Irregular Migrants at Work and the Groundless Legal Subject

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Abstract:

This chapter considers the legal gaps that construct irregular status for workers with precarious legal immigration status, in precarious employment arrangements. These gaps illustrate work that goes beyond formal legal categories in UK employment law and immigration. However the work performed by migrants (non-UK and non-EU citizens) is not outside of the law and economy. Migrant workers deemed irregular are persons in particularly vulnerable employment situations working within the nation-state. The ambiguous relationship between irregular migrant workers and UK employment law demonstrates firstly, that existing categories of employment law construct vulnerability for certain migrants at work. Secondly, the groundless legal subjectivity that irregular migrants experience is not unique to their condition but archetypal to all persons subject to the law. Thus, labour law, which holds as an aim the protection and fair treatment of persons at work, would conceptually benefit from embracing the groundlessness of the legal subject to respond to experiences beyond predetermined frames of legal recognition.

Irregular migration and work cannot be identified solely as a problem of employment law or immigration law or European law per se. The challenge of recognising persons living and migrating across borders for work is part of the global movement of capital in which there are preferred legal subjects – namely citizens and visa holders often in high-earning employment – and irregular legal subjects whose legal status is precarious, uncertain, or who are deemed 'illegal' as they do not hold the legal immigration status to remain (and work) within a country of which they are not a citizen. Migration status, as a function of immigration law, is left to the discretion of European Union member states. Many migrants can be left in limbo if they cannot be removed to their country of origin through a non-removal order, but do not have leave to remain, i.e. lack permanent residency (Queiroz 2018, 4). The situation of irregular migrant workers is an example where the mechanisms of the law fail for these individuals. In other words, the law's limit is exposed as being where the 'imaginative capacities' of the nation-state limit citizenship and recognition of persons within their territory (Pryor 2004, 267). In spite of being physically present in the country, and often working and therefore actively contributing to the economic and social fabric of the country, without legal status these persons are suspended in a legal grey area. Their legal subjectivity is irregular; their subject-hood is groundless—it is neither found to rest in citizenship nor in employment law.

The legal categories of employment law and immigration are based on predetermined frames of recognition that restrict and condition legal subjectivity according to principles of contract law (Collins 2007), the standard employment relationship (Fudge 2014; Langstaff 2016) and citizenship (Guild 2018; Anderson 2013; Mundlak 2002). The existing legal categories of employee, foreign worker or European Union-citizen worker are limited in their ability to address what is identified as irregular, where a person may have transgressed an element of their immigration status or formal work arrangement. For instance, overstaying a work or visitor permit, working more than the permitted hours per week on a student visa or changing employers where sponsorship and work visa is contingent on one employer (see Anderson 2013). Moreover, the limits of the recognised categories in employment law, modelled around the standard employment contract, obscure processes of neo-liberalisation (Peck 2012) that seek out cheaper forms of labour where employers are not bound to provide job security or reciprocal contractual terms to temporary or subcontracted workers (not 'employees', see Langstaff 2016; Collins 2007).

Neoliberalisation processes chisel away at formal employment law protections and

responsibilities to contribute to an economic market system dependent on persons in irregular situations (Fudge and Strauss 2013; Hepple 2011). Workers experience an 'intensified depletion' (Stewart 2011) of rights, protections and recognition. The lower the value given to ones work ('low-waged', 'low-skilled') the weaker the claim to job security and rights. For instance, labour law protections are demanded for workers based on provisions within the European Union freedom of movement.[i] But due to the changing conditions and nature of work, the struggle remains to have these rights protected and practiced (Kountouris 2018). Meanwhile, irregular migrant workers are found lower down the ladder of protection, often working in the most dirty, dangerous and demeaning conditions (3D's, see Boucher 2008) with even less recourse or protection against exploitation by their employers (Mantouvalou 2018). Employers, moreover, take advantage of the vulnerability of irregular migrant workers. In particular, as will be discussed below, when a workers' immigration status, and often physically their identity documents/passport, is dependent on, or held by, the employer as is the case with domestic worker visas in the UK.

