Less than Zero? The Fragmentation of Worker Protection in UK Employment Law and the Promise of an Alternative Economy

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Introduction

There is a considerable and diverse body of literature which examines the changing nature of work and the variety of contractual arrangements governing work relationships including: part-time work; fixed-term work; temporary agency work; dependent self-employment; and, work on the basis of zero hour contracts (the focus of this article).[1] Although precarious work has always been part of the British labour market, there has been extensive public, political and scholarly debate in recent years on whether and how to regulate "zero hour contracts" as a result of their proliferation in the gig economy. The language used in these instances – atypical, precarious, insecure or non-standard – all suggests that this 'new' form of work arrangement differs from 'standard' arrangements, i.e. a full-time, open-ended, year-round employment relationship with a single employer. However, this normative understanding of the standard employment relationship has always depended on particular parameters – the post-war growth of heavy manufacturing industries and clearly defined arrangements within households whereby men acted as primary breadwinners, and women stayed in the home with responsibility for care and other domestic duties. This model in terms of both the dominant industrial sector and household demarcation is increasingly obsolete. Although working arrangements have been disrupted as a result, expectations about the definition of 'work' (performed and paid for under traditional contractual nexus) and its essential quality (secure =

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[1] On zero hours contracts in particular see M. Freedland, J. Prassl, and A. Adams, 'Zero-Hours Contracts in the United Kingdom: Regulating Casual Work, or Legitimating Precarity?' (2015) No. 00/2015 University of Oxford Legal Research Paper Series; Simon Deakin and Zoe Adams, *Re-Regulating Zero Hours Contracts*, (IER 2014); and the 2022 Special Issue of the European Labour Law Journal on Zero Hours Contracts.

stable, full time and permanent) have not changed. Those workers who do not conform to the 'standard' (male) worker model are considered 'others' which results in exploitation and further levelling down of associated conditions.

In fact, labour law and labour institutions have been challenged by 'non-standard' work since their inception: the alternatives to the full-time, permanent 'job for life' which have now entered the mainstream have long been the norm for many women workers. Yet women's experiences and wider issues related to the gendering of work are still often missing from discussions of this latest workplace revolution, as evidenced by an increasing line of high-profile case law (e.g. *Uber BV v Aslam* [2021] UKSC 5) which has focussed on slotting workers employed on zero hours contracts into the standard work relationship. Although welcome for the legal certainty that they provide, such cases sit in sharp contrast to those concerning the rights of workers engaged under non-standard arrangements in what has traditionally been termed 'women's work' including social care and other service-related activities (e.g. *Royal Mencap Society v Tomlinson-Blake* [2021] UKSC 8). Even where such cases have succeeded, judgments have often been restricted to the complex facts of individual cases[2] in contrast to the sweeping and impactful effects of the judgments given in cases concerning those characterised as 'gig economy' workers. Furthermore, the unpaid care which is often undertaken alongside paid work by the women in such cases is never considered part of the equation leaving women more vulnerable to exploitative practices such as being engaged on zero hours contracts. The reasons for this have their roots in an earlier era: during the industrial revolution and in its immediate aftermath, the fair distribution of the fruits of unprecedented economic growth led to state (and trade union) intervention in the form of employment regulation. However, in the shift to a market economy, the reproductive work which enables capitalist production by

[2] E.g. *Glasgow CC v Johnstone* [2020] IRLR 908.

sustaining humankind was not accorded any value or credit in the development of processes aimed at measuring and rewarding human activity. It was thus absent from the emerging regulatory systems, and it remains absent from the resulting case law. Reproductive labour performed by women alongside formal paid work remained hidden from public view despite the constraints it imposed on their ability to conform to (male) normative standards related to workplace behaviour and employer expectations. This has caused and entrenched gendered labour market segregation, now replicated through the case law which is reshaping this area of the law.

Taking its lead from the Supreme Court judgments in *Uber* and *Royal Mencap*, this article will consider recent developments in the regulation of zero hours contracts and other irregular working arrangements with a focus on the application of statutory protection for those who work under such arrangements and, more specifically, how their working time is measured and remunerated. As this analysis shows, although the operation of zero hours contracts can be problematic, particularly in the context of determining whether employment protection applies, the diversity of irregular forms of work, including but not limited to zero hours contracts, and the related fragmentation of rights can result in reduced protection and greater precarity for many workers even those whose contractual status is not in question. Furthermore, such variations, which originate from perceptions regarding the ways in which different types of work are classified, are highly gendered. This is because regulatory approaches and judicial interpretations assimilate and perpetuate social understandings of work and its perceived economic value within the labour market so that reproductive labour, even where it is performed for payment, is often excluded or viewed as being of low value. The academic and policy focus on the gig economy, welcome as it is as a means of disturbing exploitative practices, will not necessarily assist in this regard as the arrangements and assumptions

surrounding this kind of care work largely predate the advent of technology as a management tool.

In the first section of the article, we consider the advent, challenges and use of zero hours contracts in the UK. We review their regulation up to and including the Supreme Court's judgment in the pivotal case *Uber BV v Aslam*[3] in which it was determined that Uber drivers who worked under zero hours contracts were employed under contracts for services, rather than as independent contractors, and, as such, were entitled to a range of employment rights including the national minimum wage (NMW).

We then turn our attention to the Court's judgment in *Royal Mencap Society v Tomlinson-Blake*,[4] the latest in a long line of cases concerning the application of the NMW to workers providing round the clock care for vulnerable adults. In ruling that such workers were not entitled to be paid the NMW for sleepover night-time shifts, the Supreme Court disturbed well-established jurisprudence on the matter. The worker in *Mencap* was not employed on a zero hours contract and could not be classified as a 'gig worker' (although some care workers may be). Yet the conclusion reached by the Supreme Court highlights the existence of a fragmented approach to regulation for those who work under irregular arrangements, and it is therefore of relevance to a discussion of zero hours contracts more broadly where the legal position remains uncertain notwithstanding the decision in *Uber*.

[3] [2021] UKSC 5. See also Joe Atkinson and Hitesh Dhorajiwala 'The Future of Employment: Purposive Interpretation and the Role of Contract after *Uber'* (2022) 85(3) Modern Law Review 787.
[4] [2021] UKSC 8. See also LJB Hayes, 'Discrimination by legal design? UK Supreme Court in Mencap v Tomlinson-Blake finds care workers are not protected by minimum wage law for sleep-in shifts' (2022) 51(3) Industrial Law Journal 696.

