

## Trade unions, women's labour and the gig economy

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### Abstract

The world of work is changing rapidly and concerns abound that 'non-standard' arrangements are challenging its social and collective dimension. The rapid growth of what is collectively referred to as the 'gig economy' by which workers are engaged on short-term contracts or one-off assignments often of a peripatetic nature, sometimes online or through the use of a mobile phone app, has brought these concerns to the forefront of the debate. For traditional trade unions, this shift in working arrangements brings particular challenges. However, much of the debate in the existing literature takes as its point of departure the 'standard' (male) worker and views the divergence in working arrangements as a threat to this model. This chapter examines the characteristics of non-standard arrangements and of work in the gig economy within a feminist framework based on the work of prominent theorists Catharine MacKinnon and Martha Fineman. The resulting analysis uses MacKinnon's theory of the state and Fineman's vulnerability theory to contest the apparent received wisdom that these 'new ways of working' have led to a current revolution in the world of work and posits that the 'revolution' has in fact been happening for far longer than contemporary analysis might have us believe: 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 and issues related to the gendering of work are often missing from discussions of this latest workplace revolution. Seen in this light, the gig economy is just the latest wave of supply led flexibility. The chapter concludes by considering the lessons that could be learned by 'traditional' trade unions in order

to broaden their appeal to those who work under non-standard arrangements within and beyond the gig economy.

**Keywords:** *trade unions, feminisation of work, gig economy, labour law, organising*

## **Introduction**

The world of work is changing rapidly and concerns abound that ‘non-standard’ arrangements are challenging its social and collective dimension. The rapid growth of what is collectively referred to as the ‘gig economy’ by which workers are engaged on short-term contracts or one-off assignments often of a peripatetic nature, sometimes online or through the use of a mobile phone app, has brought these concerns to the forefront of the debate. For traditional trade unions, this shift in working arrangements brings particular challenges. However, much of the debate in the existing literature takes as its point of departure the ‘standard’ (male) worker and views the divergence in working arrangements as a threat to this model. In fact, trade unions 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 and issues related to the gendering of work are often missing from discussions of this latest workplace revolution.<sup>1</sup> Although trade unionism and the intellectual underpinnings of the labour movement were instigated around and by women<sup>2</sup> just as much as they were by men, the fact remains that once institutionalised, the labour movement became focused on the needs and concerns of the ‘standard male worker’. We can see examples of this in the writings of Sidney and Beatrice Webb who argued that it is:

[F]or ever hopeless to attempt, by Mutual Insurance or Collective Bargaining, to raise appreciably the wages of the common run of women workers. Where, as is usually the case, female labor is employed for practically unskilled work, needing only the briefest experience; or where the work, though skilled, is of a kind into which every woman is initiated as part of her general education, no combination will ever be able to enforce, by its own power, any Standard Rate, any Normal Day, or any definite conditions of Sanitation and Safety.<sup>3</sup>

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<sup>1</sup> See K. Rittich, ‘Feminization and Contingency: Regulating the Stakes of Work for Women’ in J. Conaghan, R.M. Fischl and K. Klare, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* Oxford: Oxford University Press, 2004, p. 117.

<sup>2</sup> See further S. Boston, *Women Workers and the Trade Unions*, Lawrence & Wishart, 2015.

<sup>3</sup> S. Webb and B. Webb, *Industrial Democracy*, Longmans, 1902, p. 757 citing from C. Booth, *Life and Labour of the People*, vol. iX, London, 1897, pp. 757-8.

If this is the premise then it is perhaps not surprising that trade unions have historically been largely ineffective in organising women. Instead, they have often played a significant part in maintaining women's disadvantage in the labour market.<sup>4</sup> Women were initially excluded entirely from trade union membership or, later, restricted in the type of jobs that they could accept in order to avoid them actively competing with men.<sup>5</sup> Instead, women workers largely became part of the women's movement – viewed as 'the other' or a 'problem'<sup>6</sup> and often subjected to outright hostility – rather than an integral part of the British workers' movement. Women workers' early attempts to take collective action against their employers were perceived as a serious threat to social cohesion. A commentator on a female mill workers' strike in 1835 wrote that female militancy was 'more menacing to established institutions even than the education of the lower orders.'<sup>7</sup> Once they ventured beyond work such as spinning and weaving - considered extensions of 'womanly duties' - into the factories, women workers were considered a real threat to societal order and moral values due to their non-compliance with the normative model of work around which mainstream union activities including collective bargaining were based. Women's very participation in paid work threatened the 'family wage' of their fellow male workers and challenged the organisation of workers within specific workplaces.<sup>8</sup>

On the one hand, the landscape for women workers in the UK has changed significantly. Frances O'Grady now leads the British Trades Union Congress (TUC) and almost a quarter of TUC affiliates are led by women. Women trade union members outnumber men and the average British trade unionist is a young, degree-educated, white, professional woman (although it may be of little comfort to find that women's influence is expanding in a labour movement that is declining). Nonetheless, trade unions have often failed to adapt their structures to the changing make-up of the labour force and to changing employment

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<sup>4</sup> There have been some exceptions to this and there is a growing literature looking at trade unions and the feminisation of the labour market. See S. Fredman, *Women and the Law*, Oxford: Oxford University Press, 1997 and L. Briskin and P. McDemott (eds), *Women Challenging Unions: Feminism, Democracy, and Militancy*, Toronto: University of Toronto Press, 1993.

<sup>5</sup> Fredman, n 4, p. 114.

