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ILO and working conditions – An historical analysis

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1 INTRODUCTION

Any analysis of the ILO Conventions and Recommendations on working conditions requires that we first consider what the body of international labour law made by the ILO is and how it works. The first pillar in the ILO's rule-making structure is its supranational character. Rather than equating ILO Conventions directly with national laws (as the misleading label 'international labour code' does), it is more enlightening to see international labour law as a 'system for making labour law'¹ at the national level. As such, the international Conventions are a set of instructions to national actors, sometimes specifying actual standards, sometimes directing the ways in which standards may be created at levels lower than the supranational, and sometimes requesting states to take actions outside the sphere of legal regulation altogether. Once this perspective is adopted, it is clear that our ideas and expectations about domestic law should not necessarily inform or frame our discussion of the ILO.

Secondly, the concept of an ILO 'rule' raises the interesting question of the extent to which the Conventions are 'rule' or 'law'-like. It is a cliché of modern scholarship that the ILO rules are not legally binding in a number of senses. First, Conventions are only open for ratification of States, which may choose not to do so, or may later choose to renounce a former commitment. Secondly, the system of oversight and enforcement, while sophisticated and arguably better developed than in other areas of international law², lacks power to effectively compel states to carry out their voluntary commitments once made.

However, rather than starting from the essentially domestic norm of enforceability, it is more useful, again, to return to the supranational character of the ILO, and to examine the multi-faceted ways in which it might influence national rule-making and actual behaviour.

It has been shown that the impact of ILO Conventions is not limited to the extent to which they themselves become or directly create binding commands in the national sphere.³ Failure to ratify an ILO convention may not coincide with national rejection of its content, as McCann shows with the Forty Hour Week Convention, which is one of the least ratified working time instruments yet represents the most common legal limitation on the working week around the world.⁴ In other words, ratification does not measure the extent to which norms are embedded in the legal systems of states.⁵ The ILO, because of the process by which its conventions are made and the topicality of the issues it deals with, is a major force in the *circulation of ideas* about work and its regulation.⁶ This is

¹ Paul Davies used this phrase to describe the European Union directives on employment law.

² L Swepston, 'The ILO's System of Human Rights Protection' in J Symonides (ed.), *Human Rights and International Protection, Monitoring and Enforcement*, Ashgate, Dartmouth, 2003, 91.

³ This indirect influence of ILO rules was noticed by the Director-General Albert Thomas in the early years of the ILO's existence. See Report of the Director-General to the International Labour Conference, ILO, Geneva, 1924, 810.

⁴ D McCann, 'Access to Work and Leisure: Perspectives on the Regulation of Working Time', conference paper to the conference on Legal Protection of Workers' Human Rights: Regulatory Changes and Challenges, held in Onati, Spain, May 2006.

⁵ McCann, 'Access to Work and Leisure: Perspectives on the Regulation of Working Time', *ibid.*

⁶ R Baldwin and M Cave, *Understanding Regulation: Theory and Practice*, Oxford University Press, Oxford, 1999, 18.

one important way in which the ILO can influence developments in national spheres beyond the formal processes of ratification and enforcement of legal commitments.⁷ For example, if actors within the national sphere find an idea for regulation that meets their ideas, they may be able to parlay the ILO label as a means to influence political and social debates, and eventually the creation of new laws at the national level. Of course, if this more diffuse process of idea formation and dispersal has real-world impacts, then the ILO is not necessarily the sole source of such ideas in the labour field. It may be that ideas take root from other sources with no formal legal connections whatsoever. This occurred recently when the Australian Industrial Relations Commission (AIRC) adopted a modified version of the United Kingdom right to request rules for use in its award-based response to work/family claims. Of course, such transmissions when there is no legal obligation or even connection rely on knowledge of the regime from which ideas are imported, and a coincidence of regulatory goals and capacities, as I argue was the case in relation to the AIRC decision.⁸

The next task is to deal with the texts of the relevant ILO Conventions which can be usefully deconstructed to reveal their essential character. As Hall points out in his brilliant analysis of government policy decision-making in the national sphere, policy instruments contain within them not just solutions to problems, but a vision of the problem itself.⁹ The same can be said of ILO Conventions. Because they are created at different historical times, they can be seen as reflecting and refracting the evolving of national norms, prejudices and strategic positions of the various actors within the Organisation. In other words, the ‘problem’ embodied in the conventions changes over time. This phenomenon accounts for the fact the old standards are overlaid by new ones on the same topic (such as the convention which instructs states to institute six days annual leave, to the 1970s version of three weeks), and how standards shift their focus (for example from the early night work conventions designed to compulsorily exclude women from such work, to the 1990s version which permits night work for any worker subject to health checks).

Of course, the process of ‘reading’ ILO Conventions as strata in the archaeological layers of institutional decision-making is itself problematic. The activities of the International Labour Conference and the ILO Governing Body are themselves complex. Decisions on the agenda for the ILC, the forms of words used in drafts of Conventions, the political, strategic and ideological forces shaping final outcomes (including trading amongst parties for outcomes which may not directly relate to the Convention under consideration) all need to be considered if one were to claim to fully account for the rules outcomes as a product of these processes. For example, the very idea that the ‘ILO’ (presumed to be a single, rational, coherent rule-making body) has ‘made’ a Convention is one which calls for a much more nuanced analysis. Such a study would require ethnographic and other social science techniques which are not utilised here.

⁷ D Charny, ‘Regulatory Competition and the Global Co-ordination of Labor Standards’ (2004) 3 *Journal of International Economic Law* 281.

⁸ J Murray, ‘The AIRC’s Test Case on Work and Family Provisions: The End of Dynamic Regulatory Change at the Federal Level?’ (2005) 18 *Australian Journal of Labour Law* 325.

⁹ P A Hall, ‘Policy Paradigms, Social Learning and the State: the Case of Economic Policy in Britain’ (1993) 25 *Comparative Politics* 275.

Further, the analogy with archaeological strata suggests that there is a chronological coherence to be perceived in the ILO corpus of working condition rules. This is not the case. Instead, the history shows that there is a steady persistence of certain norms and concepts over time, while other ideas fade or loop in and out of the discourse depending on the complex factors which shape the institutional rule-making functions. For example, as I show below, the shifts in conceptualisation of the ‘work/life’ problem evident in the 1981 Convention on Workers with Family Responsibilities did not then become a platform for coherent regulatory changes in working time rules based on these new precepts.

