

disintegration of production⁹³ and the rise of flexible specialization;⁹⁴ the advent of transnational production organized through networks or chains of contracting;⁹⁵ and the emergence of the post-industrial economy dominated by service work rather than manufacturing work.

However, precarious work is also a governance issue:⁹⁶ whatever the force of new competitive pressures, technological innovation and other revolutions in the world of production as drivers of change in the new economy, legal⁹⁷ and normative⁹⁸ shifts are involved in both the growth of precarious work and the response to vulnerability at work. Global economic integration has almost certainly weakened the bargaining power of workers relative to capital. Nonetheless, there is general agreement that the policy changes and regulatory reforms of the last two decades have also been largely uncongenial to the interests of workers.⁹⁹ Moreover, work can be rendered precarious, or more precarious, not only by explicit labour market deregulation in the style advocated by the Jobs Strategy but also by “implicit” deregulation of labour markets, that is, by the

93 H. Collins, “Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws” (1990), 10 *Oxford J. Legal Stud.* 353.

94 M. Piore & C. Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (New York: Basic Books, 1984).

95 Castells, *supra*, note 23.

96 For a detailed discussion, see K. Rittich, “Rights, Risk and Reward: Governance Norms in the International Order and the Problem of Precarious Work,” in J. Fudge & R. Owens, eds., *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Oxford: Hart Publishing, 2006) 31; K. Rittich, *Vulnerable Workers: Regulatory and Policy Issues in the New Economy*, commissioned report, Law Commission of Canada (Ottawa: 2004).

97 J. Conaghan, R.M. Fischl & K. Klare, eds., *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002).

98 K. van Wezel Stone, “The New Psychological Contract: Implications of the Changing Workplace for Labour and Employment Law” (2001), 48 *U.C.L.A. L. Rev.* 519.

99 J. Stiglitz, “Democratic Development as the Fruits of Labor” (keynote address delivered to the Industrial Relations Research Association, Boston, January 2000) (2000), 4:1 *Perspectives on Work* 31.

failure to ensure that labour market norms reflect and respond to the changing types and conditions of work.¹⁰⁰

The emergence of precarious work, the new forms of risk to which workers are exposed, the changing demographics of the labour force, and the challenges all of these developments pose to established regulatory practices and social programs are at the heart of the current transformation of work.¹⁰¹ What makes the changes of particular interest for egalitarian and social purposes is that non-standard work is so often “bad,” or at least worse, work. For the most part, workers who labour in non-standard employment see less in the way of economic rewards and benefits; by definition, they have less employment security; and they typically have little access to either the training or internal job markets that would enable them to improve their labour market prospects. While some workers are well-positioned to manage, and even thrive, in the new economy,¹⁰² labour markets are increasingly bifurcated between those with good and bad jobs. There are fewer workers in the middle; as trends in the U.S. labour market confirm, large numbers of workers struggle merely to maintain their position, while a relatively small number at the top enjoy unprecedented economic gains. The less fortunate workers have little or no protection as employees: they may work in informal, grey or even black markets where, *de facto* or *de jure*, labour standards, collective bargaining law, and employment protections do not reach. As much as anything else, it is the failure to respond to the predicament of such workers that accounts for the declining

100 G. Standing, *Global Labour Flexibility: Seeking Distributive Justice* (New York: St. Martins, 1999).

101 A. Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 1999); G. Esping-Anderson, *The Social Foundations of Post-Industrial Economies* (Oxford: Oxford University Press, 1999); P. Auer & B. Gazier, eds., *The Future of Work, Employment and Social Protection: The Dynamics of Change and the Protection of Workers*, Report of the France/ILO Symposium, Lyon 2002 (Geneva: ILO, 2002).

102 For a discussion of one such market, see A. Hyde, *Working in Silicon Valley: Economic and Legal Analysis of a High-Velocity Labour Market* (New York: M.E. Sharpe, 2003).

contribution of labour and employment laws to worker protection and empowerment.