<sup>6</sup> See J. Bornat, 'Lost Leaders: Women, Trade Unionism and the Case of the General Union of Textile Workers' in A. John (ed.), *Unequal Opportunities. Women's Employment in England 1800-1919*, Oxford: Blackwell, 1986, p. 207.

<sup>7</sup> See L. Raw, *Striking a Light: The Bryant and May Matchwomen and their Place in History*, Continuum, 2009.

<sup>8</sup> On the concept of the male breadwinner model and the family wage see N. Fraser, 'After the Family-Wage: Gender, Equity and the Welfare State', (1994) 22 *Political Theory* 591.

relationships. A large proportion of women members are not always reflected in branch officers, workplace representatives and national officers and, as a result, trade unions are struggling to shake off their image as the representatives of white, working-class and blue-collar men.<sup>9</sup> In addition, women's position outside the mainstream labour movement has largely sustained up to the present day when gendered occupational segregation and the prevalence of non-standard work raise questions concerning the relevance of traditional trade unionism to most women's working lives. Yet union revitalisation is dependent on the repositioning of unions as representative agents for women and minorities and it is widely recognised that trade union renewal depends on representative membership which reflects the actual world of work.

In this chapter, we argue that trade unions have struggled to adapt to enable their full engagement with and representation of women workers because of their continued embeddedness in the standard (male) model of employment. As well as neglecting or failing to serve the needs of large sections of the female workforce, this continued attachment to an outdated model of the industrial worker, which is based on notions of a family wage, generally hampers efforts to organise (male and female) non-standard workers, including those in the gig economy. Perhaps unsurprisingly, it seems that the participation of men in non-standard work, largely through their engagement in gig economy jobs, may at last catalyse action on this issue. However, without a fuller consideration of the contribution made to paid ('productive') labour by the unpaid ('reproductive') labour, largely performed by women, there is a risk that the adaptations made by unions to facilitate the inclusion of such 'non-standard' workers will simply replicate the mistakes of the past. Rather than a truly inclusive and progressive model for worker representation, this could result in accommodations to the existing model to enable incorporation of some types of non-standard work arrangements, primarily those categorised as aligning with the 'gig economy', whilst continuing to exclude other long-standing but less high profile arrangements.

A feminist perspective is therefore critical in order to explain both trade unions' general lack of engagement with women workers who have, over several decades, undertaken paid work under non-standard arrangements, and the challenges posed to trade unions by the gig

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<sup>9</sup> This is in part due to the under-representation of women within trade unions but even where this is not the case, women's domestic responsibilities made it difficult for them to participate actively in a trade union. See Fredman, n 4, p. 137.

economy. In this chapter, we use Catharine MacKinnon's theory of the state and Martha Fineman's vulnerability theory to contest the apparent received wisdom that these 'new ways of working' have led to a current revolution in the world of work. We posit that the 'revolution' has in fact been happening for far longer than contemporary analysis might have us believe and has long been led by women workers who have had to engage in, and adapt, part-time, temporary and often precarious working arrangements because of the limited opportunities to balance paid work with the high levels of unpaid care for children and others. Seen in this light, the gig economy is just the latest wave of supply led flexibility. Responding thereto raises questions concerning the dichotomisation of the public and private divide which has long characterised the social, economic and political ordering within the UK and other similarly situated countries within the global North. Feminist theory offers valuable insights into alternative approaches which might be used to effect sustainable social change through the state and those institutions concerned with improving the lives of workers. The chapter therefore concludes by considering the lessons that could be learned by trade unions in order to broaden their appeal to those who work under non-standard arrangements within and beyond the gig economy.

### Section 1: Framing Work from a Feminist Perspective

In her ground-breaking theory of the state,<sup>10</sup> Catharine MacKinnon explored how the world - and its structures, institutions and relationships - is built on a male perspective, resulting from men's dominance over the public sphere and reflective of man's experience of the world and its operation. Feminism 'unmodified', as expounded by MacKinnon, provides an account of the power relations that pervade these structures, institutions and relationships which, if deconstructed from a female perspective, would require the dichotomous separation of public and private to be reconsidered so as to enable proper account to be taken of women's lived experiences,

Feminism criticizes this male totality without an account of our capacity to do so or to imagine or realize a more whole truth. Feminism affirms women's point of view by revealing, criticizing, and explaining its impossibility. This is not a dialectical paradox.

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<sup>10</sup> C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, Boston, MA: Harvard University Press, 1988.

It is a methodological expression of women's situation, in which the struggle for consciousness is a struggle for world: for a sexuality, a history, a culture, a community, a form of power, an experience of the sacred.<sup>11</sup>

Women's invisibility in the structures and arrangements that ordered society meant that feminism lacked a theory of the state and its operation. In building a feminist vision of the political system and related institutions, MacKinnon argued for feminism to be unmodified as she recognised that attempts to include women in pre-existing theoretical schema merely result in modified versions which apply theory developed without any full or adequate consideration of women's lives, so that 'socialist feminism' is Marxism applied to women and 'liberal feminism' is liberalism applied to women. MacKinnon's 'feminism unmodified' starts with women's actual experience in recognition that many women are situated very differently from men. Furthermore, 'women's issues' which become side-lined and marginalised in the context of the male-dominated notion of the state, are actually 'issues central to women's survival'<sup>12</sup> – rape, violence against women, pornography, sex work, abortion, sexual harassment, sex discrimination. Although referred to as 'radical feminism', it is difficult in retrospect to see what is so radical about this starting point which adopts a post-Marxist stance to produce a methodology in its own right rather than an accommodation of a pre-existing (and woman-exclusive) stance.

