

Reinterpreting Law's Silence: Examining the Interconnections between Legal Doctrine and the Rise of Immaterial Labour

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Recent years have seen a rise in immaterial labour in the United Kingdom and other developed economies. Sociological explanatory accounts of these developments focus primarily on economic drivers. Little, if any, inquiry has been made into the potential role of law. This article seeks to identify the aspects of law that may be constitutive of employer and worker perceptions of the acceptability (or otherwise) of employer demands for immaterial labour. Two key contributions are made. The first is a setting-out of a methodological approach to exploring the constitutive effect of law that emphasizes the internal operation of legal doctrine as critical to understanding its sociological implications. The second is the development of substantive knowledge on the potential role of law vis-à-vis the rise of immaterial labour.

I. INTRODUCTION

Sociological investigation in the United Kingdom (UK), as well as in other developed economies such as the United States (US), has identified new ways that employers are extracting value¹ from workers² in the post-Fordist

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- 1 My reference to the term 'value' includes the Marxist conception of economic value resulting from the exploitation of workers in the 'hidden abode of production'. But it extends this beyond the privileged site of the workplace to also include locations of the reproduction of social life, referred to as the 'new hidden abode of production' in the 'new' economy by Böhm and Land (S. Böhm and C. Land, 'The New "Hidden Abode": Reflections on Value and Labour in the New Economy' (2012) 62 *The Sociological Rev.* 2). While scholars such as Fraser (N. Fraser, 'Behind Marx's Hidden Abode: For an Expanded Conception of Capitalism' (2014) 86 *New Left Rev.* 55) observe that social reproduction is a necessary background condition for capitalism, Böhm and Land emphasize it as a key site of competitive advantage and economic productivity.
- 2 In the UK, Section 230(3) of the Employment Rights Act 1996 details the category of 'worker', which includes 'employees' and other contracts for the personal performance of work except as undertaken as part of an independent business.

or ‘new’ economy. Terms such as ‘immaterial labour’,³ ‘emotional labour’,⁴ and ‘aesthetic labour’⁵ are used in an attempt to capture these trends. At a broad level, they reflect how aspects of the worker ‘self’ are increasingly being drawn upon to add value to the good or service that is produced and sold.

There are various ways that this can play out in practice. For example, those working in the knowledge and cultural industries are expected to imbue a commodity or service with its informational and cultural content. There may be expectations that workers are on top of the latest cultural trends – developed in part due to their own interests and social activities – which are then drawn upon and incorporated into their creative work, thus potentially increasing the profit achieved from the output. For interactive service workers, it can involve their being required to produce a particular aesthetic environment through their body and clothing or a particular affect, such as ease, well-being, excitement, or desire. The look and feel of many retail and service settings now incorporate the physical and emotional efforts of workers in order to add an additional layer of cultural meaning to the products or service being sold. The effect is that the brand, and thus the potential for profit, is enhanced.

Even in sectors such as manufacturing, immaterial labour is said to play a role, as it constitutes the paradigm for work organization.⁶ This can be seen, for example, in the way that cooperation and communication between workers is key to the successful operation of semi-autonomous work groups. Positive and effective interaction between group members is relied upon to ensure efficient and quality production practices.

An interesting aspect of these developments is that they appear to disrupt the distinction – implicit within labour law but critical to its operation – between the productive realm of paid work and the reproductive realm of family, home, and leisure. The production/reproduction divide is both dynamic and contentious. What we are seeing in this new iteration is the productive sphere utilizing particular behaviours and socialities typically associated with the reproductive realm.⁷ In effect, employers are seeking to achieve further value from workers by requiring them as part of their job roles to reproduce or apply that associated with, developed in, and/or undertaken in the reproductive realm.

3 M. Hardt and A. Negri, *Empire* (2000); M. Lazzarato, ‘General Intellect: Towards an Inquiry into Immaterial Labour’, trans. E. Emery, updated P. Colilli, at <<http://www.geocities.ws/immateriallabour/lazzarato-immaterial-labour>>.

4 A. Hochschild, ‘Emotion Work, Feeling Rules, and Social Structure’ (1979) 85 *Am. J. of Sociology* 551; A. Hochschild, *The Managed Heart: Commercialization of Human Feelings* (2003); A. K. Daniels, ‘Invisible Work’ (1987) 34 *Social Problems* 403.

5 C. L. Williams and C. Connell, ‘“Looking Good and Sounding Right”: Aesthetic Labor and Social Inequality in the Retail Industry’ (2010) 37 *Work and Occupations* 349.

6 Hardt and Negri, op. cit., n. 3.

7 K. Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics, and Postwork Imaginaries* (2011).

The two key sociological explanatory accounts of the rise of immaterial labour – that of the autonomist Marxist tradition and that found in the ‘invisible work’ literature – focus primarily on economic drivers for this development, giving little, if any, attention to the role of law. The autonomist Marxists highlight capital’s expansion to subsume the social reproductive realm alongside labour’s heightened recognition of their own social value and rejection of the disciplinary demands of Fordist modes of production.⁸ Invisible work scholars, for their part, emphasize the increased exploitation of hidden aspects of worker selves due to an apparent ‘naturalness’ to particular persons (notably women and ethnic minority groups) or the association of such work with the domestic realm or leisure.⁹ Labour lawyers and law and society scholars have given the subject of immaterial labour scant consideration.¹⁰

One reason for this lack of focus on the role of law may be the fact that there is no positive law in the UK, the jurisdictional focus of this article, that speaks directly to the issue. It has been observed that areas of limited or no law receive less academic focus from those undertaking law and society scholarship.¹¹ However, the lack of directly focused law does not mean that the law is irrelevant to the phenomenon of immaterial labour or that there is a lag between its rise and developments in law addressing any resulting negative implications.¹² Indeed, the very recognition of law as playing a constitutive role in social life speaks against this. We know that law is crucial to shaping how non-legal actors see the world, think about individuals’ roles and relationships with others, and act in particular contexts and environs.¹³ Such constitutive effects exist even when legal action is not pursued.¹⁴

This article seeks to open up the black box of law’s constitutive effects. It identifies aspects of the law that may be constitutive of employer and worker attitudes towards immaterial labour, teasing out the detail of this law and considering how it may play a role in shaping employer and worker perceptions of the acceptability (or otherwise) of these emerging demands by employers. Two key contributions to knowledge are made.

8 Hardt and Negri, *op. cit.*, n. 3; Lazzarato, *op. cit.*, n. 3.

9 Daniels, *op. cit.*, n. 4; E. Hatton, ‘Mechanisms of Invisibility: Rethinking the Concept of Invisible Work’ (2017) 31 *Work, Employment and Society* 336.

10 One exception to this is M. G. Crain, ‘Consuming Work’ in *Invisible Labor: Hidden Work in the Contemporary World*, eds M. G. Crain et al. (2016) 257.

11 S. R. Levitsky et al., ‘“Legality with a Vengeance”: Reclaiming Distribution for Sociological Studies’ (2018) 52 *Law & Society Rev.* 709. This observation was made with respect to social redistributive law.

12 R. W. Gordon, ‘Critical Legal Histories’ (1984) 36 *Stanford Law Rev.* 57.

13 *Id.*; A. Sarat and T. R. Kearns, ‘Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life’ in *Law in Everyday Life*, eds A. Sarat and T. R. Kearns (1993) 21; S. Deakin and F. Wilkinson, *The Law of the Labour Market* (2005).