This paper works from the Conventions and conference debates themselves to suggest possible readings of their meaning. These readings do suggest that, for whatever reasons, particular visions of work and its regulation are present in ILO rules.

2 ILO WORKING TIME RULES : A BRIEF SUMMARY

The following section sets out the bare bones of some of what are seen as the ILO most significant working time rules. This task of summary and selection is not easy to do, for the reasons which will become evident in the next section. ILO standards are richly detailed and contain many regulatory options from which states and other actors may select. Different standards on the same topic co-exist and are not always readily reconciled. There is not always a clear linear progression in relation to particular subject areas, so that later Conventions are just as likely to portray a different vision of the regulatory problem as they are to merely ‘improve’ on a clear-cut standard. My purpose at this stage is to give a very broad overview of the ‘standards’ before turning to some of the more complex issues which suggest that talk of ‘standards’ is not always apt.

Normal working day: eight hours [may be worked as nine or ten normal hours per day¹⁰]

Normal working week: 40 hours¹¹, original standard 48.

Weekly day of rest: minimum of 24 hours per seven days to be granted simultaneously to all staff where possible. Communal day, but ‘traditions and customs of religious minorities shall, as far as possible, be respected.’¹²

Overtime payment for hours in excess of norm: 125%.

Absolute upper limit on working hours (normal+overtime): must be set and be legally enforceable in national sphere, but the maximum limit on hours is left to national governments to determine.

Part-time Work: government to review laws and regulations which hinder part-time work, transfer from full-time to part-time to be voluntary ‘where appropriate’, part-time workers to receive equal treatment with comparable full-time workers (trade union rights, ‘basic wage’, conditions) subject to potentially wide-ranging derogations.¹³

¹⁰ The eight hour norm may be worked as ten hours per day in ‘commerce and offices’. See Convention 30 concerning the Regulation of Hours of Work in Commerce and Offices. See also Recommendation 116 concerning Reduction of Hours of Work.

¹¹ Convention 47 concerning the Reduction of Hours of Work to Forty A Week. Earlier Conventions specified the normal working week of 48 hours: see Convention 1 and Convention 30.

¹² Convention 106 concerning Weekly Rest in Commerce and Offices, 1957.

¹³ Convention 175 concerning Part-Time Work, 1994.

Annual Leave: three weeks per year.¹⁴

Paid Maternity Leave: 14 weeks paid by state; nursing leave once back at work.

Work/family reconciliation: governments must adopt a national policy to help workers with families participate in labour market.¹⁵

Night work: permitted with health checks, right of transfer to day work if physically unfit for night work, compensation must recognise the nature of night work.

Shift work: permitted, normal hours may be averaged over a three week period. Upper limit of normal time plus overtime in shift work is 56 per week on average. At least 16 hours between shifts in continuous shift work industries¹⁶.

Information about working time: Workers must be given actual working hours requirements in writing.¹⁷ In some cases workers must be provided with a copy of the law protecting their working time rights.¹⁸ Collectively-enjoyed provisions such as the common day of rest are to be 'posted conspicuously in the establishment'.

Involvement of trade unions and other representative groups: Trade unions must be consulted before night work is introduced; must be consulted where normal hours provisions are to be averaged; must be consulted about government regulations permitting permanent and temporary exemptions to the normal hours regime.

Obligations on the State to maintain working time statistics: states should 'regularly collect, compile and publish' statistics on hours actually worked.¹⁹

Obligations on the State in terms of inspection of workplaces: system of labour inspectors envisaged by ILO, with oversight of conditions of work including working time.²⁰

3 OVERARCHING THEMES?

Although the methodology underlying the 'bare bones' sketch is flawed, this listing of the content of the standards does provide us with the opportunity to draw some conclusions at a high level of aggregation of the available information about major themes in the ILO's approach to conditions of employment over time. These are set out below.

First, the state has a role in controlling and limiting employer power to extend daily, weekly and annual working hours beyond not only a safe limit but also beyond a limit acceptable to a civilised society. The coterminous goal is to foster productivity and economic efficiency through the creation of decent work.

Secondly, the state has a role in supporting and constructing the bases on which workers with care responsibilities can continue to engage in the labour market, including the provision of quality part-time work.

¹⁴ Convention 132 concerning Annual Holidays with Pay (Revised), 1970.

¹⁵ Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981.

¹⁶ Convention 43 for the Regulation of Hours of Work in Automatic Sheet-Glass Works.

¹⁷ Convention 1, Article 8 requires that the hours at which work begins and ends must be posted in a notice 'in conspicuous places in the works or other suitable place'.

¹⁸ Convention 180 concerning Seafarers' Working Hours and Manning of Ships, 1996.

¹⁹ Convention 160 concerning Labour Statistics, 1985.

²⁰ Convention 81 concerning Labour Inspection in Industry and Commerce, 1947.

Thirdly, flexibility in actual working time norms may be devolved to levels lower than that of national government, and in appropriate cases be determined by collective bargaining at the workplace level. However, such devolution is to take place within the confines of legally mandated norms and legally mandated standards in relation to information about rights and entitlements.

Fourthly, individual flexibility may be permitted but must be subject to legally mandated circumstances.

Finally, the state and its citizens should be properly informed about actual working time patterns, and the whole legal framework must be properly enforced.

4 FOUR CONSTRUCTS OF THE WORKING TIME ‘PROBLEM’

In this section I consider four constructs or models of working time regulation. Each appears to be based on a particular vision of the regulatory problem to be addressed, and each had consequences both direct and indirect. It is beyond the scope of this paper to deal fully with all the issues, but it is worth remembering that the dominance of the regulation of ‘standard work’ meant to isolation of ‘non-standard work’ from the protections of the regime. As we will see, redressing such historical categorisations is no simple matter, and must be performed within an ideological context at that particular time.