In analysing the different approaches taken by the regulatory framework and judicial interpretation, the article, in a final section, draws on the 'alternative/diverse economies' literature which makes a values-based argument for reassessing how society and its institutions measure, monitor and reward human endeavour.[5] This fresh thinking provides the opportunity to reimagine the societal arrangements and requisite values that are accorded to different forms of work including reproductive work and to consider an alternative to capitalist ordering in line with Erik Olin Wright's notion of 'real utopias' as 'emancipatory alternatives which can inform our practical strategies for social transformation'.[6] In situating such reimagining within a feminist legal framework, we draw on the contributions of feminist theorists Nancy Folbre and Martha Fineman. We conclude by calling for a 'real utopia' for labour law that recognises the contribution of care giving and which is based on a fairer distribution of and reward for all forms of work.

Zero hours contracts: challenges for UK labour law

Since 1979, labour law was increasingly used as a tool to 'reduce the burdens on business', and thereby to facilitate a low-cost flexible workforce. Labour law policies were driven by the view that a low cost and highly flexible workforce was essential to increased competitiveness and lower unemployment.[7] This entailed the adoption of a series of measures, including the removal of minimum wage protection, weakening of trade unions and diminishing the coverage of employment protection legislation in order to facilitate productive and committed non-standard workers.[8] In addition to these policy decisions which reshaped the legal framework regulating the work relationship, factors such as the decline in manufacturing and the rise of a new

[5] See J.K Gibson-Graham 'Diverse economies: performative practices for other worlds' (2008) 32(5) *Progress in Human Geography* 613.
[6] *Envisioning Real Utopias* (Verso, 2010).
[7] See Simon Deakin and Frank Wilkinson, *Labour Standards – Essential to Economic and Social Progress* (Institute of Employment Rights 1996).
[8] See further David Harvey, *The Condition of Postmodernity* (Blackwell 1989).

economy based on modern information-based systems and technologies have all contributed to a 'rapid disintegration of the old industrial model of employment'[9]. In law, there has been a proliferation of contractual arrangements governing the work relationship which differ from the traditional (ie full-time and open-ended) employment contract in that they tend to be characterised by limited legal regulation, flexibility and precarity. Particular concerns have arisen in relation to so-called zero hours contracts.[10].

The term 'zero hours contract' encompasses a wide range of different work arrangements and often overlaps with other atypical work such as agency work, and 'gig-work' performed via apps and online platforms.[11] The term therefore often serves 'as no more than a convenient shorthand for masking the explosive growth of precarious work for a highly fragmented workforce.'[12] As Adams et al explain, '[r]ather than forming a single or unitary category, [zero hours contracts] represent some of the many possible variations of employment, ranging from "preferred choices, well-paid and secure" to "vulnerable" or "poor work".'[13]At a basic level, zero hours contracts denote arrangements that constitute personal work relations where the employer is not obliged to provide any minimum working hours.[14] In 2021, it was estimated

[9] Judy Fudge and Rosemary Owens, 'Precarious Work, Women, and the New Economy: The Challenge to Legal Norms' in Judy Fudge and Rosemary Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Hart, 2006), 3.
[10] See further Simon Deakin and Zoe Adams, *Re-Regulating Zero Hours Contracts*, (IER 2014).
[11] See Joe Atkinson, 'Zero-hours contracts and English employment law: Developments and possibilities' (2022) 13(3) *European Labour Law Journal* 347, 348 also citing M. Freedland and N. Kountouris, The Legal Construction of Personal Work Relations (OUP 2011) 318–19 and A. Adams, Z. Adams, and J. Prassl, 'Legitimizing Precarity: Zero Hours Contracts in the United Kingdom' in M. O'Sullivan and others (eds), Zero Hours and On-call Work in Anglo-Saxon Countries (Springer 2019) 43.
[12] M. Freedland, J. Prassl, and A. Adams, 'Zero-Hours Contracts in the United Kingdom: Regulating Casual Work, or Legitimating Precarity?' (2015) No. 00/2015 University of Oxford Legal Research Paper Series, p. 2.
[13] M. Freedland, J. Prassl, and A. Adams, 'Zero-Hours Contracts in the United Kingdom: Regulating Casual Work, or Legitimating Precarity?' (2015) No. 00/2015 University of Oxford Legal Research Paper Series 16, p. 5 citing for each descriptor respectively J O'Connor, 'Precarious Employment and EU Employment Regulation' in G Ramia, K Farnsworth and Z Irving, *Social Policy Review 25: Analysis and Debate in Social Policy*' (OUP 2013) 238; N Busby and M McDermont, 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings' (2012) 41 ILJ 166; citing in fn 3 DTI, *Success at Work: Protecting Vulnerable Workers, Supporting Good Employers.* (London, 2006) [25]; and T Shildrick, R MacDonald and C Webster, *Poverty and Insecurity: Life in Low-Pay, No-Pay Britain* (OUP 2012) 24.
[14] M. Freedland and N. Kountouris, The Legal Construction of Personal Work Relations, OUP, 2012, p. 318. For different discussions of the term see A. Adams, Z. Adams, and J. Prassl, 'Legitimizing Precarity: Zero

that just under 1 million people in the UK were employed in this way[15] although it is likely that this understates the true number of such contracts.[16]

Although worker profiles on zero hours contracts vary from highly skilled IT and creative professionals to unskilled workers, their use is higher in certain industries, particularly hospitality, retail and the health and social care sector, and among particular demographics of the labour market, especially younger workers and women workers.[17] Workers are often required to be extremely flexible (which is frequently cited as a positive aspect of the arrangement but which leads to increased competition between workers; to very long hours worked; and, extremely low earnings); are afforded few if any employment law protections; and, are remunerated only for actual time worked and work completed thus leading, in many cases, to financial insecurity. Concerns have also been raised about the proliferation of zero hours contracts amongst workers who use the UK benefits system which, following the introduction of Universal Credit, attaches stringent conditionality to payments thereby increasing 'the pressure on individuals to accept casualised forms of employment.'[18]

The extent to which individuals engaged under a zero-hours contract are protected by employment law depends on whether they can be classed as working under a contract of

Hours Contracts in the United Kingdom' in M. O'Sullivan and others (eds), Zero Hours and On-call Work in Anglo-Saxon Countries (Springer 2019) and also the introduction to the ELLJ 2022 special issue on zero hours contracts.

[15] https://www.statista.com/statistics/414896/employees-with-zero-hours-contracts-number/

[16] See ONS, 'Contracts That Do Not Guarantee a Minimum Number of Hours' (2018). Available at https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/april2018

[17] Overview in Abi Adams and Jeremias Prassl, *Zero-Hours Work in the United Kingdom*, Conditions of Work and Employment Series No. 101 (ILO, 2018).