The work of MacKinnon and other so-called second wave feminists,<sup>13</sup> with its realisation that 'the personal is the political',<sup>14</sup> did instigate a change in consciousness leading to important reforms in some areas of public life including the workplace. In the UK the introduction of laws providing the right to equal pay between women and men and prohibiting sex discrimination<sup>15</sup> were early features of a framework aimed at improving women's experience of paid work. Bolstered by its membership of the European Union in 1973, the UK's framework continued to expand in the 1980s through the incorporation of paid maternity leave and rights protecting expectant and new mothers from workplace discrimination. MacKinnon's work on

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<sup>11</sup> C.A. MacKinnon 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8(4) *Signs* 635, p. 637.

<sup>12</sup> *Ibid*, p. 643.

<sup>13</sup> In which the focus was on the attainment of legally constituted social and economic rights in contrast with the civil and political rights, including the right of suffrage, which characterised first wave feminism.

<sup>14</sup> MacKinnon, n10, p. 95.

<sup>15</sup> Introduced into the UK by the Equal Pay Act 1970 and the Sex Discrimination Act 1975, both effective from 1975.

sexual harassment,<sup>16</sup> which led to its recognition as a form of sex discrimination under Title VII of the Civil Rights Act 1964, undoubtedly influenced the development of similar approaches in the EU's and UK's legal systems.<sup>17</sup>

Alongside MacKinnon's reimagining of the state and the proactive legal reform that resulted from feminism's second wave, early feminist theorists advanced important critiques of existing methodological approaches. Marxist theory, with its focus on class and capitalism, omitted to provide an adequate account of patriarchy so that the resulting analysis of the state takes place largely through the prism of the male perspective and, thus, fails to provide a path to liberation for women. The class system itself is imbued with sex-based inequality and reproduces its own hegemonic hierarchy in which, because they bear a disproportionate share of unpaid reproductive labour, women's place is of less value than that of men. This lack of attention to and exclusion of women's experience colours all structures and institutions related to the class struggle including those, such as trade unions, which are intended to improve the lives of 'workers' who, under this formulation, acquire a particular form and purpose in the resulting *modus operandi* and associated arrangements.

In order to reflect women's experiences in the class struggle and in the fight for worker empowerment, traditional industrial relations machinery would require to be reimagined so as to include unpaid care work alongside waged labour. However, political and legal forces have combined to further entrench the distinction between the private sphere of home and the public sphere of work with women increasingly confined to the former and their engagement in paid work characterised as a form of exceptionalism to be accommodated through 'atypical' or non-standard arrangements with no account taken within those arrangements of the reason for their existence.<sup>18</sup>

This separation between home and work, the private and public, reproductive and productive labour, is reflected in Britain's post-war settlement and the creation of the modern welfare state which was intended to herald a new social contract between the state and its citizens with a

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<sup>16</sup> C.A. MacKinnon *Sexual Harassment of Working Women: A Case of Sex Discrimination*, Yale University Press, 1979.

<sup>17</sup> See the European Union's Equal Treatment Directive 2006/54/EC (Recast), Article 2(1)(c) and the UK's Equality Act 2010, section 26.

<sup>18</sup> See N. Busby *A Right to Care: Unpaid work in European Employment Law*, Oxford: Oxford University Press, 2011, chapters 3 and 4.

focus on social intervention and redistributive policies intended to provide protection ‘from cradle to grave’.<sup>19</sup> However, despite an increased emphasis on the state’s role in protecting and advancing the rights of workers, unpaid care remained an exclusively female activity that took place within the private and unregulated confines of the family home with women’s waged labour viewed as being for ‘pin money’, secondary to their care commitments and to that of men in their role as ‘breadwinner’ responsible for bringing home the family wage. State interference in household arrangements, although seemingly innocuous and *laissez faire*, was distinctly coercive in protecting and maintaining this gender order.<sup>20</sup> As Judy Fudge has observed,

In developed economies after World War II, employment and the family were sharply separated and regulated by their own distinctive technologies. The boundaries between home/market and public/private became deeply inscribed in contemporary legal doctrines, discourses, and institutions such that the initial jurisdictional classification appeared natural and inevitable and not political and ideological’.<sup>21</sup>

The advent of liberalism as the pervasive and dominant political philosophy of the 20<sup>th</sup> century brought opportunities for further concealment of pre-existing boundaries and the notion of a ‘free’ market which provided states with an apparent means of escaping responsibility for continuing inequality and disadvantage as the market, left to its own devices through the dual forces of supply and demand, will correct anomalies where they exist with no need for state intervention. Under this conceptualisation the amorphous and pervasive shapeshifting of the market enables its unfettered entry into all areas of social and economic life. As Fineman has noted, unlike the seemingly intractable categorisation of the public realm of state and the private realm of family, the market retains a non-dichotomous ‘chameleon-like’ form so that it can be either public or private depending on context,

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<sup>19</sup> The Labour Party’s victory pledge following the 1945 general election that it would provide for the people ‘from cradle to grave’ gave it a mandate to strengthen welfare state provision so that in 1945 family allowance was established which provided financial support for low income families and national insurance was introduced in 1946.

<sup>20</sup> See N. Busby and G. James A History of Regulating Working Families: Strains, Stereotypes, Strategies and Solutions, Hart Publishing, 2020, chapter 2.

