

BETWEEN WORKERS' RIGHTS AND FLEXIBILITY: LABOR LAW IN AN UNCERTAIN WORLD

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INTRODUCTION

It is no secret to anyone in the field of labor law that we are at a critical juncture on the question of workplace governance, and that this is a moment of deep transformation with respect to both the context of work and the norms which govern work.¹ For this reason, most of the work of labor and employment scholars falls broadly under the heading, “[T]he new economy and what it means for the law of work.”² Rather than simply a matter of disciplinary preoccupation, however, the upheaval in the field of labor law involves issues of general importance. As the financial crisis takes its toll on the broader economy, it is increasingly clear that for insight into many of the most pressing policy issues on the public agenda, we can hardly do better than to focus on labor markets and the world of work. Work continues to function, in the new economy as in the old, as a dense transfer point at which concerns ranging from social inclusion, stability, equality, and democracy to economic growth and competitiveness, converge, intermingle, and sometimes conflict. For these reasons, appreciating the transformation of work and work norms is central to grasping the changes of pursuing both economic growth along with security and social justice in the contemporary world.

Let me begin with the observation that labor and employment laws both reflect and constitute a type of social contract.³ That is, labor and employment laws express a particular social and political vision and construct social bonds

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1. This process has been underway for some time; for at least two decades, scholars have attempted to assess what is at stake in this transformation. See, e.g., PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990) (discussing the comparative advantages of alternative institutions for governing the workplace).

2. See HARRY ARTHURS, *FAIRNESS AT WORK: FEDERAL LABOR STANDARDS FOR THE 21ST CENTURY* 3–4 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=953049.

3. For an overview of the postwar social contract and its institutional underpinnings in labor law, see Thomas Kochan, *Wages and the Social Contract*, *THE AMERICAN PROSPECT*, April 22, 2007, available at http://www.prospect.org/cs/articles?article=wages_and_the_social_contract.

and obligations. But they are also mechanisms through which we allocate resources and share the benefits and the costs, the upside and the downside, of economic activity in market-based societies.

At the risk of doing violence to a complex story, it is possible to identify three interlinked aspirations or ideals that informed the postwar social contract in both the United States and Canada and that, in the current order, are turning out to be very much in flux and in question. By way of preamble, let me say that even if valid, there is no single legal or institutional form in which these aspirations can be expressed or advanced. Nor were these objectives unmixed with objectives of a distinctly different kind; indeed, the opposite is true.⁴ Parts of this social contract were simply problematic and hard to defend, certainly from the vantage point of the present. For example, it was deliberately crafted around gender norms which conferred preferential status and entitlements on male breadwinners while consigning women to a peripheral role in the labor market and, by extension, to substandard wages and entitlements at work.⁵ It ignored the obligations of unpaid work and the resulting consequences for those who also work in the labor market in ways that, in light of the feminization of work, now seem unsustainable as well as unfair.⁶ It effectively privileged workers in core industrial sectors over those in other sectors of the economy, including the growing number of workers engaged in service work.⁷ By excluding particular categories of workers, such as agricultural and domestic workers, from access to collective bargaining and other entitlements, it had the effect (and intention) of excluding the majority of African-American workers from important protections and benefits of labor and employment law for a long period of time.⁸ In addition, it was predicated on a norm of stable, long-term employment and an assumed congruence between regulatory and productive space, both of which seem quaint and

4. For classic discussions of the response of both employers and the judiciary to the National Labor Relations Act, see Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 285-289 (1978); Katherine V.W. Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511 (1981).

5. Judy Fudge, *Reconceiving Employment Standards Legislation: Labour Law's Little Sister and the Feminization of Labour*, 7 J.L. & SOC. POL'Y 73, 77-78 (1991).

6. See *id.* at 77-79. See generally, *LABOUR LAW, WORK, AND FAMILY: CRITICAL AND COMPARATIVE PERSPECTIVES* (Joanne Conaghan & Kerry Rittich eds., Oxford University Press, 2005) (discussing the relationship between family and market work, its impact on gender equality, and the implications of both for labor law in different jurisdictions).

7. *Id.* at 76-77.

8. See, e.g., Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1678-80 (2001); see also PAUL FRYMER, *BLACK AND BLUE* 22-30 (2008) (discussing the historical context surrounding this exclusion of the African-American worker).

outdated in a volatile and dynamic economy that increasingly operates on a regional and global rather than national basis.⁹

Yet, while it seems clear that the contract needs to be revised and reinvented for reasons both old and new, the contract also reflects foundational values, norms, and commitments. Even if these values and commitments are only part of the story, even if they never enjoyed universal assent,¹⁰ and even if they are, at the end of the day, relatively modest in their transformative reach,¹¹ their fate seems worth highlighting. Indeed, there is reason to suppose that any “new deal” at work that sidelines or entirely ignores these values and commitments is unlikely to function in any stable or enduring sense. These values might be described as follows: solidarity and collective action among workers; a norm of shared workplace governance, if not full-blown industrial democracy as such; and a hard-fought commitment to a measure of basic economic security along with a share in general prosperity for those in the labor market.

I. THE TRANSFORMATION OF WORK

Let me lay out the context that animates this reflection. The first observation is that a central part of the new world is greater diversity in the economic fortunes of citizens. To put it simply, North America is experiencing unprecedented increases in economic inequality.¹² While it is less pronounced in Canada than the United States, the trend in both countries has been fairly consistent in recent years through both good times and bad.¹³ Whatever the overall state of the economy at any given time, the winners seem to be doing consistently better and the losers doing consistently worse.¹⁴ What makes this trend noteworthy, and alarming, is the concentration of economic

9. See Michael E. Porter, *Location, Competition, and Economic Development: Local Clusters in a Global Economy*, 14 ECON. DEV. Q., 15, 15 (2000).