The *OECD Employment Outlook 2006* does not attempt to evaluate the influence of policy and regulatory changes (or their absence) on real wages and living standards, even though it acknowledges that these issues are important to the assessment of labour market performance.¹⁰³ Instead, productivity is simply identified as a key determinant of real wage growth in the long run. The renewed emphasis on job training and other active labour market policies might seem to be responsive to the concern about employability and “good” jobs. However, investments in skill and active labour market policies on their own are unlikely to shift significant numbers of workers into high-skill, high-velocity, high value-added work,¹⁰⁴ particularly in a service-dominated economy. Even where a focus on education and training seems appropriate if not crucial, the complexity of matching skill to market demand should not be underestimated, whether in terms of resources or of administrative and institutional infrastructure. As the many unsuccessful, or only moderately successful, efforts have underscored, policies to get workers into jobs that are both suitable and that provide decent wages typically require sustained effort over the long term, as well as significant amounts of financing and deep connections between firms and industrial sectors on the one hand, and the institutions that provide training and education to their workforces on the other. As the recent experiments with “welfare to work” strategies disclose, increasing employment may also require significant funding for child care.¹⁰⁵ A focus on skill also, of course, implies relatively high base levels of funding for public education. Alas, these elements, or at least some of them, are precisely what tend to be missing or eroded in so many jurisdictions, particularly in the Anglo-American world, which has no tradition of coordinated bargaining or labour-management and tripartite

103 OECD, *OECD Employment Outlook 2006*, *supra*, note 43, at p. 23.

104 H. Bruton & D. Fairris, “Work and Development” (1999), 138 *International Labour Review* 5.

105 A.M. Collins *et al.*, *National Study of Child Care for Low Income Families*, State and Community Substudy Interim Report (Washington, D.C.: Administration for Children, Youth and Families, 2000), online: <<http://eric.ed.gov>>

consultation about production. Given the concern that is driving the emphasis on increased labour force participation in the first place — namely, the alleviation of fiscal strain through a reduction of the scope and ambition of social and redistributive programs — there is no reason to think that the financing and administrative structures adequate to skills acquisition and other labour market initiatives would be warmly embraced, at least where they are not already well-entrenched. It is therefore not surprising that adequate financing for active labour market policies receives little attention in the Jobs Strategy.

If the gamble is that productivity growth alone will in the end translate into wage gains for workers, so that a direct focus on supporting wages and improving working conditions by other means is unnecessary, it ignores an emerging trend: worker productivity gains which are increasingly delinked from wage gains. The Jobs Strategy proposes that in labour markets shorn of the rigidities imposed by collective bargaining and employment standards, employability and, by extension, income security will better track the merit, effort and real economic contribution of individual workers. This promise rings increasingly hollow, as workers' real incomes continue to lag considerably behind the growth in productivity, and the returns of production shift from wages to income derived from capital. The OECD characterizes the decade after the 1994 study as one of "wage moderation."¹⁰⁶ Translated, this means that workers failed to benefit economically from the recent economic boom. However, even assuming that the gains for meritorious and productive workers were to materialize as promised, by definition not all workers would benefit: it is important to recognize that the Jobs Strategy effectively sanctions more income inequality among workers in the pursuit of higher productivity. As described below, this is especially significant because of the maldistribution of unpaid work between men and women.

Here we arrive at a critical issue: the distribution of gains from production, and the processes and institutions that organize this process. The efficiency optic applied to labour markets in the Jobs Strategy makes it easy to imagine that wages and working conditions really do reflect the marginal productivity of workers, except to the

106 OECD, *OECD Employment Outlook 2006*, *supra*, note 43, at p. 20.

extent that they are otherwise “distorted” by ill-advised labour market rules and institutions. Missing in this account, however, is a feature that has been recognized as a distinctive part of the contract of employment at least since the time of Adam Smith:¹⁰⁷ the disparity in bargaining power that typically obtains between workers and employers. It has long been observed that, well-positioned workers aside, employers are systematically able to call the shots and, for the most part, set the terms of the employment bargain. There is no reason to think that this observation has lost any of its force; if anything, it has in recent years gained more force.¹⁰⁸

This disparity in bargaining power, and the sub-standard contracts for workers that result, have long served to ground the case for rules that either enable collective action on the part of workers or provide a floor under the employment contract.¹⁰⁹ If the balance of power between workers and employers is a legal as well as an economic issue, something that is rooted in private law entitlements as well as labour market institutions,¹¹⁰ we should not be surprised to see declining gains for workers at a time when the property and contract rights of employers and capital-holders are being assiduously strengthened, and the legal entitlements of workers are being weakened or eliminated. The Jobs Strategy as a whole appears relatively indifferent to issues of income adequacy and job quality, and proposed reforms to unemployment insurance policy and social benefits may actually serve to aggravate the problem of bad jobs. Precisely because such reforms are designed to induce workers to (re)enter the labour market more quickly than they otherwise might, they are

107 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776; reprinted New York: Random House, 1937).