The Law and Irregular Migrants at Work

Law, as a practice and a frame, offers recognition. This recognition is affirmed and re-affirmed through legal subjectivity. The subjection of persons as legal subjects is troubled when persons are in the shadow or gaps of the law. These gaps exist, for instance, when a person is in a country in contravention of immigration laws such as overstaying a visitor visa but maintaining employment through a contract of employment. Jurisprudential questions need to consider, are they legal subjects? Are they excluded from the law? The United Kingdom Supreme Court cases of *Hounga v Allen* [2014] and *Taiwo* and *Onu* [2016], illustrate how the gaps in employment law contain an experience of work that goes beyond formal legal categories in employment law and immigration. Persons such as Miss Hounga, Ms Taiwo and Ms Onu are not without legal subjectivity, but their subject-hood and subsequent treatment by the law is ambivalent.

Conventionally, the aim of recognition and the goal of achieving legal subjectivity and status is conformity with a subject that is a liberal, individual and autonomous being. This liberal legal subject is typified through the standard employment contract: the male, able-bodied, citizen worker, working in full time permanent employment, with a single employer, with consistent hours and salary. This 'ideal' worker has been demystified by labour law scholars who draw attention to the current labour market and globalised economic system that does not support this type of employment clarity and consistency,

notwithstanding that the standard employment contract only ever existed as a reality for a very small percentage of the population (Kountouris 2018; Fudge and Strauss 2013). Moreover, the liberal, individual, autonomous legal subject presupposes a nation-state system whereby the subject remains in the country of birth and citizenship. While this subject may theoretically remain the model for legal categories, the practice of employment law in tribunal and court levels demonstrate that most legal actors struggle to fit this mould. Crucially, irregular migrant workers, especially women from non-EU countries, brought by their employer-sponsors to work in private households radically challenge the liberal legal subject and standard employment contractual arrangement.

In the UK Supreme Court case law, legal actors—particularly those who are not able to conform to the liberal model—can be seen to shift their position and subjectivity to cover up or make up for the gaps inherent in the law.[ii] The law works by both consolidating its limits/ boundaries and responding to difference, always extending beyond itself to include what is present but beyond the formal limit. In other words, the law is both determinate and indeterminate (Fitzpatrick 156, 2007; Fitzpatrick 124, 2009). The irregular migrant worker is a legal subject not ignored by the law: persons in these irregular, grey areas are subjected to the determinate law, in that they are included within the ambit of law by their activity, and importance, in the labour market.[iii] However, they are denied recognition as full legal subjects; their treatment and ability to receive compensation through legal mechanisms is, in the case law, largely indeterminate. Their ambiguous position is a condition of popularly reinforced notions that firstly, migrant workers are foreign/non-citizens and therefore not the responsibility of the nation-state or worthy of state protection. Secondly, their labour market position relegates them to spaces and conditions that are in the margins of statutory protection. For instance, often not fulfilling the criteria for 'employee' status under the Employment Rights Act 1996 (Collins 2007; see also *Halawi* 2014). Or being in the margins of contract law including the doctrine of illegality (*Hounga*). Or receiving ambiguous recognition under the Modern Slavery Act 2015 (Broad and Turnbull 2018), which largely depends on constructing/presenting the subject as a victim and who has had no part in consenting to their treatment and situation. Or the margins of the Equality Act 2010, for instance experiencing discrimination based on a characteristic that is not protected until the Act such as will be discussed below in *Taiwo* and *Onu* [2016].

The legal grey areas occupied by persons considered irregular migrant labourers suggest that to search for a legal remedy for the phenomenon of irregular migrant labourers is

to face a legal impasse (for further elaboration on the irregular, see Amaya Castro 2013). However, the attempts of legal actors within existing systems and functions of law ultimately reveal not an impasse but shifting groundlessness at the core of legal subjectivity in labour rights. This groundlessness refers to the unpredictable, ambivalent treatment within the case law. Also, more fundamentally, that the irregular migrant is not so much an anomaly (ir-regular) as an archetypal legal subject in labour law. The legal subject in labour law, migrant or citizen, is not definitive because the experience of labour or working is dependent on relationships and employment arrangements that differ according to experience. Thus, the ambivalent treatment experienced by irregular migrant workers under the law is not uniquely the experience of migrant workers but heightened due to their precarious immigration status.