[18] Simon Deakin and Zoe Adams, *Re-Regulating Zero Hours Contracts*, (IER 2014), 24. On the interaction between the benefits system and ZHCs see Virginia Mantouvalou, 'Welfare-to-work, zero-hours contracts and human rights' (2022) 13(3) *European Labour Law Journal* 431.

employment. In English law, the contract of employment serves as the 'cornerstone' [19] of the modern labour law system and those classed as employees benefit from the full range of employment rights and protections. The statutory regulation of the employment contract is limited, and in its absence, the common law has, over time, developed various tests to determine whether someone is an employee. Thus, a contract of employment requires a wage-work bargain between the parties which confers rights on the employer to control performance and contains no terms inconsistent with employee status.[20] Other relevant factors include ascertaining levels of 'control'[21], the degree of an individual's 'integration'[22] into the employing entity, and the 'economic reality'[23] of the relationship. Finally, there must be an 'irreducible minimum' of continuing obligations to offer and perform work, also known as 'mutuality of obligation'[24]. Freedland, writing in 1976, offered the following analysis on 'mutuality of obligation':

> At the first level there is an exchange of work for remuneration. At the second level there is an exchange of mutual promises of future performance. The second level – the promises to employ and to be employed – provides the arrangement with its stability and with its continuity as a contract. The promises to employ and to be employed may be of short duration or may be terminable at short notice; but they still form an integral and most important part of the contract. They are the mutual undertakings to maintain the employment relationship in being which are inherent in any contract of employment so called.[25]

[19] O. Kahn-Freund, 'Legal Framework' in A. Flanders and H. Clegg, *The System of Industrial Relations in Great Britain* (Basil Blackwell, Oxford, 1954) 42, 45.
[20] *Ready Mixed Concrete Ltd v Minister of Pensions* [1968] 2 QB 497
[21] *Yewens v Noakes* (1880) 6 QBD 530.
[22] *Steven, Jordan & Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101.
[23] *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173.
[24] *O'Kelly v Trusthouse Forte plc* [1983] ICR 728; *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 (CA); *Clark v Oxfordshire Health Authority* [1998] IRLR 125 (CA). See also N. Countouris, 'Mutuality of Obligation' in A. Bogg and others (eds), The Autonomy of Labour Law (Hart 2015).
[25] MR Freedland, The Contract of Employment (Clarendon Press, 1976), 21-22.

In essence, Freedland suggests that the contract of employment consists not only of a work-wage bargain made whenever the employee goes to work but also a pair of promises that the employer will continue to provide future work which the employee will accept; thereby drawing the separate work-wage bargains into a global or umbrella contract. In subsequent case law, the courts have tended to apply mutuality of obligation in this way; without mutuality of obligation, that is to say a legal obligation on the part of the employer to find future work for the employee, there can be no contract of employment.[26]

The requirement for mutuality of obligation subsequently became a stumbling block for those hired on a casual, short-term or intermittent basis to establishing employment status. Since 1997, a number of statutes have therefore applied not only to employees but also to 'workers' which includes those who work under 'any other contract […] whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.' (section 230(3)(b)Employment Rights Act (ERA) 1996) In applying the definition in section 230(3)(b) ERA 1996, the courts have also relied on the tests used to identify employee status, such as control, integration, and mutuality of obligation albeit the application of the tests has been more generous and 'in the putative worker's favour'.[27] More recently, the courts have moved away from using 'preconceived ideas drawn from the employee case law'[28], emphasising the obligation on the part of the worker to perform work or services personally[29]. This has meant that 'worker' has become a distinct category, not a '"low-fat" version of employee: it is a different concept altogether.'[30] Those

[26] See also ACL Davies, Employment Law (Pearson, 2015).
[27] *Byrne Bros (Formwork) v Baird* [2002] ICR 667 (EAT), [17] and see *Singh v Bristol Sikh Temple Management Committee* (2012) UKEAT/0429/11/ZT.
[28] ACL Davies, Employment Law (Pearson, 2015), 114.
[29] See *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32.
[30] ACL Davies, Employment Law (Pearson, 2015), 114.

found to be workers under section 230(3)(b) are entitled to a limited number of employment rights, including the minimum wage, working time and holiday pay regulations, rights under the agency worker regulations, and some anti-discrimination protections. Rights to redundancy and unfair dismissal protections, minimum notice periods, and maternity and parental rights are however reserved to employees.

Individuals who fall outwith the definitions of both employee and worker are self-employed independent contractors, which takes them outside the scope of employment protections. The extent to which individuals on zero hours contracts are considered employees, workers or self-employed depends on the terms of the contract and the facts of the case. The orthodox common law position was that the overarching contract will not amount to a contract of employment, as there is insufficient mutuality of obligation, but an individual could be classed as a worker or employee while they are actually working provided they fulfil the requisite common law tests during that time.[31] Yet in some cases, the presence of a substitution clause – a clause which negates the need for personal service and allows the worker to provide a substitute – has led the courts to find that even those times when an individual was working did not endow employment or worker status as the clause negated the 'irreducible minimum of obligation' necessary in the provision of personal service.[32]

In recent case law, the courts have, in some cases, departed from this orthodox common law position to recognise the reality of many working relationships. In *Autoclenz v Belcher*[33], the claimants were car valeters whose signed contractual documents contained statements to the

[31] See *Carmichael v National Power plc* [2000] IRLR 43 and *McMeechan v Secretary of State for Employment* [1997] IRLR 353.
[32] *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367; *Staffordshire Sentinel Newspapers Ltd v Potter* [2004] IRLR 752; *Commissioners of Inland Revenue v Post Office Ltd* [2003] IRLR 199; *IWGB v CAC and Roofoods Ltd (t/a Deliveroo)* [2018] IRLR 911.
[33] [2011] UKSC 41.

effect that the claimants were self-employed. The claimants maintained that this did not reflect the reality of their relationship with Autoclenz[34] and they sought a declaration that they were workers as defined under the Working Time Regulations 1998 and the National Minimum Wage Regulations 1999. On appeal, the Supreme Court agreed with the finding of the Employment Tribunal that the claimants were workers and, in doing so, had regard to 'the relative bargaining power of the parties […] in deciding whether the terms of any written agreement in truth represent what was agreed'. In order to ascertain the true nature of the employment relationship, courts should therefore have regard to 'all the circumstances of the case, of which the written agreement is only a part.'[35] In *Pulse Healthcare* this allowed the Employment Appeal Tribunal (EAT) to confirm that 6 healthcare workers were employees notwithstanding a zero hours term in their contract. The EAT found that 'the written contracts – the "Zero Hours Contract Agreement" – did not reflect the true agreement between the parties.'[36] The decision in *Autoclenz* has since been relied upon by courts to justify a finding of employee or worker status where the facts of a case are at odds with formal contractual wording, especially in recent cases concerning the employment status of gig workers.[37] However question marks remained over the extent to which courts could 'disregard written contractual terms which are consistent with how the parties worked in practice but which it regards as unfairly disadvantageous (whether because they create a relationship that does not attract employment protection or otherwise) and which might not have been agreed if the parties had been in an equal bargaining position.'[38]

[34] The facts are summarised in [2011] UKSC 41 at [37].
[35] At [35].
[36] *Pulse Healthcare Ltd v Carewatch Care Services Ltd & 6 Others* UKEAT/0123/12/BA.
[37] *White v Troutbeck* [2013] IRLR 286; *Pimlico Plumbers* [2018] UKSC 29; *Addison Lee Ltd v Gasgoigne* [2018] ICR 1826; *Addison Lee Ltd v Lange* [2019] ICR 637; *Dewhurst v City Sprint UK Ltd* [2017] 1 WLUK 16; *Leyland v Hermes Parcelnet Ltd* [2018] 6 WLUK 464.
[38] Underhill LJ in the Court of Appeal in Uber [2019] IRLR 257 at [120].