10. For a treatise on these questions, see JAMES ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983). See also a range of perspectives on these values and assumptions in, *Symposium on James Atleson's Values and Assumptions in American Labor Law, a Twenty Fifth Anniversary Retrospective*, 57 BUFF. L. REV. 629 (2009).

11. Klare, *supra* note 4.

12. Jared Bernstein, *Updated CBO Data Reveal Unprecedented Increase in Inequality*, ECON. POL'Y INST., Dec. 13, 2007, available at <http://www.epi.org/publications/entry/ib239/> (last visited Feb. 15, 2010).

13. See Armine Yalnizyan, *Lecture at the Walter Gordon Massey Symposium: Income Inequality and the Pursuit of Prosperity*, CANADIAN CENTRE FOR POL'Y ALTERNATIVES 1 (March 10, 2009), available at <http://intraspec.ca/WalterGordonLectureOnIncomeInequality-1.pdf>.

14. *Id.* at 2.

gains within a relatively small part of the population accompanied by an increase in the economic insecurity of those beyond that favored minority.¹⁵

The second observation is that this growing inequality is unusually visible in the world of work. The relative returns to workers are declining vis-à-vis those of capital, and the position and fortunes of different groups of workers within the labor market are diverging, sometimes quite sharply, too.¹⁶ Lower-skill workers are at a particular disadvantage in labor markets that place a premium on adaptability to change.¹⁷ Yet even as the returns to workers accrue disproportionately to those with greater human capital, wages have also come to represent a declining part of the gross domestic product.¹⁸ While some groups of workers have done well—some exceedingly well—the general story for workers is one of unmistakable decline.¹⁹ Wages have been stagnant or falling for the vast majority of workers over much of the last generation.²⁰ Significant and growing numbers of workers are engaged in precarious, economically insecure, and even degraded forms of work,²¹ while, for reasons described next, many more have little if any say over the terms and conditions under which they work.

One of the hallmarks of the current labor markets is the decline of organized labor in the last generation, particularly in the private sector. While, again, this trend is more pronounced in the United States, the trend in Canada is also clear.²² This absence of worker organizations from the workplace, whether in the form of traditional unions or other vehicles of collective voice, has a fairly predictable impact on the contract of employment: high-end employees excepted, individual contracting as opposed to collective bargaining diminishes the bargaining power of workers and, in general, results in

15. *See id.* at 2–4.

16. Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States* (Aug. 5, 2009), available at <http://www.econ.berkeley.edu/~saez/saez-UStopincomes-2007.pdf>; Yalnizyan, *supra* note 13, at 2.

17. Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 108–09 (1998).

18. Steven Greenhouse & David Leonhardt, *Real Wages Fail to Match a Rise in Productivity*, N.Y. TIMES, Aug. 28, 2006 at A1.

19. *Id.*

20. *Id.*

21. Kerry Rittich, *A View from the Left: International Economic Law*, 31 N.Y.U. REV. L. & SOC. CHANGE 671, 677 (2007); PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS (Judy Fudge & Rosemary Owens eds., 2006).

22. Compare U.S. DEP'T OF LABOR, USDL 09-0095, UNION MEMBERS IN 2008, at 2 (2009), available at <http://www.bls.gov/news.release/union2.nr0.htm> (last visited Feb. 15, 2010) (showing twenty-nine states and the D.C. have union membership rates below the national average), with *Unionization Rates in the First Half of 2008 and 2009*, PERSPECTIVES ON LABOR AND INCOME, August 2009, at 27, available at <http://www.statcan.gc.ca/pub/75-001-x/topics-sujets/unionizationsyndicalisation/unionization-syndicalisation-2009-eng.htm> (demonstrating that the United States, based on statistical data, has seen a more pronounced level of union decline).

declining economic rewards and greater assumption of economic risk by workers. But the absence of an effective collective voice for workers generates consequences in the political and legislative arena as well, resulting in reforms that are less informed by, and less congenial to, workers' interests than they otherwise might be. This weakened political voice, in turn, exacerbates the disadvantage of workers; sometimes it simply results in a lawless workplace.²³

This leads to the third point: evidence increasingly indicates that these developments have something to do with current trends in workplace governance. There are multiple drivers behind the current changes at work—economic, social, demographic, cultural, and technological—as well as competing explanations about their relative significance.²⁴ However, the diverse experiences of different states in the context of what looks at first glance like a common challenge²⁵—adjusting to a new economy that is transnational in reach and increasingly post-industrial and service-dominated in character—suggests that better and worse outcomes for workers might, in part, be explained by decisions about how to allocate risk, authority, and bargaining power through legal rules and institutions.

II. WORKPLACE GOVERNANCE IN THE NEW ECONOMY

At present, large numbers of employees have no meaningful access to collective bargaining, employment standards are increasingly inadequate in both their reach and content, and many workers, including some of the most vulnerable, are outside the “law of work”²⁶ entirely by reason of their legal status as independent contractors. Much of this is a function of the reorganization and increasing heterogeneity of work²⁷ and the changed identity of a workforce that is increasingly feminized and diverse²⁸ in combination with a relatively static set of workplace rules and norms.²⁹ This disjuncture, arising

23. See Annette Bernhardt et al., *Working Without Laws*, NATION, Sept. 4, 2009, http://www.thenation.com/doc/20090921/bernhardt_milkman_theodore.

24. *Id.* at 4–6 (stating that changes in the socioeconomic environment of the workplace have resulted from product market changes, capital market changes, technological innovation, and changes in the work force).

25. See *supra* text accompanying note 13 (comparing the fact that both the United States and Canada have experienced decreases in union membership, but the decrease in the United States is more pronounced).