4.1 Limits on length of working day, week and year and ‘standard workers’

The first construct evolved from observation and political commentary in the nineteenth century about the nature of employer exploitation of working time. Marx argued that the employer’s technique of *lengthening the working day* (week and year) was the key mechanism of extracting ‘surplus value’ from the worker and was therefore central to exploitation. ‘To appropriate labour during all the twenty-four hours of the day, therefore, is the inherent tendency of capitalist production.’²¹ Similarly, the Webbs argued that ‘the employer’s decision will perpetually be biased in favour of lengthening the working day’.²²

Marx’s conceptualisation of the battle over the length of working time focused on the gross exploitation of workers inherent in their economic position, the ‘slavery and death’ vision of long working hours. The first statutory labour law regimes in the first industrialized state, England, dealt with the need to protect vulnerable workers from this pressure to extend working time.²³

²¹ K Marx, *Capital*, Volume 1, Foreign Languages Publishing House, Moscow, no year of publication given, 256/7. Marx called for workers to organize and agitate for ‘a law, an all-powerful social barrier that shall prevent the very workers from selling by voluntary contract with capital, themselves and their families into slavery and death.’ *Ibid.*, 302.

²² S Webb and B Webb, *Industrial Democracy*, 1914, 327.

²³ B L Hutchins and A Harrison, *A History of Factory Legislation*, PS King and Son, Westminster, 1903.

Two regulatory strategies were adopted by the ILO to deal with this perceived threat to worker well-being. The first was to set a maximum outer limit on the length of the working day and week, and the second was to institute and protect a minimum period of weekly rest.²⁴

So it was that the ILO first conceptualised ‘the working time problem’ as one of *duration* of work. However, the construct had more to say about the problem than that. Of particular interest is the fact that the need to mandate periods of rest for workers was tied to a concern for a particular kind of worker.²⁵ This archetypal worker was conceptualised as male and working full-time over the life-course.²⁶ For this worker, time away from work was conceived of as leisure – a time in which the standard worker ‘could do as they please’.²⁷ The standard worker at leisure was seen as the citizen *par excellence*, and one important rationale for ILO regulation in this form was nothing less than to support the development of civilisation itself. Leisure – the standard worker’s non-work time – could permit such masculine pursuits including ‘gardening, running an allotment and keeping poultry, playing games and sports, and increasing knowledge through libraries, lectures and technical courses.’²⁸ At the International Labour Conference in 1921 it was argued that :

It is essential that the worker should be able to recruit his strength after his week’s work, and should have time to fulfil his duties as father and as a citizen and have come intellectual distraction, so as to become a man instead of a mere machine.²⁹

This view of work and the worker was connected at the deepest level with the vision of the ILO as a body committed to the principle that ‘labour is not a commodity’.

But it is *how* the Conventions set about establishing maximum hours of work and minimum periods of rest which worth examining. Contrary to the strong linkages made between such regulation and the utopian visions of a more civilised world which could follow for (male) workers once such rules were created, the standards themselves are much more equivocal about the limitations themselves. Convention 1 does not really promulgate a hard standard at all. Instead, it creates a system for marking working time rules which vary *around* those standards of the eight hour day and the 48 hour week. The Convention adopts many regulatory techniques perceived today to be of contemporary relevance : delegation of standard setting to the work-place level, flexibility to alter even core standards by means of averaging or in the event of ‘force majeure’ and the division of the workforce into core/periphery elements where the periphery are not subject to the key elements of the regulatory regime.

²⁴ The key Conventions are Convention 14 concerning Weekly Rest (Industry) (1921) and Convention 106 Weekly Rest (Commerce and Offices) Convention 1957.

²⁵ Discussion of this model is derived from J Murray, ‘The International Regulation of Maternity: Still Waiting for the Reconciliation of Work and Family Life’ (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations*, 25, 27-8. See further Leah F Vosko, ‘Gender, Precarious Work and the International Labour Code: the Ghost in the ILO Machine’, in J Fudge and R Owens (eds.), *Precarious Work, Women and the New Economy*, Hart Publishing, Oxford, 2006, 53ff.

²⁶ See generally S Fredman, *Women and the Law*, Oxford University Press, Oxford, 1997.

²⁷ Recommendation 21 on Utilisation of Spare Time, 1924.

²⁸ *Ibid.*, Article IV2(a),(b),(c).

²⁹ Delegate Fontaine addressing the International Labour Conference, 1921, Record of Proceedings, 355.

So the Convention permits working days of more than eight hours, and working weeks of longer than 48. In some cases this flexibility is limited by a rule that hours should *average* eight per day or 48 per week, over either a three week calculation period or an even longer period decided by agreement between ‘workers and employers organisations’.³⁰ Shift workers’ standard week was to be an average of 56 hours. Extensions to these hours were permitted in certain emergencies (eg ‘accident, actual or threatened’).³¹ The Convention constructs a system of paid overtime, permitting temporary alterations in hours of work in favour of the employer in certain circumstances. Ratifying states were required to set a cap on total hours for workers permanently or temporarily excluded from the protective regime because of the demands of work. However, the level at which the cap was to be set was not determined by the ILO. Instead, this regulatory task was delegated to the relevant national ‘public authority’ in ratifying states.³²

The fuzziness of even this most famous standard can in my opinion be attributed in part to the fundamental identity of the ILO. The ILO’s tripartite structure is based on an implicit trust in the efficacy and responsibility of both government and organisations of employers and employees to carry out regulatory tasks in line with the aims of the ILO. The power to adapt the internationally fixed standards (even the iconic eight hour itself) was vested in the processes of collective bargaining and public administration within the national realm. These decisions were still ‘controlled’ by the international rule. I have argued elsewhere

[States] had to set a cap on total hours, and their decision had to be taken in the context of the 48 hour week, with overtime paid at a rate of 125% of the normal rate. Thus although an important decision was left to them, ratifying States would have to take an interventionist approach to industrial relations, and juridify the labour relations of all workers falling within the scope of the Conventions.³³

By the time the International Labour Conference came to deal with the question of ‘maximum’ hours of work for non-industrial workers, the link between the iconic eight hour day/48 hour week and the standards in the Convention was even more tenuous. See, for example, how the eight hour day standard is transmuted into what in fact is a ten hour rule :

Article 3

The hours of work of persons to whom this Convention applies shall not exceed 48 in the week and eight hours in the day, except as hereinafter otherwise provided.

Article 4

³⁰ Convention 1, Article 5.

³¹ Convention 1, Article 3.

³² Convention 1, Article 6.

³³ Murray, *Transnational Labour Regulation*, 47.