In *Uber BV v Aslam*[39], the Supreme Court provided some clarity. The question was whether drivers providing private vehicle hires whose work was arranged through Uber's smartphone application were independent contractors or workers for the purposes of the Employment Rights Act 1996, the National Minimum Wage Regulations 2015 (NMWR 2015), and the Working Time Regulations 1998. The NMWR 2015, which we will return to in our analysis below, contain complex provisions governing the way in which time is to be reckoned for the purpose of establishing in any particular case whether the employer has paid the appropriate remuneration under the National Minimum Wage Act 1998.

Uber argued that the drivers performed services under contracts made with passengers through Uber as their booking agent. The Employment Tribunal disagreed and found that the drivers worked under worker contracts for Uber London. This was upheld on appeal by the Employment Appeal Tribunal and the Court of Appeal. The Supreme Court unanimously dismissed Uber's appeal to also find that the drivers were workers and were considered to be working whenever they were logged into the Uber app within the territory in which the driver was licensed to operate and were ready and willing to accept trips. In reaching its conclusion, the Court recognised not only the inequality of bargaining power (as in *Autoclenz*) between the parties but also the protective purpose of the employment legislation to which individuals only become entitled once they have attained the requisite status. According to Lord Leggatt, labour laws 'were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those designated by their employer as qualifying for protection.'[40] This distinguishes employment rights from other contractual rights agreed between the parties. The Supreme Court therefore concluded that courts should, when assessing employment status,

[39] [2021] UKSC 5. See also Joe Atkinson and Hitesh Dhorajiwala 'The Future of Employment: Purposive Interpretation and the Role of Contract after *Uber'* (2022) 85(3) Modern Law Review 787.
[40] At [77].

determine, on a broad reading of the facts, whether the individual was one that the statute sought to protect. Taking such a purposive approach implied that courts, in determining whether an individual is a 'worker', should not take the contractual agreement as a starting point as that would 'reinstate the mischief which the legislation was enacted to prevent.'[41] Rather, courts are required to consider the facts of the case, including the level of subordination and dependency, and the purpose of the legislation in order to determine the true nature of the agreement. Any contractual wording remains relevant but not determinative in making such an assessment. The practical consequence of the decision in *Uber* is that any time periods when the driver is logged into the Uber app within the territory in which they are licensed to operate and are ready and willing to accept trips could count as 'working time' for the purposes of the Working Time Regulations 1998 and as 'unmeasured work' for the purposes of the NMWR 2015.[42] Periods of 'unmeasured work' in any pay reference period are to be computed in accordance with regulation 45 of the NMWR 2015 and refer to the 'hours … worked' meaning that a driver is to be paid during the whole period of work time rather than just when they are actually engaged in driving a passenger.

The decision in Uber is considered to represent 'a dramatic shift in focus, replacing a more formalistic contractual approach with a broader "relational" analysis that engages with the underlying goals and purposes of employment statutes.'[43] Practically, it may lead to thousands of claims for holiday pay and national minimum wage claims. Although the case involved worker status in the context of the gig economy, the principles set out by the Supreme Court are broad enough to have the potential to be applicable whenever courts are determining

[41] At [76]. See also the EAT decision in *Uber*.
[42] At [138].
[43] Joe Atkinson and Hitesh Dhorajiwala 'The Future of Employment: Purposive Interpretation and the Role of Contract after *Uber'* (2022) 85(3) Modern Law Review 787, 799.

employment status, including in other factual scenarios and should, in theory, make it easier for workers on zero hours contracts to claim employment rights and protections.[44]

The question then arises whether this refocus on the purposive rationale of employment protection measures *is* likely to benefit all of those who find themselves employed under precarious or insecure arrangements in the UK. When placed alongside another decision handed down by the Supreme Court in 2021, the answer would appear to be less certain. In the following section, we consider a contrasting parallel development in the Supreme Court's jurisprudence in order to show that the fragmentation which characterises the UK's precarious workforce means that an enduring adherence to formulism can have divisive and devastating consequences for workers in specific sectors. Furthermore, this fragmentation, by which different types of work are classified in different ways in order to rationalise the maintenance of the status quo, gives rise to vastly different treatment of workers which is, de facto, deeply gendered.

Employment protection and the care worker conundrum

In *Royal Mencap Society v Tomlinson-Blake*,[45] (*Mencap*) the Supreme Court was asked to consider how the number of hours of work undertaken by night-time carers were to be calculated for the purposes of applying the NMW. In one of two joined cases the Court was asked to rule on whether the overnight hours in which a female carer who undertook sleep-in shifts for the Royal Mencap Society should be included in her total working hours under the NMWR 2015. She was permitted to sleep during these specified hours but was required to remain at the homes of the two adults with learning disabilities for whom she cared. She had

[44] Although it remains to be seen how the principles set out in *Uber* will be applied where a substitution clause is present in the employment contract (see *IWGB v CAC and Roofoods Ltd (t/a Deliveroo)* [2021] EWCA Civ 952 which, at time of writing, is under appeal to the Supreme Court).
[45] [2021] UKSC 8.

no assigned tasks to perform during the night but had to keep a 'listening ear' out and to respond to any incident that required her intervention. Over the 16 months preceding the case, she had been required to respond six times and she received an allowance of £22.35 for the whole sleep-in shift plus one hour's pay in expectation of the amount of work she would undertake overnight, giving a total payment per sleep-in of £29.05. At first instance the Employment Tribunal held that Ms Tomlinson-Blake was entitled to be paid at the hourly NMW rate for each hour of her sleep-in shift. Mencap's appeal to the Employment Appeal Tribunal (EAT) was dismissed on the basis that she was working during the sleep-in shift. The Court of Appeal overturned that decision leading to the appeal to the Supreme Court.[46]

The judgment of the Supreme Court was largely based on a technical reading of the NMWR 2015. The relevant type of work in *Mencap* is defined in the NMWR 2015 as 'time work'. i.e. work in respect of which a worker is paid by reference to the amount of time worked.[47] Regulation 32 of the NMWR 2015 states,

1. Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.
2. In paragraph (1), hours when a worker is 'available' only includes hours when the worker is **awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work** and the employer provides suitable facilities for sleeping. (our emphasis).