The law constitutes an order of being, something is made valid when it is legalized, but equally what the law sidelines, or maintains as irregular, is also part of its constitution. The irregular migrant, living, working, contributing to the economic, social and political system is not an outsider but rather is 'inside' but significantly lacking equal status and subjectivity. Many theorists have written of how one cannot speak about Europe without speaking of its other – the non-European inside, or the 'almost European' – be it people from former colonized countries or those that are seen to aspire to be 'European' but are forever judged against a European norm (see Balibar 2004; Butler and Spivak 2012). Thus, the irregular migrant in Europe cannot be conceptualized as an outsider, and in the UK cases of irregular migrants have been heard at the Supreme Court. Thus, irregular migrants are not lacking in legal subjectivity, but their subject-hood is differentially treated in the law by the nation-state legal regime. This leaves them exposed to exploitation outside state protection.

Irregular migrant workers, although not totally excluded from legal subjectivity, are a demographic that, practically, often cannot gain legal representation in court processes due to a lack of resources. There are few cases at the Supreme Court to address the situation of irregular migrants at work. However, in the past few years, two cases have significantly demonstrated the legal questions and difficulty of extending national legal protection to irregular migrants. The two cases, *Hounga v Allen* [2014] and the jointly heard appeals of *Taiwo* and *Onu* [2016], are exemplary of labour situations that many other workers experience.

Hounga v Allen [2014]

The case of Miss Hounga, heard at the UK Supreme Court on appeal in 2014, illustrates the condition of legal irregularity that irregular migrant workers may find

themselves in, in spite of employment law. Miss Hounga was a Nigerian national brought to work in a private household by the Allen's in 2007, when she was about 14 years old. She travelled with an affidavit that stated she was born in 1986, however Miss Hounga admitted that the statement was falsified (she was 14, not 19 years old). Meanwhile, Mrs Allen testified to the employment tribunal that the affidavit was true, meaning that Miss Hounga was an adult when she arrived to the UK and thus legally able to consent to work and employment. Miss Hounga was illiterate and had been orphaned in Nigeria. Upon arriving to the UK, she began work at the Allen's in spite of not holding a work permit. After six months her visitor visa expired and she had no legal right to stay and/or work in the UK. Nevertheless, Miss Hounga continued to live and work in the Allen household. The Allen's did not pay Miss Hounga for her work and she was subjected to violence, verbal abuse and harassment. Miss Hounga was eventually kicked out of the Allen home after Mrs Allen beat her, poured water over her and locked her out of the house. Miss Hounga was found in a supermarket car park and brought to an NGO that advocated on her behalf.

The case was brought to the employment tribunal on the basis of racial discrimination (under the Race Relations Act 1976 incorporated into the Equality Act 2010, s 9) with regards to the harassment suffered during employment and her dismissal. Miss Hounga claimed that she was treated less favourably (discriminated against) based on her race. In other words a British worker in the same or similar circumstances would have been treated more favourably. Contractual claims were also brought to the tribunal based on breach of employment contract, unfair dismissal, unpaid wages and holiday pay. At the employment tribunal, Miss Hounga's contract law claims were dismissed based on the doctrine of illegality. The doctrine of illegality deems that if there is illegality at the basis of the contract – i.e. Miss Hounga's living and work in the country without legal permit – then the contract is void. The racial discrimination claims were dismissed based on Miss Hounga's failure to follow grievance procedures whilst in employment. Furthermore her dismissal from employment was held to be due to her illegal immigration status that she was deemed to be aware of, therefore not wrongful on the part of the employer (the Allens). The Court of Appeal held that the illegality at the basis of Miss Hounga's presence in the country overrode any claims to contractual grievances or discrimination.[iv]

The contract law claims were not pursed at the Supreme Court level because of the lasting doctrine of illegality in contracts (see Lord Hughes para 54, 59). However, the appeal for compensation for the discrimination suffered by Miss Hounga, in spite of the illegality underlying their contractual relationship, was revisited. The decision revealed the malleability

of legal rules exercised when the will to provide justice for irregular (vulnerable) migrants exists. In reviewing the law that dealt with the doctrine of illegality, the Supreme Court justices held that the inextricable link test – meaning that there is an inextricable link between the illegality and the claim on the contract/employment relationship – had to take public policy into account. The public policy considerations of Miss Hounga's case were two-fold. On the one hand, the Court did not want to be seen to condone immigration illegality. On the other hand, the Court did not want to explicitly deny Miss Hounga protection in the face of her undeniable suffering and vulnerability in the hands of her employers. Additionally, the Court held that permitting the doctrine of illegality to override discrimination claims would condone the abusive, illegal behaviour of the employers, the Allens.