The maximum hours of work in the week laid down in Article 3 may be so arranged that hours of work in any day do not exceed ten hours.³⁴

The regulatory strategy of providing for a period of minimum rest was also adopted by the ILO. Of course the concept of a 'day of rest' has its roots deep in cultural traditions in many societies, although within national boundaries different traditions may co-exist. The key ILO Conventions on weekly rest demonstrate many of the features of the 'maximum hours of work' strategy, although the central standard of at least 24 consecutive hours away from work in each seven day period is more strongly protected than the eight hour day or 48 hour week. The principle of subsidiarity – of delegating those regulatory functions which need to be undertaken at lower levels in the regulatory chain – is alive in these Conventions, as they envisage that the actual day selected should be a matter for the government of the ratifying state, and should coincide with days already established by custom and tradition in that country.³⁵ Just as the maximum hours Conventions established a strong sense of the workplace as a functioning space within which labour law should be visible (eg the requirements to post the legally binding working time rules in each workplace), the contribution of the minimum rest strategy is to press ratifying states to ensure that the day of rest 'shall, wherever possible, be granted simultaneously to the whole of the staff in each undertaking'.³⁶

Exceptions may be made by the state, 'special regard being had to all proper humanitarian and economic considerations and after consultation with responsible associations of employers and workers, wherever such exist.'³⁷

Implicit in the concept of the standard worker was its shadow, the excluded non-standard worker.³⁸ Those who were defined as different to the standard worker were to be excluded from the operation of the working time codes. Thus Convention 1 permits the exclusion from its protective scope of those involved in 'preparatory or complementary work which must necessarily be carried on outside the limits laid down for the general working of the establishment, or for certain classes of workers whose work is essentially intermittent.'³⁹ Today we label such employment as 'atypical' or 'precarious', yet this 1919 Convention shows us how long such categories have been utilised as a counterpoint against which legal protections for other workers were structured.⁴⁰

The early working time Conventions also focused on a particular subset of the standard worker, a group we can characterise as 'dependent' and therefore vulnerable to employer power to extend the working day/week. Those working in such positions of power, supervisors and managers, were excluded from the ILO regime :

³⁴ Convention 30 concerning the Regulation of Hours of Work in Commerce and Offices (1933).

³⁵ Convention 14 concerning the Application of the Weekly Rest in Industrial Undertakings (1921), Article 2. By the time the principle of weekly rest was applied to those working in 'commerce and offices', this requirement was augmented with the following provision : 'The traditions and customs of religious minorities shall, as far as possible, be respected.' (Convention 30, Article 6(4)).

³⁶ Convention 14, Article 2(2); Convention 30, Article 6(2).

³⁷ Ibid., Article 4.

³⁸ See generally L F Vosko, 'Gender, Precarious Work and the International Labour Code: the Ghost in the ILO Closet' in J Fudge and R Owens (eds.), *Precarious Work, Women and the New Economy : the Challenge to Legal Norms*, Hart Publishing, Oxford and Portland, 2006.

³⁹ Convention 1, Article 6(a).

⁴⁰ J Fudge and R Owens etc

The provisions of this Convention shall not apply to persons holding positions of supervision or management, nor to persons employed in a confidential capacity.⁴¹

Thus, from the very beginnings of modern working time regulation, reluctance to shape the hours of work of those perceived of as having control of their time was expressed. Most recently, the issue of ‘unmeasured time’ has gained notoriety in the context of the European Union’s Working Time Directive.

Most important was the complete nature of the gender segregation entailed in the ILO’s construction of the standard worker and his needs for leisure. The early Conventions did not treat women as citizens in need of rest to fulfil their civic duties, nor as citizens of the workplace. The first maternity leave conventions directed that women be *compulsorily excluded* from the workplace as the birth approached, *with no right of return to work*. The maternity leave Conventions and their development over time are discussed in detail below.

While it is clear that the male standard worker model can be posited in relation to the early ILO standards, we might expect that the influence of this construct would dissipate over time. Did this in fact occur? I would argue that the standard worker model retained much of its power over the course of the twentieth century.

One reason for this was that the goal of reducing working time as a ‘reward’ for increased productivity and in response to changed socio-economic conditions remained central to worker organisations and their political supporters throughout the twentieth-century.⁴² Thus, the concept of paid annual leave as an employment entitlement gained traction in terms of its acceptability as a general entitlement for all workers and in terms of the length of leave mandated as the minimum standard. Originally seen as a perk of white colour workers (and the small-scale minima of six days), the ILO in the 1970s created a new standard of three weeks annual leave.⁴³ Although such modest advances were highly contested and always opposed by the main employer representatives from developed states, the idea that work should be permeable to breaks such as this became naturalised in the discourse. The battles became to be about *how much time* should be traded at what cost in terms of foregone pay, not whether or not work should be capable of being divided in this way.⁴⁴

The significance of the concept of annual leave in the conceptualisation of working time as a regulatory problem should not be under-estimated. As I have argued elsewhere,

The instance of paid annual leave...shows that when attitudes are acculturated to it, a single job can be regarded as having a slightly elastic quality which can be

⁴¹ Convention 1, Article 2(a).

⁴² There is a full discussion in Murray, *Transnational Labour Regulation*.

⁴³ Progress was not uniform for various classes of workers. Thus, Convention 101 concerning Holidays with Pay in Agriculture (1952) does not specify any period of leave and merely establishes the principle of paid leave. Convention 132 concerning Annual Holidays with Pay (Revised) 1970 covers ‘all employed persons’ and specifies a minimum entitlement of ‘three working weeks for one year of service’ (Article 3(3)).

⁴⁴ Murray, ‘The International Regulation of Maternity’, *ibid.*, 45.

manipulated and managed in such a way as to accommodate the absence of an individual worker for particular periods. The effort taken [by the employer] to arrange annual leave is repaid in the attraction, retention and productivity of staff...⁴⁵

Annual leave continued the work/leisure dichotomy established for the standard worker in 1919, and despite the fierce contests between capital and labour about the precise boundaries, the idea became embedded in a way that, for example, leave to care for others at home did not. This divergence of regulatory approaches and outcomes is considered further below.

Over the course of the 20th century, the ILO dealt with other inroads into the duration of working time for standard workers. For example, the concept of ‘paid educational leave’ was established.⁴⁶ This was paid leave ‘for a specified period during working hours, with adequate entitlements’ for the worker to pursue ‘educational purposes’.⁴⁷ In line with the kind of work/non-work divisions created in 1919, the Convention nominated three kinds of education : ‘training at any level’ (presumably meaning vocational training), ‘general, social and civic education’ and ‘trade union training’.⁴⁸ In addition to these features, there is a 1970s theme here of adjusting to economic change or ‘contemporary requirements’ as Article 3 puts it.