14 P. Ewick and S. S. Silbey, *The Common Place of Law: Stories from Everyday Life* (1998); S. S. Silbey and A. Cavicchi, ‘The Common Place of Law: Transforming Matters of Concern into the Objects of Everyday Life’ in *Making Things Public: Atmosphere of Democracy*, eds B. Latour and P. Weibel (2005) 556.

The first contribution is the setting-out of a methodological approach to exploring the constitutive effect of law. Here, I draw on earlier calls to focus on legal doctrine and the internal operation of law to understand its sociological implications.¹⁵ Legal doctrine includes law's norms, rules, principles, concepts, and modes of interpretation and validation.¹⁶ In this article, I highlight and explore three distinct forms of legal doctrine: law's codification of power relations through managerial prerogative, which allows employers to instruct workers as they see fit; law's use of legal concepts, specifically that of 'work', to link facts in social life to rules; and rules from the broader legal order that are socially related to the rise in immaterial labour but legally distinct, specifically the UK's Flexible Working provisions and its conditionality requirements for social security recipients. For each of these features of legal doctrine, I draw on legal theoretical tools to understand its mode of internal operation. This then helps to inform my analyses of how these can each in turn, and cumulatively, have potential constitutive effects in social life.

This contribution is important because it allows for a more nuanced analysis of law's constitutive effects. A detailed analysis of law's internal operation can reveal the different ways that legal doctrine can be constitutive. Identifying this variation allows law and society scholars to engage in different modes of analysis to chart how the legal doctrine may shape thought and action in wider social life. Moreover, consideration of these multiple features of legal doctrine opens up space to think about how they may work together and how any constitutive effects may change over time. It is not my claim that employers and workers will have a detailed understanding of the workings of legal doctrine; nor is it that legal doctrine is determinate of particular behaviours outside of the legal realm.¹⁷ Rather, my point is that law and society scholars need to examine the detail of legal doctrine in order that they may more readily discern potential interconnections (or disconnects) with the perceptions, assumptions, and actions of non-legal actors. This can usefully inform subsequent empirical investigation.

The second contribution is the development of substantive knowledge on the potential role of law vis-à-vis the rise of immaterial labour. Social scientists and labour lawyers alike have given this issue little consideration. Labour lawyers, for their part, often assume that the dynamism of capitalism means that there is a necessary lag between developments in work and any potential protections to workers or limitations on employer actions put in place by law. This article challenges that view. The mapping exercise undertaken in this article sets out, at least partially, the potential role of law (as one

15 R. Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25 *J. of Law and Society* 171; J. Příbáň, 'A Sociology of Legal Distinctions: Introducing Contemporary Interpretations of Class Socio-Legal Concepts' (2017) 44 *J. of Law and Society* 1.

16 Cotterrell, id.

17 Gordon, op. cit., n. 12; Deakin and Wilkinson, op. cit., n. 13.

factor among many) in shaping the perceived acceptability or otherwise by employers and workers of employer demand for immaterial labour. This new knowledge is important to fill the present gap in the literature and to act as a corrective to any assumptions about the passive or irrelevant operation of law due to its apparent silence on the matter.

The format of this article is as follows. In the next section, I describe in greater detail the new developments that are occurring in work whereby employers are seeking to achieve further profit by requiring workers to apply that associated with, developed in, and/or undertaken in the reproductive realm in their job roles. This is followed by a review of theoretical approaches to considering the relationship between law and society and, indeed, how to conceptualize law. I locate the present article within this literature. The subsequent sections set out my investigation into how legal doctrine is potentially relevant to lay people's conceptions of immaterial labour. This is followed by my conclusion.

II. IMMATERIAL LABOUR AND THE RELATIONSHIP BETWEEN PRODUCTION AND REPRODUCTION

Social scientists and legal scholars alike have observed the dynamic relationship between the world of work and the social reproductive realm of family, home, and leisure. The particular delineation between the two spheres has also been noted as highly contentious. People's social position in relation to this divide and the positive or negative implications that arise from this are dependent on their social role, be they an employer or worker, as well as other factors including their sex, class, race, and nation.

The very division between what constitutes productive 'work' (in this article, I use the term 'work' to refer to paid work undertaken as part of a person's employment) and what falls outside of it is a key example. That which is deemed to be part of the productive realm and thus work is rewarded with wages and various social protections. That which falls outside of this, typically conceptualized as housework and care of children and others, but which in reality involves much more than this, is largely undervalued, falling outside of that considered necessary to remunerate or regulate. It goes without saying that this social reproductive work is primarily undertaken by women. Despite the clear interconnections between production and reproduction, including capital's reliance on reproductive unpaid work for the daily and longer-term supply of labour to capital,¹⁸ the division is maintained in law and common discourse.

18 J. Conaghan and K. Rittich, 'Introduction: Interrogating the Work/Family Divide' in *Labour Law, Work and Family*, eds J. Conaghan and K. Rittich (2005) 1; J. Conaghan, 'Work, Family, and the Discipline of Labour Law' in *Labour Law, Work and Family*, eds J. Conaghan and K. Rittich (2005) 19; Weeks, op. cit., n. 7.

Developments in the past few decades have resulted in work being increasingly undertaken outside of standard times and locations of production. This represents an example of the dynamism and contentious nature of the relationship between the two realms. Information and communication technologies have facilitated a weakening of the supposed boundary between work and non-work life.¹⁹ Many workers are finding that they are required to be increasingly available and responsive to work demands and, for some, assumed to be able to complete work outside of the usual place of work.²⁰ Despite claims of benefits arising from this new temporal and spatial flexibility, the reality – for workers, at least – can be quite different.²¹

The developments that I focus on in this article – where the realm of production is seeking to gain value from activities typically associated with the social reproductive sphere – reflect a new iteration of the dynamism and associated contention in the production/reproduction divide. What we are seeing with the rise of immaterial labour is an extension of capital's reliance on labour's reproductive activity. However, this time the emphasis is not simply on labour bearing many of the costs associated with the supply of labour, but more on capital putting to use the unpaid work (and leisure) of labour directly for commercial gain. While I focus on the observed changes in the realm of paid work, it is important to note developing conceptions of the reproductive realm itself. Here, I want to highlight the work of Weeks, who suggests that we may want to understand social reproduction as more than simply housework and child rearing and rather as 'the production of the forms of social cooperation on which accumulation depends or, alternatively, as the rest of life beyond work that capital seeks continually to harness to its times, spaces, rhythms, purposes, and values'.²²

2.1. *Autonomist Marxism and immaterial labour*

One key body of work that describes the developments in work that I am focusing on in this article is that of the autonomist Marxist tradition²³ and its use of the concept of immaterial labour. Immaterial labour is understood to mean labour that 'produces immaterial goods, such as a service, a cultural

19 Eurofound and the International Labour Office, *Working Anytime, Anywhere: The Effects on the World of Work* (2017); E. Rose, 'Temporal Flexibility and Its Limits: The Personal Use of ICTs at Work' (2015) 4 *Sociology* 505; E. Rose, 'Access Denied: Employee Control of Personal Communications at Work' (2013) 27 *Work, Employment and Society* 694; J. Wajcman et al., 'Enacting Virtual Connections between Work and Home Life' (2010) 46 *J. of Sociology* 257.

20 E. Rose, 'The New Politics of Time' (2019) 34 *International J. of Comparative Labour Law and Industrial Relations* 373; M. Greggs, *Work's Intimacy* (2011).