26. See Richard M. Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 207 (2007).

27. FRAGMENTING WORK: BLURRING ORGANIZATIONAL BOUNDARIES AND DISORDERING HIERARCHIES (Mick Marchington et al. eds., 2006).

28. See James R. Elliot & Ryan A. Smith, *Race, Gender, and Workplace Power*, 69 AM. SOC. REV. 365, 365 (2004) (noting the “unprecedented” number of women and minorities in the working world).

29. See Thomas A. Kochan, *Labor Policy for the Twenty-First Century Workplace*, 1 U. PA. J. LAB. & EMP. L. 117 (1998).

when workplace governance structures no longer reflect either the world of work or the needs and characteristics of workers they are theoretically intended to protect and empower, is commonly described as a regulatory “gap.”³⁰ The failure, however, to address this gap in any serious way reflects the fact that the underlying objectives of worker protection and empowerment are contested and in flux.

The future of labor and employment law sits at the intersection of two powerful forces. The first is the call to reground employment protection for workers and economic security for citizens in the new economy; the second is the push for greater flexibility and employer power in the employment relationship. Despite the evidence that economic insecurity is growing, and moreover, generating adverse consequences in the economy as a whole as well as for the affected individuals and households,³¹ so far the second has been the dominant consideration in the policy calculus.³² This is, in part, because questions of labor and employment law are now embedded in a wider debate concerning the role of the state as well as the function and purposes of policy and regulation in a more closely-integrated and competitive economy.³³

Although the result is often styled as labor market “deregulation,” the better way to capture the outcome is in terms of “re-regulation,” or a shift or transformation in regulatory priorities and practices. One of the markers of this transformation is the rise of ordinary contractual norms in the employment relationship.³⁴ Not only are investor rights and business interests given more and more deference and recognition, authority and exclusive decision-making power, are presumed to flow properly, and indeed naturally, from the mere possession of property rights.³⁵ The result is that except for ongoing norms of obedience and fidelity on the part of employees—norms that persist despite the end of long-term employment and economic security for workers, the vertical

30. See Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 631 (1998).

31. Greenhouse & Leonhardt, *supra* note 18.

32. Org. for Econ. Co-operation and Dev., *Boosting Jobs and Incomes, Policy Lessons from Reassessing the OECD Jobs Strategy* (2006), http://www.oecd.org/document/19/0,3343,en_21571361_36276310_36276371_1_1_1_1,00.html (suggesting that better economic outcomes can be expected from flexible labor markets); Anne Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 17 (2007) (describing the doctrine of management prerogatives as being in line with “American legal culture”).

33. See Kerry Rittich, *Global Labour Policy as Global Social Policy*, 14 CAN. LAB. & EMP. L. J. 227 (2008) (setting out the connection between arguments for flexible labor markets and broader law and governance norms in the global economy).

34. See FRAGMENTING WORK, *supra* note 27; Claude D. Rohwer, *Terminable-At-Will: New Theories for Job Security*, 15 PAC. L.J. 759, 761–62, 769–70 (1984) (discussing how normal contractual terms and definitions affect the employment relationship, and how they are still present in many areas of employment law).

35. Lofaso, *supra* note 32, at 27.

disintegration of firms,³⁶ the flattening of formal workplace hierarchy and the rise of networked production,³⁷ the emergence of the knowledge economy,³⁸ the increasingly central role imagined for workers in the design as well as the execution of tasks,³⁹ and the diffusion of new norms of worker entrepreneurialism⁴⁰—the employment relationship is increasingly indistinguishable from ordinary commercial relations. At the same time, labor law—as a discipline, as a set of regulatory norms and practices, and as repository of social justice objectives—is pushed aside, regarded as a relic of an era that has now passed away. This is despite the fact that economic insecurity, protection against which has historically provided the justification both for employers' obligations and workers' distinctive subordination in the employment contract,⁴¹ is pervasive and growing in the new economy.

In the United States, Canada, and elsewhere, efforts to create more flexible labor markets have included reforms that restrict access to employment insurance and the amount of replacement income that is available to unemployed workers, new rules that make the acquisition of collective bargaining rights more difficult, and modifications to employment standards that reduce compensation for overtime work or the loss of a job.⁴² Although there are different types of labor market flexibility and unresolved debates about which types of flexibility are in fact desirable in the new economy,⁴³ reforms of this type are designed to confer greater authority upon employers and give them greater latitude to determine when and how work is performed.⁴⁴ The net result is legal regimes that transfer risk to employees,

36. Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, 10 OXFORD J. LEGAL STUD. 353, 356 (1990) (“[V]ertical disintegration offers greater flexibility than regular employment contracts in raising and lowering the effective size of the workforce . . .”).

37. See MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY: THE INFORMATION AGE* 261–67, 467–68 (2000).

38. See *id.* at 77–78.

39. See *id.* at 261–65 (showing the central role of employees in the design of production processes through several case studies).

40. *Id.* at 148.

41. Simon Deakin, *The Many Futures of the Contract of Employment*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 177, 178, 194–95 (Joanne Conaghan et al. eds., 2002).

42. GUY STANDING, *GLOBAL LABOUR FLEXIBILITY: SEEKING DISTRIBUTIVE JUSTICE passim* (1999).

43. See Sandra Fredman, *Precarious Norms for Precarious Workers* 177 (University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No. 32, 2006); *PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS*, (Judy Fudge & Rosemary Owens eds. 2006).

44. See *id.*

endow employers with greater entitlements, and shift overall bargaining power—and sometimes resources outright—to the detriment of workers.

