

# FAMILIES ON THE EDGE: GOVERNING HOME AND WORK IN A GLOBALIZED ECONOMY\*

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## INTRODUCTION

Scholars working in the fields of labor law, globalization, law and development, and of course gender now encounter the family at every turn. This is sometimes true even when families and households are officially absent from the debate or issue under discussion, as is often the case. Whether the topic is the transformation of labor and employment law, the character of economic restructuring and market reform, or the path of development policy, the place and function of the family turn out to be key items of interest. Noticing, or failing to notice, where the family fits in and what goes on within households may completely change the perception of the issue, the understanding

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of how social and economic processes operate, and the assessment of what is to be done at the level of norms, policy, and regulation.

The subject today is the place of families on the global economic landscape. My specific concern is how households are connected to the broader economy, to labor markets in particular, and how market reforms and changing policy and regulatory priorities, in turn, ultimately touch down in families and households. I want to suggest that the current economic crisis is both revealing connections between households, workplaces, and the broader economy that, if hidden, have always been present and heightening the perils of ignoring them. The crisis is also casting new light on the significance of a wide range of legal rules and policies to the health and well-being of families and households.

Families are on the edge in a number of senses. It is clear that many families are “on the brink,” that is, on the edge of a financial precipice and at risk of falling out of the middle class, whether that is because they are losing their jobs, or losing their homes or declaring bankruptcy. But families are also on the cutting edge: they are a leading indicator of change and crisis, the place where social and economic transformation, not only of a personal but of a general kind, are most clearly in view. Finally, families are at the edge in another sense: rather than a separate and autonomous private world or sphere, they are connected to markets and economies in myriad ways both hidden and overt, and affected in direct and indirect ways by the rules and policies that govern them.

In order to explore these edges, I want to take this opportunity to talk about a set of interlinked transformations in households and in labor markets. We already know at an intuitive level that there are revolutions afoot at home and at work, and that they are linked rather than independent events that serendipitously have emerged at the same time. Most of us, after all, inhabit both worlds: we live in households and work at jobs and we experience these connections as we ourselves and those we know move across the worlds of work and family. We know, too, that changes at work routinely provoke changes in the organization of households, while transformations in the household can sometimes destabilize norms and practices at work.

What I would like to do is formalize these intuitions by describing a parallel set of transformations at home and at work—fragmentation, feminization, and flexibilization—and placing them within a larger context. The claim is that fragmentation, feminization, and flexibilization are not simply related developments at home and work. Nor are they best understood on their own terms. Instead, they

can be thought of as pieces of a larger puzzle, processes that are connected in interlocking ways both to the wider economy and to changing policies, practices, and preoccupations of the state. In particular, the transformations within households and at work are, in part, a consequence of a larger set of governance projects and priorities that have had wide circulation and support in the international order. Designed to promote economic development through increased market integration and private ordering, these initiatives are devolving much more risk and responsibility to individual workers and households and are systematically shifting the position, structure, and fortunes of families at the same time as they are both creating and normalizing a world of more precarious work.<sup>1</sup>

These projects and priorities are global, rather than limited, particular, or regional in their ambitions. To say that they are global is not to say that they are centrally organized, that they are uncontested, that they generate a uniform set of consequences in either households or work places, or even that different states are all doing the same things. Rather, they are global in the following sense: it is possible to identify across many jurisdictions common trends and preoccupations concerning the regulation of households and labor markets, common assumptions and arguments about the desirability or even the inevitability of reforms, and international players and institutions that play key and recurring roles in the defense of these policy and regulatory reforms. The result is a “family resemblance” among the governance and regulatory initiatives around work and family across both the industrialized and developing worlds.

In recent years, households and labor markets have become places of deep interest, and no small amount of intervention and experimentation, as international and domestic regulators and policy makers turn their attention to what does, and does not, go on in households and labor markets. Anyone reading current literature on development, economic restructuring, and market reform will encounter sophisticated arguments about the need to prod and push behavior in households and labor markets so that they are more responsive to market signals.<sup>2</sup> For example, families have become

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1. See Kerry Rittich, *Rights, Risk, and Reward: Governance Norms in the International Order and the Problem of Precarious Work*, in *PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 31, 31–32 (Judy Fudge & Rosemary Owens eds., 2006).

2. See generally ORG. FOR ECON. CO-OPERATION & DEV., *OECD EMPLOYMENT OUTLOOK 2001*, at 129–59 (2001), available at <http://www.oecd.org/dataoecd/11/12/2079435.pdf> (identifying the main policy challenge in respect of work/family issues as

conduits for development assistance, as gender equality advocates and international financial institutions champion strategies of “investing in women” and construct gender equality indicators to mark progress toward a better economic future for all.<sup>3</sup> Households are now the recipients of conditional transfers, as states seek to mold family behavior in ways thought more conducive to better health and educational outcomes, and thus to greater human capital formation and higher growth.<sup>4</sup> Formalizing informal economic activity, sometimes including household production, is now viewed as a route to enhancing growth as well as poverty alleviation.<sup>5</sup> But profound changes are envisioned and underway in the industrialized world too, as states modify the rules governing work and welfare so as to reduce “dependency” and increase levels of market participation. In both the South and the North, these policy and regulatory shifts are not only designed to change family and household behavior; they are also designed to remake norms and expectations about the roles and duties of individuals, households, and citizens in respect of economic security.

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encouraging greater labor market participation by mothers); THE WORLD BANK, *WORLD DEVELOPMENT REPORT 1995: WORKERS IN AN INTEGRATING WORLD* 23–30 (1995) (discussing the impact of household labor decisions on labor markets and economic development); Int’l Monetary Fund, *Growth and Institutions—Chapter IV: Unemployment and Labor Market Institutions: Why Reforms Pay Off*, *WORLD ECON. OUTLOOK*, Apr. 2003, at 129, 143–49, available at <http://www.imf.org/external/pubs/ft/weo/2003/01/pdf/chapter4.pdf> (arguing that countries with high unemployment suffer from structural deficiencies in their labor markets that may be remedied by loosening wage controls and increasing competition in labor and product markets).

3. See generally MAYRA BUVINIĆ, CATHERINE GWIN & LISA M. BATES, *INVESTING IN WOMEN: PROGRESS AND PROSPECTS FOR THE WORLD BANK* (1996) (outlining a role for the World Bank in “investment in physical and human capital” especially in relation to women); KAREN OPPENHEIM MASON, *GENDER EQUALITY AND AID DELIVERY: WHAT HAS CHANGED IN DEVELOPMENT CO-OPERATION AGENCIES SINCE 1999?* (Org. Econ. Co-operation & Dev. ed., 2007), available at <http://www.oecd.org/dataoecd/44/0/38773781.pdf> (discussing agencies’ attempts to achieve gender equality by employing “a specific targeted approach in which equality or women’s advancement” is part of a given aid package).

4. See ANNE MARIE GOETZ ET AL., UNITED NATIONS DEV. FUND FOR WOMEN, *PROGRESS OF THE WORLD’S WOMEN 2008/2009: WHO ANSWERS TO WOMEN?* 35, 46, U.N. Sales No. 08.III.F.1 (2008), available at [http://www.unifem.org/progress/2008/media/POWW08\\_Report\\_Full\\_Text.pdf](http://www.unifem.org/progress/2008/media/POWW08_Report_Full_Text.pdf); Laura B. Rawlings & Gloria M. Rubio, *Evaluating the Impact of Conditional Cash Transfer Programs*, 20 *WORLD BANK RES. OBSERVER* 29, 29–30 (2005); Maxine Molyneux, *Conditional Cash Transfers: A ‘Pathway to Women’s Empowerment’?* 14–15 (Dep’t for Int’l Dev., Pathways Working Paper No. 5, 2008), available at <http://www.pathwaysofempowerment.org/PathwaysWP5-website.pdf>.

5. COMM’N ON LEGAL EMPOWERMENT OF THE POOR & UNITED NATIONS DEV. PROGRAMME, *MAKING THE LAW WORK FOR EVERYONE* 4 (2008), available at <http://www.undp.org/legalempowerment/library.shtml>.

But if home and work are key sites of governance intervention and activity, it is also in households and labor markets that we are most clearly able to see the consequences of the broader governance agenda of which they are a part. We can think of households and labor markets as the terminal sites of the economic system, the place where the effects of a wide range of governance decisions often take their most intimate and immediate form. Decisions about financial markets, monetary policy, trade and investment links, and even land reform that are often made far away and directed at concerns that seem remote from workers and families, in the end, turn out to be central to the well-being of both. If this is a claim that might once have seemed obscure or far-fetched, it no longer appears that way anymore.