21 Eurofound and the International Labour Office, op. cit., n. 19; TUC, *The Decent Jobs Deficit* (2015).

22 Weeks, op. cit., n. 7.

23 Weeks observes that: 'The label "autonomist Marxism" refers historically to its autonomy as part of the Italian extraparliamentary Left in relation to other leftist parties and unions. ... [But "autonomy" also refers to] a number of its critical,

product, knowledge or communication',²⁴ or the 'informational and cultural content of the commodity'.²⁵ It is important to note that it is not the labour itself that is immaterial, but rather its product.²⁶ Critically, immaterial labour draws our attention to the new ways in which workers create profit for employers.²⁷ Below, I set out two empirical studies that utilize this theoretical conceptualization and help to demonstrate its application in practice.

A study by Land and Taylor examined the role of workers in a small ethical, lifestyle clothing company.²⁸ The company sourced, rather than produced, the products that it sold – although it did print quirky slogans on its T-shirts. Profit was achieved by the development of a brand surrounding the clothing based on 'authenticity', environmentalism, sporting lifestyles, and ethical trading.

Those working for the company were often drawn to work there because of the company ethos. However, the company itself also used the lifestyles of its workers as part of its brand enhancement practices. One example of this was the 'too nice to work' vouchers that the company gave staff after a good sales period. Staff could redeem them whenever they wanted and use the day off for their own purposes. One employee used one of these vouchers to go sea kayaking. This activity – undertaken outside of work – was then written about in the company's blog and clothing catalogue. While on the one hand the voucher was a reward by the company, it also represented a branding opportunity. In effect, use was made of the activities of the workers outside of work to create additional profit. They did this by helping the company to develop its brand – by demonstrating that the company, together with its workers, were committed to the lifestyle that it promoted.

We can see from this example that value-producing activity is no longer necessarily confined to the physical location of work or the discrete hours of work. But more than this, it is no longer confined to that which might typically be considered work. Rather, workers' non-work activities – in this case, their leisure – are drawn on by employers to imbue products with additional value. Activities previously coded as part of the social reproductive realm are now being utilized by capital.²⁹

Another example of the profit sought through immaterial labour is the study of waitressing conducted by Dowling.³⁰ This demonstrates the extent to which some employers recognize the value produced by enhancing the affective quality of service. In the restaurant in question, waitresses were explicitly

political, and utopian commitments. ... But perhaps more important, it refers to an affirmation of a collective capacity for autonomy vis-à-vis capital.' Id., p. 95.

24 Hardt and Negri, op. cit., n. 3, p. 200.

25 Lazzarato, op. cit., n. 3.

26 Hardt and Negri, op. cit., n. 3.

27 M. Hardt and A. Negri, *Labor of Dionysus: A Critique of the State Form* (1994).

28 C. Land and S. Taylor, 'Surf's Up: Work, Life, Balance and Brand in a New Age Capitalist Organization' (2010) 44 *Sociology* 395.

29 See also Böhm and Land, op. cit., n. 1.

30 E. Dowling, 'Producing the Dining Experience: Measure, Subjectivity and the Affective Work' (2007) 7 *ephemera* 117.

required to make the customer feel happy, contented, and entertained. The company's *Philosophy of Hospitality* handbook explained:

We are throwing a party ... We want our guests to feel at home and cared for. We have to make them feel that they are the only ones at the party, that they are important to us ... You are the key ... you have to be the perfect host or hostess: cheery, relaxed, unflappable ... you are graceful, sincere and refined.³¹

In addition to following a detailed step-by-step process of how to interact with customers, waitresses were also encouraged to 'let their own personalities shape their engagement with customers who were to be imagined as the waitress's personal guest in their own home'.³²

What is being sold in this example is a form of immaterial labour that produces a particular service experience, notably the type of sociality typically associated with the reproductive realm: warmth, specific interest in the individual, and care. The employer is attempting to recreate this reproductive form of sociality in the productive realm for the purposes of enhancing profit.

2.2. *Invisible work*

This production of affect speaks directly to the conceptual beginnings of the other sociological theory that describes the developments in work that I focus on in this article: invisible work. Invisible work includes work performed that benefits employing organizations but that is overlooked, ignored, and/or economically devalued.³³ The early work in this literature focused on emotional labour – that is, the warm and caring aspects of the construction of interpersonal relations.³⁴ More recently, it has come to include observing how others are feeling and working to bring about a particular affective ambience, such as sympathy or gaiety.³⁵

The invisible work literature makes the critical point that this work tends to be invisible – in the sense of being overlooked, ignored, and/or economically devalued – because it appears 'natural' to a particular person,³⁶ or is associated with domestic work, leisure, or consumption.³⁷ There is, of course, a strong gender dimension here. Expectations of women in the private

31 Id., p. 120.

32 Dowling, op. cit., n. 30, p. 121.

33 W. R. Poster et al., 'Introduction: Conceptualizing Invisible Labor' in eds Crain et al., op. cit., n. 10, p. 1; Hatton, op. cit., n. 9.

34 Daniels, op. cit., n. 4. See also Hochschild, op. cit. (1979), n. 4; Hochschild, op. cit. (2003), n. 4.

35 C. Warhurst, 'From Invisible Work to Invisible Workers: The Impact of Service Employers' Speech Demands on the Working Class' in eds Crain et al., op. cit., n. 10, p. 214; M. Korczynski, 'The Point of Selling: Capitalism, Consumption and Contradictions' (2005) 12 *Organization* 69; A. Witz et al., 'The Labour of Aesthetics and the Aesthetics of Organization' (2003) 10 *Organization* 33.

36 Hatton, op. cit., n. 9.

37 Poster et al., op. cit., n. 33; Hatton, op. cit., n. 9.

reproductive realm become silently incorporated into and simply assumed to be part of ‘female’ jobs.

Another facet of invisible work that I want to highlight is that which is called aesthetic labour. This refers to the management of workers’ corporeality – that is, a worker’s deportment, style, accent, voice, and attractiveness.³⁸ Aesthetic labour has become increasingly important in interactive service work, especially fashion or lifestyle retail and hospitality. This is because it is these service workers – the way that they look, sound, and act – that is part of what is purchased.³⁹ Service workers can be viewed as ‘brand representatives’ who personify the products on display and convey to consumers the intended cultural meaning associated with the organization.⁴⁰ Employers are fully aware of the potential value-add of workers who can enhance the product brand by embodying the aspirations that it seeks to sell. Studies demonstrate that many employers view emotional and aesthetic ‘skills’ to be vital for the job and that they recruit and train staff accordingly.⁴¹

Writers on aesthetic labour often draw on Bourdieu’s notion of habitus to theorize the deep-seated dispositions that form the basis of aesthetic labour. Bourdieu used the term ‘habitus’ to capture the ‘practical sense’ that we learn in order to meet the demands and expectations of our social position in society.⁴² It is not something that one has but, rather, constitutes something that one is. The link to social class is very important. Aesthetic labour is not about whether someone is good looking or not. Rather, it refers to the presentation of the self that emerges from the social conditioning that takes place in the reproductive realm. It is notable that the generally preferred form of presentation or the acceptable habitus is that of the middle class. Other forms of habitus, such as the working-class habitus, are often viewed as deficient.

So, again we are seeing employers attempting to increase profit from their workers’ activities in the reproductive sphere: this time, the work done towards producing one’s habitus. But it is not simply any work in this regard, rather the work that produces the valued middle-class habitus.

III. CONCEPTUALIZING THE INTERCONNECTIONS BETWEEN LAW AND SOCIETY

In seeking to address the question of how law might be involved in these developments at work, I necessarily position myself in some way in relation

38 Williams and Connell, *op. cit.*, n. 5.

39 P. Thompson et al., ‘Ignorant Theory and Knowledgeable Workers: Interrogating the Connections between Knowledge, Skills and Services’ (2001) 38 *J. of Management Studies* 923; Williams and Connell, *id.*

40 Williams and Connell, *op. cit.*, n. 5; Witz et al., *op. cit.*, n. 35.

41 D. Nickson et al., ‘Soft Skills and Employability: Evidence from UK Retail’ (2012) 33 *Economic and Industrial Democracy* 65; Thompson et al., *op. cit.*, n. 39.