Despite this provision, care workers had been found to be working during sleep-in shifts in a line of previous EAT judgments.[48] Justifications for this approach included that the workers

[46] [2018] EWCA Civ 164. For a scathing contextualised critique of the judgment, see LJB Hayes 'Three steps too far in the undervaluing of care: Mencap v Tomlinson-Blake', Labour Law blog, 15th August 2018, https://uklabourlawblog.com/2018/08/15/three-steps-too-far-in-the-undervaluing-of-care-mencap-v-tomlinson-blake-ljb-hayes/

[47] Regulation 3, the National Minimum Wage Regulations 2015.

[48] See *Burrow Down v Rossiter* [2008] ICR 1172; *Whittlestone v BJP Home Support Ltd* UKEAT/0128/13/BA;

concerned could not leave site and were present pursuant to a statutory obligation on the employer, for example to comply with health and safety or other such provisions, which meant that the question of whether the work fell within the scope of Regulation 32 did not arise.[49] Furthermore, it had also been established that regardless of whether a worker was sleeping, a contractual requirement to attend and remain at a premises is a duty constituting 'work' for the purposes of minimum wage protection, not least because the period of attendance is controlled by the employer and the worker is subject to discipline if they leave the premises or fail to perform other required duties during the shift.[50]

Taking a different approach in its judgment, the Supreme Court in *Mencap* drew a line between carrying out 'actual work',[51] when those of sleep-in shifts would be entitled to have their hours counted for NMW purposes and being 'available for work'. The latter case, which applied to the appellant, would be caught by Regulation 32 with the NMW only applicable when the worker is awake for the purposes of working.[52] This approach overruled the Court of Appeal's decision in *British Nursing Association v Inland Revenue*[53] in which it held that home-based night workers, who assigned 'bank nurses' for nursing homes on an emergency basis via a 24-hour telephone booking service, were entitled to the NMW even though the work was intermittent and they were permitted to sleep. The decision of the Inner House of the Court of Session in *Scottbridge Construction Ltd v Wright*[54] was also overruled. In that case a worker responsible for answering the phone and dealing with security alarms on an overnight shift was

and *Esparon v Slavikovska* UKEAT/0217/12/DA.
[49] *Esparon* judgment, para 56.
[50] *Whittlestone* judgment, para 56.
[51] See Regulation 3, the National Minimum Wage Regulations 2015.
[52] See paras 42-45 of the judgment.
[53] [2003] ICR 19.
[54] [2003] IRLR 21.

held to be working throughout the shift, even though it was very rare that he was not able to sleep.

Work: classifications and value

The workers in the cases concerning overnight provision were not classified either as working under zero hours contracts or as gig-economy workers and enjoyed the status of employees without any ambiguity. Indeed Ms Tomlinson-Blake was salaried for the daytime care she provided, and the night-time sleep-in shifts were part of her regular rota. Such work and the arrangements under which it is performed are not new phenomena, nor are they unusual for those whose job it is to provide essential round the clock care for vulnerable adults. The long-term existence and inevitable continuation of such arrangements makes the lack of certainty concerning their rate of remuneration, despite legislation and related case law going back over 20 years of particular concern. The authority now given by the Supreme Court that care workers will be expected to provide their services overnight for considerably less than the NMW, places them in an at least equally precarious position as those who endure unclear contractual status; a situation which previous judgments had sought to avoid. For example, the EAT in *Whittlestone* was aware of the important connection between employment status and the enjoyment of employment rights when, in finding that the care worker concerned should be entitled to the NMW for sleep-in shifts, it noted that '…there had been agreement between the employer and the Claimant that she would work; she would have been disciplined if she had not been present throughout the period of time; she could not for instance slip out for a late night movie or for fish and chips.'[55] In that respect, she was subject to the same expectations regarding the fulfilment of her contractual obligations whatever the time - day or night.

[55] UKEAT/0128/13/BA, para 58.

Following on from that logic, why are such workers, following *Mencap*, no longer subject to the appropriate protection of the law in the same way as Uber drivers are now deemed to be during the time when they are at their employer's disposal and ready and willing to work? We suggest that the distinguishing factor is value, specifically the different values ascribed to different forms of work in terms of contribution and reward.

Related judgments (both judicial and societal) and underpinning rationale are imbued with perceptions and assumptions concerning the labour-wage exchange and the purpose of employment protection legislation such as the National Minimum Wage Act 1998. In *Mencap*, the NMW was classified by the Court as only applying to those hours of active engagement prescribed as such by the employer, regardless of the institutional benefits including legal compliance which directly accrued as a result of such work, whereas in *Uber* the Court found that 'Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it'.[56] The Supreme Court in *Uber* agreed with the Employment Tribunal[57] that the Uber workers' hours were not 'time work' but 'unmeasured work'[58] and, thus, the drivers were entitled to be paid the NMW from the point at which they turned on the app (or 'clocked on') until they turned it off at the end of a shift, the intention being that they would be paid at the NMW rate for waiting time in between assignments.[59] This approach replies on what Bogg and Ford have described as a statutory purposive approach[60]

[56] [2021] UKSC 5, para 76.
[57] *Aslam and Farrer & Others v Uber*, 2202550/2015/ET, 28 October 2016, para 122.
[58] *Uber* judgment, para 138.
[59] This remains an issue of contention with the company continuing to dispute the payment of the NMW from 'clock on' to 'clock off' - https://freedomnews.org.uk/2022/06/23/london-hundreds-of-uber-drivers-rally-to-protest-the-companys-failure-to-protect-workers-from-the-cost-of-living-crisis/
[60] Alan Bogg and Michael Ford, 'The Death of Contract in Determining Employment Status' (2021) *L.Q.R.* 137, 392.

whereby the court asks 'whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.'[61] As outlined above, the determining factor for the Court in deciding on the status of the Uber drivers' time was the element of control present so that, following *Uber*, the factual matrix must be considered in deciding whether specific statutory protections will apply. If the same approach had been used in *Mencap* the hours of work would surely have been classified as unmeasured work, rather than time work enabling the workers to benefit from the application of the NMW in the same way as the *Uber* workers were able to.