### I. THE CRISIS, CONTEXT, AND THE CURRENT MOMENT

A couple of years ago it was difficult if not impossible to persuade policy makers in the North that there was anything to be seriously worried about on the economic front. To be sure, there was evidence of growing income inequality<sup>6</sup> and flat or falling wages for the majority of the population, especially in countries such as the United States.<sup>7</sup> These and other disquieting changes and trends in the economic security and activities of families and workers were being tracked by sociologists, political scientists, legal analysts, economists, and other scholars. For example, levels of indebtedness and bankruptcy rates were rising, and skyrocketing among women,<sup>8</sup> long-term or structural unemployment showed a marked uptick,<sup>9</sup> productivity increases were not translating into higher incomes for workers,<sup>10</sup> and economic recoveries were no longer securely linked to job growth.<sup>11</sup> Overall, workers and citizens were at greater economic

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6. Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q.J. ECON. 1, 1–3 (2003); Emmanuel Saez, *Striking It Richer: The Evolution of Top Incomes in the U.S.*, PATHWAYS MAG., Winter 2008, at 6, 6, available at [http://www.stanford.edu/group/scspi/pdfs/pathways/winter\\_2008/winter\\_2008.pdf](http://www.stanford.edu/group/scspi/pdfs/pathways/winter_2008/winter_2008.pdf).

7. See LAWRENCE MISHEL, JARED BERNSTEIN & HEIDI SHIERHOLZ, *THE STATE OF WORKING AMERICA*, 2008/2009, at 77–79 (2008).

8. See ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* 4–7 (2003).

9. See Lucia Mutikani, *Structural Unemployment Crisis Stalking U.S. Economy*, REUTERS, Oct. 6, 2009, <http://www.reuters.com/article/idUSTRE5955NE20091006>.

10. Jared Bernstein & Lawrence Mishel, *Economy's Gains Fail to Reach Most Workers' Paychecks* (Econ. Pol'y Inst., EPI Briefing Paper No. 195, 2007), <http://www.epi.org/publications/entry/bp195/>.

11. See Kathleen Pender, *Are We Facing Another Jobless Recovery?*, S.F. CHRON., Aug. 6, 2009, at C1, available at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/08/06/>

risk than before.<sup>12</sup> Nonetheless, the dominant view was a positive one: things were good, and they were getting better. Moreover, we had, in some senses, reached the “end of history” on important questions about the organization of economic life.<sup>13</sup> Market ordering with minimal regulation was embraced across the political spectrum, and individualism and entrepreneurialism on the part of citizens and workers was the order of the day.<sup>14</sup>

The outlook is distinctly different now. The financial crisis from which we have yet to conclusively emerge is illuminating two facets of the global order which were formerly more obscured.

#### A. *Connecting Households and Markets*

The first facet that has been revealed is the deep interconnection between what happens in and to households and what occurs in the broader economy. The sheer precariousness of the economic position of so many workers and households is reminding us that if we did not know or had forgotten it before, both households and workers are acutely vulnerable to broader economic upheavals and downturns. However, the process works in both directions: not only are the fortunes of families and workers linked to the broader economy, it turns out that the economy too is dependent on the actions and decisions of workers and families.

These interconnections operate at the international as well as the local and national levels. Scholars of migration and development have observed for some time the ways in which families and entire communities can be upended and transformed by political decisions and economic events that include regional economic integration, trade liberalization, and fiscal austerity drives, as well as economic contractions and financial crises.<sup>15</sup> A frequent consequence is the fracturing of households and the dispersal of their members, now a central part of the experience of development and globalization in much of the world. The economic health and survival of households,

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BUT819402D.DTL (showing table of last two recessions (1991 and 2001) which were followed by long periods of rising or flat unemployment).

12. JACOB HACKER, *THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM* 12–13 (rev. & expanded ed. 2008).

13. See SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY* 33–34 (2002).

14. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION* 134–35 (1999); FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 41–42 (1992).

15. See SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL: A STUDY IN INTERNATIONAL INVESTMENT AND LABOR FLOW* 97 (1988).

and sometimes entire communities, has been feminized,<sup>16</sup> as women have entered and come to form an increasingly large part of the flow of global migrants.<sup>17</sup> At the same time as sending states have come to rely on the remittances that migrants send home, receiving countries have become so thoroughly dependent on the presence and services of migrants for many forms of labor that entire sectors of their economies could not function, at least as they now do, in their absence.<sup>18</sup> Migrant workers perform not only domestic, agricultural, and sex work, as is well-known; in many places, they also provide significant parts of the workforce in construction, service, and industrial production too.<sup>19</sup> Both the decisions of individual migrants and the mutual dependence of states in the North and South speak volumes about the chain of events stretching from the level of the household to the economy that global processes have either set in motion or reinforced. These links would be difficult if not impossible to disentangle or break, even if we were inclined to do so. This intense interconnection between the decisions of families and the structures of economies is simply one of the conditions of our time.

It turns out that globalization is not merely upending households in the Third World or periphery: homes have been abandoned, neighborhoods devastated, and entire towns and regions hollowed out by economic restructuring and the off-shoring of services and production in the North as well.<sup>20</sup> As foreclosures and job losses mount, the crisis is revealing yet more interconnections between households and markets and, at the same time, demonstrating that

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16. Saskia Sassen, *Women's Burden: Counter-geographies of Globalization and the Feminization of Survival*, 53 J. INT'L AFF. 503, 506 (2000).

17. See Hania Zlotnik, *The Global Dimensions of Female Migration*, MIGRATION POL'Y INST., Mar. 2003, <http://www.migrationinformation.org/Feature/display.cfm?ID=109>. But see U.N. Dep't of Econ. & Soc. Aff., *International Migrant Stock: The 2008 Revision*, U.N. Doc POP/DB/MIG/Stock/Rev.2008 (2009), <http://esa.un.org/migration/index.asp> (select "Female migrants as percentage of all international migrants" as variable and "World" as region) (female migrants as percentage of all international migrants calculated from world database).

18. See generally SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (2d ed. 2001) (describing the centrality of low wage service and care workers, many of whom are migrants, to global cities and the post-industrial economy); GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2002) (exploring the gendered nature of care and sex work in the global economy).

19. See International Labour Conference, Geneva, Switz., May 31–June 16, 2005, *A Global Alliance Against Forced Labour, Report I(B)*, ¶¶ 223–24, available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf>.

20. See BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA: PLANT CLOSINGS, COMMUNITY ABANDONMENT, AND THE DISMANTLING OF BASIC INDUSTRIES* 49, 67 (1982).

the process also works in reverse. Not only are households adversely affected by economic downturns; it turns out that, at least in consumer-driven economies, the severity of economic downturns and the health of the economy as a whole are ineluctably tied to the status and security of households and workers. To put it simply, there is a series of feedback loops between the microprocesses of the family—the decisions that families and family members make about when and where to work and whether and how to spend their resources—and those within the economy that are now in full view. The more we see, the more it is apparent that the prospects are remote for stabilizing the economy without paying serious attention to the declining resources of the households and the degraded and precarious status of workers. No return to normal in the broader economy seems possible without more jobs, without higher incomes, and without a modicum of economic security and stability in citizens' personal and family lives. Yet what is striking is how little attention has been paid to the complex connections between households and markets; untangling these connections, understanding how they operate, and mapping the precise nature of the feedback loops between the family and the market is now the task at hand.

The second facet of the global economic order that has come to light in the current crisis is the frequent disjuncture between advances in the overall state of the economy and improvements in human well-being, whether measured in the aggregate or in terms of the status of particular groups. It has been clear for a while that there may be a considerable gap between economic progress and social progress. Depending on how they are distributed, the gains from growth may either improve general welfare or by contrast leave the majority untouched or even worse off.<sup>21</sup> The claim is that, as of summer 2009, the recession is now officially over.<sup>22</sup> Yet whatever the state of the recovery in the broader economy, we have yet to see a secure floor under the declines in either the jobs or the housing market.<sup>23</sup> In the

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21. This theme is explored by Joseph Stiglitz, Amartya Sen, and Jean-Paul Fitoussi in their recent report. See JOSEPH STIGLITZ, AMARTYA SEN & JEAN-PAUL FITOUSSI, COMM'N ON THE MEASUREMENT OF ECON. PERFORMANCE & SOC. PROGRESS, REPORT BY THE COMMISSION ON THE MEASUREMENT OF ECONOMIC PERFORMANCE AND SOCIAL PROGRESS 8 (2009), available at <http://media.ft.com/cms/f3b4c24a-a141-11de-a88d-00144feabdc0.pdf> (the "Sarkozy Report").

22. See Scott Lanman & Craig Torres, *Bernanke Says U.S. Recession 'Very Likely' Has Ended*, BLOOMBERG PRESS, Sept. 15, 2009, <http://www.bloomberg.com/apps/news?pid=20601087&sid=af1WYD0hCPqA>.