<sup>21</sup> J. Fudge ‘A New Vocabulary and Imaginary for Labour Law: Taking Legal Constitution, Gender and Social Reproduction Seriously’ in D. Brodie, N. Busby and R. Zahn (eds.) The Future Regulation of Work: New Concepts, New Paradigms, Basingstoke: Palgrave Macmillan, 2015, pp. 14-15.



Markets are constructed as public (and therefore under a different, competitive set of norms) when contrasted with the family, but as private (and therefore not easily susceptible to public regulation) when paired with the state. Law and Economics decidedly views the market as a private realm and views the intervention of the public government into market activities in the form of governmental regulation as suspect.<sup>22</sup>

Against the backdrop of liberalism, feminist scholars have provided important critiques, not just of the public world of state, but also of the private realm of family. Carole Pateman's concept of the sexual contract showed how the social contract entrenched men's political domination over women as well as men's right of access to women's bodies<sup>23</sup> both legitimated by the marriage contract. Thus, contracts made in both the private and public realms were, and continue to be, informed by and imbued with patriarchy. With their focus on the public sphere and production within the social and economic construct of the 'labour market', contemporary understandings of contract obscure its patriarchal roots and mask the dependency of the market on the reproductive work performed within the private sphere.<sup>24</sup> The whole notion of the contract as an expression of freedom is false if not everyone can participate equally in its creation.<sup>25</sup> Likewise the construct of the liberal subject which has evolved through a rhetoric of the "individual as owner of oneself"<sup>26</sup> and which promotes the idea that all contracts involving property in the person are free.<sup>27</sup> Despite Pateman's compelling analysis of the social contract which revealed its deeply flawed nature due to its predication upon and neglect of the sexual contract, it continues to provide the basis on which institutions and relationships in both the private and public realms are grounded and reproduced.

The central planks of liberal theory – that the market is autonomous and free from state intervention and that the state is, in turn, neutral and inactive – have been critiqued by Martha Fineman through her vulnerability theory<sup>28</sup> which offers an alternative account of the market and the state's role in social and economic ordering. In Fineman's view the state is always

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<sup>22</sup> M.A. Fineman, 'Introduction' in M.A. Fineman and T. Dougherty (eds) *Feminism Confronts Homo Economicus*, Cornell University Press, 2018, pp. xii-xiii.

<sup>23</sup> C. Pateman, *The Sexual Contract*, Polity Press, 1988, p. 2.

<sup>24</sup> *Ibid*, pp. 4 and 11.

<sup>25</sup> *Ibid*, p. 6.

<sup>26</sup> *Ibid*, p. 8.

<sup>27</sup> *Ibid*, pp. 14-17.

<sup>28</sup> M.A. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008-9) 20 *Yale Journal of Law and Feminism* 1.

active and the central question we should ask ourselves is ‘in whose interests does it act?’<sup>29</sup> Likewise, the notion of markets as naturally occurring, self-sustaining phenomena is replaced by an understanding of them as man-made constructs imbued with an innate ability to preserve and sustain pre-existing hierarchies of power and privilege. Fineman’s focus on the ‘liberal subject’<sup>30</sup> as the misplaced beneficiary of the state’s activities is echoed in the ‘homo economicus’ of neo-classical economic theory and in contemporary modelling concerning the ‘standard worker’ as the idealised target of labour market regulation. The liberal subject is rational, autonomous and unencumbered so that he is able to participate ‘freely’ in the contractual relations necessary for the operation of the market through the performance of productive labour. Notwithstanding the encumbrance such an individual almost certainly places on others who are required to perform reproductive labour on his behalf, this formulation overlooks the basic human need for interconnectedness which arises from our universal vulnerability.<sup>31</sup>

In Fineman’s view, we are all inherently and inescapably vulnerable through both our embodiment and also through our embeddedness in social institutions, relationships and arrangements which are, themselves, vulnerable to changing extraneous circumstances including government policy.<sup>32</sup> The counter to vulnerability is not invulnerability, which is a false state, but resilience which as individuals we have varying capacity to build depending on a range of factors including the social networks and other resources at our disposal. Fineman argues for a responsive state which is attuned to and acts on behalf of the vulnerable subject who as the true subject of legal and policy intervention, is representative of all of us. Under this formulation the state ‘fulfils [its] responsibility primarily through the establishment and support of societal institutions’<sup>33</sup> including those concerned with improvements to working conditions and broader social justice concerns within the context of work – be it paid productive labour or unpaid reproductive labour.

In considering trade unions’ responses to changes in the social and economic arrangements surrounding work, a feminist analysis has much to offer. MacKinnon’s call for feminism

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<sup>29</sup> M.A. Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60 *Emory Law Journal* 251.

<sup>30</sup> Fineman, n. 28.

<sup>31</sup> See M.A. Fineman, ‘Vulnerability and Social Justice’ (2019) 53 *Valparaiso University Law Review* 341, p. 357.

<sup>32</sup> See Fineman, n. 28, p. 11; and n. 29, p. 269.

<sup>33</sup> See Fineman, n. 29, p. 255.

unmodified in constructing a new theory of the state, its role and relationships throws a spotlight on the exclusion of women from the central institutions concerned with workers' rights and collective bargaining arrangements. Given the lack of a feminist theory of the state at the time in which MacKinnon made her initial observations, it is hardly surprising that trade unions were not attuned to the ways in which women workers were so differently situated from their male counterparts or that the unpaid care largely performed by women within households was not considered relevant to their operation. What is surprising is how little has changed in the intervening five decades.