One final aspect of the standard worker model should be noted at this stage. The construction of this worker also reflected a coherent socio-ethnic identity. By this I mean that the kind of worker was imagined in some detail beyond the male character so often assigned to it. That archetypal worker was not only male : he was a blue collar worker in a ‘Fordist’-type endeavour. (This ‘enterprise’ or workplace’ is also a construct of the early ILO Conventions, for example by the attempts to ensure that all workers received the same day off each week and the requirements to post notices as to working times.) The enterprise is in ‘industry’⁴⁹. It is assumed that collective labour relations are a viable means of dealing with the fine-tuning and even setting of actual standards at the level of the enterprise. The ILO archetype of the standard worker is thus also a unionised worker, or one whose interests can be properly represented by the relevant association of workers.

Later on, workers in other fields were included in the ILO corpus of rules, but these industry specific Conventions tended to act laterally by seeking to apply the pre-existing standard worker standards to the newly recognised groups. This showed the power and centrality of the earlier model. For example, in 1979 a Convention on nurses’ working conditions was created.⁵⁰ This Convention utilised existing standard worker regulation as the ‘hook’, and Article 6 requires ratifying states to ensure that nurses ‘shall enjoy conditions at least equivalent to those of other workers in the country [in relation

⁴⁵ Murray, *Int reg of mat*, 45.

⁴⁶ Convention 140 concerning Paid Education Leave (1976).

⁴⁷ *Ibid.*, Article 1.

⁴⁸ *Ibid.*, Article 2.

⁴⁹ Convention 1 defines industry as mines, quarries and other works; industries in which articles are manufactured, altered, cleaned, repaired, ornamented, finished etc including shipbuilding, electricity generation and so on; construction maintenance and repair of any building, railway, tramway, harbour, dock, pier etc; transport of passengers or goods by road, rail, sea or inland waterway but excluding transport by hand.

⁵⁰ Convention 149 concerning Employment and Conditions of Work and Life of Nursing Personnel (1979).

to]...hours of work [including overtime, inconvenient hours and shift work], weekly rest, paid annual holidays, educational leave, maternity leave and so on. In relation to home work, a similar clause requiring equal treatment so far as possible is not extended to include these working time clauses.⁵¹

The ethnographic side of the standard worker model was readily seen on the face of the first Conventions of 1919. The ILO Constitution was designed to permit differential rules for less developed countries, and the early Conventions *excluded* workers in certain countries and colonies from the protections enshrined therein. Convention 1 permitted Japan to institute a 57 hour week (60 hours in silk manufacture), and 'British India' was permitted to establish a standard week of 60 hours. The Convention also stated that 'the provisions of this Convention shall not apply to China, Persia and Siam...'⁵² The Convention states that ratifying countries could apply lower standards in their colonies 'where owing to local conditions its provisions are inapplicable.'⁵³ Even where the standards were to be applied, the ILO Convention permitted 'such modifications as may be necessary to adapt its provisions to local conditions.'⁵⁴

As Yves-Ghebali put it, the ILO's global role between 1919 and 1944 was 'inevitably taken to a large extent to mean European'.⁵⁵

So, to conclude on this first, important construct. We have identified a way of viewing work and the problem of working hours which was essentially concerned with a male worker, unencumbered by domestic care responsibilities and subject to potential exploitation in relation to the duration of working time. The ILO had two main strategies : to set a maximum limit on daily and weekly (and annual hours, via the paid annual leave concept), and to set a minimum period of weekly rest. The contemporary relevance of this construct can be seen in the 1996 Convention dealing with seafarers' hours of work.⁵⁶

This Convention offers ratifying States the opportunity to select *either* a maximum outer limit to daily and weekly hours of work *or* a minimum period of daily or weekly rest. Perhaps this 'flexibility' measure (for ratifying states) accounts for the fact that the Convention was recently highlighted by the Committee of Experts as an example which the ILO should follow in future regulation of conditions of work. This is a radical prescription indeed, given that the actual standards specify are maximum hours of 14 per day and 72 per week, and the minimum periods of rest in any 24 hours is ten. Obviously, life on board ship contains its own work processes and labour demands, and by definition is remote from the boundary between work and life which a more general ILO rule would

⁵¹ Convention 177 concerning Home Work, Article 4 calls for equal treatment for home workers in relation to freedom of association, discrimination, occupational health and safety, remuneration, statutory social security protection, access to training, minimum age of workers and maternity protection.

⁵² Convention 1, Articles 9, 10 and 11. Murray, *Transnational Labour Regulation*, 42.

⁵³ Convention 1, Article 16.

⁵⁴ *Ibid.*

⁵⁵ V Yves-Ghebali, *The ILO: A Case Study in the Evolution of a UN Specialised Agency*, Martinus Nijhoff, Dordrecht, 1989.

⁵⁶ Convention No 180 concerning Seafarers' Hours of Work and the Manning of Ships (1996). This Convention formed the basis of an agreement between the social partners in the maritime industry within the European Union, and was subsequently passed into EC law : Council Directive 1999/63/EEC of 21 June 1999, *Official Journal* L167, 33-37.

need to address. For whatever reason, this most recent ILO Convention on working time fits squarely with the first construct discussed in this section : the archetype of the male, unencumbered worker facing the remorseless pressure to work for too long each day and each week.

There are other ways of constructing the working time problem, to which I will now turn.

4.2 ILO standards as an input to micro-economic efficiency

A second model focused on the idea that regulation of working time could aid improvements in the organisation of work, and hence productivity.⁵⁷ In the early days of the twentieth century, this argument coincided with the demands of worker organisations for shorter hours for the standard worker. Hence, the eight hour day convention should not be seen as purely an expression of the regulatory goal of protecting the standard worker from long working hours.