108 K. Klare, “Countervailing Workers’ Power as a Regulatory Strategy,” in H. Collins, Paul Davies & Roger Rideout, eds., *Legal Regulation of the Employment Relation* (London: Kluwer Law International, 2000).

109 A. Fox, *Beyond Contract: Work, Power and Trust Relations* (London: Faber and Faber, 1974).

110 For classic discussions of the legal underpinnings of bargaining power in the employment relationship, see M.R. Cohen, “Property and Sovereignty” (1927), 13 Cornell Law Quarterly 8; Hale, *supra*, note 58; and J. Singer, “Legal Realism Now” (1988), 76 Cal. L. Rev. 465.

likely to have an adverse effect on efforts to improve wages and working conditions. To put it another way, because the reforms effectively increase the labour supply, they are likely to reinforce rather than alleviate pressures already unleashed in more intensely competitive labour markets.¹¹¹

We also need to entertain the possibility that these reforms will increase the degree of inequality within societies. This is not only because they reduce the scope and degree of redistribution, and compel those who must rely on unemployment benefits or welfare to get by on less in the way of replacement income. The widening economic chasm that these reforms create may, in turn, work to undermine support for more robust social entitlements, thereby further eroding the matrix of public goods and services. The complex, reciprocal relationship between social entitlements and inequality derives from the political context which generates and sustains them. The adage that “programs for poor people are poor programs” reflects a recurring phenomenon: however much it seems to make sense to target resources to the neediest — the approach proposed by the Jobs Strategy and almost universally endorsed within the IFIs as the proper approach to social protection — broadly available programs and services, along with the middle-class buy-in and the political pressure that this constituency provides, often turn out to be critical not only to guarantee the quality of services, but sometimes to ensure their continued availability.¹¹² If social benefits and programs and publicly provided services become either unattractive or unusable to the majority of the population, that majority is unlikely to be invested in their maintenance, especially if alternatives are available on the market. Once this happens, further downward pressure on the quality and availability of benefits and services can be expected, with yet more detrimental results to those who depend on them.

111 For a description of the dynamic relationship between low labour standards and declining social rights in industrializing England, see Deakin, *supra*, note 24.

112 A. Sen, “The Political Economy of Targeting,” in D. van de Walle & K. Nead, eds., *Public Spending and the Poor: Theory and Evidence* (Baltimore: John Hopkins University Press, 1995) 11.

(iii) *The Consequences of Unpaid Work*

One of the assumptions embedded in the Jobs Strategy is that workers both can and will respond to a defined set of economic incentives in common and roughly predictable ways. However, some classes of workers are likely to face disadvantage under a labour market strategy centred on rewarding productivity gains and encouraging responsiveness to market signals. Women workers are among the most obvious candidates.

Labour scholars and feminist scholars of all stripes have repeatedly demonstrated that women's disproportionate representation in precarious work is a structural rather than contingent feature of labour markets.¹¹³ Essentialist claims about either women or markets are not the issue here. Much of the disadvantage arises from the presence of non-market obligations and the limits which those obligations place on labour market participation; for reasons that are social as well as biological, much of this disadvantage falls to women. More to the point, this disadvantage is a consequence of workplace rules and norms that fail to compensate for the effects of these obligations and thereby benefit those who are free of them. It is well documented that women continue to perform much of the unpaid, "reproductive" work that is crucial for both the recreation of societies and the operation of markets.¹¹⁴ This unpaid work has been described as a tax on women's labour market participation;¹¹⁵ however characterized, responsibility for performing unpaid work is likely to disadvantage women relative to men in a multitude of quite concrete ways. For example, it may constrain women's ability to take up the most remunerative opportunities that are available; it may limit their working time and thus their income; it may cause women to under-invest in paid employment; and it may induce employers to prefer male

113 This discussion draws on previous work on this issue: K. Rittich, *Re-characterizing Restructuring: Law, Distribution and Gender in Market Reform* (The Hague: Kluwer Law International, 2002); Rittich, "Rights, Risk and Reward," *supra*, note 96.