23. See Janet Morrissey, *Still Hunting for a Bottom in Housing*, TIME, Jan. 7, 2010, <http://www.time.com/time/business/article/0,8599,1952132,00.html>; *Recovery Still Too*



United States and United Kingdom, for example, unemployment and foreclosures both continue to rise, and they are expected to do so for the foreseeable future, whatever “green shoots” or other signs of stabilization are visible on the horizon.<sup>24</sup> In the United States, large numbers of workers are un- or underemployed if broader measures of unemployment that capture discouraged workers and those who are involuntarily working part-time are used.<sup>25</sup> An unprecedented number of homes in the United States are on a path toward, or already in, foreclosure.<sup>26</sup> In addition, the bite of the crisis is uneven; minority households are suffering reversals of fortune that far outstrip those of the nation as a whole,<sup>27</sup> and low-income families are experiencing unemployment rates that are many multiples of those at the top.<sup>28</sup> To put it simply, for the vast majority of workers and families the crisis is far from over. Moreover, it is unclear that there will ever be a return to “normal” on the jobs front. In some sectors, the crisis has accelerated the outsourcing and industrial restructuring that was already underway,<sup>29</sup> and it seems likely that many of the jobs

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*Timid to Halt Rising Unemployment, Says OECD Economic Outlook*, OECD ECON. OUTLOOK, Nov. 19, 2009, [http://www.oecd.org/document/9/0,3343,en\\_2649\\_34109\\_44083593\\_1\\_1\\_1\\_37443,00.html](http://www.oecd.org/document/9/0,3343,en_2649_34109_44083593_1_1_1_37443,00.html).

24. See, e.g., Catherine Rampell, *August Joblessness Hit 10% in 14 States and D.C.*, N.Y. TIMES, Sept. 18, 2009, at B4.

25. For current unemployment statistics, see Press Release, Bureau of Labor Statistics, *Employment Situation Summary* (Feb. 5, 2010), <http://www.bls.gov/news.release/empsit.nr0.htm> (summarizing U.S. unemployment data for January 2010). The current crisis has seen unemployment rise as high as 10.2% in the United States. See David Leonhardt, *Jobless Rate Hits 10.2%, with More Underemployed*, N.Y. TIMES, Nov. 7, 2009, at A1. To a more limited degree, this is also true in Canada. See Ken Lewenza, *Rising Employment Number Masks Devastated Job Market: Analysts Hail Recovery but Deeper Probing Reveals More Precarious Situation for Workers*, TORONTO STAR, Feb. 8, 2010, at A13, available at <http://www.thestar.com/opinion/article/761419--rising-employment-number-masks-devastated-job-market>.

26. See Lynn Adler, *U.S. 2009 Foreclosures Shatter Record Despite Aid*, REUTERS, Jan. 14, 2010, <http://www.reuters.com/article/idUSTRE60D0LZ20100114>.

27. See Greg Kaufmann, *The Silent Depression*, NATION, Sept. 25, 2009, <http://www.thenation.com/doc/20091012/kaufmann>.

28. CTR. FOR LABOR MKT. STUDIES, NORTHEASTERN UNIV., *LABOR UNDERUTILIZATION PROBLEMS OF U.S. WORKERS ACROSS HOUSEHOLD INCOME GROUPS AT THE END OF THE GREAT RECESSION: A TRULY GREAT DEPRESSION AMONG THE NATION'S LOW INCOME WORKERS AMIDST FULL EMPLOYMENT AMONG THE MOST AFFLUENT 4* (2010), available at [http://www.clms.neu.edu/publication/documents/Labor\\_Underutilization\\_Problems\\_of\\_U.pdf](http://www.clms.neu.edu/publication/documents/Labor_Underutilization_Problems_of_U.pdf).

29. See Erika Kinetz, *How the U.S. Hiring Freeze Is Working for India*, GLOBE & MAIL, Jan. 21, 2010, <http://www.theglobeandmail.com/report-on-business/as-demand-for-outsourcing-grows-indias-hiring/article1437904/>.

that evaporated during the recession have disappeared for good, to be replaced, if at all, with work of a more precarious nature.<sup>30</sup>

There are many different ways to account for globalization—some optimistic, some less so. Because the crisis has highlighted its dark side, and because the pervasive experience of precariousness at home and work is neither well-theorized nor adequately explained in the dominant narratives about global economic integration, let me focus on this side of the equation.

Put simply, globalization creates winners and losers. It tends to both concentrate gains and losses and disperse the economic positions of different groups. From the standpoint of the majority of citizens, the most salient feature of global economic integration has been the experience of (relatively rapid) social and economic change combined with a massive reallocation of risk and the redistribution of rewards. In the North, much of this is a result of changing fortunes in the labor market. Scholars have documented in detail the changes that greater product and labor market competition—as well as policies designed to promote greater flexibility—have wrought for workers.<sup>31</sup> Although experiences vary among different jurisdictions, the general trends and patterns are clear enough. Workers in the North are gaining less from their labor and experiencing much greater volatility of income and economic insecurity than before.<sup>32</sup> In many countries, access to social insurance and income transfers have been curtailed as well,<sup>33</sup> leaving

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30. See Mutikani, *supra* note 9.

31. See generally GUY STANDING, *GLOBAL LABOUR FLEXIBILITY: SEEKING DISTRIBUTIVE JUSTICE* (1999) (analyzing the impact of labor market flexibility policies on workers); *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002) (canvassing the impact of and consequences for globalization on labor law in different jurisdictions); Lourdes Benería, *Globalization, Women's Work, and Care Needs: The Urgency of Reconciliation Policies*, 88 N.C. L. REV. 1501, 1502–03 (2010) (describing, *inter alia*, the global trend to more flexible and precarious work); Kerry Rittich, *Global Labour Policy as Social Policy*, 14 CAN. LAB. & EMP. L.J. 227 (2008) (describing the collapse of labor market concerns into economic objectives within the reform policies promoted by the international financial institutions); Joseph Stiglitz, Keynote Address at the Industrial Research Association: Democratic Development as the Fruits of Labor (Jan. 25, 2000), in JOSEPH STIGLITZ AND THE WORLD BANK: THE REBEL WITHIN 279 (2001) (describing the approach to labor market issues within the World Bank).

32. See Andrew Green & Heidi Shierholz, *Minimum Wage Workers: Better Educated, Worse Compensated*, ECON. POL'Y INST. Jan. 22, 2009, [http://www.epi.org/economic\\_snapshots/entry/snapshot\\_20090722/](http://www.epi.org/economic_snapshots/entry/snapshot_20090722/). For an analysis, see Leah F. Vosko, *Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity*, in PRECARIOUS EMPLOYMENT: UNDERSTANDING LABOUR MARKET INSECURITY IN CANADA 3, 21 (Leah F. Vosko ed., 2006).

33. See STANDING, *supra* note 31, at 258–59.

families and households increasingly on their own to manage as best they can in circumstances that may be largely out of their control.

At first glance, workers in the global South look like winners in these transformations; after all, they may have new jobs as a result of production or services that have been outsourced from the North. Yet the high levels of labor force turnover associated with global production speak to an underlying degree of dissatisfaction about the terms and conditions of work that is hard to discount.<sup>34</sup> Workers in the global South, too, remain at risk of acute declines in income and sudden reversals of economic fortune, whether from economic downturns or simply from the ordinary and expected competition from other low-wage jurisdictions.<sup>35</sup> Although we hear less about them in mainstream accounts than we should, even in countries that are doing well, many people have been left out of these new economic activities and opportunities, and some are even worse off.<sup>36</sup> Whether, and how much, the picture remains rosy if the costs as well as the benefits of these changes are counted is uncertain.<sup>37</sup>

#### *B. Explaining Insecurity—Four Observations*

How might we explain this experience of insecurity? Here, four things seem worth emphasizing. The first is simply the central role of decision, policy, and rule—that is, matters of law and governance—in the production as well as the amelioration of insecurity. The changing fortunes of workers and households are often attributed to technical and information innovations associated with globalization,<sup>38</sup> greater competition among firms and workers,<sup>39</sup> the rising premium placed on skill and adaptability in a dynamic, knowledge-based economy,<sup>40</sup> or the rise of new contingent and precarious forms of employment that are poor in terms of the economic rewards, working conditions, job or

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34. See SARAH PERMAN ET AL., INT'L CONFEDERATION OF FREE TRADE UNIONS, BEHIND THE BRAND NAMES: WORKING CONDITIONS AND LABOUR RIGHTS IN EXPORT PROCESSING ZONES 7 (2004), available at <http://www.icftu.org/www/PDF/EPZreportE.pdf>.

35. *Id.*

36. See BRANKO MILANOVIC, WORLDS APART: MEASURING INTERNATIONAL AND GLOBAL INEQUALITY 131, 209 (2005).

37. See STIGLITZ ET AL., *supra* note 21, at 53; Peter S. Goodman, *Emphasis on Growth Is Called Misguided*, N.Y. TIMES, Sept. 23, 2009, at B1.