Current concerns regarding how unions might better engage with and represent the interests of those who work under atypical or non-standard arrangements has been sparked, not by decades of women's work on part-time, temporary and precarious bases, but rather by the advent of the 'gig economy'. Fineman's critique of liberalism and rejection of its central tenets as fictive, especially the liberal subject as the target of state action, offers a compelling empirical account of why this is the case. Whilst the trade union movement, by its very existence, recognises that an active state is a necessary component in challenging the assumed corollary between the market and the achievement of individual freedom, where women are concerned related action has all too often been subsumed by the traditional trappings of liberalism predicated on assumptions concerning the nature of 'work', including how and by whom it is performed. Due to its continued dominance by men and an outdated attachment to an industrial model of production, the labour movement itself has in many ways - both concealed and exposed - become co-opted by those concerned with the preservation of the status quo and this preoccupation has disabled it from alignment with the central goals of feminism, namely the empowerment of women and the transformation of institutions dominated by men. The antithesis of the liberal subject and his incarnation as the standard worker is the non-standard worker. In the next section this concept is further explored within the contrasting contexts of the paid work long performed by women and the newer forms of non-standard work incorporated in classifications of the gig economy.

## **Section 2: The changing world of work**

There is a considerable and diverse body of literature which examines the changing nature and composition of labour – referred to using various terms such as precarious, non-standard,

contingent, atypical, insecure, and flexible.<sup>34</sup> Global economic factors and the changing contours of work and workplace relations have led to a reorientation of the social, economic, political and cultural environment within which labour law has developed as well as precipitating a changing role for labour law itself.<sup>35</sup> While collective bargaining in conjunction with legal intervention to protect workers who fell outside its sphere used to be the primary source of protection for workers in the post-war era, individual rights were increasingly extended during the 1960s and 1970s to workers both within and outside the collective bargaining arena. Instead of targeting workers who, for a variety of reasons, found themselves working under precarious arrangements, this legislation introducing individual rights was based on two general principles, first, that the floor of rights should not be available to those who were entrepreneurs in their own right; and, second, that some rights at least must be 'earned' by a period of service with the employer.<sup>36</sup> In the intervening years, labour law has increasingly been used as a tool to 'reduce the burdens on business', and thereby to facilitate a low-cost flexible workforce. Labour law policies have been driven by the view that a low cost and highly flexible workforce is essential to increased competitiveness and lower unemployment.<sup>37</sup> 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 as well as facilitating a ready-supply of low cost labour both within and from outside the UK.<sup>38</sup> Marginal workers were seen as attracting not more but less protection from the law than standard workers; a policy decision which had a 'disproportionately serious impact on women'<sup>39</sup> who were over-represented in non-standard work. At the same time, reform of welfare and tax regimes encouraged a fundamental shift away from the male breadwinner employment norm to a new multi-earner family model whereby women were actively encouraged to work outside the household.<sup>40</sup> This had a

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<sup>34</sup> For comprehensive references to the debate see the contributions in (2016) 37(3) *Comparative Labor Law and Policy Journal* on 'Crowdsourcing, the Gig-Economy and the Law'.

<sup>35</sup> See further J. Fudge and R. Owens, 'Precarious Work, Women, and the New Economy: The Challenge to Legal Norms' in J. Fudge and R. Owens (eds), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*, Hart, 2006, p. 5.

<sup>36</sup> See further S. Fredman, *Labour Law in Flux: The Changing Composition of the Workforce*, (1997) 26(4) *Industrial Law Journal* 337.

<sup>37</sup> See S. Deakin and F. Wilkinson, *Labour Standards – Essential to Economic and Social Progress*, Institute of Employment Rights, 1996.

<sup>38</sup> See further D. Harvey, *The Condition of Postmodernity*, Oxford: Blackwell, 1989.

<sup>39</sup> S. Fredman, 'Precarious Norms for Precarious Workers' in J. Fudge and R. Owens, n. 35, p. 184.

<sup>40</sup> Fudge and Owens, n. 35, pp. 14-15.

profound impact on women's labour and labour market participation at a time when there has been an 'intensification and erosion of gender in the labour market'<sup>41</sup>.

In addition to these policy decisions which reshaped the legal framework regulating the work relationship and had a knock-on effect on the constitution of the labour market, factors such as the decline in manufacturing and the rise of a new economy based on modern information-based systems and technologies have all contributed to a 'rapid disintegration of the old industrial model of employment.'<sup>42</sup> In legal terms, there has been a proliferation of non-standard contractual arrangements which govern the work relationship including: part-time work; fixed-term work; temporary agency work; dependent self-employment; and, work on the basis of zero hour contracts. The level of legal protection afforded to those who work under such arrangements varies but they are often associated with insecurity, precarity and limited, if any, employment rights. The enhanced focus on the market as the arbiter of labour standards and resulting deregulation coupled with the intensification of supply-led flexibility combined to further entrench the liberal subject<sup>43</sup> as the preferred target of legal intervention. This left many women workers outside of the law's protection due to their propensity for non-standard work as a way of balancing it with the provision of unpaid care.

The exponential growth in work in the so-called gig economy is the latest development in the changing world of work.<sup>44</sup> The gig economy is generally understood to include two main forms of work: 'crowdwork' and 'work on-demand via app'.<sup>45</sup> The former refers to a work situation where a series of tasks are completed through online platforms. The online platforms establish contact between individuals and organisations. The latter describes a form of work where the execution of traditional working activities such as transport, clerical work or cleaning is channelled through apps that are managed by firms who also require minimum quality standards of service and intervene in the selection and management of the workforce.<sup>46</sup> In both

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<sup>41</sup> J. Fudge and B. Cossman, 'Privatization, Law and the Challenge to Feminism' in J. Fudge and B. Cossman (eds), *Privatization, Law and the Challenge to Feminism*, Toronto: Toronto University Press, 2002.