42 P. Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (1984).

to two key issues that lie at the core of law and society scholarship: what is the relationship between law and society and what, for that matter, is law?

With respect to the first question relating to the nature of the relationship between law and society, I locate myself in the now widely accepted view that law and society are mutually constitutive. This suggests that law simultaneously forms part of society and contributes to the very form that it takes, and vice versa. But what might this look like in practical terms? The potential points, forms, and degree of interconnection are multiple, as revealed by the different approaches adopted in law and society scholarship.⁴³ However, given that my starting point is legal doctrine, I want to focus on the possible interconnections with social life that emerge from this.⁴⁴

One way in which this can be undertaken is to consider law's instrumental effects. This approach is typically concerned with the causality between law and the activities of legal subjects.⁴⁵ Key issues include assessing the effectiveness (or otherwise) of law's ability to regulate behaviour. However, as noted above, the present inquiry into the rise of immaterial labour is in the main *not* subject to direct legislation or rules from case law. Efforts to chart direct causal effects from law to social life would be rather fruitless.

Another approach to considering the implications of law is to understand its constitutive effect. This can capture the way that law's categories, concepts,

43 There are various accounts of how this might work. For a general review, see C. Tomlins, 'How Autonomous Is Law?' (2007) 3 *Annual Rev. of Law and Social Science*

45. Specific theories of interaction include S. Deakin, 'Evolution for Our Time: A Theory of Legal Memetics' (2002) 55 *Current Legal Problems* 1; Gordon, op. cit., n. 12.

44 The fact that the starting point for my investigation is legal doctrine may suggest that it is a study of the effect of a particular aspect of law on society. However, I make no claims as to the direction of such changes. Potential features of legal doctrine may bring about change with respect to how employers and workers think and act, but at the same time these features of legal doctrine may themselves have come about, at least in part, from developments (and contestation) in the realms of economics, finance, and production.

45 D. Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36 *Stanford Law Rev.* 575; Sarat and Kearns, op. cit., n. 13. An example of the instrumental effect of law in practice in the context of employment law in the UK can be seen in C. Barnard et al., 'Opting Out of the 48-Hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK' (2003) 32 *Industrial Law J.* 4. This article noted some evidence of employer efforts to reduce working hours to comply with the upper weekly working limit of 48 hours, but also reported widespread use of a derogation via an opt-out provision. Employers took advantage of the ability to obtain an opt-out agreement from employees, typically at the commencement of their employment. Employer justification for this approach says much about the UK legal culture when it comes to employment relations. Employers cited the business case for opt-out agreements, pragmatic issues (such as administrative costs in attempting to comply with weekly working limits), and the industrial relations culture, which is highly individualized. Such a view was supported by the state, which framed the individual opt-out derogation as vital to maintaining a flexible labour market.

and structuring of particular relationships can shape how non-legal actors conceptualize and act in social life,⁴⁶ and even their very consciousness.⁴⁷ The resulting legal ideas can mould people's everyday categories of thought and influence their interactions with others. It is not simply the case, though, that the law influences all communities or individuals in the same way. A whole raft of studies has revealed otherwise. Particular occupational communities⁴⁸ and different racial or class-based groups,⁴⁹ for example, demonstrate diverging conceptions of, attitudes towards, and behaviour with respect to the law. Moreover, legal cultures in different jurisdictional contexts shape law's constitutive effects. The UK's employment legislation, common law, and dispute resolution processes reflect a liberal labour market that promotes employer freedoms and individualizes employment relations.⁵⁰

Ways in which law can be further constitutive of social life can be explored through Michel Foucault's ideas of law as a mode of biopolitical power that governs through normalization.⁵¹ Foucault suggests that in modernity law operates increasingly as a norm. It wields its power by defining norms relating to particular substantive conceptions of desirable ends.⁵² This contrasts with an earlier juridical form in which the institution of law operates as an expression of a sovereign's power.⁵³ Here, rules are external to those over whom they govern and relate to extrinsic standards of authority, mortality, virtue, or duty of obedience.⁵⁴ The norm, by contrast, operates as a mode of social law in the sense that the state sets out an intended form of individual

46 Gordon, *op. cit.*, n. 12; Sarat and Kearns, *op. cit.*, n. 13; Trubek, *id.*; Deakin and Wilkinson, *op. cit.*, n. 13.

47 A. Sarat, "'... The Law Is All Over': Power, Resistance and the Legal Consciousness of the Welfare Poor' (1990) 2 *Yale J. of Law and Humanities* 343; Ewick and Silbey, *op. cit.*, n. 14. While not drawing explicitly on the notion of 'legal consciousness', Rose and Busby highlight the internalized subjectivities of low-income workers in the UK regarding morally appropriate behaviours when faced with workplace problems. Modes of neoliberal governance evidenced in policy discourse and changing procedural aspects of the employment tribunal process had the effect of disincentivising workers from asserting their employment rights. E. Rose and N. Busby, 'Power Relations in Employment Disputes' (2017) 44 *J. of Law and Society* 4.

48 M. Hertogh, *Nobody's Law: Legal Consciousness and Legal Alienation in Everyday Life* (2018).

49 Ewick and Silbey, *op. cit.*, n. 14; L. B. Nielsen, 'Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment' (2000) 34 *Law & Society Rev.* 1055.

50 G. J. Anderson et al., *The Common Law Employment Relationship: A Comparative Study* (2017); G. S. Morris, 'The Development of Statutory Employment Rights in Britain and Enforcement Mechanisms' in *Making Employment Rights Effective: Issues of Enforcement and Compliance*, ed. L. Dickens (2012) 7.

51 M. Foucault, *The History of Sexuality, Vol 1: An Introduction*, trans. Robert Hurley (1980); F. Ewald, 'Norms, Discipline, and the Law' (1990) 30 *Representations* 138; N. Rose and M. Valverde, 'Governed by Law?' (1998) 7 *Social & Legal Studies* 541.

52 Rose and Valverde, *id.*

53 Ewald, *op. cit.*, n. 51.

54 Rose and Valverde, *op. cit.*, n. 51.

behaviour that reflects a standard that emerges from the society in which it governs.

Normalization is more nuanced than the idea of law being made up of normative propositions or having a normative effect. Normativity refers to rules or principles describing how legal persons or parties to a contract, for example, should act or the statements of the rights and duties that they have in relation to each other.⁵⁵ Norms in the sense that Foucault intends, on the other hand, refers to the way that law can operate as both a measurement of behaviour and a means of producing a common standard. It generates the positive control of normalization as individuals can compare themselves, and are compared by others, to the norm.⁵⁶ In this way, the thoughts and actions of certain groups of individuals to which the norm refers can be powerfully shaped by that norm.