38. See MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY 36 (2d ed. 2000).

39. Jagdish N. Bhagwati, *Challenges to the Doctrine of Free Trade*, 25 N.Y.U. J. INT'L L. & POL. 219, 227–28 (1993).

40. Thomas J. Courchene, *Human Capital in an Information Era*, 28 CAN. PUB. POL'Y 73, 73–74 (2002).

employment security, and/or control exercised by workers.<sup>41</sup> However, there is reason to think that these declining fortunes have at least as much to do with governance priorities and regulatory decisions. Put simply, whatever the role of technical and economic transformations, growing insecurity needs to be understood in legal and institutional terms as well. In many jurisdictions, the last two to three decades have been a period of intense regulatory change. Legal and economic reforms, especially in respect of trade and investment, have greatly enhanced the volatility of markets and increased both the likelihood of economic change and the speed at which the reallocation of the labor force occurs.<sup>42</sup> Those same reforms have also affected the legal rights of workers and employers and the social entitlements of citizens. Although they play out in a range of ways for social groups in different places, in general, reforms—including those adopted to spur development and respond to economic crises—have altered the bargaining power and exit options for workers and families to their detriment.<sup>43</sup> As I will describe, they have also imposed new costs and greater risks on workers and households.

The second thing of interest is the object of those decisions, policies, and rules. If globalization is about governance—norms, institutions, and practices, both formal and informal—as much as it is simply a fact about or condition of the contemporary world, then new governance norms and regulatory projects appear, at least in the first instance, to be primarily directed at markets and the economy writ large rather than at families or households. I want to suggest, however, that this reallocation of rights and entitlements in the labor

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41. KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67–86 (2004).

42. See generally Kevin Banks, *The Impact of Globalization on Labour Standards: A Second Look at the Evidence*, in GLOBALIZATION AND THE FUTURE OF LABOUR LAW 77, 79–82 (John D. R. Craig & S. Michael Lynk eds., 2006) (explaining the effects of competitive forces on labor markets and the possibility that they may reduce the redistributive effects of labor standards).

43. See Simon Deakin & Hannah Reed, *River Crossing or Cold Bath? Deregulation and Employment in Britain in the 1980s and 1990s*, in WHY DEREGULATE LABOUR MARKETS? 115, 115–19, 127 (Gøsta Esping-Andersen & Marino Regini eds., 2000) (examining the complex relationship between regulatory change and economic outcomes in the 1980s and 1990s in the British labor market; challenging popular understanding that increased flexibility translated to labor market gains through higher employment rates and noting the accompanying increases in inequality and social exclusion); Stiglitz, *supra* note 31, at 285–86 (explaining that workers bore the costs of the East Asian financial crisis through increased unemployment and reduced wages and noting the absence of unions and attention to workers' rights in discussions about reforms to the international economic architecture as well as the "studied inattention" to the possible role of the labor movement in economic development).

market and in the sphere of social protection and social policy is not only visible and very much experienced in the family; in the end, such reforms are very much “about” the family. Decisions about labor market governance and social policy, and a wide range of other issues too, can end up having a profound impact on the organization of families and households: what their priorities are and the direction in which they must evolve; where and how they live; and with whom and where they form or dissolve communities. In some cases, they are matters of life or death for families.

The crisis is widening our perception and increasing our knowledge of the forms and types of governance that are relevant to families; it is also making more visible the manner in which households and markets are articulated to each other. Because of the current state of economic flux, we can see more clearly than ever that the boundary between households and markets is porous, unstable, and perhaps even fictional. But we can also discern some of the ways that it is possible to move that boundary, and thereby change households as well as markets, through legal and institutional reform.<sup>44</sup>

Although it would be easy to miss this fact given its absence from most debates about the economy, the household remains an important site of production, of care, of resource provision, and of redistribution, important not only to the family but to the broader economy and to social life writ large.<sup>45</sup> But what goes on in the family—how much production of goods and services, of what type and intensity, and by whom—is deeply affected by what does, or does not, go on in the market, the state, and other social institutions. Think for a moment of child care. It may be provided in a range of ways: at home, in the market, in the community, or through a public institution. Demand for care in the market will be affected by the level of women’s participation in labor markets which, in turn, is partly determined by conditions in the wider economy. How much care is actually available outside the home, whether on a voluntary basis or for a fee, and of what quality and at what price, will affect

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44. KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM 182–96 (2002) (describing the interconstitutive relationship between the productive and reproductive economies; the varied ways that tasks and activities can be allocated between the household and the market; and the effect of legal rules and norms on the boundary between home and market and the recognition of activities as productive or not).

45. See UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 1995, at 97 (1995), available at <http://hdr.undp.org/en/reports/global/hdr1995/chapters/> (estimating \$11 trillion of unpaid work performed by women worldwide).

both the degree of care that is performed in the home versus the market as well as the amount of paid work performed in the market, especially by women. Both the supply of and demand for care at home and in the market are affected, in part, by the price of care relative to other income generating opportunities. But the price of care is not merely a function of market processes: it depends on numerous regulatory and institutional details, as does the price of other forms of labor: tax law, labor law, equality and discrimination law, for example, all might have some bearing on its cost. Moreover, the extent to which families take up external options for care will turn to some degree on whether and to what extent the provision of care is subsidized by non-household members or directly provided through other institutions. Those subsidies might come through payroll taxes, tax credits, or general tax revenues; the care itself might be directly provided as a public service like education, subsidized in part via some state program, or provided as an employment-related benefit. And this only begins the analysis; many other factors might affect the organization, cost, and provision of care as well. The general point to emphasize is that, even if we restrict our focus to the issue of child care, we can see an interminable loop of interactions between households and markets, with no single or stable point of equilibrium. There are many possible arrangements, each with different effects on the labor and resources of family members, women in particular. What particular settlement we end up with at any given point will be deeply affected by the legal rules through which both household and market activity are organized.<sup>46</sup>

The border between the family or household and the market may also be uncertain. Think for a minute of a family business in which family members manage and integrate the performance of household and business activities in ways that make the two domains difficult to separate. Indeed, imagine a self-employed single parent, typically a woman, in which the answer to the question, "what is a family versus a business expense?" is not only uncertain, the distinction itself may be unhelpful: in some cases it is both, at the same time.

As we are learning anew, the boundary between households and the broader economy is also transitory, contingent, and to some extent, politically and ideationally determined. Settled norms about what families do and what their responsibilities are may undergo transformation as a result of change from outside. For all of these reasons, rather than cabining home and market in separate spheres,

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46. RITTICH, *supra* note 44, at 190–96.

for many purposes it makes sense to imagine an integrated system or sphere of economic activity, one in which the rules, institutions, and decisions in one place inevitably affect the system as a whole. Given the overlap and interpenetration between the family and the market, much economic reorganization and restructuring will inevitably be social restructuring too. When the policies, rules, and norms that govern the market change, we should expect that they will provoke transformation in household norms and practices too.<sup>47</sup> From this vantage point, it is easier to see how and why reforms to the market are not only *destined* to affect households and families; some are, in essence, also reforms *to* households and families.

Third, moments of crisis and transition are always also moments of redistribution.<sup>48</sup> Legal and economic reforms and interventions that are instituted to manage crises and direct the path of recovery or effect a transition to a new order not only generate effects beyond, sometimes far beyond, their intended objects; they invariably reallocate power, resources, and opportunities in ways that affect the status and interests of social groups as well.<sup>49</sup> As is now all too clear, actions taken, or not taken, to regulate the market can increase or decrease the value of family and household assets—including, of course, that most valuable of assets, the family home. But decisions about which firms or sectors of the economy to bail out or rescue and which to leave to their fates may spell sickness or health, life or death for neighborhoods, communities, even entire regions.<sup>50</sup> Nor are such interventions neutral as between the forms of family life that they permit and promote or alternatively discourage and destroy. Rather, they may set in motion a chain of events that encourage the dissolution or reformation of households, disperse family members, channel them into new economic activities, or render old ones no longer viable.

Fourth, these governance activities that operate on the family and the world of work should be understood as knowledge practices as well as regulatory activities. Enormous effort and considerable resources are being expended not simply to change the rules of the

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47. *Id.* at 195.

48. *Id.* at 156–58 (describing the change in legal powers and entitlements entailed by reform and thus the inevitability of redistribution in the course of restructuring).

49. *Id.* at 200–26 (discussing the manner in which economic reforms and restructuring designed to promote transition to liberal market orders are likely to systematically and adversely alter the position of women).