<sup>42</sup> Fudge and Owens, n. 35, p. 3.

<sup>43</sup> Fineman above.

<sup>44</sup> For an overview of the phenomenon and references to further literature see J. Adams-Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy*, Oxford: Oxford University Press, 2018.

<sup>45</sup> This is explored in great detail by V. de Stefano, 'The Rise of the 'Just-in-time workforce': on-demand work, crowdwork, and labor protection in the gig-economy', (2015-2016) 37 *Comparative Labor Law and Policy Journal* 471 and see the references in footnotes 1- 2 of the same piece.

<sup>46</sup> See further V. de Stefano, *The rise of the 'just-in-time workforce': On-demand work, crowdwork and labour protection in the 'gig-economy'*, Geneva: ILO, *Conditions of Work and Employment Series No. 71*, 2016.

cases, workers are required to be extremely flexible (which is often cited as a positive aspect of the work but which leads to increased competition between workers, often on a global scale; to very long hours worked; and, extremely low earnings); are afforded few if any labour protections; and, are remunerated only for actual time worked and work completed. There is almost no human contact in most transactions either between the worker and client; the worker and platform/firm; or, the client and platform/firm. Coupled with the very nature of IT-based work, this leads to a dehumanisation of the individual worker.<sup>47</sup>

One rarely comes across the term ‘work’, ‘worker’ or ‘labour’ in the gig economy and in practice, many platforms or firms classify their ‘workers’ as independent contractors. However, evidence suggests that in most cases the worker is rarely operating independently and that for many workers money earned in the gig economy is an essential source of income.<sup>48</sup> Against this background, de Stefano and Berg suggest that ‘gig economy work is simply twenty-first century casual work rebranded.’<sup>49</sup>

The increase in precarious or non-standard work undermines labour law and labour institutions which have been created around the concept of standard employment relationships. Yet this dichotomy in language ignores the nature of women’s work during this and earlier periods which was often concentrated in precarious or ‘non-standard’ work (and which, thus for them, was ‘standard’).<sup>50</sup> It is only now that more men are working in precarious forms of work – previously identified with women – that policymakers’, mainstream academics’ and trade unions’ attention turns to these workers and their ‘non-standard’ nature is seen as cause for concern. The starting point in most debates is that such work is a problematic deviation from the ‘standard’ (male) norm. In these debates, the gig economy is portrayed as masculine: a male taxi driver/a male bicycle courier/a male delivery driver. The litigation that has occurred largely

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<sup>47</sup> De Stefano, n. 45, p. 477 and Andrew Callaway, *Apploitation in a City of Instaserfs: How the ‘Sharing Economy’ Has Turned San Fancisco into a Dystopia for the Working Class* (Canada Centre for Policy Alternatives, 2016) available at <https://www.policyalternatives.ca/publications/monitor/apploitation-city-instaserfs>.

<sup>48</sup> This was confirmed by an increasing number of court judgments in different European and North American jurisdictions which have recognised that these workers are indeed ‘workers’ in a legal sense. The most famous case in the UK is the 2021 decision in *Uber BV and others v Aslam and others* [2021] UKSC 5.

<sup>49</sup> J. Berg and V. de Stefano, *It’s time to regulate the gig economy*, *speri blog*, 17 April 2017 available at <http://speri.dept.shef.ac.uk/2017/04/18/its-time-to-regulate-the-gig-economy/> [last accessed 25 May 2021].

<sup>50</sup> J. Fudge and L. Vosko ‘Gendered Paradoxes and the Rise of Contingent Work: Towards a Transformative Feminist Political Economy of the Labour Market’ in W. Clement and L. Vosko (eds), *Changing Canada: Political Economy as Transformation*, Montreal: McGill-Queen’s University Press, 2003.

reflects this portrayal.<sup>51</sup> We rarely see images associated with the gig economy which portray it as represented by a female cleaner, a female childminder, or female administrative support even though all of these services are available on platforms such as Taskrabbit and female participation in the gig economy is high. The gig economy is also becoming increasingly widespread in sectors traditionally occupied by women, such as homecare work where carers can be matched with clients through an app and where carers' working lives and different shifts for different clients or care homes are increasingly organised online using specialist software.<sup>52</sup>

The language of the 'standard' employment relationship therefore loses credibility and we see a shift away from the male breadwinner model towards a 'feminisation of work'.<sup>53</sup> 'Feminisation' in this case has a double meaning, referring both to 'the increased labour market participation of women and the proliferation of forms of employment historically associated with women, that is, jobs that are part time, temporary, poorly paid, and lacking benefits and collective forms of representation.'<sup>54</sup> This is not to say that there has been complete convergence between men and women's work within atypical forms of work; occupational gender segregation and equal pay differentials persist.<sup>55</sup> There is also mounting evidence within the gig economy specifically that women experience discrimination at the hands of algorithms or ratings which are used to allocate work.<sup>56</sup> As Valenduc and Vendramin point out, the flexible nature of work in the gig economy entrenches gender segregation in the private sphere and reproduces gender power.<sup>57</sup> Yet seen from this perspective, work (by men) in the gig economy, rather than being revolutionary, is a continuation of the kind of work that has been performed predominantly by women workers for decades.