Within the UK, for example, experiments during the First World War showed that shorter working hours improved productivity.⁵⁸ ILO Director-General Albert Thomas believed that

(t)he eight hour day was not just a simple reform; it was...the key to an overhaul of the entire productive system. To reduce the work day clearly implied that production would have to be increased to make up for the time.⁵⁹

Notice that implicit in Thomas' statement is the view that the demands of economic efficiency coincided with worker interests and demands. This rosy world view did not last long, when workers and governments in several key European states opposed ratification of the iconic Convention 1. But more importantly, Thomas' optimism in the convergence of efficiency and social justice goals gave way to a very different ideological outlook. This strand of thought remained within the ILO, and gave rise to such Conventions as the one on the development of human resources. This Convention was designed to promote vocational 'guidance and training'.⁶⁰

From the 1970s onwards, neo-liberal philosophies gained ground in many western states. A focus on worker protection was displaced by the perceived need to free labour markets from rigid regulation in order to institute flexibility in the deployment of labour. It is here we must remember the point made in the introduction about the supranational nature of ILO regulation. The neo-liberal project was, in part, aimed at dismantling protective labour statutes where they existed, that is, in the domestic realm of the nation states.⁶¹ A

⁵⁷ For a discussion of the ideas underlying this theme, see S Deakin and F Wilkinson, 'Rights v Efficiency? The Economic Case for Transnational Labour Standards' (1994) 23 *Industrial Law Journal* 289.

⁵⁸ B L Hutchins and A Harrison, *A History of Factory Legislation*, 1903, 128.

⁵⁹ M Fine, 'Albert Thomas: A Reformer's Vision of Modernisation: 1914- 1932' (1997) 12 *Journal of Contemporary History* 545, 554.

⁶⁰ Convention 142 concerning Vocational Guidance and Vocational Training in the Development of Human Resources' (1977).

⁶¹ Of course, this is not to say that neo-liberal governments would end of with 'less' law : the unraveling of existing entitlements, processes and institutions often took vast volumes of legislation. The most recent example of such a massive enterprise was the Australian government's WorkChoices legislation. See J

neo-liberal agenda *at the ILO*, however, might seek to create new rules designed to aid this dismantling task.

ILO working time Conventions made in the 1990s certainly an impulse, recognisable as neo-liberal, to permit the deregulation of previous protections of workers created at the national level, for example, to enable the spread of ‘other than full time’ work. Such arguments were explicitly made by delegates of the International Labour Conference concerning the Part-Time Work Convention⁶² and Night Work Convention.⁶³ It is necessary not to overstate this observation. The agenda of ‘flexibility’ had a number of different faces, depending on the way in which it was prosecuted and made concrete in actual regulatory instruments. One concurrent agenda in the making of the Part-Time Work was the desire to unwind rules which made it difficult for workers with domestic care responsibilities to combine work and care. I have argued that in relation to the Part-Time Work Convention, this meant that even the core labour standards on freedom of association and the right to collectively bargain were undercut by some of the provisions of the Part-Time Work Convention.⁶⁴

4.3 ILO standards and macro-economic goals

A third construct was that which saw working time reduction as a macro-economic tool which had the capacity to lift the level of employment across an economy as a whole. One of the strands of thought underlying the early ‘standard worker’ conventions was the notion that a ‘pool’ of labour existed in any given state : if some workers worked ‘too much’, then there would be less work for others.⁶⁵ It was said

‘a community in which some members are overworked while others can do no work at all is *ipso facto* unhealthy.’⁶⁶

This philosophy underpinned the debates about the potential role for international labour rules in response to the Great Depression. Eventually, against bitter opposition from employers and some states, the ILO created its Convention on the Forty Hour week, which was directly aimed at generating employment:

The proposal to consider the reduction of hours of work [to 40] has not been put forward on the ground that the 48 hour week is excessively long, or that it imposes undue fatigue on the work, or that it deprives him of a reasonable amount of leisure. The proposal has been advanced as a remedy for, and a preventative of unemployment.⁶⁷

Murray, ‘WorkChoices and the Radical Revision of the Public Realm of Australian Statutory Labour Law’ (2006) 35(4) *Industrial Law Journal* 343.

⁶² See J Murray. ‘Social Justice for Women? The ILO Convention on Part-Time Work’ (1999) 15 *International Journal of Comparative Labour Law and Industrial Relations* 3.

⁶³ Convention 171 concerning Night Work, 1990.

⁶⁴ Murray, Social Justice for Women?, above.

⁶⁵ This ‘lump of labour’ view is regarded as a fallacy by economists.

⁶⁶ S Webb and H Cox, *The Eight Hours Day*, 1891, 6

⁶⁷ ILC 16th Session, 11.

The issue of further reductions in working time was revisited by the ILO in the 1960s when deep political differences amongst the parties stymied the creation of a new Convention.⁶⁸ In most developed countries, the economic conditions in the 1970s gave impetus to the debates.⁶⁹ Most recently, the French Government's 'Loi Aubry' (1998) required the creation of a 35 hour week (through collective bargaining at the workplace) with a view to increasing overall employment, a goal which some argue may have been successfully furthered by the law.⁷⁰

ILO Conventions were therefore used, at various historical stages, as a tool to influence national macro-economic policy. The primary purpose was not to set 'standards' of the kind that would approximate national labour laws. Rather, these Conventions were a 'message to policy', an attempt to influence a much broader array of government economic levers. The sensitivity of national governments to receiving such advice, in the form of ILO Convention, meant that debates around these very contentious topics were bitter and protracted. The end result, as always, was a compromise between the various ideological and pragmatic positions adopted. The real 'message' was often rather vague. See the key Convention on the forty hour week :

Each Member of the ILO which ratifies this Convention declares its approval of (a) the principle of a forty-hour week applied in such a manner that the standard of living is not reduced in consequence; and (b) the taking or facilitating of such measures as may be judged appropriate to secure this end.⁷¹

Attempts to keep the ILO 'in' the game of recommending reduction in working time continued throughout the twentieth century.⁷² I trace this history in Chapter Three of *Transnational Labour Regulation*. This history shows that the secular reduction in working time within nation states put 'upward' pressure on the ILO to update its working time standards. The political context in which these demands were made, however, meant that the vehicles used were the rather vague, policy-oriented instruments based on the Forty Hour Week Convention. However, the 1960s discussions were not limited to the macro-economic rationale which underpinned the 1935 instrument. As I show, there was a new concern for self-fulfilment at work, and the humanisation of working conditions which represented some of the cultural changes experienced in powerful ILO member states following the post-War booms and into the 1960s.

⁶⁸ See for example ILO, *Reduction in Hours of Work*, Report VII(1), 44th Session, 1960, 29.

⁶⁹ R A Hart, *Shorter Working Time: A Dilemma for Collective Bargaining*, OECD, Paris, 1984, 12.