50. See Joe Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 614 (1988) (discussing the impact of the closing of the Youngstown steel plant).

game at home and work. Rather, the aim is to transform values and expectations about the family, the market, and the state; to recalibrate the normative balance between public and private responsibility; to challenge entrenched social rights and remake established conceptions of gender equality; and to bring under greater surveillance and control economic and social spaces in their totality. By way of illustration, the next Part will focus on three processes in which these transformative practices are visible: fragmentation, feminization, and flexibilization.

## II. FRAGMENTATION, FEMINIZATION, FLEXIBILIZATION

At the end of World War II, states all over the industrialized world moved to enshrine a series of interlocking labor market policies and social protections schemes to moderate the consequences of economic downturns for their workers and backstop the economic security of their citizens.<sup>51</sup> In the United States, beginning with the New Deal legislation and reaching its apogee in the Great Society programs of the 1960s, a web of rules and policies was constructed to ensure access to collective bargaining<sup>52</sup> and fair labor standards,<sup>53</sup> as well as social security,<sup>54</sup> employment insurance,<sup>55</sup> job training,<sup>56</sup> equal opportunity at work,<sup>57</sup> and income support programs, especially to families with dependent children.<sup>58</sup> The result, in the United States, as elsewhere, was a social contract that specified, both directly and by default, a division of labor and allocated roles, responsibilities, and

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51. See GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 101 (1990); Paul Pierson, *The New Politics of the Welfare State*, 48 *WORLD POL.* 143, 146–47 (1996); John Gerard Ruggie, *International Regimes, Transactions and Change: Embedded Liberalism in the Post-War Economic Order*, 36 *INT'L ORG.* 379, 388 (1982).

52. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

53. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2006)).

54. Social Security Act of 1935, ch. 531, §§ 201–210, 49 Stat. 620, 622–25 (codified as amended at 42 U.S.C. §§ 301–302 (2006)).

55. Social Security Act of 1935, ch. 531, §§ 301–303.

56. Economic Opportunity Act of 1964, Part B, Pub. L. No. 88-452, §§ 111–116, 78 Stat. 508, 512–27 (repealed 1981).

57. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971–2000a (2006)).

58. Social Security Act §§ 401–406, *repealed by* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2113 (codified at 42 U.S.C. §§ 601–617 (2006)).



risks among the three key institutions responsible for welfare: employers and the labor market, the state, and the family.<sup>59</sup>

It is common ground among labor scholars and students of globalization that the foundation underneath this social contract has been cut away by transformations in legal consciousness<sup>60</sup> as well as massive changes in the organization of economic activity that affect the world of work.<sup>61</sup> These developments are not limited to specific geographic locations or to particular sectors or types of work. Instead, they are generalized phenomena linked to processes of globalization that can be identified in virtually every country. At the same time, there are also profound changes underway within families. These parallel transformations both reflect and are themselves shifting the relationship between home and work. Operating in tandem, they risk creating something of a perfect storm in which work and family are in open conflict. It is well-recognized that this situation is increasingly stressful, difficult and unmanageable for both workers and their families. But these conflicts also generate significant short, medium, and long term costs to the economy, costs that we have not in some cases begun to notice, let alone adequately weigh. Without significant attention and change of direction, particularly concerning regulatory priorities, there is no reason to think that this scenario will get much better.

How might we understand the path by which we have reached this state of affairs? One way is to consider the processes of fragmentation, feminization, and flexibilization that are underway at home and at work.

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59. See GØSTA ESPING-ANDERSEN, *SOCIAL FOUNDATIONS OF POSTINDUSTRIAL ECONOMIES* 35 (1999); Kerry Rittich, *Equity or Efficiency: International Institutions and the Work/Family Nexus*, in *LABOUR LAW, WORK, AND FAMILY* 43, 52–55 (Joanne Conaghan & Kerry Rittich eds., 2005).

60. See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 63–68 (David M. Trubek & Alvaro Santos eds., 2006).

61. See Brian Bercusson & Cynthia Estlund, *Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions*, in *REGULATING LABOUR IN THE WAKE OF GLOBALISATION* 1, 1–5 (Brian Bercusson & Cynthia Estlund eds., 2008); Karl Klare, *Countervailing Workers' Power as a Regulatory Strategy*, in *LEGAL REGULATION OF THE EMPLOYMENT RELATION* 63, 64–65 (Hugh Collins, Paul Davies & Roger Rideout eds., 2000) [hereinafter *Countervailing Power*]; Karl Klare, *The Horizons of Transformative Labour and Employment Law*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES*, *supra* note 31, at 3, 4–5 [hereinafter *Horizons of Labour Law*].

*A. Fragmentation, Feminization, and Flexibilization at Work*

## 1. Fragmentation

The standard employment relationship with settled expectations around working time, norms about regular and rising wages, and defined benefits organized around a normative worker known as the “male breadwinner” are increasingly scarce in the post-industrial labor markets of the global North.<sup>62</sup> Rather than a single, or even dominant, model of work organization, workers now labor under a multitude of different contractual arrangements, from normal “full-time” work with predictable wages and benefits to casual, part-time, contract, and self-employment. This diverse array of work arrangements, in turn, is a result of profound changes in the organization of firms and the delivery of products and services in the post-industrial economy.<sup>63</sup> Firms and workplaces have been vertically disintegrated, decentralized and reorganized as networks of firms and contractors, sometimes with only ephemeral rather than enduring relations to each other.<sup>64</sup> As work is outsourced and subcontracted to other firms, workers end up in a variety of different employment and work situations;<sup>65</sup> it follows that they are also subject to different terms and conditions at work, including quite wide-ranging wages and benefits for performing the same or very similar work. Although it may seem obvious, it needs to be said that in general, fragmentation has not worked to the advantage of workers. Nor does it simply reflect the replacement of a single work model with an appealing, or at least understandable, array of alternatives. Instead, for workers the fragmentation of the employment relationship is associated with decreasing returns to work, much greater assumption of risk, and an

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62. See LEAH F. VOSKO, *TEMPORARY WORK: THE GENDERED RISE OF A PRECARIOUS EMPLOYMENT RELATIONSHIP* 29–31 (2000); Simon Deakin, *The Contract of Employment: A Study in Legal Evolution*, 11 HIST. STUD. INDUS. REL. 1, 32 (2001); Ulrich Mückenberger, *Non-Standard Forms of Work and the Role of Changes in Labour and Social Security Regulation*, 17 INT’L J. SOC. L. 381, 391–95 (1989).

63. Judy Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, 44 OSGOODE HALL L.J. 609, 611–17 (2006).

64. Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, 10 OXFORD J. LEGAL STUD. 353, 356 (1990); Katherine V.W. Stone, *Flexibilization, Globalization and Privatization: Three Challenges to Labor Rights in Our Time*, in *REGULATING LABOUR IN THE WAKE OF GLOBALISATION*, *supra* note 61, at 115, 116.

65. *STANDING*, *supra* note 31, at 101–14.

increasing disconnect between labor market participation and economic security.<sup>66</sup>

## 2. Feminization

Labor markets have also been feminized. Indeed, as job losses have concentrated in male-dominated sectors like manufacturing, construction, and high-end financial services during the current downturn, a landmark has been reached: the labor markets in the United States, Canada, and the United Kingdom are now approaching the point at which they are female-dominated.<sup>67</sup> While part of this shift in the composition of the workforce is attributable to the revolution in gender expectations, opportunities, and norms that has transformed almost every dimension of social life in the last generation, much can be explained simply in terms of economic factors. A variety of forces have converged to increase the pressure on women to participate in the market, including those who were formerly exempt from such work because they were understood to be engaged in socially valuable care work.<sup>68</sup> The demise of the male-breadwinner norm and the progressive difficulty in maintaining a middle-class—or even a basic—existence on a single wage has conspired to draw millions of women into the paid labor force of the industrialized, transitioning, and developing worlds.<sup>69</sup> Indeed, the feminization that is visible in the labor markets all over the world is arguably as much the product of the relentless economic pressure arising from declining subsistence opportunities and the general degradation of the wages of male workers as it is the result of new economic opportunities and greater desire for market work on the part of women.<sup>70</sup> In the global South, feminization has been part of a

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66. ULRICH BECK, *THE BRAVE NEW WORLD OF WORK* 72–76 (2000); Katherine V. Stone, *In the Shadow of Globalization: Changing Firm-Level and Shifting Employment Risks in the United States*, in 2 *THE IMPACT OF GLOBALIZATION ON THE UNITED STATES* 23, 24–25 (Beverly Crawford ed., 2008).

67. See BUREAU OF LABOR STATISTICS, *WOMEN IN THE WORKFORCE: A DATABOOK 1* (2009), available at <http://www.bls.gov/cps/wlf-databook-2009.pdf>; Catherine Rampell, *Women Now a Majority in American Workplaces*, N.Y. TIMES, Feb. 5, 2010, at A10.