The difference in the ascription of value by the Court in the *Uber* and *Mencap* cases is related to the nature of the work carried out and the general assumption that care, or the readiness to provide care, is an activity which is performed intuitively and without effort in a 'homely' setting, and thus does not amount to real work, whereas taxi driving, including preparedness to undertake a driving assignment, is always work. The fact that the former is performed predominantly by women and the latter is performed predominantly by men is both constitutive (work is sex-typed) and incidental (recruitment may be gender neutral and, in certain care situations, a male carer may actually be required[62]) but nevertheless results in the affirmation and perpetuation of low value 'women's work'.

It is perhaps also salient to note the difference in employer type: Uber is a private sector organisation whereas, despite the widespread practice of the contracting-out of services to the

[61] *Collector of Stamp Revenue v Arrowtown* [2003] HKFCA 46, at 35.
[62] The worker in the case originally joined with *Mencap* (*Shannon v Rampersad (t/a Clifton House Residential Home)* was male and his right of appeal was dismissed by the Court of Appeal.

private and third sectors,[63] care provision in the UK ostensibly remains the preserve of the public sector as it is inextricably linked to the provision of a public health service and access to social assistance 'from cradle to grave' as part of a universal welfare state.[64] The judgment of the Supreme Court in *Mencap* was issued against a policy backdrop of claims by the care sector that the continuation of the policy of paying the NMW for sleep-in shifts could have put the whole care system in financial jeopardy. As Hayes has outlined in the context of the Court of Appeal's decision,[65] claims by employers that maintenance of the earlier EAT decisions would have resulted in a bill of over £400 million to redress underpayments[66] are difficult to confirm but it does seem likely that the renewed approach, now confirmed by the Supreme Court, has vastly reduced the cost of care provision by the state. The passing on of liability for failure to meet the true costs of care provision to private and third sector organisations, through the long-term policy of the contracting-out of essential services, raises questions concerning the state's apparent distance from its 'cradle to grave' commitments. The cutting of the ties between government policy and the performance of service delivery, obfuscates state liability for failure to meet statutory standards and to address worker exploitation, reaffirming homecare's status as 'invisible labour'.[67] As unfortunate as it might be for an already overburdened and under resourced third sector to have to bear the high cost of fully compensating care workers for their labour, it is more unfortunate that it is the workers themselves who are expected to bear that cost through reduced wages – an action, that when applied to those on minimum wage, can be classified as 'wage theft'.[68]

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[63] Royal Mencap Society is a registered charity which provides various forms of support. Including care provision, for people with a learning disability.
[64] Beveridge Report, 1944.
[65] LJB Hayes, 'Three steps too far in the undervaluing of care: Mencap v Tomlinson-Blake,' UK Labour Law Blog, 15 August 2018, available at https://wordpress.com/view/uklabourlawblog.com
[66] See: https://www.local.gov.uk/sites/default/files/documents/Sleep%20ins%20Brief%20May%202018%20updated.pdf
[67] Nancy Folbre (2001) The invisible Heart: Economics and Family Values; LJB Hayes Stories of care, 34-41;
[68] Nicole Hallett 'The Problem of Wage Theft' *Yale Law & Policy Review*, Vol. 37, No. 1 (fall 2018), pp. 93-152.

This brings us back to a consideration of the purpose of labour law, specifically in the context of subordination and dependency. Is dependency in the work context, as applied by the Court in *Uber*, a purely economic concept limited to the incumbent's reliance on the income generated or does it also refer to '… dependence on the work for other things such as social interaction and relationships, a sense of self-worth, or contribution to society'?[69] The latter would seem to incorporate the social and psychological value of the care-related work with which *Mencap* is concerned more accurately. The recognition that the contribution of such work goes beyond the mere performance of the tasks involved would surely require a more protective approach from the law in exchange than that applied by the Court in *Mencap*. The relevance of control in working relations also appears to be a slippery concept depending on what type of work is performed and by whom. The employees in *Mencap* exercised a high degree of control over their working conditions and their employers presumably placed a particular value on their ability to do so right up to the point at which this changed so that, rather than 'working' they were merely required to be present in case their services might be needed. As McCann has argued, when considered alongside each other, the Supreme Court's judgments in *Mencap* and *Uber* (and indeed the different factual bases and legal treatment of the claims themselves) highlight 'fractures in how UK labour law prompts, sustains, and curbs temporal casualisation.'[70] The judgment in *Mencap* illustrates 'a regulated casualisation of night work'[71] or to be more specific care work that takes place at night, whereas *Uber* produces the potential for unification of other working arrangements. The singling out for different treatment of the care workers in *Mencap* is both sectoral and gendered and one cannot help but

[69] Joe Atkinson and Hitesh Dhorajiwala 'The Future of Employment: Purposive Interpretation and the Role of Contract after *Uber'* (2022) 85(3) Modern Law Review 787, 794.
[70] Deirdre McCann, 'Mencap and Uber in the Supreme Court: Working Time Regulation in an Era of Casualisation', (OxHRH Blog, April 2021), https://ohrh.law.ox.ac.uk/mencap-and-uber-in-the-supreme-court-working-time-regulation-in-an-era-of-casualisation/
[71] McCann ibid.

wonder how a case which combines questions over the employment status and associated rights of contract care workers might play out post *Uber*. Nonetheless, it seems incongruous that the legal framework supports and sustains such sectoral and gendered fragmentation even where employment status is not in question.

This brings us to the question of what, if anything, can be done to challenge the status quo? The legal framework which regulates work in the UK is complex and obfuscate and, as the preceding analysis shows, even where legal challenge is possible and results in success, outcomes may be piecemeal, lacking cohesion and consistency and requiring further enforcement. Furthermore, the gendered nature of certain types of work and its ascribed value has proved to be stubbornly resistant to legal intervention despite decades of sex equality law. Precarity and insecurity, it seems, will always find a way to circumvent law's reach. This has made some scholars question whether, rather than attempting to regulate post facto the economic circumstances relating to work to accommodate different patterns and arrangements of work, the very economic foundations themselves should be scrutinised and alternatives considered. This seems a particularly timely juncture at which to concern ourselves with such fresh thinking, particularly as debates abound regarding the import of a 'new' economy premised on contemporary arrangements concerning information-based systems and new technologies and the shift away from the industrial model of employment. In the next section we explore some of the 'alternative economies' literature to discern what it can tell us about the way things are and how they might be reimagined to produce more socially just outcomes for all workers regardless of gender, race, class or working arrangements, and in particular the way in which the use of temporality as a means of measuring work can reproduce flawed assumptions regarding contribution and reward.