Yet although such changes tend to attract more attention, part of the story is the stasis and persistence of legal rules and institutions when the underlying conditions of work have changed. Indeed, the “implicit deregulation”⁴⁵ that occurs because of the increasing disconnect between the way that work is organized and the assumptions on which it is governed, although less obvious, may be the more pressing problem. Implicit deregulation is simply the failure to alter and update labor laws and employment standards to adequately protect workers in the type of work, and under the work relations, in which they currently find themselves and extend real—as opposed to theoretical—opportunities to bargain collectively and influence the terms and conditions of work.⁴⁶

For example, it is no secret that it is difficult to acquire bargaining rights in many contemporary workplaces; even workers’ fundamental right to associate may be in question.⁴⁷ This is not inevitable; rather, it has long been observed that the labor relations regimes in North America place formidable barriers, some of which have growing significance in the new economy, in the way of many workers who want to organize.⁴⁸ Contractualized work relations, for example, mean that many workers engaged in precarious and contingent work are legally designated as independent contractors and have no entitlement to bargain collectively.⁴⁹ Managerial and professional exclusions under the National Labor Relations Act continue to disentitle other workers from bargaining collectively as well,⁵⁰ even though the growth of the knowledge economy and the reorganization of production and service delivery often make distinctions between managing and executing work less relevant. But even those who have formal access to collective bargaining discover that where workplaces are small—a common feature of the service sector—or where employment relations are themselves transitory, the entitlement to bargain collectively may be more theoretical than real.⁵¹ In addition, workers with

45. *STANDING*, *supra* note 42, at 75–76.

46. *See* ARTHURS, *supra* note 2, at 47–49 (discussing the principles that new regulations and updates to employment law should follow).

47. *See* LANCE COMPA, *UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS* 130 (2004) (discussing related historical examples).

48. *See id.* at 47.

49. *Id.* at 181–84.

50. *Id.* at 185–86.

51. *See id.* at 122–23 (demonstrating that even where the parties engage in collective bargaining, the employer may have no intention of actually concluding a collective agreement).

common concerns and interests are often geographically dispersed and, for both legal and practical reasons, find it difficult if not impossible to organize.⁵²

By contrast, employers continue to enjoy routine opportunities both in law and in practice to discourage bargaining and other forms of collective action on the part of workers.⁵³ In addition, changes in the broader terrain of work linked to the new economy have exacerbated deficiencies in other rules, sometimes rendering them manifestly unfair to workers. For example, it is difficult to see the case for retaining the limitations on secondary action in the context of labor disputes once employers decide to restructure production so that it occurs in legally distinct entities or traverse national borders to exploit economic advantages that include lower regulatory and labor costs.⁵⁴ But employers may also have legitimate claims in current economic conditions that favor revisions to existing rules and norms.

The bottom line is that underlying changes in the world of work are just too profound to expect the existing labor and employment rules to operate as originally intended. There is a great deal that could be done about this state of affairs, and there is no shortage of ideas about how to respond to the changed conditions of the post-industrial economy, whether at the level of legal doctrine, reforms to statutory rules, the replacement of entire workplace governance regimes, or the reform and reconceptualization of paradigms for social protection.⁵⁵ Some reforms are squarely on the agenda—the proposed *Employee Free Choice Act*⁵⁶ being the most obvious example—and some useful change could arguably be implemented within existing legal rules; comparative study of labor jurisprudence in Canada and the United States is instructive.⁵⁷ But whatever the route or mechanism, there is no doubt that without significant change, many of the most vulnerable workers will remain outside the law of work entirely.

52. See Ellen J. Dannin, *We Can't Overcome? A Case Study of Freedom of Contract and Labor Law Reform*, 16 BERKELEY J. EMP. & LAB. L. 1, 95 (1995) (discussing the Distribution Workers Union, and how the geographical locations of the workforce makes it difficult to organize).

53. See COMPA, *supra* note 47, at 121–23.

54. The Supreme Court of Canada did recently revisit this exclusion. See *Retail, Wholesale & Dept. Store Union, Local 558 v. Pepsi-Cola Canada Beverages*, [2002] 1 S.C.R.156, 2002 SCC 8 (Can.).

55. For a discussion of these topics and possible reforms, see *REGULATING LABOUR IN THE WAKE OF GLOBALIZATION* (Brian Bercusson & Cynthia Estlund eds., 2008); ALAIN SUPLOT, *BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE* (2001).

56. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009); Employee Free Choice Act of 2009, S. 560, 111th Cong. (2009).

57. See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1816–18 (1983) (comparing the effects of Canadian labor laws versus the effects of labor laws in the United States over the same period).

It is clear that the political management of such reforms can be difficult; there is nothing necessarily new or surprising here. The barriers to reform, however, operate not only at the political level but also at the level of ideas. Perhaps the biggest departure from the previous era is the rise of discourse about labor market governance dissociating enhanced worker bargaining power and entitlements from the general or public interest. Although it is still public policy everywhere in North America—and in virtually every other jurisdiction—to protect freedom of association and promote the collective resolution of workplace disputes, one of the present challenges to labor law as a discipline is the idea embedded in contemporary governance norms that labor market institutions, and sometimes unions too, are *per se* constraints on productivity and impediments to growth and, for that reason, are suspect if not presumptively undesirable.⁵⁸ The premise is that when thinking about labor market institutions, we should think about them in the same way as the other rules governing global markets—that is, how to facilitate transactions and ease burdensome restraints that impair investment and growth.⁵⁹ Policy and regulatory debates, in turn, are deeply beholden to the belief that market “interventions,” among which are included the rules and institutions that entrench worker rights and labor standards, only make sense, if they ever do, as a response to market failures.