### **Section 3: The challenge to trade unions and lessons to be learnt**

The rise of the gig economy has injected a sense of urgency into the debate on how trade unions should respond to non-standard work. The lack of human contact and the wide dispersal of people across large geographical areas pose a particular challenge for trade unions which does

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<sup>51</sup> In the UK, see the cases brought against Deliveroo, CitySprint, Addison Lee or Uber.

<sup>52</sup> See, for example, <https://carehires.com>.

<sup>53</sup> Fudge and Owens, n. 35.

<sup>54</sup> Ibid, p. 12.

<sup>55</sup> Ibid.

<sup>56</sup> See M. Kullmann, 'Platform Work, Algorithmic Decision-Making, and EU Gender Equality Law' (2018) 34(1) International Journal of Comparative Labour Law and Industrial Relations 1.

<sup>57</sup> G. Valenduc and P. Vendramin, Work in the digital economy: sorting the old from the new, ETUI Working Paper 2016.03, p. 37.

not exist in the same way for other non-standard forms of work. This (again) raises the question of how to organise, represent and regulate non-standard work at a time of union decline<sup>58</sup> and limited legislative support. The move to individual rights rather than a labour law system which includes collective bargaining underlines this dilemma for unions<sup>59</sup> and ‘weakens trade union capacity to regulate work and employment within the national boundaries in which they are embedded.’<sup>60</sup> Moreover, ‘changes in social values and expectations of workers towards unions’<sup>61</sup> have forced unions to reassess their traditional role as worker associations.

In light of the nature of work in the gig economy – precarious, geographically dispersed, and often low-skilled – certain parallels can be (and have been) drawn with women worker attempts at organising in the nineteenth and early twentieth centuries.<sup>62</sup> Barbara Drake, writing in 1920, describes various instances of joint trade unions or women’s trade unions being successful in organising women nonstandard workers precisely because it took the workers’ lived experiences as a starting point.<sup>63</sup> One such example is that of the Domestic Workers’ Union (DWU) formed in 1909 which lasted until 1913 and organised domestic servants.<sup>64</sup> Organisation of these workers was done by correspondence with the newspaper *Women Worker* initially being the main forum until a more permanent structure was set up. Key was building a sense of solidarity amongst these workers, figuring out what these women needed and catering to their needs – an approach that can be aligned with that advocated by the second wave feminists of the 1970s and 1980s.<sup>65</sup> The young (working class) women who joined the DWU saw their grievances as extending beyond the individual mistress–maid relationship to connect with wider experiences of workplace exploitation. This meant that they demanded that women’s work in the home – usually regarded as ‘non work’ – should be considered as work just like that of ‘factory girls’ or ‘miners’ with corresponding rights and protections.<sup>66</sup> Other

<sup>58</sup> See further the special issue of the (2011) 17(2) *European Journal of Industrial Relations*.

<sup>59</sup> Equally, much of the literature which has considered alternative conceptions of ‘worker’ in order to encompass workers in the gig economy does not seem to move away from the individualised approach.

<sup>60</sup> R. Gumbrell-McCormick and R. Hyman, *Trade Unions in Western Europe: Hard Times, Hard Choices*, Oxford: Oxford University Press, 2013, p. 29.

<sup>61</sup> B. Ebbinghaus and J. Visser, *When Institutions Matter – Union Growth and Decline in Western Europe, 1950–1995*, (1999) 15(2) *European Sociological Review* 135, p. 143.

<sup>62</sup> See F. Flanagan, ‘Theorising the Gig Economy and Home-Based Service Work’ (2019) 61 *Journal of Industrial Relations* 57.

<sup>63</sup> B. Drake, *Women in Trade Unions*, Virago Press, 1984 (reprint).

<sup>64</sup> See further L. Schwartz, ‘“What We Think is Needed is a Union of Domesticity Such as the Miners Have”: The Domestic Workers’ Union of Great Britain and Ireland 1908–14’ (2014) 25 *Twentieth Century British History* 173

<sup>65</sup> See MacKinnon, n. 10.

<sup>66</sup> A proposal was made to the Trades Union Congress asking that ‘the private houses where they are employed should be inspected by officials’, such as factories were currently subject to.’



demands included keeping a blacklist of employers, campaigning for adequate board and accommodation, helping ‘unfortunate’ (pregnant) girls and trying to reform the ‘character’ (reference) system. The DWU, like other women’s labour activists, thus shifted attention away from traditionally male spheres of work to less visible labour taking place in the private sphere of the home. Although the DWU did receive some support from predominantly male trade unions, its success depended primarily on its alliance with the suffragette/broader women’s movement.<sup>67</sup>

Much of the contemporary organisation of workers in the gig economy in the UK has also occurred at a grass roots level – outwith established union structures – by the Independent Workers Union of Great Britain (IWGB). The IWGB was founded in 2012 and is a small, independent trade union – not affiliated to the TUC – whose members are predominantly low paid migrant workers in London. In its work it focuses on high-profile campaigns which are of concern to its membership more broadly including but not limited to issues at work.<sup>68</sup> This recognition of the impact of factors outside of narrow contractual conceptions of work echoes the efforts of the DWU and other examples of successful women’s organisation, and provides a possible route to a more holistic consideration of a whole working life including how different forms of labour, including reproductive, interact with paid work. The IWGB has so far acted as a dynamic and cooperative model with very limited or no hierarchies (in contrast to the democratic centralism which characterises ‘traditional’ trade unions<sup>69</sup>), and with noticeable success in organising and campaigning within specific sectors dominated by non-standard (male and female) workers including for couriers working in the gig economy.