Foucault's reconceptualization of the law as operating through the power of the norm opens up the second question at the core of law and society scholarship that my present investigation entails: what is law? Many studies that focus on the way that law influences society assume law to be positive law – that is, the 'law on the books'. Sometimes, law is referred to as a general unspecified block of rules – the law 'in general' – or perhaps the law relating to a general area, such as welfare.⁵⁷ However, this approach has been critiqued by certain scholars. Valverde claims that "'Law" is the mother of all legal fictions'.⁵⁸ These fictions are the work of the legal discipline itself, through its textbooks and jurisprudence, as it attempts to unify and rationalize what is in reality a diversity of legal sites, legal concepts, legal criteria or judgments, legal personnel, and so on.⁵⁹

Alternative framings of law include consideration of it as its own epistemic subject with a distinct form of social discourse and ways of doing things. Scholars conceptualizing law in this way highlight the importance of understanding the internal operation of law through its various knowledge practices.⁶⁰ These practices are claimed to encapsulate part of the politics that constitute the very operation of law.⁶¹

What could be viewed as an extension of this are studies that recognize the material aspects of law and its operation. One example is Grabham's study of legal temporalities.⁶² Drawing on actor-network theory and object-related anthropology, she observes the critical role of objects employed in the legal

55 M. Freedland, *The Personal Employment Contract* (2003).

56 Ewald, *op. cit.*, n. 51.

57 Sarat, *op. cit.*, n. 47.

58 M. Valverde, *Law's Dream of a Common Knowledge* (2003) 18.

59 Rose and Valverde, *op. cit.*, n. 51.

60 Deakin and Wilkinson, *op. cit.*, n. 13; G. Teubner, 'How the Law Thinks: Toward a Constructivist Epistemology of Law' (1989) 23 *Law & Society Rev.* 727; Příbáň, *op. cit.*, n. 15; A. Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53 *Buffalo Law Rev.* 973.

61 Riles, *id.*; Valverde, *op. cit.*, n. 58.

62 E. Grabham, *Brewing Legal Times* (2016).

field (such as case reports, medical tests, drugs, and classification systems) to the materialization of time in legal networks, and considers ‘ways of doing law with these things’.⁶³ For Grabham, understanding a particular area of legal regulation and the temporalities constituted therein requires grasping the specific relationships between people, things, and laws.

Valverde presents another example.⁶⁴ She explores the various modes of knowledge and forms of knowledge production circulating in the legal arena, including determinations of ‘fact’ by those holding non-scientific knowledges, the application of values, and the details contained in various codes. Indeed, Valverde (and together with Rose⁶⁵), inspired by Foucault, argues that the empirical focus should be on particular *legal complexes*, which they describe as ‘ill-defined, uncoordinated, often decentralized sets of networks, institutions, rituals, texts, and relations of power and of knowledge that develop in those societies in which it has become important for people and institutions to take a position vis-à-vis law’.⁶⁶

I locate the present investigation into the potential interconnections between legal doctrine and the rise in immaterial labour within the conceptualization of law as a particular episteme with its own form of social discourse. My very starting point of legal doctrine – law’s norms, rules, principles, concepts, and modes of interpretation and validation⁶⁷ – necessitates an investigation into how the law on this issue operates or ‘thinks’. An understanding of these everyday legal knowledge practices informs how I identify the potential constitutive effects of legal doctrine⁶⁸ – be this through constituting categories of thought and social relationship, normalizing processes, or otherwise.

Indeed, in many ways, my investigation into legal doctrine may be viewed as focusing on certain aspects of the legal complex, as per Rose and Valverde.⁶⁹ However, my limited engagement with the various features that comprise the legal complex is due in part to the fact that my point of inquiry is prior to any specific legal action being taken. I do not consider the experiences of employers or workers who seek to directly engage with law, such as making a claim in an employment tribunal. Instead, I am interested in how legal doctrine operates as a backdrop to these non-legal actors’ lives (albeit, as I hope to show, as an active one).

As noted above, at first glance it would appear that there is very little positive law relating to immaterial labour. However, part of what I hope to convey is that law and society scholars need to go beyond an apparent silence of specific legal rules to consider the perhaps less obvious features of legal doctrine that may play a constitutive role in shaping the perceptions

63 *Id.*, p. 6.

64 Valverde, *op. cit.*, n. 58.

65 Rose and Valverde, *op. cit.*, n. 51.

66 Valverde, *op. cit.*, n. 58, p. 18.

67 Cotterrell, *op. cit.*, n. 15.

68 *Id.*; Příbání, *op. cit.*, n. 15.

69 Rose and Valverde, *op. cit.*, n. 51.

and/or actions of non-legal actors. This article highlights three aspects of legal doctrine potentially relevant to the rise of immaterial labour: law's codification of power relations through managerial prerogative; law's use of legal concepts to link facts in social life to rules; and rules from the broader legal order providing new norms regarding the nature of the relationship between employers and workers and what workers should bring to the exchange relationship with their employers.

With respect to the latter feature – rules from the broader legal order – Cotterrell reminds us that sociological investigation of law should take account of legal doctrine that may be legally distinct but are socially interconnected.⁷⁰ The interconnectedness of the wider legal background has been noted as a relevant feature of legal evolution.⁷¹ On the one hand, as new legal doctrine comes into being at different periods of time, overlaying existing doctrine, the broader body of doctrine already in existence may not necessarily shift.⁷² Older features of legal doctrine may thus appear relatively autonomous, transcending and/or playing some role in the way that newer forms of legal doctrine operate in practice.⁷³ On the other hand, it has been observed that legal concepts, such as that of 'work', are malleable and can change over time.⁷⁴ A key driver for such change is developments in other areas of law, such as through the introduction of new legislation.⁷⁵

I consider these insights useful for my present investigation. While they relate to the development of legal doctrine itself, the idea of the layering of and interrelationship between different features of legal doctrine also seems applicable when considering law's constitutive effect. It suggests that while different features of legal doctrine should be subject to individual analysis, attention also needs to be given to potential cumulative implications. Employers and workers may be influenced by multiple features of legal doctrine that in varying ways speak to the same social issue.

IV. MANAGERIAL PREROGATIVE: THE CODIFICATION OF POWER RELATIONS

The first aspect of legal doctrine that I will examine that may potentially shape employer and worker perceptions of the acceptability (or otherwise) of employer demands for immaterial labour is the concept of managerial prerogative. Managerial prerogative is the name given to certain common law implied terms in the contract of employment that provide (1) that an employer has the power to direct its workers as it sees fit, and (2) that workers must

70 Cotterrell, *op. cit.*, n. 15.

71 Deakin and Wilkinson, *op. cit.*, n. 13; Deakin, *op. cit.*, n. 43.

72 Gordon, *op. cit.*, n. 12.

73 *Id.*; Deakin, *op. cit.*, n. 43.

74 Deakin and Wilkinson, *op. cit.*, n. 13; Deakin, *id.*

75 Deakin and Wilkinson, *id.*

comply with the lawful instruction of their employer.⁷⁶ It effectively provides a solution to the necessary incompleteness of contracts of employment at the time that they are created.⁷⁷ It offers a means by which employers can manage their workers in a way that they view as necessary to meet the immediate and changing needs of a business. In essence, managerial prerogative allows for the ongoing creation of workplace rules or requirements as set by the employer.⁷⁸

A critical feature of managerial prerogative is that it is not necessary for an employer to get legal confirmation that their requests of workers are acceptable in law. Rather, managers have the right or entitlement to give instruction as they see fit, provided that they do not go against positive law. The law can only intervene if a case is brought before the courts to question a matter or if new legislation comes into force to outlaw particular employer practices. In the broader scheme of employment operations, this is an infrequent occurrence. In essence, managerial prerogative is a mechanism that facilitates employer-driven change.