68. The previous entitlement to income transfers to support unpaid work at home through programs such as Aid to Families with Dependent Children (“AFDC”) was, in any event, highly racialized and always restricted to women deemed “deserving”. See LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890–1935*, at 39–49 (1994).

69. See, e.g., SASSEN, *supra* note 15, at 107–09; Catherine Rampell, *As Layoffs Surge, Women May Pass Men in Job Force*, N.Y. TIMES, Feb. 5, 2009, at A1.

70. Lisa Belkin, *The New Gender Gap*, N.Y. TIMES, Oct. 4, 2009, (Magazine), at 11.

concerted development strategy.<sup>71</sup> In the North, structural changes in the labor market, including the decline of middle class manufacturing jobs in places such as Detroit and Windsor, have played a role;<sup>72</sup> so has the rise of the historically less-organized and more poorly paid service sector along with a high-skill, information, and knowledge intensive sector in the post-industrial economy.<sup>73</sup>

### 3. Flexibilization

What joins the fragmentation and feminization of work is the third change, the flexibilization of labor markets. Labor market flexibility is not only a feature of workplace relations in the new economy; it has been consciously adopted as an economic governance strategy, a priority reform to stimulate growth.<sup>74</sup> Labor market flexibility—understood as reforms that weaken or preclude job security provisions and anything more than “core” or basic labor standards, decentralize worker collective action, and remove many of the constraints on employers to deploy labor as they see fit or as changing circumstances dictate—has been enshrined as a good governance norm at the international level for at least fifteen years.<sup>75</sup> Every serious student of labor markets can describe the ways in which flexibility norms have left their mark on domestic policy and regulation and eroded the worker power and workplace protections provided under the preexisting social contract.<sup>76</sup>

Labor market institutions, from fair labor standards to collective bargaining rules, are the classic means of redressing the imbalance of

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71. Guy Standing, *Global Feminization Through Flexible Labor: A Theme Revisited*, 27 *WORLD DEV.* 583, 585 (1999).

72. BLUESTONE & HARRISON, *supra* note 20, at 29–32, 35–36.

73. See SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS: ESSAYS ON THE NEW MOBILITY OF PEOPLE AND MONEY* 137–42 (1998).

74. The classic statement about the benefits of flexible labor markets is found in *ORG. FOR ECON. CO-OPERATION & DEV., OECD JOBS STUDY: EVIDENCE AND EXPLANATIONS* 69 (1994). See also *STANDING, supra* note 31, at 97–101 (identifying, *inter alia*, ten “variable labor costs” which are used to provide justification for increased labor market flexibility); Rittich, *supra* note 1, at 35–36 (describing labor market flexibility as the “linchpin” of the World Bank and IMF policy agenda).

75. See Harry Arthurs, *Labour Law Beyond the State?*, 46 *U. TORONTO L.J.* 1, 15–17 (1996); Marco Biagi, *Quality in European Community Industrial Relations*, in *THE EVOLVING EMPLOYMENT RELATIONSHIP AND THE NEW ECONOMY* 153, 154–55 (R. Blanpain ed., 2001); Hugh Collins, *The Productive Disintegration of Labour Law*, 26 *INDUS. L.J.* 295, 302–04 (1997); Kerry Rittich, *Core Labour Rights and Labour Market Flexibility: Two Paths Entwined?*, in *LABOR LAW BEYOND BORDERS: ADR AND THE INTERNATIONALIZATION OF LABOR DISPUTE RESOLUTION* 157, 162, 175 (Int’l Bureau of the Permanent Court of Arbitration ed., 2003).

76. *STANDING, supra* note 31, at 113–14.

bargaining power between employers and employees so as to eliminate the substandard working conditions that both undermine the economic security of citizens and erode the basis of economic performance as a whole.<sup>77</sup> Under flexibility norms, however, labor market institutions are evaluated not for their capacity to deliver better terms and conditions of work, but according to their assumed adverse effects on competition, efficiency, and the rate of economic growth.<sup>78</sup> The result has been downward pressure on labor standards and reforms that reallocate risks and burdens as between workers and employers, again, not to the benefit of workers.

Similar objectives are reshaping social policy. Fiscal concerns and constraints are inducing states to cut back on income transfers and other forms of social protection and social insurance; think, for example, of the changes to modern welfare regimes that are designed to incentivize work by limiting access to public resources, such as the replacement of Aid to Families with Dependent Children ("AFDC")<sup>79</sup> with Temporary Assistance to Needy Families ("TANF").<sup>80</sup> Whether they emanate from changing demographics such as falling birth rates that change the ratio of active labor market participants to dependents; greater capital mobility and regulatory competition that limit states' capacity to tax;<sup>81</sup> the belief that robust social expenditures are a threat to sound macroeconomic management;<sup>82</sup> or simply greater political or ideological resistance to

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77. KARL POLANYI, *ORIGINS OF OUR TIME: THE GREAT TRANSFORMATION* 135–36 (1944); *Countervailing Power*, *supra* note 61, at 66–69.

78. See STANDING, *supra* note 31, at 87–88; Alvaro Santos, *Labor Flexibility, Legal Reform, and Economic Development*, 50 VA. J. INT'L L. 43, 49–50 (2009).

79. Social Security Act of 1935, ch. 531, §§ 401–406, 49 Stat. 620, 627–29, *repealed by* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105, 2113 (codified at 42 U.S.C. §§ 601–617 (2006)).

80. Temporary Aid to Needy Families ("TANF") is part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, §§ 101–116. A key element of TANF is a lifetime limit of five years or sixty months on the amount of time that a family with an adult can receive federally funded assistance. 42 U.S.C. § 608(a)(7)(A) (2006).

81. See Reuven Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1632–33 (2000); Isabelle Grunberg, *Double Jeopardy: Globalization, Liberalization, and the Fiscal Squeeze*, 26 WORLD DEV. 591, 595–96 (1998).

82. Cutbacks to social expenditures in the name of sound macroeconomic management are sometimes enforced by the international financial institutions, the International Monetary Fund and the World Bank, through loan conditionalities. See Grunberg, *supra* note 81, at 592, 601.

taxation;<sup>83</sup> concerns about the imbalance between income and expenditures are placing hard limits on the creative uses of social policy to reground workers' and households' economic security in the new economy,<sup>84</sup> no matter how much that might be a good idea for reasons of both efficiency and equity.<sup>85</sup> The overarching objective of social policy now is to "make work pay": to ensure that everyone possible is induced, cajoled, or coerced into labor market participation.<sup>86</sup>

Flexibility policies have intensified the fragmentation of the standard employment relationship and ensured that much work in the post-industrial economy is not simply flexible but precarious, that is poor in terms of economic rewards, working conditions, job or employment security, and control exercised by workers. The deliberate displacement of the objectives of worker protection and countervailing worker power in favor of the promotion of competitiveness and efficiency through both labor market governance and social policy mean that workers are increasingly subjected to the vagaries of product market cycles and other market forces and, as the financial crisis has disclosed, left with much reduced economic security in the course of economic downturns.

Two things are worth observing here. First, although often styled "deregulation," reforms to labor markets are better understood in legal terms as "reregulation." Flexibility norms typically involve the simultaneous de-institutionalization (or weakening) of worker rights and entrenchment (or strengthening) of employer rights and powers. Job security, for example, may be weakened, or workers' rights to overtime compensation reduced.<sup>87</sup> Second, although redistributive

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83. See Lisa Phillips, *Tax Law and Social Reproduction: The Gender of Fiscal Policy in an Age of Privatization*, in *PRIVATIZATION AND THE CHALLENGE TO FEMINISM* 41, 41 (Brenda Cossman & Judy Fudge eds., 2002).

84. For a fairly comprehensive survey of these constraints, see Grunberg, *supra* note 81, at 597–99.

85. See generally ESPING-ANDERSEN, *supra* note 59 (discussing the relationship between social protection and labor market integration in postindustrial economies); ALAIN SUPIOT, *BEYOND EMPLOYMENT* (2001) (discussing the traditional "Fordist" labor regime and the current demands for flexibility in employer and employee relationships).

86. See, e.g., ORG. FOR ECON. CO-OPERATION & DEV., *BOOSTING JOBS AND INCOME: POLICY LESSONS FROM REASSESSING THE OECD JOBS STRATEGY* 9–13 (2006); Kerry Rittich, *Social Rights and Social Policy: Transformations on the International Landscape*, in *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* 107, 123 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

87. See, e.g., Employment Standards Act, R.S.C., ch. 41, § 22 (2000), *amended by* 2004 R.S.C., ch. 21, § 6 (Can.) (replacing the previous entitlement to overtime pay after forty-four hours of work per week with an entitlement, subject to the agreement of the employee, to average overtime payments).

policies are officially out of fashion, flexibility norms do in fact entail a significant redistribution of risks and resources in the labor market. However, in general it is employers and capital holders, rather than workers and households, who have benefited from this redistribution.