Alternative economies and real utopias

The project of critiquing 'masculinist visions of the economy and politics that overlook the care labour required for the reproduction of life for all of us'[72] is not a new venture for feminist scholarship.[73] It has long been recognised that the reallocation of care work - away from its association with low value and low (or no) pay - is required and this, in turn calls for a reconsideration of what such work consists of and how it is measured, compensated and/or rewarded. Using a diverse economies approach enables attention to be paid '…to the multiple and complex forms of "compensation" and motivation that compel or invite us to perform this labour.'[74] The performance of care is class-bound and racialised, as well as being gendered, and so the composition of the relevant workforce is as important as the motivation for undertaking such work and the forms of compensation received.[75] In other words, the *who* cannot and should not be separated from the nature of the work and the arrangements under which it is performed. This emphasises the need to look at economic ordering rather than legal regulation as a starting point for achieving meaningful change. Furthermore, the combination of paid work, unpaid work, and work which is paid for or compensated through hybrid or alternative means, for example through reciprocity, which characterises the provision of care can only be fully captured by its placement within the economic schema. Law and the legal regulation of work is confined to that which is paid and generally restricted to an obligatory framing based on a contractual nexus of responsibility,[76] hence the importance of status as a

[72] Kelly Dombroski, 'Caring labour: redistributing care work' in JK Graham-Gibson et al, *The Handbook of Diverse Economies* (Edward Elgar, 2020), 154.
[73] J Tronto, *Caring Democracy: Markets, Equality, and Justice* (New York University Press, 2013); J Tronto, J. (2017), 'There is an alternative: *Homines curans* and the limits of neoliberalism' (2017) *International Journal of Care and Caring* 27; See also CA MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1988) or M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008-2009) 20 *Yale Journal of Law and Feminism* 1.
[74] Kelly Dombroski, 'Caring labour: redistributing care work' in JK Graham-Gibson et al, *The Handbook of Diverse Economies* (Edward Elgar, 2020), 154.
[75] K Dombroski, S. Healy and K. McKinnon 'Care-full community economies', in W. Harcour and C. Bauhardt (eds), *Feminist Political Ecology and Economies of Care* (Routledge, 2019).
[76] N. Busby *A Right to Care: Unpaid Work in European Employment Law* (OUP, 2011).

means of acquiring labour law's protection as demonstrated in *Uber*. The combination of the different types of labour and compensation encapsulated by care is acknowledged by diverse economies scholars who recognise that it can be simultaneously capitalist and non-capitalist.[77] Indeed such acknowledgement is a necessary step in making visible the range of economic relations that are 'more-than-capitalist'.[78]

In seeking to explore the relationship between work, value and reward, Kathi Weeks has questioned the economic and social logic in placing primary importance on the value of waged work at a time when opportunities for individuals to secure jobs which pay a living wage are rapidly diminishing.[79] Under the status quo, the 'work society' frames waged work as morally necessary and the imperative to engage in it provides the gateway to citizenship and the right to participate in the wider capitalist economy, thus providing the means by which the life that a person lives is legitimated. In Weeks's estimation, against the backdrop of growing global financial insecurity, this stance is, in itself, morally questionable particularly when so many are unable to achieve stable and secure paid work.

Of course, there is nothing new about the expectations that flow from this hegemonic conception of work and the different values ascribed to different forms of productive and reproductive work within the capitalist system. Debates about work have been prevalent since the Industrial Revolution which heralded the birth of the particular model of employment protection that endures to this day. The invisibility of 'women's work' in the shift to a market

[77] Kelly Dombroski, 'Caring labour: redistributing care work' in JK Graham-Gibson et al, *The Handbook of Diverse Economies* (Edward Elgar, 2020), 154, 155; J Cameron and K Gibson-Graham, 'Feminising the Economy: Metaphors, Strategies, Politics' (2003) 10(2) *Gender, Place and Culture* 145.
[78] Ibid. For examples of such scholarship, see M. Waring, 'Counting for something! Recognising women's contribution to the global economy through alternative accounting systems' (2003) 11(1) *Gender & Development*, 35; Gradon Diprose, 'Radical equality, care and labour in a community economy' (2017) 24(6) *Gender, Place & Culture* 834.
[79] K. Weeks *The Problem with Work; Feminism, Marxism, Antiwork Politics and Postwork Imaginaries*. (Duke University Press, 2011)

economy was reflected in its absence from the regulatory framework and this continued absence, or at best accommodation, of the different arrangements under which paid work is performed alongside high levels of unpaid care underpins the fragmentation of the labour market along gendered and sectoral lines as illustrated by the *Uber* and *Mencap* cases. In economic terms, these differences have been exacerbated and the valorisation of paid (productive) work has intensified since the global financial crisis.[80] Against this backdrop, it is clear that the digital revolution is only a revolution in so far as it has disrupted the ways in which some work is arranged and performed. Societal expectations about 'work' and the parameters of its regulation, i.e. that it is largely performed, measured and paid for under a contractual nexus, based on the ideal that it should be secure, stable, full time and permanent, have not changed. Such idealisation has reinforced the act of 'othering' those whose experiences of work do not conform, giving rise to exploitation, and the levelling down of associated conditions.

Although some of the literature on diverse economies, particularly when it aligns with feminist theory, calls for enhanced opportunities for more women to engage in different forms of waged work, or for an increase in the value given to the types of work undertaken in the performance of care (both paid and unpaid),[81] there are other alternatives. As Cameron and Gibson-Graham note,[82] such analyses which are essentially rooted in traditional economic theory, tend to focus on 'adding on and counting in' various forms of waged work using pre-existing measures of the economy rather than challenging the underlying economic system. As Gradon Diprose has noted, '…in some instances, calls for more and better work for women have actually extended

[80] Ibid.
[81] N. Busby *A Right to Care: Unpaid Work in European Employment Law* (OUP, 2011).
[82] J Cameron and K Gibson-Graham, 'Feminising the Economy: Metaphors, Strategies, Politics' (2003) 10(2) *Gender, Place and Culture* 145, 147.

the contradictions of the work society'[83] resulting in the raising of expectations about what women 'should' be doing rather than the alleviation of the pressures of the 'second shift'.[84] Furthermore, in some occupations an increase in women workers has had a negative effect on wage rates overall.[85]

In reimagining the economic valuing of all forms of work and resulting changes to work arrangements, we are required to think deeply about how the current conditions under which work takes place are framed and thus perpetuated in the legal, policy and public consciousnesses. As dominant contemporary processes such as automation and outsourcing reduce waged work to a minimum, our participation in waged work continues to be the core measure and source of wealth and social identity. This produces a paradox whereby workers are unable to participate in the prescribed form, that is under a full-time and permanent 'standard' arrangement, not because of any reluctance on the part of the individual worker, but because such participation is not available to them: the secure and stable work model of the past has been replaced for so many by increasingly precarious, non-standard forms of work. The central question is whether the rise in precarity and related loss of job security offer new opportunities for a different way of life. In her blog post 'Struggling with Precarity: From More and Better Jobs to Less and Lesser Work',[86] Wanda Vrasti has posited that the crisis of capitalist productivity predicated by the onset of cheaper, automated production methods is, in fact, '…a crisis of work or a crisis of a society built around work as the only legitimate point