⁷⁰ For example F Contenson and R Vranceanu, *Working Time: Theory and Policy Implications*, Edward Elgar, Cheltenham UK, 2000 argue that 'the law provoked a wave of reorganizations at firm level that may have improved their competitiveness' (at p 35) .

⁷¹ Convention 47 concerning the Forty Hour Week (1935), Article 1.

⁷² By 1960, the Forty Hour Week Convention had only been ratified by the USSR, Ukraine, Byelorussia and New Zealand. In 1961, all that the Conference could agree upon was a recommendation : Recommendation 116 concerning Reduction of Hours of Work (1962). Attempts were made over the years to assist ratification of the concept of the forty hour week, including by the creation of industry-specific conventions on that topic. See Convention 49 Reduction of hours of Work (Glass Bottle Works) (1935), Convention 51 Reduction of Hours of Work (Public Works) (1936), Reduction of Hours of Work (Textiles) Convention (1937)

These various strands are crystallized in the Employment Policy Convention of 1964, which requires ratifying states to adopt ‘an active policy designed to promote full, productive and freely chosen employment.’⁷³

4.4 ILO standards and work/life boundaries

It was pointed out above the standard worker concept conceptualised the worker as male, employment from youth to retirement in full-time work and subject to the continuing ‘problem’ of pressure to work longer hours.

This construct did not mean that the ILO did not recognise women workers. What it meant was that the construction of what was acceptable practice in workplaces (and within national regulatory schemas) was largely based around the particular male norms which emerged in ILO discussions and debates about labour rules.⁷⁴ It meant, in fact, that the ILO conceptualised and helped to construct a domestic realm completely separate from the workplace with which women as carers were most likely to be associated. There are many direct and indirect means by which this construction occurred.

We can see this separate realm in much of the rule-making already discussed in this paper. In particular, the exclusion from regulation by ILO standards of work performed within a family business effectively promoted the idea of a realm outside the norms of decent work. (An attempt to reverse some of this impact was made with the Home Work Convention.) For example, a ratifying state could exclude from the weekly rest standard those workers ‘employed in industrial undertakings in which only the members of one single family are employed’.⁷⁵ Of course, work and life are not subject to the clear and settled boundary suggested by the first construction (the standard worker model) outlined above. If the human race is to be regenerated, women must give birth. This ‘problem’ for regulation was conceptualised by the ILO around its constructed vision of the female worker, a particular vision of the State which the ILO sought to both rely on and export around the globe at that time and the narrow characterisation of caring work as limited to the concerns of maternity and care for babies during their very first years. Let us consider each aspect in turn.

First, the norm of the female worker derived from the ILO Conventions differs from that of the standard worker. The female worker was not seen as being a citizen as such, either of the workplace or within society as a whole. Her time away from work took her into the unregulated domestic realm, not the libraries and trade union meeting rooms and garden allotments envisaged for the standard (male) worker. Furthermore, unlike the male norm, the female archetype was not to have a say in the adaptation of her work to care needs. In 1919, the ILO created its first standard on maternity leave which stated ‘a woman shall

⁷³ Convention 122 concerning Employment Policy (1966), Article 1.

⁷⁴ It is important to recognize that many male workers would also have been excluded from the regulatory scope by dint of the particular standard worker approach adopted by the ILO.

⁷⁵ Convention 14, Article 3. A similar provision is in the standard on working time in commerce and offices, see Convention 30, Article 3(a). The exclusion in the 1957 Convention on weekly rest in commerce/offices states : ‘[countries may exclude from protection] establishments in which only members of the employer’s family who are not or cannot be considered wage earners are employed’; Convention 106 Article 5(a).

not be permitted to work during the six weeks following her confinement.⁷⁶ The first night work convention similarly stated that women ‘shall not be employed during the night’.⁷⁷ The kind of flexibility which let individual workers, collectivities of workers and employers negotiated creative flexibility even of the most important standards such as the eight hour day was not to be permitted for women workers.

Secondly, ILO consistently took the view that pay whilst on maternity leave should not be a matter for the employer, but part of the system of state social security provision. This attitude remained unchanged from 1919⁷⁸, through the major revision in 1952⁷⁹ to the most recent revision in 2000⁸⁰. Unlike paid annual leave, ‘paid’ maternity leave was not conceptualised as a work-related entitlement, with all that followed from that categorisation. Owens has pointed out in relation to Australian policy that the provision of maternity payments through state-run social security schemes reinforced the separation of the public sphere of work and the private sphere of care, as the ‘benefits’ for women are not seen as arising from their role as workers.⁸¹ Wynn argues that where women are seen as ‘dependent mothers’ rather than ‘productive workers’ the ‘problem’ is ‘located in the realm of social protection where economic justifications are more likely to gain recognition’.⁸²

Thirdly, during the twentieth century, the ILO had worked on revising the 1919 Maternity Protection Convention. The 1952 revision did not alter the original construct of female worker and narrow mode of care. However, towards the end of the twentieth century, pressures from various sources were building to do more in this field. As mentioned above, the growth in significance of the concepts of equal treatment and equality of opportunity led to the creation of what are now the core Conventions on discrimination at work.⁸³ The 1981 Convention on Workers with Family Responsibilities had made two important inroads into the 1919 construction of female workers and their domestic responsibilities.

For the first time in an international instrument of the ILO, care duties other than the nurturing of small infants was recognised. Thus, the Convention covered workers caring for ‘dependent’ children, and those caring for ‘other members of their immediate family who clearly need their support, where such responsibilities restrict their possibilities for preparing for, entering, participating in or advancing in economic activity.’ The second important step was the fact that mother were not represented as the only ones responsible for care. Indeed, to achieve the ILO’s goal of equality, the Workers with Family Responsibilities Convention stated it was necessary to recognise and encourage the care work of men and women, and

⁷⁶ Convention 3, Article 3(a).

⁷⁷ Convention 4 concerning Night Work (Women), Article 3.

⁷⁸ Convention 3 concerning Maternity Protection (1919).

⁷⁹ Convention 103 concerning Maternity Protection (Revised) (1952).

⁸⁰ Convention concerning Maternity Protection (2000).

⁸¹ R J Owens, ‘The Traditional Labour Law Framework: A Critical Evaluation’ in R Mitchell (ed.), *Redefining Labour Law : New Perspectives on the Future of Teaching and Research*, Centre for Employment and Labour Relations Law, Occasional Monograph Series No 3, 1995, 5.