Given their effects on incomes and economic security, it is not surprising that flexibility norms at work are also generating spillovers and collateral effects beyond the borders of labor markets which, in turn, confront and intersect with changes in the household.

### *B. Fragmentation, Feminization, and Flexibilization at Home*

Anyone studying the border between work and family might be struck by a parallel, related, and equally transformative set of changes now underway within households: fragmentation, feminization, and flexibilization are going on there as well.

#### 1. Fragmentation

The nuclear family, with a male breadwinner and an unpaid female caregiver with only a peripheral if any relation to the market—the normative basis of everything from the design of labor and employment law to the delivery of social policy—is now fragmented and in decline. In its place are myriad diverse families and households whose form, members, location, and responsibilities are both recognizable yet profoundly transformed. Contemporary households, for example, may be organized around same sex as well as opposite sex couples; they are often blended and multi-generational as well as nuclear. Indeed, households may be constituted out of diverse combinations of persons who have substantial economic and emotional attachments and who assume reciprocal, ongoing obligations in respect of each other even in the absence of connections of blood or conjugality. And the demise of the family wage at work, just described, has dealt a death blow to the male breadwinner norm at home: now most adults in households work in the labor market, even where they also work at home. So far, public policy has been slow to catch up to these changes. In general, non-standard families and households continue to get less in the way of income support and tax breaks, and make do on less in the way of resources as a result.<sup>88</sup> For example, single-parent families are much more likely than others to be poor.<sup>89</sup>

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88. For a discussion of the way that the Canadian tax code has historically instituted preferences for married rather than single persons and reflects household norms organized

## 2. Feminization

Households and families, as well as labor markets, might also be thought of as feminized. An increasing number of households have only a single parent, a trend that seems to be durable, even growing, rather than temporary or limited in its impact.<sup>90</sup> The vast majority of these single parent households are headed by women.<sup>91</sup> Some argue that the female-led family is now as much the norm as the two-parent family, and that rather than “deviant,” families based on the mother-child dyad have as much claim to form the basis of family law and policy as does the nuclear prototype that still prevails in the social imagination.<sup>92</sup>

## 3. Flexibilization

Families and households are also, in some senses, increasingly “flexible.” While many family bonds are of course enduring, it is also true that households now form and reform with a speed and degree of fluidity that would seem breathtaking if measured according to the norms and benchmarks of only a few years past. Some of this is attributable to higher rates of separation and divorce, and reflected in the central questions of family law: What are the financial obligations of spouses and parents upon marriage breakdown? To what extent are divorced spouses entitled to support and thereby permitted to stay out of the market, and when must they make their way back into it, whatever their roles and obligations when the family was intact? How should we value the unpaid work of women in the division of family property? Upon whom should we impose the costs of the care of children?

Sometimes household fragmentation and reformation are driven by economic pressures. Families may now split up so that members can seek, or take, new work, work that in uncertain or poor economic conditions they may have no option to turn down. Thus, migrant workers may find themselves sharing more time and living space with

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around child-rearing by heterosexual couples and female dependency on male income, see Phillips, *supra* note 83, at 46–48.

89. ROSE M. KREIDER & DIANA B. ELLIOTT, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2007, at 11–12 (2009), available at <http://www.census.gov/population/www/socdemo/hh-fam/p20-561.pdf>.

90. *Id.* at 1.

91. *Id.*

92. See generally MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) (examining and criticizing the central role played by the husband and wife dyad in family law and policy).



virtual strangers, whether those strangers are their employers or other workers, than they do with their own families. For example, workers who are driven to urban or suburban centers but are unable to afford the costs of living in close proximity to where they work may find themselves living in temporary relations with their co-workers.<sup>93</sup> But households may be voluntarily formed by people who have no blood or sexual relationship too,<sup>94</sup> and economizing may be a powerful reason for them to do so, especially where incomes are uncertain or are rising more slowly than household expenditures, as is now the case.<sup>95</sup>

The combined forces of fragmentation, feminization, and flexibilization at home and at work have not only changed the structure and operation of households and labor markets, they are reinforcing each other in ways that intensify the risk and economic insecurity of workers and family members. The upside of flexible work for workers is supposed to be rewards commensurate with effort and economic “value.”<sup>96</sup> But flexible labor markets are designed to, and do in fact, compel workers to become more responsive to market signals and incentives.<sup>97</sup> They also increase their economic risks. At the same moment that demands from work disrupt family life, fragmentation and change in household structure are very likely to lead to much more income variability and insecurity and, in turn, enhanced economic pressure as well.

One of the consequences of shifting governance priorities in labor markets and the sphere of social protection has been the imposition of greater costs and responsibilities on families and individual workers. A direct result has been the (re)familialization<sup>98</sup> of welfare: the family or household is reemerging an important site of economic security for large numbers of people. Declining incomes on the one hand and reduced expenditures on public services and income transfers on the other are compelling the family to become the

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93. See JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 14 (2005).

94. A rising number of people live in non-family households. See KREIDER & ELLIOTT, *supra* note 89, at 4.

95. Christian Weller, *The Middle Class Falls Back*, CHALLENGE, Jan.–Feb. 2006, at 16, 17.

96. STANDING, *supra* note 31, at 94–96.

97. E.g., *id.* at 97; Katherine Van Wezel Stone, *Rethinking Labor Law: Employment Protection for Boundaryless Workers*, in *BOUNDARIES AND FRONTIERS OF LABOUR LAW* 155, 158–59 (Guy Davidov & Brian Langille eds., 2006).

98. ESPING-ANDERSEN, *supra* note 59, at 45 (“A familialistic welfare regime is . . . one that assigns a maximum of welfare obligations to the household.”).

default social support system—the institution that assumes primary responsibility for its members, even where, as in the case of divorced spouses, they are no longer officially part of the same family.<sup>99</sup>

The household has always been an important economic institution, and it remains a place in which a great deal of care work and redistribution of resources is expected to, and does in fact, occur.<sup>100</sup> Yet the desire to return to a moment in which the family functioned as the primary source of welfare is, on one level, a fantasy. There are good reasons to suppose that households and families are ill-placed to perform the function of welfare-provider of last resort even if they are so inclined. For example, family members may be far-flung, including for reasons of economic necessity. Due to the feminization of the labor force, there may be no one at home in a position to provide unpaid care. Because for so many workers incomes have been flat, benefits at work have been cut, and working for a living has become a much less reliable source of security than it used to be,<sup>101</sup> covering even basic household expenses is a strain; in these circumstances, supporting others on top of immediate household members is likely to be difficult if not out of the question. In short, because of a range of economic and labor market changes that have already been underway for at least the last three decades, assuming greater economic responsibility for family members is simply now more difficult to do.

In addition, it is not difficult to observe how privatized or familialized social security schemes place some groups at a sharp disadvantage. Women are typically expected to, and often do, perform more unpaid caregiving and domestic labor for others when publicly provided health and social services are cut back.<sup>102</sup> In some societies, norms and practices around the gender division of unpaid work are starting to shift.<sup>103</sup> However, it is important to understand

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99. See generally Brenda Cossman, *Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project*, in PRIVATIZATION AND THE CHALLENGE TO FEMINISM, *supra* note 83, at 169 (describing changes in family and social welfare law in Canada in the areas of spousal definition, spousal and child support, and social welfare for single mothers, all of which impose more of the costs of social reproduction on families).

100. See MARILYN WARING, *IF WOMEN COUNTED* 25–27 (1988); Benería, *supra* note 31, at 1506; Diane Elson, *Labor Markets as Gendered Institutions: Equality, Efficiency and Empowerment Issues*, 27 WORLD DEV. 611, 612 (1999).

101. See, e.g., Green & Shierholz, *supra* note 32.

102. See Joan M. Gilmour, *Creeping Privatization in Health Care: Implications for Women as the State Withdraws Its Role*, in PRIVATIZATION AND THE CHALLENGE TO FEMINISM, *supra* note 83, at 267, 270–71.

103. See, e.g., Benería, *supra* note 31, at 1503–05 (reporting that gender norms around unpaid labor are beginning to shift in Spain).

the countervailing forces that might work against the assumption of greater unpaid work obligations by household members, whether male or female. Flexibility norms privilege the unencumbered worker who is both prepared and able to subordinate family obligations to the demands of the market. Market work organized to compel workers to respond primarily to economic signals is likely to be a disincentive to, or simply a hard constraint on, the performance of unpaid work, no matter how valuable or necessary, like child or elder care, such work might be. Whatever their advantages according to standard economic assumptions, regulatory regimes that are organized to promote the performance of ever more market work often make it more difficult to respond to family demands. Moreover, single parent families in particular are typically in no position to conform to limitless demands at work. Here, flexible work might seem like the magic bullet; rather than the problem, it seems to promise a solution to the conflict between work and family. But flexibility typically comes at a cost for women in the form of lower incomes and foregone opportunities for advancement at work.<sup>104</sup> And the flexible labor markets of the United States are associated with high rates of poverty, especially for single parent households.<sup>105</sup>

These tensions and countervailing trends are provoking crises at home and work. While people are, as they must, trying to cope as best they can, typically by just working more at home and in the market, we have not begun to come to grips with the profound intensification in workload and responsibilities that fragmentation, feminization, and flexibilization both at home and work entail and provoke.