[83] Gradon Diprose, 'Radical equality, care and labour in a community economy' (2017) 24(6) *Gender, Place & Culture* 834, 835.
[84] Arlie Hochschild and Anne Machung *The Second Shift: Working Parents and the Revolution at Home* (Penguin Books, 2012).
[85] Emily Murphy and Daniel Oesch 'The Feminization of Occupations and Change in Wages: A Panel Analysis of Britain, Germany, and Switzerland' (2016) 94(3) *Social Forces* 1221.
[86] W. Vrasti (2013) 'Struggling with Precarity: From More and Better Jobs to Less and Lesser Work' available at https://thedisorderofthings.com/2013/10/12/struggling-with-precarity-from-more-and-better-jobs-to-less-and-lesser-work/.

of access for income, status and citizenship rights.'[87] Through its association with this crisis of the society of work, '[p]recarity is a word for our time. It describes the slow disintegration of the historic bond between capitalism, democracy and the welfare state.'[88]

This conceptualisation relies on a Marxist understanding of late capitalism. As Marx observed, where labour time is stripped back to the bare minimum, 'Capital itself is the moving contradiction, [in] that it presses to reduce labour time to a minimum, while it posits labour time, on the other side, as sole measure and source of wealth. Hence it diminishes labour time in the necessary form so as to increase it in the superfluous form.'[89] In recognising the relevance of this formulation to the current social stasis, Vrasti asks 'What if instead of describing a shared experience all that the concept [of precarity] did was point to the absence of a common ground? Is there any way we could turn precarity around from a testament to our shared vulnerability into a positive affirmation of collective desire?'.[90] In this reimagining, rather than framing the increased precarity surrounding work as representative of the loss of a societal utopia where work security was the norm, we could utilise it as a galvanising force for imagining a different future. In the absence of a return to the traditional forms of regulation and measures of stability and security, 'could we perhaps push the contradictions of the present into a future where flexibility and contingency are an expression of security rather than a form of punishment.' [91]

[87] Ibid,
[88] Ibid.
[89] K. Marx (1857-61) *Grundrisse: Foundations of the Critique of Political Economy (Rough Draft), Notebook VII:* The Chapter on Capital (published in 1973 by Penguin Books in association with New Left Review) available: https://www.marxists.org/archive/marx/works/1857/grundrisse/,
[90] W. Vrasti (2013) 'Struggling with Precarity: From More and Better Jobs to Less and Lesser Work' available at https://thedisorderofthings.com/2013/10/12/struggling-with-precarity-from-more-and-better-jobs-to-less-and-lesser-work/.
[91] Ibid.

This reclaiming of the term and state of precarity in order to contextualise the experiential reality of our working lives has a certain resonance with Fineman's utilisation of vulnerability as 'universal and constant, inherent in the human condition' and her call for a legal framework that places the 'vulnerable subject' at its core.[92] However, whereas Fineman's thesis relates to the human subject of law who experiences vulnerability through her embodied state and embeddedness within institutions which are themselves vulnerable, precarity is more usefully recognised as inherent to the experience of interacting with the processes and structures by and within which work is organised in a late capitalist system. In fact, to reject the idea of precarity as being potentially of value risks reaffirmation of post-war capitalism as the ideal economic model which 'perpetuates the quite-common fantasy that Fordism was capitalism done right'[93]. In acknowledging precarity's positive qualities, we can point to the individual freedom that a decoupling from the full-time, permanent model of employment can bring. In the abstract the appeal of this redefinition of precarity is obvious – the subject gains time to commit to the other activities that make a life complete including the pursuit of leisure and travel. In constructing such an ideal it is important that we take account of the proper place of care as a crucial and non-negotiable, yet variable, aspect of life. In setting out a case for including the non-monetized value of care in economic modelling, Nancy Folbre argues for recognition of the contribution made by the invisible heart of the carer[94] in contrast to Adam Smith's invisible hand of the market.[95] What such a shift in perspective would mean for labour law is difficult to estimate: the challenge to the free market ideology which underpins the capitalist system and around

[92] M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008-9) 20 *Yale Journal of Law and Feminism* 1, 2.
[93] W. Vrasti (2013) 'Struggling with Precarity: From More and Better Jobs to Less and Lesser Work' available at https://thedisorderofthings.com/2013/10/12/struggling-with-precarity-from-more-and-better-jobs-to-less-and-lesser-work/.
[94] Nancy Folbre *The Invisible Heart: Economics and Family Values* (New Press, 2001), 231.
[95] Adam Smith *Wealth of Nations* (17th Ed: Wordsworth Editions, 2012).

which the legal framework is constructed would at the very least reveal the mythology of so many of its central tenets including the autonomy and independence of the individual and the apparent neutrality of its key institutions including law. By embracing our common vulnerability, interdependency and innate precarity, we might seek to build a more inclusive and reflective legal and policy response capable of instilling sustainable social change and achieving gender justice.

Conclusion

This article took as its starting point the use of and regulatory challenges surrounding zero hours contracts in the UK up to and including the Supreme Court's judgment in *Uber*. This judgment was then contrasted with the approach taken by the Court in *Mencap* in order to highlight the existence of a fragmented approach to regulation for those who work under irregular arrangements. In analysing the different approaches taken by the regulatory framework and judicial interpretation, the article drew on the 'alternative/diverse economies' literature which makes a values-based argument for reassessing how society and its institutions measure, monitor and reward human endeavour. This process of thinking about the organisation of work and how to develop an empirically-grounded contemporary model on which to base its future regulation can benefit from the reimagining of a 'real utopia'[96] – an ideal that is grounded in the real potential for social change. Rather than 'adding on' or 'counting in' the activities associated with care so that they become subject to the same constraints that currently exist in relation to waged work, we need to consider alternative approaches that make it possible and desirable for all humans, regardless of gender, to engage with the care of themselves and others. Radical fiscal measures such as a universal basic income or minimum income guarantee may offer routes out of the paid work bind by enabling

[96] Erik Olin Wright *Envisioning Real Utopias* (Verso, 2010).

individuals to embrace the increasingly precarious nature of paid work whilst ensuring that all of life's facets are accounted for. In accepting that we have reached the outer limits of late capitalism as foreseen by Marx and evidenced by the unsatisfactory treatment of temporality in cases such as *Uber* and *Mencap*, the necessary search for such alternatives has the potential to free us all.