1): 1–26

Freedland, M. and Kountouris, N. (2012). Employment Equality and Personal Work Relations – A Critique of Jivraj v Hashwani. *Industrial Law Journal* 41(1): 56–66.

Fudge, J. (2006). Self-Employment, Women, and Precarious Work: The Scope of Labour Protection. *In* J. Fudge and R. Owen (Eds) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms*. Oxford: Hart.

——— (2007). The New Workplace: Surveying the Landscape. Paper prepared for and presented at the Isaac Pitblado Lectures, Winnipeg, Manitoba, 9–10 November 2007.

Galpin, D. (2010). Policy and the Protection of Older People from Abuse. *Journal of Social Welfare Law and Family Law* 32(3): 237–45.

Hardy, K., Kingston, S. and Sanders, T. (Eds) (2010). *New Sociologies of Sex Work*. Farnham: Ashgate.

Herring, J. (2009). *Older People in Law and Society.* Oxford: Oxford University Press.

Kahn-Freund, O. (1972). *Labour and the Law.* London: Stevens for the Hamlyn Trust.
The Law Commission (2011). *Adult Social Care* No 326 HC 941 May. London: HMG.
Lyon, D. and Glucksmann, M. (2008). Comparative Configurations of Care Work across Europe. *Sociology* 42: 101–17.
Mantouvalou, V. (2006). Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers. *International Labour Journal* 35(4): 395–414.
——— (2010). Modern Slavery: The UK Response. *International Labour Journal* 39(4): 425–31.
McCrudden, C. (2012). Two Views of Subordination: The Personal Scope of Employment Discrimination Law in Jivraj v Hashwani. *Industrial Law Journal* 41(1): 30–55.
McDowell, L., Batnitzky, A. and Dyer, S. (2007). Division, Segmentation, and Interpellation: The Embodied Labors of Migrant Workers in a Greater London Hotel. *Economic Geography* 83(1): 1–25.
Means, R., Richards, S. and Smith, R. (2008). *Community Care: Policy and Practice*, 4th ed. Basingstoke: Palgrave Macmillan.
O'Connell Davidson, J. and Anderson, B. (2006). The Trouble with 'Trafficking'. *In* C.L. van den Anker and J. Doomernik (Eds) *Trafficking and Women's Rights in Europe.* London: Palgrave Macmillan. Pp. 11–26.
Pateman, C. (1988). *Sexual Contract.* Cambridge: Polity.
Stewart, A. (2011). *Gender, Law and Justice in a Global Market.* Cambridge: Cambridge University Press.
——— (2012). From Family to Personal Responsibility: The Challenges for Care of the Elderly in England. *Journal of Social Welfare and Family Law.* Available at http://www.tandfonline.com/doi/abs/10.1080/09649069.2012.718534.
Stewart, A., Niccolai, S. and Hoskyns, C. (2011). Disability Discrimination by Association: A Case of the Double Yes? *Social and Legal Studies* 20(2): 173–90.
Ungerson, C. (2000). Thinking about the Production and Consumption of Long-Term Care in Britain: Does Gender Still Matter? *Journal of Social Policy* 29(4): 623–43.
Yeandle, S., Bennett, C., Buckner, L., Fry, G. and Price, C. (2007a). *Diversity in Caring: Towards Equality for Carers*. Employment and Service Report Series, No. 3, University of Leeds. Available at http://www.sociology.leeds.ac.uk/circle/publications/ces-reports.php.
——— (2007b). *Managing Caring and Employment.* Employment and Service Report Series, No. 2, University of Leeds. Available at http://www.sociology.leeds.ac.uk/circle/publications/ces-reports.php.
——— (2007c). *Stages and Transitions in the Experience of Caring*. Employment and Service Report Series, No. 1, University of Leeds. Available at http://www.sociology.leeds.ac.uk/circle/publications/ces-reports.php.