It is worth noting the importance of the starting point. Within this frame of reference, the problem of work in the global economy is not imagined as a question of how to better protect workers who labor in a volatile and increasingly precarious world of work. Nor is it a question of enhancing the bargaining power of workers who are decreasingly likely to have substantive input into, or control over, the terms and conditions of work. Instead, the key concerns are how to simultaneously encourage labor market participation and induce or compel workers to take on more risk and responsibility for their own economic security. On the regulatory front, a small subset of workers’ “basic” rights aside, the primary concern is typically not what to implement in terms of better labor market rules and institutions, but rather what to eliminate so as to both increase the degree of labor market participation and reduce the cost of

58. This is also an established position with debates about labor law in the United States. See Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor law and the Search for Bargaining Equity and Industrial Peace*, 91 MICHIGAN L. REV. 419 (1993) (describing the classic economic arguments against labor market institutions and providing a series of possible defenses to those institutions). See also Sheldon Friedman & Christian Weller, *One More Time: Labor Market Flexibility, Aggregate Demand, and Comparative Employment Growth in the U.S. and Europe*, 19 COMP. LAB. L. & POL’Y J. 307, 307–08 (1998) (discussing the general notion that stricter labor laws and unions stifle economic growth by comparing the United States and Europe).

59. *Id.*

labor.⁶⁰ Moreover, labor market rules and institutions are assessed not simply in consequentialist or utilitarian terms—what will best maximize economic output and, by extension, overall social welfare. Instead, labor market rules and institutions are evaluated on the assumption that we already know the outcome of the cost-benefit calculation and we know that labor market institutions fall on the cost side of the ledger, despite considerable debate, contingency, and outright uncertainty about the effects of labor market institutions and reforms both in theory and in fact.⁶¹

Since about 1994, there has been a policy consensus circulating within the international financial and economic organizations, one reiterated by countless technocrats and think-tanks, about “good” labor market governance.⁶² Three things about this consensus bear emphasis. The first is that the consensus itself matters: the constant reiteration of claims about good labor market governance itself helps (re)construct both public and professional opinion on the uses and desirability of labor market institutions. The second is that it is powerful: the institutions centrally involved in disseminating claims about good labor market governance have formidable resources and many platforms at their disposal. Third, notwithstanding its power and pervasiveness, the consensus should be understood as a theory or argument rather than a set of facts concerning the effects of regulation on labor markets and the economy at large. Moreover, at this point in time, it is evident that it is an unsafe basis on which to construct the law and policy of work.

A fundamental part of this consensus is the claim that imprudent regulatory and policy decisions are distorting workers’ employment choices and creating disincentives to work. More specifically, labor market institutions such as collective bargaining rules, job security protections, and employment standards restrict competition, interfere with the optimal allocation of labor resources, and introduce inefficiencies into the operation of labor markets and, for this reason, impair growth.⁶³ But labor institutions also cost jobs and protect labor

60. See Judy Fudge, *A New Gender Contract? Work/Life Balance and Working-Time Flexibility*, in *LABOUR LAW, WORK, AND FAMILY* 261, 272–79 (Joanne Conaghan & Kerry Rittich eds., 2005) (describing the substance of Ontario’s Employment Standards Act of 2000, which was intended to increase the degree of labor market participation while appearing to ensure some basic worker rights).

61. For a compendium of views on this question, see *Labor and Employment Law and Economics* (Kenneth G. Dau-Schmidt et al. eds., 2009), in *ENCYCLOPEDIA OF LAW AND ECONOMICS* (Gerrit De Geest ed.) (2009).

62. See *ORG. FOR ECON. CO-OPERATION AND DEV., THE OECD JOBS STUDY: FACTS, ANALYSIS, STRATEGIES, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT* (1994), available at <http://www1.oecd.org/sge/min/job94/fore.htm>. For discussion of this policy consensus, see Rittich, *Global Labour Policy*, *supra* note 33, at 227.

63. See *THE OECD JOBS STUDY*, *supra* note 62; Horst Siebert, *Labor Market Rigidities: At the Root of Unemployment in Europe*, 11 *J. ECON. PERSP.* 37, 39–50 (1997) (arguing that the reason for unemployment and poorer economic conditions in Europe, as compared to the United

market “insiders” at the expense of “outsiders.”⁶⁴ Aside from those which enshrine “core” or “basic” rights which are now typically conceptualized in terms of individual rights, the general view is that labor market rules are a bad idea, particularly in globalized labor markets.⁶⁵

In order to address the fiscal crisis of the welfare state, reduce “dependency,” increase productivity, and increase the levels of labor market participation, states are advised to adopt the following strategy: flexibilize employment standards as well as reduce or eliminate job security provisions, decentralize collective bargaining, and shift from passive to active labor market policies—that is provide less income support and more training and assistance tied to job searches in order to “make work pay,” typically by reducing access to alternative sources of income (e.g. lowering the wage replacement rate of Employment Insurance or reducing welfare rates).⁶⁶ Just as these ideas have been diffused as part of a wider set of governance reforms, many jurisdictions have taken steps—such as introducing new barriers to the acquisition of bargaining rights or raising the number of work hours required to access employment insurance—that have weakened the economic position of workers and the collective power of unions.⁶⁷ To the extent that labor-market policy beyond flexibility is perceived to have a legitimate place, objectives tend to be focused on increasing labor force participation and improving the human capital of workers through skills acquisition and training.⁶⁸

The feminization of the labor force combined with the desire to reduce dependency has led to expanded interest in, and a degree of support for, policies to enhance work–life balance.⁶⁹ For example, extended parental and maternity leave provisions have been introduced or strengthened across the industrialized world, often at the same time as states have been reforming their labor market institutions in the employer-friendly manner described above.⁷⁰

States, is that regulation and institutional changes in Europe’s labor laws have stifled economic growth).