Whether, and in what ways, these developments are ultimately sustainable is unclear, but what is certain is that we do not know, and have not even begun to even assess, the full range of costs that these processes entail. The costs of simultaneously flexibilizing labor markets and mobilizing women for market work include: the fragmentation of families; the loss or reduction of nonmarket production and services; and an increase in total work burden, especially for women who continue to perform the majority of unpaid work as well. But these costs also extend to changes in quality and extent of care to family members as women rotate into poorly remunerated work, and other women, often equally poorly paid, take their place as caregivers. This, in turn, introduces cleavages among

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104. See Elson, *supra* note 100, at 612–13.

105. See KREIDER & ELLIOTT, *supra* note 89, at 11 (reporting that a quarter of mother-only households have incomes below \$15,000).

women in the labor market: splits or shifts in the position of better and worse off women, those who are paid well and can purchase child care services on the market and those who are not and must rely on informal arrangements or family networks for care.

#### CONCLUSION: BACK TO THE CRISIS

The financial crisis, and the jobs and housing crises to which it is linked, is not only revealing the effects of labor and other types of market flexibility norms on social welfare. The crisis is also demonstrating something that feminist economists and sociologists have long argued, which is that there are continuous flows of resources, risk, power, and labor across households and markets;<sup>106</sup> only a preexisting commitment to the idea that they are distinct spheres prevents us from observing the ways in which home and market are deeply intertwined and interconnected. Many of the apparent “efficiencies” obtained by changing legal norms, including those designed to make labor markets more flexible, are obtained by imposing greater costs on households and individuals, and often women in particular, costs that do not show up in standard measures of economic growth.<sup>107</sup> There have long been arguments that this state of affairs should be reversed: for example, that subsidies and contributions from home-based production should be priced-in rather than discounted or externalized from the calculus when we judge the state of the economy,<sup>108</sup> and that the costs or “tax”—whether in terms of foregone wages or market opportunities—for those who now perform nonmarket work should be compensated rather than ignored.<sup>109</sup> The current emphasis on flexible labor markets and

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106. See generally Diane Elson, *Micro, Meso, Macro: Gender and Economic Analysis in the Context of Policy Reform*, in THE STRATEGIC SILENCE: GENDER AND ECONOMIC POLICY 33 (Isabella Bakker ed., 1994) (explaining the interconnections between the monetized and non-monetized economy); Bina Agarwal, “Bargaining” and Gender Relations: Within and Beyond the Household, FEMINIST ECON., Mar. 1997, at 1 (describing how market opportunities for women affect gender relations within the household).

107. Diane Elson, *From Survival Strategies to Transformation Strategies: Women's Needs and Structural Adjustment*, in UNEQUAL BURDEN: ECONOMIC CRISIS, PERSISTENT POVERTY, AND WOMEN'S WORK 26, 31–36 (Lourdes Benería & Shelley Feldman eds., 1992) (explaining that macroeconomists may ignore any increased costs imposed on households because of the view that they have no repercussions for the monetized economy).

108. See generally WARING, *supra* note 100 (discussing various studies and the methods used to calculate the value of women's unpaid work in the home). For a contemporary analysis, see STIGLITZ ET AL., *supra* note 21, at 21–23.

109. Ingrid Palmer, *Public Finance from a Gender Perspective*, 23 WORLD DEV. 1981, 1985 (1995).

market valuation of labor only strengthens these arguments because it intensifies the market penalties for those who do unpaid work.

But there is another reason that these arguments should now be regarded as more persuasive. The crisis is revealing how misguided it is to conflate maximum flexibility for employers and maximum disposability of workers with anything like the “general good.” And we are starting to gain an appreciation of how distorted the valuation of economic activity—and how unreliable the connection between economic growth and welfare gains—might be when the gains to firms, employers, and shareholders are counted on the positive side of the ledger without subtracting the losses and risks to workers, households, communities, and the population at large.<sup>110</sup>

We might look at the issues connecting home and market as discrete and important problems, deserving of solutions in their own right because they are important to values such as social justice or gender equality.<sup>111</sup> But we might also understand home and work as interconnected sites of a more general struggle over the nature and character of global governance. For it turns out that what connects families and markets—for example, the terms of women’s labor market participation, the availability of child care, even the presence or absence of health care—also affects “hard” economic issues such as human capital creation, global competitiveness, and long-term fiscal sustainability.<sup>112</sup>

Here, it is helpful to know that the laws and policies that make for competitive and efficient markets, labor markets in particular, are anything but straightforward, prevailing economic and regulatory theories that suggest otherwise notwithstanding.<sup>113</sup> The reported tradeoffs between equity and efficiency, for instance, may be more theoretical than real; job security may not, in fact, always come at the cost of higher unemployment; and labor market flexibility does not, on its own, necessarily produce either more jobs or greater economic growth.<sup>114</sup> But even if flexibility does seem like both an attractive and an inevitable feature of the new economy, flexibility at work has many different forms and faces—it might be functional or

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110. See STIGLITZ ET AL., *supra* note 21, at 29–30.

111. See Benería, *supra* note 31, at 1520 (discussing feminist versus functionalist motivations for reconciling work and family).

112. ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 2, at 130.

113. Simon Deakin & Frank Wilkinson, *Labour Law and Economic Theory: A Reappraisal*, in LEGAL REGULATION OF THE EMPLOYMENT RELATION, *supra* note 61, at 29, 31–33.

114. See Rittich, *supra* note 31, at 270–74.

numerical,<sup>115</sup> or temporal and geographic, for example. Which forms are desirable, and when, are questions that do not admit of any single answer; instead, they look different depending on the value, metric, or standpoint by which they are assessed. Because flexibility is ultimately about who possesses control,<sup>116</sup> workers may differ on the question from employers, and workers with obligations to family members may hold different views from those without them. Moreover, what looks optimal from the standpoint of the private sector may look undesirable, or even perverse, when assessed according to the economy or polity as a whole. In short, there is no single story to be told about what flexibility at work even *is*, let alone whether it is desirable.

As the current crisis is disclosing, the gains from flexible labor markets may be illusory, especially to the extent that they merely transfer costs and risks to workers or the community at large. Whatever their benefits in boom times, and it is apparent that they are less than even their champions supposed, economies organized around infinitely disposable workers may set in motion events whose negative effects are difficult to control and whose ultimate consequence is to depress the economy as a whole.<sup>117</sup> Large populations of working poor are a tragedy, and a condemnation, in their own right.<sup>118</sup> Unemployment, especially long-term unemployment, is likely to impoverish children and generate serious social, economic, and even political problems down the road. Moreover, the full brunt of the costs of poverty and unemployment do not just fall on those most directly affected. Low incomes inevitably contribute to falling demand and depressed economic conditions. Unemployment erodes tax bases, inducing states and municipalities to lay off public sector workers, creating still more unemployment and yet lower demand.<sup>119</sup> In short, the cycle continues and the consequences widen.

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115. STANDING, *supra* note 31, at 101–02, 114–17; Sandra Fredman, *Precarious Norms for Precarious Workers*, in PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS, *supra* note 1, at 166, 177.

116. STANDING, *supra* note 31, at 81.

117. See generally LOUIS UCHITELLE, *THE DISPOSABLE AMERICAN: LAYOFFS AND THEIR CONSEQUENCES* (2006) (documenting the rise and fall of job security in America and the social and economic effects of increasing layoffs).

118. See generally DAVID SHIPLER, *THE WORKING POOR* (2004) (exploring the causes and effects of being a member of America's "working poor").

119. Lucy Dadaan & Donald J. Boyd, Rockefeller Inst., *State Tax Revenues Show Record Drop, for Second Consecutive Quarter*, 77 ST. REVENUE REP. 1, 21–22 (2009), available at [http://www.rockinst.org/pdf/government\\_finance/state\\_revenue\\_report/2009-10-15-SRR\\_77.pdf](http://www.rockinst.org/pdf/government_finance/state_revenue_report/2009-10-15-SRR_77.pdf).

Even skeptics are now getting an object lesson in how tightly connected families and households are to the market in a globalized world and how difficult, if not impossible, it is to imagine (re)stabilizing economic relations while holding the family in abeyance. Whether, and how, we use the insights the crisis has generated to examine the connections between them and rethink our strategies and priorities is now the question.