⁸² M Wynn, ‘Pregnancy Discrimination: Equality, Protection or Reconciliation’ (1999) 62(3) *Modern Law Review* 435, 442.

⁸³ Convention 100 concerning Equal Remuneration (1951) and Convention 111 concerning Discrimination (Employment and Occupation) (1958).

to integrate the demands of the domestic sphere with those of the paid workplace.⁸⁴

By the time of the new century, a much more sophisticated vision of the ‘labour problem’ of combining work and life was available. It was increasingly recognised that for workers with care responsibilities, time away from work was not time spent as the worker pleased, as posited in early ILO thinking. Rather, such workers needed to intersperse periods of work and non-work for various purposes, and for various lengths of time.⁸⁵ This more complicated view of the worker gave rise to other pressing normative issues relating to working conditions. What kind of job security should be given to workers who were previously seen as peripheral to both workplace and workplace regulation? Instead of totally excluding women in order to define the domestic realm, how could social justice and dignity at work be achieved in a more subtle regime? Rather than defining the ‘problem’ as one of the duration of working time, this new approach called for regulatory responses to the need to make work more *permeable* to care.

The re-invigorated approach of ‘equal treatment’ eventually led to changes in ILO attitudes to some of the old paternalistic standards. I will briefly consider the trajectory of the night work for women Conventions. In 1973, the Governing Body noted a report which argued that women should receive equal treatment with men, and should not be hindered from ‘integrating’ into the labour force. During the International Labour Conference in 1975, the Office recommended that

Measures should be taken to review all protective legislation applying to women only (with the exception of maternity protection) in the light of up-to-date scientific knowledge and to revise, supplement, extend to all workers or repeal such legislation according to national needs and circumstances.⁸⁶

Women were no longer excluded from night work simply because they were women. However, the dominant regulatory ethos within which the 1990 Convention 171 on Night Work was created meant that the new convention no longer provided much meaningful protection for any worker faced with work at night. I conclude elsewhere

Night workers were defined as those who worked ‘a substantial number of hours’ at night, and ‘night time’ was defined as a period of at least seven hours including the span from midnight to 5.00 am. This was a significant reduction in the scope of the 1948 Convention, and so the gender-neutral instrument did not ‘level-up’ in the sense of extending previous levels of protection [available to women] to men. Further, no ban or limitation was placed on night work itself, and given contemporary demands to expand operating hours of enterprises and the flexible deployment of staff [...] *the Convention should be seen as permissive of night work*....Any sense that working at night was intrinsically undesirable, always

⁸⁴ J Murray, ‘The International Regulation of Maternity’, 33/34.

⁸⁵ For a discussion of these issues, see J Murray, ‘Work and Care : New Legal Techniques for Adaptation’ (2005) Labour and Industry, page.

⁸⁶ ILO, *Equality of Opportunity and Treatment for Women Workers*, Report VIII, International Labour Conference, 60th Session, 1975, 92.

weakly expressed at the international level because of the limited scope of the old ILO instruments, was essentially lost with the 1990 Convention.⁸⁷

When the question of maternity protection was re-opened at the International Labour Conference in 2000, the space created for change by the 1981 Convention on Workers with Family Responsibilities was not utilised. The 2000 Convention did not add to the scope of ‘care’ beyond mothers’ care for new-born infants : there was insufficient support for consideration of a more broadly-based parental leave instrument. Further, and perhaps most surprisingly, there was no change to the quantum of leave itself. This meant that the ILO was confirming that women’s entitlement to leave at the time of maternity were unchanged from 1919. Small advances were made, and these appeared to follow from European Community regulation.⁸⁸ The reasons for this lack of progress, striking when considered against the changes eventually won for other leave entitlements including paid annual leave, lay in the deep ideological divides then prevalent within the ILO.

5 INTERSECTION OF REGULATORY TECHNIQUES AND REGULATORY CONTENT

The section above sketches out some of the regulatory content of the key working time conventions by examining four constructs of the ‘problem’ to be dealt with. It is not asserted that these four areas (standard worker protection, micro-economic efficiency, macro-economic goals and work/life boundaries) provide a complete picture of the ILO’s rule-making. Nor is it possible to place these four constructs in any clear chronological timeframes. As we have seen, the standard worker model has remained resilient throughout the entire history of the ILO, and the boundaries between work and ‘care’ have been defined by it since 1919.

Another way to ‘slice up’ the material is to consider the regulatory *techniques* adopted in the various conventions. This is a rather neglected field of study within ILO scholarship, which tends to assume a uniformity of regulatory approach which is simply not discernable on close reading of the standards themselves.

I have stressed that the ILO rules must be seen as part of the multi-layers of regulation inherent in the ILO system. The ILO’s regulatory conversation is with states, but what it says to them varies widely within and across conventions. One mode the ILO adopts is to adopt a strict standard, specify that standard, and *require ratifying states to pass that standard into law at the national level*. I have referred to this as a ‘message to law’. The core Convention on Freedom of Association takes this form, as does the most recent convention dealing with hours of work of seafarers. Even Convention 1, with all its inherent ‘fuzziness’ and flexibility (discussed above), requires that the actual hours of work be determined and fixed *by law* for each workplace. In other words, while the standards themselves were negotiable, the ILO insisted that legally binding protection of whatever norms were agreed was not.

Not all ILO conventions require ratifying states to pass laws in order to give effect to the standard. Collective bargaining may be an adequate means of implementation. In other

⁸⁷ Murray, *Transnational Labour Regulation*, 132.

⁸⁸ See my discussion in J Murray, *International Regulation of Maternity*, 25, 37.

cases, the convention requires the *creation of a national policy*, as is the case with the Convention on Workers with Family Responsibilities. There is no ‘message to law’ here, and hence the potential scope for pressuring regulators within a national regime is muted. All one can legitimately press for is a national policy, which may or may not have legal components. In countries of the Anglo-Saxon legal tradition, the common law contract of employment is a potent regulatory instrument, and one which has proved to be largely inimical to the kinds of flexibilities sought by workers in adapting their working lives to domestic care responsibilities.⁸⁹ In other words, without further legal intervention, progressive change is not possible. The absence of ILO leadership on this issue had hurt the development of appropriate legal models in this field.

⁸⁹ Murray, Work and Care.