64. See *id.* at 53; Kerry Rittich, *Core Labour Rights and Labour Market Flexibility: Two Paths Entwined?*, in *LABOR LAW BEYOND BORDERS: ADR AND THE INTERNATIONALIZATION OF LABOR DISPUTE SETTLEMENT* 157, 191 (International Bureau of the Permanent Court of Arbitration ed., 2003).

65. See Siebert, *supra* note 63, at 53.

66. See THE OECD JOBS STUDY, *supra* note 62.

67. See, e.g., Judy Fudge, *A New Gender Contract?*, *supra* note 60, at 282 (describing the Liberal government in Canada’s failure to institute meaningful labor reform).

68. OECD, *Boosting Jobs and Incomes*, *supra* note 32.

69. See generally JOANNE CONAGHAN & KERRY RITTICH, *LABOUR LAW, WORK AND FAMILY: CRITICAL AND COMPARATIVE PERSPECTIVES* (2005).

70. See Judy Fudge, *A New Gender Contract?*, *supra* note 60 at 278–79 (describing how Ontario’s Employment Standards Act increased paternity leave while also making labor markets more flexible).

Yet while this seems to be evidence of competing or countervailing policy considerations, the primary motive of such policies is to induce women to remain in or return to the labor market when they have children.⁷¹ And while these policies typically enable a degree of time flexibility to manage the demands and obligations of both paid and unpaid work, whether and how much they actually benefit workers or households is unclear, as the advantages of such flexibility often come at the cost of significantly diminished income.⁷²

Meanwhile, the idea that human capital is central to success in the global economy has become policy boilerplate and regulatory common sense.⁷³ Mainstream pundits take it as beyond dispute that the primary labor market challenge facing industrialized countries is increasing productivity, and virtually every contemporary discussion of work makes reference to the need for increased worker knowledge and skill in order to retool work relations for a post-industrial economy and maintain or improve the competitive advantages of workers, firms, and nations in a globally integrated economy.⁷⁴ Yet, so far, serious efforts to adopt the policy and regulatory measures to improve knowledge and human capital are, at least in the United States and Canada, largely nonexistent.⁷⁵ Indeed, cutbacks to educational and social spending may be undermining the commitment to improving knowledge and human capital.⁷⁶ In addition, there is accumulating evidence that the historic connection between increased worker productivity and better wages and working conditions has come undone, even though the actual level of skill among workers has never been higher.⁷⁷ In short, there is a visible disconnect between success narratives in the world of work in the new economy and the policy and regulatory shifts that seem to be required to enable it. So much for what is missing: what about what is there?

Accompanying the labor market flexibility agenda are new calls to respect workers' core or basic rights. The International Labour Organization (ILO) 1998 *Declaration on Fundamental Principles and Rights at Work*,⁷⁸ which articulates four core rights—freedom from discrimination, child labor, forced labor, and freedom of association and the “effective” recognition of workers’

71. See *id.* at 280 (noting that lower income women are particularly more likely to return to work early to avoid negative economic consequences).

72. *Id.*

73. Thomas J. Courchene, *Human Capital in an Information Era*, 28 CAN. PUB. POL'Y 73, 73 (2002).

74. See *id.* at 78–80.

75. See *id.* at 80.

76. See *id.*

77. Lawrence Mishel et al., *Executive Summary* to THE STATE OF WORKING IN AMERICA 1–2 (2009).

78. 86th Sess., Geneva, Switz., June 1998, available at <http://www.ilo.org/declaration/the-declaration/textdeclaration/lang--en/index.htm>.

right to bargain collectively⁷⁹—and makes the promotion of those rights an obligation of membership in the ILO, has served as a rallying point on the contentious issue of labor standards in a globalized economy.⁸⁰ These rights are increasingly endorsed by corporations and other actors in the global economy and incorporated into corporate codes of conduct and industry standards.⁸¹ Yet as much as these rights express important values, and though it is tempting to regard agreement on workers' rights as progress, a measure of disquiet is in order, at least if these rights are imagined as a means of reconstructing workers' bargaining power and improving their economic position.⁸² Assent to workers' rights at the abstract level guarantees nothing about the extent of agreement concerning the rules and mechanisms by which to advance those rights or their application in any particular dispute. Some who support core workers' rights may do so precisely because they view those rights as compatible rather than at odds with enhanced employer freedom and entitlements at work.⁸³ Moreover, antidiscrimination rights and freedom of association may advance the individual rights of workers, not workers' collective rights and interests.⁸⁴ Along with the collapse of labor market and social policy into economic imperatives, a broader cultural shift has emerged, one to which new governance norms about labor and other markets have certainly contributed. Widespread appreciation of the value of collective action and solidarity in social, economic, and political life is in abeyance.⁸⁵ New entitlements at work, and even defenses of old ones, are now likely to be articulated in terms of the freedom, rights, and dignity of the individual, rather than in alternative languages or frameworks of equality, solidarity, citizenship, social inclusion, national interest, or even basic needs.

It is worth emphasizing what is displaced in these narratives and strategies, whether they are articulated in terms of the protection of individual rights or rooted in concerns about labor force participation and the improvement of human capital. As workers' basic rights gain increasing support, labor

79. *Id.*

80. *Id.*

81. See Overview of the UN Global Compact, (June 2009) available at <http://www.unglobalcompact.org/AboutTheGC/index.html>; Rittich, *supra* note 64, at 160.

82. See Philip Alston, "Core Labour Standards" and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT'L L. 457, 457, 520–21 (2004); Philip Alston, *Facing Up to the Complexities of the ILO's Core Labour Standards Agenda*, 16 EUR. J. INT'L L. 467, 467–80 (2005); Brian A. Langille, *Core Labour Rights: The True Story (Reply to Alston)*, 16 EUR. J. INT'L L. 409, 409 (2005). See also, Rittich, *supra* note 64, at 160.