Lord Wilson, in the majority decision, raised the following considerations: (a) Would the tribunal's award (compensation) allow Miss Hounga to profit from her wrongdoing? No. (b) Did the award 'permit evasion of a penalty prescribed by the criminal law?' No, there was no prosecution for her entry into the employment contract. (c) Would the award of compensation encourage others to act as Miss Hounga did? No. And lastly, (d) 'Would the application of the defence of illegality so as to defeat the award compromise the integrity of the legal system by appearing to encourage those in the situation of Mrs Allen to enter into illegal contracts of employment?' and for this final consideration Lord Wilson suggested that yes, it was possible that employers would believe they could discriminate against vulnerable employees 'with impunity'. Yes, possibly: it might sustain a belief that private employers could discriminate against such employees with impunity. (from Lord Wilson, *Hounga v Allen,* at para 44).

The Supreme Court interpreted the doctrine of illegality against the previous decisions. Lord Wilson expressed concern that the defense could condone the abusive behaviour of the employers, rather than the actions of opportunistic employees. Lord Wilson went on to discuss trafficking and modern-day slavery. Modern day slavery allegations against Mrs Allen were not considered at the tribunal level perhaps due to the alleged consent and action taken by Miss Hounga herself, seemingly demonstrating that she was not an actor and not a hapless victim. Also, Parliament was only debating the Modern Slavery Bill in 2014, during the time of the Supreme Court hearing. Thus, the legal lens through which the employment tribunal, and Court of Appeal, regarded Miss Hounga was restricted to the contract of employment, where illegality overwhelmed all other factors in the case.

Legal subjects, conventionally understood within a liberal, legal understanding are

compartmentalised into particular categories, in this case the employee and employer relationship. Fitting subjects into predetermined categories ignores other factors of the working relationship, in this case the exploitation and vulnerability experienced. Ignoring the context behind these employment relationships is arguably what makes employment law efficient and transferrable to different and diverse contexts. Yet, as was made clear in *Hounga,* forcing conformity into these categories and limited interpretations exacerbates the gaps that cause certain populations to exist beyond legal protection. Notwithstanding the immigration transgression of her presence in the UK, Lord Wilson held that, 'it would be a breach of the UK's international obligations under the Convention for its law to cause Miss Hounga's complaint to be defeated by the defence of illegality.' (Wilson para 50).

The Supreme Court allowed Miss Hounga's appeal to receive compensation for the discrimination she experienced while working and living with the Allen's. Miss Hounga was deemed 'worthy' (Wilson para 56) of legal protection and a victim of conditions akin to modern-day slavery, and the law was used to respond accordingly.

Taiwo v Olaigbe and *Onu v Akwiwu* [2016]

Ms Taiwo and Ms Onu were, similar to Miss Hounga, brought from Nigeria to work in domestic, private households. Their cases were jointly heard at the UK Supreme Court on appeal, with Lady Hale delivering the judgement. Both women were independently employed to take care of the household and children. However, their right to employment in the UK (including their immigration status) was tied to their employers as per immigration rules on foreign workers. In both Ms Taiwo and Ms Onu's employment tribunal hearings, it was held that 'the reason for the employers' mistreatment of their employees was their victims' vulnerability owing to their precarious immigration status' (Lady Hale para 2). The Supreme Court, therefore, had to decide whether the two women suffered discrimination because of, or on the basis of, immigration status – which, under the Equality Act 2010, would constitute discrimination because of, or on the basis of, nationality (EA 2010 s 9 (1) b).

The facts of their situations were as follow: Ms Taiwo arrived to the UK to escape poverty in Nigeria and work in the Olaigbe household, in order to send money home to her children. While Ms Taiwo's entry into the country was legal, via a domestic worker visa, the Olaigbe's fabricated a contract of employment, and failed to show her the contract or pay her for her work. Ms Taiwo's passport was taken from her and she was routinely abused physically and mentally. Ms Onu was employed by Mr and Mrs Akwiwu and, similar Ms

Taiwo, was brought to the UK on a domestic worker visa, but with information falsified by the employers. Once Ms Onu was in the Akwiwu's residence, they refused to pay her for her work. Ms Onu was refused rest periods and annual leave. She was regularly threatened that if she tried to run away, she would be arrested and imprisoned. In both Ms Taiwo and Ms Onu's experiences, their passports were taken and withheld from them by their employers.