The provisions comprising managerial prerogative effectively codify the power relations that exist between the parties to the contract of employment. Employers have a wide ability to dictate the terms of the position and workers have little option but to adapt to these instructions, which can change over time. The structuring of the terms of interaction between employers and workers in this way operates akin to a background rule that underpins almost all aspects of the way in which the parties to the contract of employment are able to relate to each other.⁷⁹

The legal concept of managerial prerogative will likely have a strong normative effect, constituting a sense of right or entitlement on the part of employers and a sense of obligation on the part of workers.⁸⁰ Employers will likely feel that they are perfectly within their remit to seek new forms of value from workers for the benefit of the business, even if they draw on that typically associated with the reproductive realm. This is especially the

76 S. Deakin and G. S. Morris, *Labour Law* (2012, 6th edn).

77 Freedland, *op. cit.*, n. 55; Deakin and Morris, *id.*; H. Collins et al., *Labour Law* (2012).

78 Despite jurisprudential analyses noting the common law developments of an implied duty of mutual trust and confidence, which emphasizes a positive mutual obligation of cooperation and fairness between the parties to the contract of employment, the employer's prerogative to command obedience during working hours largely remains unfettered. See D. Brodie, 'The Heart of the Matter: Mutual Trust and Confidence' (1996) 25 *Industrial Law J.* 121; Anderson et al., *op. cit.*, n. 50.

79 D. Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 15 *Legal Studies Forum* 327.

80 H. Arthurs, 'Understanding Labour Law: The Debate over "Industrial Pluralism"' (1985) 38 *Current Legal Problems* 83. It has been observed that the parties to the contract will have various implicit expectations vis-à-vis the operation of the contract of employment that are not specified in the express terms of that contract, but that are at least in part captured by the implied terms, such as the employer's right to manage. See Collins et al., *op. cit.*, n. 77.

case given that the apparent silence of law on the matter suggests that such requests are lawful. Workers, for their part, may well expect that they should follow the instructions of the employer. This may be the default position taken. A request by an employer will likely need to be rather exceptional for them to refuse.

Indeed, the sense of a right on the part of employers and a complementary obligation on the part of workers has been reinforced on a number of fronts in recent years. The neoliberal policy agenda of the past few decades has emphasized the freedoms of entrepreneurs and attempted to limit anything that may restrict these. For example, the UK Conservative and Coalition Government (2011–2015) undertook a ‘Red Tape Challenge’ that aimed to reduce the regulation viewed as unnecessarily burdening business and the economy.⁸¹ Employment law was targeted, with various requirements placed on employers cut in a bid to promote entrepreneurial freedom. Another factor likely strengthening employers’ sense of right to instruct workers is the declining rates of trade union membership⁸² and the diminishment of their effective abilities through successive legislation.⁸³ This has had the effect of reducing viable resistance to managerial demands.

It is easy to see how the normative effect of managerial prerogative might influence the general acceptance of shifting practices vis-à-vis productive activity. When employers direct workers to act in a way that is associated with, developed in, and/or undertaken in the reproductive realm, it may be understood by workers as simply another instruction that must be followed as part of the job. In effect, performing immaterial labour as part of one’s job may become simply normal. This suggests changing notions of what constitutes work – a topic to which I now turn.

V. LEGAL CONCEPTS: LINKING FACTS IN SOCIAL LIFE TO RULES

Another feature of legal doctrine that may potentially have a constitutive effect on the developments taking place at work is law’s use of legal concepts, in particular that of ‘work’. Legal concepts perform the vital function of linking facts in social life to legal rules.⁸⁴ They enable legal actors to categorize whether or not legal rules might apply to a particular factual situation. Labour

81 National Archives, ‘About Red Tape Challenge’, at <<https://webarchive.nationalarchives.gov.uk/20150507103822/http://www.redtapechallenge.cabinetoffice.gov.uk/about/>>.

82 Department for Business, Energy & Industrial Strategy, *Trade Union Membership 2017: Statistical Bulletin* (May 2018), at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/712543/TU_membership_bulletin.pdf>.

83 For example, the Trade Union Act 2016.

84 G. Samuel, *Epistemology and Method in Law* (2003); Deakin and Wilkinson, op. cit., n. 13.

law operates primarily through the concept of the contract of employment.⁸⁵ If a social arrangement between two parties is positively categorized as such, the relevant law relating to employment arrangements will be mobilized.⁸⁶ At the heart of the contract of employment lies the wage–work bargain, in which the legal concept of ‘work’ is crucial.

Workers undertake ‘work’ in exchange for wages. An employer can specify the nature of the tasks required to be performed in the contract of employment or, as noted above, through their managerial prerogative. Relatedly, certain statutory instruments require the need to determine whether a worker has spent time ‘working’. These include the National Minimum Wage Act 1998 (NMW), in order to determine the period of time for which workers need to be paid, and the Working Time Regulations 1998 (WTR), in order to determine entitlement to rest breaks. The legal concept of ‘work’ is further developed through the application of these provisions.

In her analysis of the meaning of ‘work’, Davies identifies two strands of reasoning emerging in the case law in both common law and statutory contexts.⁸⁷ These are, first, a literal view of work as time spent actively engaged in the tasks set by the employer and, second, a more nuanced perspective that focuses on the worker being ready and willing to work. In the determination of whether or not a person is ‘working’ for the purposes of the NMW and the WTR, being available for work at the employer’s premises is a relevant consideration.⁸⁸ The specific tasks undertaken are typically irrelevant.⁸⁹ The situation varies for workers who are away from an employer’s premises. If the worker is on call, he or she will not be working for the purposes of the NMW or the WTR.⁹⁰ However, it is possible for the worker to be working from home (or some other location), in which case the NMW and the WTR will apply.⁹¹

The concept of ‘work’ would seem to be a prime example of an aspect of law that has a constitutive effect, shaping how people see the world and their categories of thought. Although subject to empirical verification, I would suggest that most non-legal actors likely understand ‘work’ to mean activities relating to one’s job and typically undertaken in the workplace. Conversely, non-legal actors will likely have a common-sense understanding of what falls outside of ‘work’. This will include labour and efforts undertaken but not as part of one’s paid employment.

85 Deakin and Wilkinson, *id.*

86 Deakin and Wilkinson, *id.*

87 A. C. L. Davies, ‘Getting More than You Bargained For? Rethinking the Meaning of “Work” in Employment Law’ (2017) 46 *Industrial Law J.* 4.

88 *Id.*; L. Rodgers, ‘The Notion of Working Time’ (2009) 38 *Industrial Law J.* 80.

89 However, the situation is more complex when workers are allowed to sleep at the work premises. See Davies, *id.*; Rodgers, *id.*

90 Davies, *id.*

91 *British Nursing Association v. Inland Revenue* [2002] EWCA Civ 494, [2003] ICR 19.

Given this, it is probable that non-legal actors' conception of 'work' will readily accommodate, and perhaps even has already accommodated, employer requests for immaterial labour. A key factor here is the substantive openness of the legal concept of 'work'. The specific nature of the tasks undertaken as part of 'work' is irrelevant when determining what can appropriately fit within its bounds. This particularity of the legal concept of 'work' likely has flow-on implications in terms of its constitutive effects. As such, the fact that immaterial labour requires workers to reproduce or apply that associated with, developed in, and/or undertaken in the reproductive realm is of no significance. Such tasks will likely be unproblematically considered to fall within people's idea of 'work' provided that they are requested by an employer as part of the employment relationship and that the tasks are undertaken in the usual place of work.

But what of the practice of employers trying to benefit financially from the activities undertaken by workers in the reproductive realm of family, home, and leisure? Will non-legal actors readily accept these as falling outside of the bounds of 'work'? Might workers think that they deserve payment for the time, effort, and expense involved in activities such as the preparation of their bodies for aesthetic labour (dressing in a particular manner, applying make-up, styling hair, and maintaining the desired physique)? These activities are drawn upon by employers in the work context to add a layer of cultural meaning to the products or services sold, which employers hope will translate into profit.