83. Rittich, *supra* note 64, at 161–62.

84. See *id.* at 187–89 (discussing how individual rights and rights regarding collective bargaining have been intertwined, even though they are distinct).

85. See, e.g., Greenhouse & Leonhardt, *supra* note 18, at A13 (discussing the weakness of trade unions in the United States).

standards beyond the core, including better wages, benefits, and working conditions, tend to be downplayed, even delegitimized.⁸⁶ As the dignity of the individual worker becomes the touchstone, power and its distribution between labor and capital is eclipsed. As process and participation concerns take center stage, substantive outcomes for workers tend to recede from view.⁸⁷ As entitlements for the individual worker are emphasized, those that protect collective action are given less weight.⁸⁸ As human capital concerns and active labor market policies dominate the regulatory discussion, labor policy becomes largely a supply-side issue—a question of the extent to which workers are responding appropriately to the demands and pressures of the new economy. At the same time, the demand side of the equation—whether there are in fact jobs for workers, and what kind and quality of jobs are available—falls from view, even though the phenomenon of “jobless growth” has been observed in the industrialized world at least since the early 1990s and even though the disappearance of classic middle-class jobs, and along with them, the middle class itself, has itself become a policy issue.⁸⁹ Although the official mantra is, as they say in Europe, “more and better jobs,”⁹⁰ it remains a struggle to keep “better” in the equation. Indeed, sometimes it is a struggle to keep the focus on jobs, rather than economic growth *simpliciter*, even as we can no longer avoid observing that recovery for the economy as a whole or success for particular firms no longer necessarily results in jobs or better terms and conditions of work. As commercial contracting norms start to pervade the employment relationship, questions of bargaining power recede. As cooperation between employers and workers for competitive success is stressed, the persistence of conflict, and the need to address it equitably and effectively, recedes. Finally, as regulating for efficiency becomes the presumptive goal, regulating for other objectives—greater distributive justice or increased voice and representation at work—falls by the wayside. But, so do the possible synergies between higher labor standards and better economic outcomes, which are essential to any labor market strategy that aims for more than mere growth based upon low-wage competition.

Stepping back and looking at the big picture, what is most visible is the normative priority now given to considerations of economic competitiveness and efficiency in the realm of labor market (and other) policy. Although it is

86. Rittich, *supra* note 64, at 191.

87. *See id.*

88. *Id.*

89. Basil J. Moore, *Sluggish Job Growth: Rising Productivity, Anemic Recovery, or Something Else?*, 17 J. POST-KEYNSIAN ECON. 473, 473 (1995).

90. ENRIQUE FERNANDEZ-MACIAS & JOHN HURLEY, EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS ERM REPORT 2008: MORE AND BETTER JOBS: PATTERNS OF EMPLOYMENT EXPANSION IN EUROPE, at v (2008), available at <http://www.eurofound.europa.eu/pubdocs/2008/50/en/1/EF0850EN.pdf>.

difficult to see why this would be desirable in the long run, the task of regrounding employment security for workers and, by extension, economic security for citizens as a whole, has been relegated to the back seat. In the past fifteen or twenty years, there has been virtually no attention to what we might think of as “releveling the playing field”—addressing the regulatory and policy deficits that simultaneously contribute to workers’ diminished bargaining power and drive the declining fortunes of so many citizens.⁹¹ Indeed, the worry is that at least some of the policies that have been so popular in recent decades—welfare and employment insurance reforms, for example⁹²—are reinforcing rather than mitigating the forces and pressures in the new economy that are converging to produce so much precarious and degraded work. Looking in one direction at contemporary debates about reforms to labor law rules, doctrines, and institutions, and, in the other direction, at broader trends in economic governance, it is impossible to avoid noticing how far we have departed from where we started: a recognition of collective, not merely individual, interests at work; an acceptance of the goal of shared governance rather than unilateral authority in the workplace; and the commitment to widely-shared economic prosperity or, perhaps more minimally, basic economic security and a share in economic growth. We can, of course, just give up these ideals and abandon efforts to further them; maybe we have already decided to do so. But if there is anything to the hunch that it is unrealistic to expect to sustain robust democratic societies in the face of growing economic inequality, or if the ideals and objectives underpinning labor and employment law have any important connection to other social and economic goals, including economic stability and growth, then the way in which we manage the future of labor law is much more fateful and has broader implications than we have come to grips with so far.

The financial crisis has cast yet another angle on these issues: blindness to the effects of labor market flexibility may turn out to be simply bad economic policy as well. There is a case for understanding the financial crisis as, at base, a crisis of distributive justice and, in part, a problem of work.⁹³ To reiterate, a striking feature of the economic landscape is the degree to which gains from economic activity in recent years have been enjoyed by those at the very top of

91. See Fudge, *supra* note 60, at 272–79, for a description of legislation (the Employment Standards Act, 2000) which has driven the declining fortunes of workers within the past fifteen years in Canada.

92. See *id.* at 282–83 (describing the program for increased employment insurance benefits in Canada enacted in 2004, but stating that such reforms failed to roll back the damage done to the definition of the standard workweek under the Employment Standards Act).