According to the Employment Appeal Tribunal, Ms Taiwo's situation was 'systematic and callous exploitation' (Hale para 4). Nevertheless, her ill treatment by her employer was held not to be due to her being Nigerian (race/nationality), but because she was a precarious migrant: precarious because her status depended on her employers, Mr and Mrs Olaigbe. On the basis that immigration status is not a protected characteristic under the Equality Act 2010 (chapter 1, s 4), the Supreme Court too rejected the appeals from both Ms Taiwo and Ms Onu. It was held that the rejection was 'not because these appellants do not deserve a remedy for all the grievous harms they have suffered. It is because the present law, while able to redress some of those harms, cannot redress them all.' (Hale para 34).

The Supreme Court acknowledged that the abuse suffered by these women held in exploitative working conditions needed recognition and compensation. However, the Equality Act 2010's anti-discrimination provisions under employment law or the Modern Slavery Act 2015 lacked the jurisdiction to recognize their legal subjectivity and remedy/compensate for their ill treatment. Here, the law was not able to respond to the exploitation they experienced, but rather affirmed the limit of law's reach at the existing statutory provisions for anti-discrimination and the protected characteristics.

Arguably the law, formally understood and administered, failed all three women. Existing provisions under the Employment Rights Act and Equality Act, the statutory foundations of UK employment law, failed to extend themselves to these vulnerable irregular migrants at work. Yet the shifting subjectivity of these irregular' workers was used to shape them into legal subjects, where in the case of Miss Hounga the law was able to shine the light and grant compensation. She was deemed worthy of protection because of her vulnerability akin to the modern slavery being discussed in Parliament and because she did not profit or benefit from her illegality – her situation was not seen to condone illegal entry, but rather could be seen to condone employers abusing vulnerable workers. In the case of Ms Taiwo and Ms Onu, their exploitation and abuse was recognised as being 'callous and systematic', but not due to a characteristic recognised by UK law. The limit of the law would have to be stretched too far to recognize immigration status as a characteristic in need to protection, in

spite of the obvious vulnerability their precarious immigration status created.

Groundlessness and the Legal Subject

What, then, does the legal subjectivity of the irregular migrant worker rest on? Where, or what, is its foundation? Vulnerability to exploitation and a need for protection are not enough. But conformity with the standard employment relationship and citizenship is not a definitive prerequisite. This illustrates how the limit of the law, and the basis of legal recognition to grant legal subjectivity and protection are groundless. In other words, when we search for the core of the legal subject, we find no rock-bed, no foundation. Because there is no-*thing* at the basis of the law: Law is no object or thing in and of itself (see Nancy 1993, 47-48, 55). Law responds to, shapes and is shaped by, experiences in and of the world. Thus, the subject of the law, while a thing (a noun: a person, a figure, a being) is not constituted from something before it—it cannot be presupposed based on an external other. Undeniably, the legal frame provides us with 'ideal'[v] legal actors: the formal employee, the single employer, the migrant worker present with a valid, temporary work visa. But in practice, few subjects fit these character molds. Therefore what constitutes the law and the subjects of the law is the experience of beings, of people working and relating in society.

Groundlessness is the condition of there being 'nothing other than experience of sense (and this is the world) if "experience" says that sense precedes all appropriation or succeeds on and exceeds it.' (Nancy 1997, 11, 159). The experience of work and the relation of working presuppose subjectivity because experience precedes and exceeds categories. And so if experience is what we have, all that we have, as a foundation, then foundation is without one, single, solid ground; it is groundless. The bodies at work, as evident in the cases of *Hounga* and *Taiwo & Onu,* re-constitute law's limit by challenging the formal predetermined boundary and legal category. Bodies, the people that work and interact in the labour market and nation-state, are part of the constitution of law by challenging it beyond itself—to a beyond that is unknown until the experience of the judgment. It is only through the circulation of beings, as the experience of bodies at work, that do we have law, society and economy. Bodies have a constitutional role because Being presupposes any subjectivity placed onto being.[vi]

Furthermore, law's existence as no-*thing* is consistent because no single foundation can be found to collectively ground being and world. Therefore law cannot 'be' something, but is responsive to the constitutional relationality and action of bodies. Put into action for

labour law and persons at work, this means that when thinking of labour and law the very nature of law needs to be recognised for its ambivalence. Work and the relationality that is formed through working are elemental to our subjectivity and cannot be predetermined or prescribed. Otherwise, respect, dignity and rights will never be attainable for the most vulnerable of workers (those with precarious, irregular status, working in the lowest forms of labour and employment).