It seems that the legal concept of 'work' and the mechanism by which it enables the categorization of what might fall inside and outside of its bounds makes this outcome unlikely. Legal concepts do not map directly onto reality in social life.⁹² Rather, legal concepts, such as 'work', subject this reality to a particular vision of the world – a process that is far from neutral.⁹³ The particular vision of the world embedded in the legal concept of 'work' is one where employers can ignore and fail to acknowledge their dependence on the unpaid labour (or, indeed, leisure) taking place in the reproductive realm.⁹⁴ There is widespread acceptance among non-legal actors that reproductive tasks such as child rearing, cooking, and cleaning fall outside of the concept of 'work'. I suggest that it is likely such acceptance will extend to capture those activities that enable people to perform immaterial labour in the space and time of their jobs.

Moreover, questioning the particular delineation of activities assumed within the legal concept of 'work' requires a non-legal actor to challenge, even if in a minor way, the dominant political, social, and economic order. The categorizing function of the legal concept, and the worldview embedded within it, means that its very operation forms an element of the broader social

92 Teubner, *op. cit.*, n. 60; Samuel, *op. cit.*, n. 84; Deakin and Wilkinson, *op. cit.*, n. 13.

93 Samuel, *id.*

94 Conaghan and Rittich, *op. cit.*, n. 18.

structure.⁹⁵ Legal categories do not exist in isolation but rather take effect alongside – and, indeed, with the support of – wider political, social, and economic institutions. This renders the questioning of legal concepts, such as ‘work’, less likely.

VI. RULES FROM THE BROADER LEGAL ORDER: NORMALIZING NEW EMPLOYMENT RELATIONS

The final aspect of legal doctrine that I will consider are rules that seek to regulate the broader legal context, such as those touching on the nature of the employment relationship and regulation of entry points to the labour market. As noted above, legal concepts, such as that of ‘work’, may shift and develop in light of changes in the wider legal context. Over time, this may produce a change in formal law. However, in the interim, it is possible that a more immediate constitutive effect may be felt outside of the legal realm.

In this section, I want to focus on two pieces of legislation that operate in the wider legal context that I consider are potentially relevant to how non-legal actors view what might appropriately fall within the notion of productive work and, as a result, to how they feel about employer demands for immaterial labour. What I want to highlight is not the possibility of formal legal change but rather the prospect of constitutive change in the minds of employers and workers. The legislation is, first, the Flexible Working provisions detailed in Part 8A of the Employment Rights Act 1996 and, second, the Claimant Responsibilities provisions with respect to Universal Credit contained in the Welfare Reform Act 2012.

To help me to grasp the possible constitutive effect of these statutory instruments, I draw on Foucauldian ideas of law as operating through the power of the norm. An aspect of this approach that I find particularly useful is the suggestion made by Rose and Valverde of decentring the law itself and asking about the problem that the state seeks to address through particular legislation.⁹⁶ The state will identify certain objectives as the rational and strategic response to the problem. A norm will be proposed to bring into effect the desired end. As noted earlier, a norm can act as both a measurement of behaviour and a means of producing a common standard. It generates the positive control of normalization as individuals can compare themselves, and be compared by others, with this particular social law. Needless to say, the thoughts and actions of certain groups of individuals to which the norm refers can be powerfully shaped by the norm.

95 Samuel, *op. cit.*, n. 84.

96 Rose and Valverde, *op. cit.*, n. 51.

6.1. Flexible Working provisions in the Employment Rights Act 1996

The problem that the state seems to be attempting to resolve in the Flexible Working provisions is one that many employees⁹⁷ experience in trying to manage the relationship between their work and personal life.⁹⁸ However, the proposed solution to this is not one that requires the employer to unconditionally accept the need for flexibility to better accommodate employees' needs. Rather, employer accommodation of employees' needs is dependent on a common appreciation and valuing – between both parties to the employment relationship – of business needs. This is infused through the very procedure set out for requesting flexible working, through the criteria of judgment upon which a request can be declined, and through giving the employer the role of the authority to make this decision.

The basic mechanics of the Flexible Working provisions are that a qualifying employee can apply to his or her employer in writing⁹⁹ for a change to the hours that the employee is required to work, the times when the employee is required to work, and/or where the employee is required to work (as between his or her home and the place of business of the employer).¹⁰⁰ The employee must also explain the effect, if any, that he or she thinks such change will have on the employer and how this might be dealt with.¹⁰¹ The bases upon which an employer can reject a request for flexible working are broad, relating to a range of what can be termed 'business reasons'.¹⁰² These include, for example, the burden of additional costs, the detrimental effect on the ability to meet customer demand, or the inability to re-organize work among existing staff.

The new norm outlined in the provisions is one of a common interest between employers and employees. (This is in stark contrast to an apparent starting point of opposing interests between employers' needs and employees' needs.) The common ground is emphasized to be one of flexibility. Government consultation documents declare flexibility to be good for employers because it helps them to retain staff (which is beneficial for maintaining quality and containing costs), widen the talent pool of staff from which employers can recruit, and increase the commitment and loyalty of staff members, potentially improving productivity.¹⁰³ Flexibility, of course, is the proposed solution to employees' work–personal life problems. However, the

97 Note that I use the term 'employee' in this subsection (as opposed to 'worker') because the provisions relate to employees only.

98 BIS, *Flexible, Effective, Fair: Promoting Economic Growth through a Strong and Efficient Labour Market* (2011); BIS, *Modern Workplaces Consultation: Government Response on Flexible Working* (2012).

99 Flexible Working Regulations 2014, reg. 4(a).

100 Employment Rights Act 1996, sec. 80F(1)(a).

101 Employment Rights Act 1996, sec. 80F(2)(c).

102 Employment Rights Act 1996, sec. 80G(1)(b).

103 BIS, *op. cit.*, n. 98, p. 6.

practical aspects of putting this flexibility into practice require employees to be cognisant of the business needs of their employer and to be proactive in thinking about how any adverse effects can be avoided or mitigated. Moreover, business needs are the standard by which an employer can disallow a requested change. The norm sets a new standard in terms of the relevant considerations and mode of operating for both parties to the contract of employment.

If we consider the potential constitutive effect of this new norm on employers and employees in terms of the rise in immaterial labour, it brings the issue into a new light. If employer and employee interests are aligned, the new demands made by employers may not be interpreted by employees as unfair or possibly an affront to their dignity. Employees may see it as reasonable that employers are asking them to work in ways that achieve greater profit for the business. Conversely, it may appear unreasonable to employees if they seek to limit what they offer their employers. It may even be the case that employer requests of employees are interpreted as reflecting a particular valuing of what employees can offer the enterprise. These outcomes are distinct possibilities with the standards set by this new norm.

6.2. Claimant Responsibilities provisions for Universal Credit in the Welfare Reform Act 2012

Recipients of Universal Credit have various claimant responsibilities that are set out as a condition upon which they can receive this state benefit.¹⁰⁴ Failure to meet these conditions results in the sanctioning of benefits.¹⁰⁵ The conditionality requirements form part of a broader trend of labour market activation strategies evident in many developed economies. The OECD describes the objective of these as being to give more people access to the labour market and good jobs.¹⁰⁶ This can be achieved by enhancing motivation and incentives to seek employment, improving job readiness and help in finding suitable employment, and expanding employment opportunities.