The success of the IWGB and other forms of grassroots organisations in organising non-standard workers raises the question whether ‘traditional’ trade unions are able to effectively respond to the rise of non-standard forms of work, and to the gig economy in particular. It is suggested that part of the difficulty for these trade unions lies in their outdated attachment to an industrial model of production, based on a gendered understanding of ‘norms of employment, assumptions about who workers are and what they need, and ideas about how

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<sup>67</sup> See further L. Schwartz, *Feminism and the Servant Problem*, Cambridge: Cambridge University Press, 2019.

<sup>68</sup> For example on the congestion charge which has a negative effect on the low paid workers in London but isn’t directly linked to work itself. Or on violence against women which affects women at work but also outside of work.

<sup>69</sup> See U. Mückenberger, E. Schmidt and R. Zoll (eds), *Die Modernisierung der Gewerkschaften in Europa*, Verlag Westfälisches Dampfboot, 1996, p. 12.

regulation works'<sup>70</sup>. This means that trade unions' primary concern has been the regulation of the employment relationship through collective bargaining. Yet this is for the most part not feasible for non-standard (predominantly female) workers due to the absence of government support for collective bargaining, often hostile employers and a lack of effective representation of these workers by trade unions. As a result, unions implicitly continue to act as active defenders of privileges of 'standard' (male) workers. Collective bargaining and work regulation by trade unions is also often concerned with industrial or economic matters whereas issues that affect women workers and non-standard workers more broadly, such as job segregation, (numerical) worker flexibility and a systematic undervaluing of non-standard (women's) work are considered social or equality issues<sup>71</sup> despite the fact that they constitute subtle forms of job regulation which have the effect of keeping 'women [and non-standard workers] in their place'<sup>72</sup>.

## **Conclusion**

The current focus on the gig economy as an organising force for trade unions is thus welcome but, without careful consideration of the often narrowly defined parameters of what constitutes the gig economy, there is a real risk that much of the paid work traditionally performed by women will be excluded from its scope. To achieve a more inclusive approach requires the adoption of a broader conception of work which incorporates all forms of labour – paid and unpaid, productive and reproductive, physical and emotional. Collective action, be it organised through traditional trade union structures or by newer, less formal means, offers a route to sustainable social change which is clearly aligned with the values and ethos of the women's movement. In her call for a feminist theory of the state MacKinnon highlighted the importance of consciousness raising by which the reality of women's lived experience should be incorporated and analysed as the starting point for engendering individual and social change.<sup>73</sup> Such an account would recognise the importance of interdependency as essential to the human condition in place of the fictive independence and autonomy on which the enduring model of the standard worker is premised and which continues to serve as the paradigm target for state

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<sup>70</sup> Fudge and Owens, n. 35, p. 3.

<sup>71</sup> See A. Blackett and C. Sheppard, 'Collective bargaining and equality: Making connections', (2003) 142 *International Labor Review* 419, p. 432.

<sup>72</sup> A. Forrest, 'A View from Outside the Whale: The Treatment of Women and Unions in Industrial Relations' in Briskin and McDermott, n. 4, p. 336.

<sup>73</sup> MacKinnon, n. 11, p. 519.

intervention in the form of individualized employment rights in place of representative forms of collective negotiation.

Fineman's notion of the vulnerable subject as the rightful target of state intervention enables the inclusion of all aspects of a human life to be considered in the formulation of laws and policies aimed at building individual and institutional resilience as a means of countering our universal and inevitable vulnerability. The incorporation of lived experience in the strategies used by organisations which aim to represent the interests of workers may appear to require radical rethinking and, in many respects, this is true due to the entrenched and often narrow conceptions of workers and work that have permeated the trade union movement since its inception. However, surely such reimagining, which would require inclusion of the different facets of a human life and how they intertwine to impact profoundly on an individual's engagement with paid work, is critical if such institutions are to be truly representative? The predominance of the market and the intensification of supply-side flexibility highlights the ever-present potential for worker exploitation.

The high profile given to the gig economy and recognition of the need for better regulation of atypical working arrangements demonstrates the presumed role that the state and its institutions continue to play in the constitution and operation of labour relations. Rather than a neutral player in this context, the state is always active. Under Fineman's estimation a responsive state<sup>74</sup> and its institutions should act for all, not just the liberal subject who finds his counterpart in this context in *homo economicus*<sup>75</sup> operating under the guise of the 'standard worker'. A focus on the all-encompassing and fully inclusive notion of the vulnerable subject – whether a male bicycle courier or a female care worker; a 'standard' or a 'non-standard' worker – requires a re-evaluation of dependency and consideration to be taken of the full spectrum of workers' lived experiences in the formulation of state responses.<sup>76</sup> By renegotiating the distinction between the private and public realms of home and state and associated normative concepts, collective action in this context has the capacity to confront an array of contributory features of worker exploitation including job segregation, (numerical) worker flexibility and the systemic undervaluing of non-standard work, including where it is performed within the gig economy. This reformulated understanding of 'work' as the focus of solidarity within the

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<sup>74</sup> Fineman, n. 29.

<sup>75</sup> See Fineman and Dougherty, n. 22.

<sup>76</sup> See Busby and James, n. 20.

labour movement would enable the inclusion of *all* work – both paid and unpaid – and by extension, non-standard work more broadly whoever it is performed by, to be worthy of inclusion in the continuing struggle for social justice.