Groundless Legal Subjects

The irregular migrant is a condition of the impossibility for existing legal frames, which use as their reference a predetermined notion of what is 'regular' and what is 'legal' that is based on a limited liberal subject. The presence and experience of persons at work do not fit into pre-determined frameworks of legal subjectivity, and in practice legal subjects extend beyond these frames and categories. The legal gaps that reinforce migration situations considered irregular reveal that the categories of migration law exist for limited recognition of a particular conforming legal subject. If one is not recognised as within this legal category, one is irregular. Yet legal categories are not built from some elemental core, they are a construct of a particular modern legal system that does not reflect labour market practices.

Those who are not recognised as easily fitting into categories of UK employment law when bringing a grievance to the employment tribunal and then appealing to the UK Supreme Court – Miss Hounga, Ms Taiwo and Ms Onu – are nevertheless subjected to the law and are subjects of the law. Employment law rests on the employment contract and contractual principles – which, in Miss Hounga's case in the Court of Appeal, affirmed the doctrine of illegality. Embedded within this contract-based definition of employment is a particular legal subject as worker: a national with formal citizenship status, who is a full employee working for one employer in a workplace that is neither the employer nor employees place of residence, and rights (benefits, holiday pay, sick leave and pension) are delegated accordingly. Miss Hounga's presence and experience of exploitation challenged the limits of employment law (including the doctrine of illegality) and ultimately demanded that her vulnerability be recognised and compensated. Ms Taiwo and Ms Onu's respective experiences also demanded recognition, but met the limit of the law at the limit of anti-discrimination protected characteristics. The three women's experiences as legal subjects illustrate how legal categories and limits can shift in practice, because at the base the legal subject is nothing but the person standing before the law, constituting the law.

The cases of *Hounga* and *Taiwo & Onu* demonstrate the irregular migrant exposes how the law itself - and legal subjects under the law – is founded in groundlessness. Nevertheless, limited recognition in formal categories of employment law persist in creating and maintaining irregular situations, which in turn bear the burden of depleted rights and protection. The presence of irregular migrant workers allow employers and businesses to demand cheaper, more temporary and precarious forms of labour in order to maintain economic market competitiveness in processes of neoliberalisation. However, when law is taken from its fixed form and recognised in its practice or application as simultaneously determinate and indeterminate, law does not withhold legal subjectivity. Within such an understanding of law, the only sense we can make of legal subjectivity is that all legal subjects are founded in groundlessness. Labour migration and the challenges arising out of cross-border movement whereby workers are labelled as 'irregular' are exemplary of the constitutive groundlessness of our being against the frameworks of juridical, political and economic categories. Meaning that our subject-hood and the way we see and relate to each other is only ever formed by our experience. Therefore law must respond to these experiences, not be beholden to predetermined frames of recognition, to protect the fair treatment, rights and dignity of persons at work.

[i] EU Freedom of Movement: Article 3(2) of the Treaty on European Union (TEU). Article 21, Titles IV and V, of the Treaty on the Functioning of the European Union (TFEU). Article 45 of the Charter of Fundamental Rights of the European Union.

[ii] For more on the gaps inherent in the law, see Tataryn 2016.

[iii] See Lindahl 2009, for his explication of the migrant as the 'included-as-excluded'.

[iv] For more analysis of the doctrine of illegality in *Hounga v Allen* see Bogg and Green 2015.

[v] See Anderson 2013, for a discussion of the 'ideal' or 'good' citizen and 'good' migrant versus the failed citizen and failed migrant.

[vi] This claim is similar to Merleau-Ponty's phenomenological approach of subjectivity as living body (Merleau Ponty 2013, 121). The difference, however, is in my contention that the subject is constituted by the relationality of experience. In other words, the living body not in isolation, but the living body as a relation of work and being with others.

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