93. See INT’L TRADE UNION CONFEDERATION [ITUC-CSI-IGB] & TRADE UNION ADVISORY COMM. TO THE ORG. FOR ECON. CO-OPERATION AND DEV. [OECD], STATEMENT TO THE LONDON G20 SUMMIT: GLOBAL UNIONS LONDON DECLARATION 2, 13 (April 2009), http://www.global-unions.org/IMG/pdf/G20_London_Declaration_EN.pdf.

the income ladder—above the 95th percentile—while virtually everyone else has been excluded.⁹⁴ How the result—one of increasing maldistribution of both income and wealth and growing economic insecurity⁹⁵—could be read as anything but a bad sign is, in retrospect, mysterious. If nothing else, the increasing disconnect between incomes and housing prices and other expenditures encouraged, if not compelled, widespread resort to alternative sources of income. This includes the heavy reliance on credit, which has since dried up, and the withdrawal of home equity, which has now vanished, that underpins the crisis as a whole.⁹⁶

Anyone with a sense of history about the hardship and damage that can result from economic exclusion might well be worried. Yet, even well into the crisis, there has been no sustained attention to the predicaments facing households and wage earners. So far, recognition of the relationship between declining incomes and the financial crisis has been muted in public debates, and there has been relatively little in the way of policy responses. Instead, and somewhat perversely, the remaining workers with relatively good terms and conditions of work have found themselves under intense pressure to make concessions and job sacrifices for the good, or simply the survival, of their firms.⁹⁷

Whatever other factors and forces are at work, both the degree of inequality and its comparative absence as a public issue are surely a sign of the inability of workers and unions to exercise effective political voice in policy and regulatory debates, as well as evidence of their declining ability to exert countervailing economic pressure in the workplace. Yet, although the responses so far are not especially encouraging, the longer-term implications of the unfolding crisis on debates about workers' rights are still to be determined. Will the promotion of labor market flexibility continue unabated? Will it even intensify, supported by the belief that firms and employers require still more economic relief and room to maneuver in times of crisis? Or will there be renewed attention to questions of bargaining power and to the broader effects, both social and economic, of substandard labor contracts and working conditions? If so, will that recognition simply translate into arguments for greater protectionism and preserving "good" jobs "at home?" Or will there be

94. See Bernstein, *supra* note 12.

95. JACOB S. HACKER, *THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM* 68 (2008).

96. See Kelly D. Edmiston & Roger Zolneraitis, *Rising Foreclosures in the United States: A Perfect Storm*, FED. RES. BANK OF KANSAS CITY ECON. REV., Fourth Quarter 2007, at 115, 133, available at <http://www.kc.frb.org/publicat/econrev/PDF/4Q07Edmiston.pdf>.

97. Mike Ramsey, *GM, Chrysler Win Union Concessions to Bolster Aid Bid*, BLOOMBERG, Dec. 3, 2008, <http://www.bloomberg.com/apps/news?pid=20601087&refer=home&sid=aSm249vkuvUY>.

ways to understand and consider the distributive consequences for workers across borders as well?

There is an argument that no hope of restoring financial stability exists, at least in consumer-driven and-dominated economies such as the United States, without improving the position of households, most of which (still) derive their buying power from income at work. As Robert Reich has pointed out, there is a paradox in our simultaneous positions as consumers and workers,⁹⁸ one that has now, apparently, reached the crisis stage.⁹⁹ Yet in any imagined future, it is unclear why the case for maintaining the three commitments identified at the outset—the value of collective action among workers, the benefits of shared governance at work, and the importance of economic security and relatively widely-shared prosperity—would be weaker rather than stronger. If this is true, then a host of labor-related issues should be out of the cold and back at the center of policy discussions.

As is the case with many crises, the current crisis offers a measure of opportunity. If the interconnections between remedies for precarious and low-wage work and the restoration of financial and economic stability become more broadly recognized, and if the crisis, and its management, sharpens popular intuitions about the relationship between bargaining and political power on the one hand and distributional outcomes on the other, perhaps we can look forward to a recalibrated attitude towards labor market regulation and greater receptivity to the positive, rather than simply the negative, possibilities of labor market institutions on the part of labor market technocrats and policy makers, if not the economic elites themselves.¹⁰⁰ If so, it may open new avenues for empowering workers both at the domestic level and across national boundaries, avenues that have seemed blocked until now.

Although we tend to think of this as an economic problem, this is essentially a political task. When it is undertaken, the best bet is that what emerges from the process will both reinforce yet remake fundamental parts of the law of work, including, perhaps, basic ideas about what unions do, what they are for, and who they must work with.¹⁰¹ Some of the most successful

98. ROBERT REICH, *SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE* 3–14 (2007). There are also arguments that consumption-driven economic growth is unsustainable and has to be rethought as well.

99. *See id.* at 4–5 (discussing how job stability has decreased while our choices as consumers increased as capitalism has evolved).

100. For a defense of labor market institutions in the context of trade, see CHRISTIAN BARRY & SANJAY G. REDDY, *INTERNATIONAL TRADE & LABOR STANDARDS: A PROPOSAL FOR LINKAGE* (2008).

101. *See* Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 505 (2007) (discussing the new role of unions regarding immigration and immigrant workers); Jennifer Gordon, *Towards Transnational Labor Citizenship: Restructuring Labor Migration to Reinforce Workers' Rights* 27 (Columbia University School of Law, Center for Institutional and

labor campaigns in recent years—those involving janitors, service, restaurant and hotel workers, and domestic workers, for example—have involved novel and effective coalitions with community groups, churches, students and university faculty, as well as the support of traditional unions.¹⁰² Although it is far from a foregone conclusion, the future may well also involve a changed “geography of community” as well, by which I mean a changed sense of who our interlocutors are and those to whom we owe obligations, some of whom will lie beyond national borders.

Social Change Faculty Workshop Series, Jan. 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348064 (discussing how unions could foster worker migration over international borders).

102. See Richard Michael Fischl, *The Other Side of the Picket Line: Contract, Democracy, and Power in a Law School Class Room*, 31 N.Y.U. REV. L. & SOC. CHANGE 517, 518 (2007) (discussing the success of a strike of service workers at the University of Miami, Florida).