The state, then, in introducing these conditionality requirements for those in receipt of Universal Credit, is hoping to address the issue of a lack of participation in the labour market and an inability to secure good jobs. The prescribed solution, in terms of the individual social security benefit recipient actions, is to ensure that they have the appropriate motivation and job readiness to achieve these outcomes.

To this end, section 13 of the Welfare Reform Act 2012 sets out a 'work preparation requirement'. This is elaborated upon in section 16 and includes action to be taken to improve personal presentation and

104 Welfare Reform Act 2012, ch. 2.

105 Welfare Reform Act 2012, sec. 26.

106 OECD, 'Active Labour Market Policies: Connecting People with Jobs', at <<http://www.oecd.org/employment/activation.htm>>.

participation in training. Much of this training is aimed at getting benefit recipients to demonstrate positive affect and other attitudes, such as optimism, aspiration, and conscientiousness. Labour on the self in order to achieve these psychological characteristics is widely promoted and, indeed, demanded through the system of conditionality.¹⁰⁷ These requirements operate to try to improve the aesthetic appeal, communication skills, and psychological disposition of those seeking work – the aim being to help these people to acquire the skills and attributes deemed necessary for employability.¹⁰⁸

It is striking that the features of conditionality that I have just mentioned map very closely to the types of immaterial labour described in this article. That is, they reflect aspects of the worker self typically associated with reproduction, but from which employers now seek to create profit, such as emotional and aesthetic labour.

The substantive content of the Claimant Responsibilities provisions is to set out a standard or description of what is normal (or, indeed, required) to achieve employment in the contemporary labour market. This sets out in detail what it is that prospective workers are expected to bring to and give in any job. Beyond a prospective worker's time and skill, he or she now needs to bring to the table, with a view to putting into practice, a particular form of affect and presentation of the self. While these new norms relate to those in receipt of Universal Credit, some of whom are in employment,¹⁰⁹ I would suggest that they potentially have a normalizing effect beyond this group.

These provisions have distinct constitutive implications. The state is articulating new expectations vis-à-vis what workers need to bring to and demonstrate in their job roles. As noted above, in many ways these are similar to those expected with the rise of immaterial labour. Both employers' and workers' perceptions of productive activity may alter as a result. Activities and socialities once associated with the reproductive realm are articulated as now necessary for entry into the productive realm in an unproblematic way. This clear statement by the government of its expectations of workers (or would-be workers) makes it difficult for workers to protest against employer requests to perform immaterial labour in their jobs.

VII. CONCLUSION

This article has sought to understand how law may play a constitutive role in employer and worker perceptions regarding immaterial labour and, importantly, how we might begin to understand any such constitutive effects.

107 L. Friedli and R. Stearn, 'Positive Affect as Coercive Strategy: Conditionality, Activation and the Role of Psychology in UK Government Workfare Programmes' (2015) 41 *Medical Humanities* 40.

108 *Id.*

109 P. Dwyer and S. Wright, 'Universal Credit, Ubiquitous Conditionality and Its Implications for Social Citizenship' (2014) 22 *J. of Poverty and Social Justice* 27.

Empirical investigation into the constitutive effects of law is difficult at the best of times. Non-legal actors do not typically have a detailed understanding of law. Nor is it easy to discern a clear line of influence from law to attitudes and actions held by particular individuals or groups. Multiple other social influences are always part of the mix.¹¹⁰ However, understanding law's influence is even more complex in circumstances where there is no specific law on the issues being explored. This is the situation with immaterial labour. How, then, do we begin to empirically understand law's constitutive effects?

The approach put forward in this article is the detailed examination of a broad range of legal doctrine. I have sought to identify different aspects of legal doctrine that may be potentially relevant to the issue of immaterial labour. This focuses attention beyond 'the law' as a concept and instead onto specific aspects of the social discourse that may shape or act as a pivot in terms of the acceptability (or otherwise) of employer demand for immaterial labour. The range of legal doctrine identified as potentially relevant is broad, moving beyond what may be linked to the issue in legal terms to that which may link to social understandings of immaterial labour.

Legal and social theory is drawn upon to illuminate potential interconnections between legal doctrine and employer and worker conceptions of immaterial labour. This includes theories explaining the internal operation of law and how it 'thinks'. My use of insights from legal evolution and legal autopoiesis revealing the way that law links facts in social life to rules via legal categories is an example of this. The identification of legal doctrine that takes the form of normalizing rules is another example. Here, I applied insights from Foucault and theorists drawing on his ideas to identify how particular rules can shape thought and action through the power of the norm.

Identification of these aspects of legal doctrine and the analysis of how they bring about constitutive effects can open up space to consider the temporality implicit therein. Managerial prerogative sets out a background rule that facilitates ongoing change determined by the employer in its relationship with its workers. The particular parameters and tests for the legal concept of 'work' are sufficiently flexible to accommodate shifts in its substantive content and thus can readily accommodate many of these changing employer demands. New legislation, such as that detailing the right to request flexible working or the claimant responsibilities for Universal Credit, overlies existing legal doctrine and potentially shapes how we might come to view the rights of employers to instruct workers in particular ways or the appropriateness of what falls inside (or outside) of the productive realm of 'work'.

All of this can usefully inform empirical investigation into employer and worker perceptions of the acceptability (or otherwise) of employer demand for immaterial labour. It may assist us to identify connections (or disconnects) with the assumptions, tools, and prescriptions contained in legal doctrine

110 K. Levine and V. Mellema, 'Strategizing the Street: How Law Matters in the Lives of Women in the Street-Level Drug Economy' (2001) 26 *Law & Social Inquiry* 169.

and the thinking, rationalizations, and actions of those party to the contract of employment. Of course, such an analysis must be contextualized by an understanding of other influences on these non-legal actors and detail of their structural position, such as the occupational sector, the economic climate, and so on. However, without the detailed background analysis of legal doctrine, any attempt to understand the potential constitutive role of law would be difficult.

In terms of the substantive knowledge relating to the potential role of law vis-à-vis the rise of immaterial labour, a range of important aspects of legal doctrine have been identified. The introduction of the workplace developments will likely have been facilitated by the implied terms in the contract of employment that make up managerial prerogative, allowing employers to direct workers to perform these new tasks. The legal concept of ‘work’ appears to be sufficiently malleable to allow in an unproblematic way activities typically associated with reproduction to form part of the domain of productive activity. We also know that there are shifts in the wider legal order that operate in ways that appear to try to shape the nature of the relationship between employers and employees and what it is that workers need to bring to and deliver in their job roles. New legislation, such as the right to request flexible working, includes provisions that require employees to start thinking about the operation of the entity for which they work and, further, to moderate their own expectations and potential acts in order that they fit in with and help to work towards the needs of the employing entity. Such an attempt at moulding the nature of the relationship between employers and employees is quite distinct from, for example, one that assumes opposition between the parties to the employment contract and acts to limit powers or provide absolute rights.

Likewise, the Claimant Responsibilities provisions for Universal Credit set out clear expectations – indeed, requirements – for those in receipt of state support looking for work or in work but on low incomes. A new baseline is set regarding what is needed to enter into and participate in even the most basic of jobs in the labour market. The state is legitimating a particular level of worker effort in terms of the presentation and actions of the self that is quite some way from earlier expectations regarding the offering of workers’ time and effort in attending to work tasks.

It can be seen, then, that legal doctrine is operating in myriad ways vis-à-vis immaterial labour. My analysis has identified some of these. Aspects of these potential effects of law are long standing, but may now operate in new ways, while others are newer and perhaps interact with the older features of legal doctrine. All, of course, form part of the mix of social structures, processes, and positions that influence the constantly shifting picture of social life.