114 Beneria, *supra*, note 55; UNDP, *Human Development Report 1999*, *supra*, note 22.

115 I. Palmer, "Public Finance from a Gender Perspective" (1995), 23 *World Development* 1981.

workers who are presumed to be, and may in fact be, less restricted and more able to focus on paid work.

At the same time, this (mal)distribution of unpaid work confers correlative benefits on others. All market activity is dependent, if in often unrecognized ways, upon the processes of social reproduction and economic activity in the non-market sphere.¹¹⁶ The extensive empirical literature documenting the extent and value of unpaid work has begun to register in the literature of the World Bank and the OECD.¹¹⁷ Some of the most probing and far-reaching analyses of the post-industrial economy, and its implications for the redesign of labour market and social policy, put at the centre of the conundrum the interrelated issues of gender, the interface between work and family, and the consequences of unpaid work.¹¹⁸ Despite such analyses, consideration of the place of non-market work is often still absent from discussions of market design and structural reforms to labour markets. The OECD Jobs Strategy, in 2006 as in 1994, is a case in point. Despite the deep paradoxes that arise from failing to consider seriously the impact of unpaid work *and* pursuing a broad strategy of increased labour force participation that necessarily includes, and may even target, women, the Jobs Strategy gives no real attention to the legal and other institutional reforms that might be necessary to better, and more equitably, manage the work/family nexus.

The failure to recognize the extent of unpaid work, its intersection and conflict with labour market work, and the degree to which it underwrites economic activity allows its costs to be effectively imposed on women. The problem is not only that anyone with

116 M. Waring, *Counting for Nothing: A New Feminist Economics* (San Francisco: Harper and Row, 1988); A. Picchio, *Social Reproduction: The Political Economy of the Labour Market* (Cambridge: Cambridge University Press, 1992); Elson, *supra*, note 55.

117 World Bank, *World Development Report 2000-2001*, *supra*, note 36; OECD, *OECD Employment Outlook 2006*, *supra*, note 43.

118 Supiot, *supra*, note 101; G. Esping-Anderson, *supra*, note 101. For a collection of articles on the work/family interface in the labour law regimes in the industrialized world, see J. Conaghan & K. Rittich, ed., *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford: Oxford University Press, 2005).

significant non-market obligations does not, in fact, have equal “opportunity” to participate in the market, thus undermining both emerging labour market ideals and equality norms at the most basic level. Nor is it that the market should “accommodate” those with family obligations because of moral or social imperatives.¹¹⁹ More to the point, the singular focus on market work to the exclusion of unpaid work obscures the basic distribution of costs, risks and benefits within the labour market itself. The promise of the Jobs Strategy from the standpoint of workers is reward commensurate with their skill, effort and adaptability to the demands of the market. However, the presence of uncompensated work, the costs and burdens it imposes, and its association with particular groups systematically skew the outcomes of labour market participation against those with obligations of care. Critical but non-market “reproductive” work will still occur; indeed, such work is already increasing due to policies driven on the one hand by a pervasive fear of fostering “dependency,” and on the other by the desire to decrease the fiscal burden on states. It will be largely women who do this work; this in turn will impair women’s labour market prospects in predictable, if varied, ways.

5. CORE LABOUR RIGHTS: AN ALTERNATIVE ROUTE?

Workers do, in theory, now have “basic” or core labour rights (CLR), typically identified as those listed in the ILO Declaration on Fundamental Principles and Rights at Work: freedom of association and effective recognition of the right to bargain collectively, freedom from discrimination, freedom from forced labour, and freedom from child labour.¹²⁰ Moreover, not only states but corporations as well are now exhorted to recognize workers’ and human rights in the new economic order. Might these rights provide the foundations of a reconstructed system of worker protections in the new globalized economy? Despite references to basic rights in the matrix of social

119 ILO, *A Fair Globalization*, *supra*, note 1, at p. 4.

120 ILO, *Declaration on Fundamental Principles and Rights at Work*, *supra*, note 21. See also OECD, *Trade, Employment and Labour Standards: A Study of Core Workers’ Rights and International Trade* (Paris: OECD, 1996).

objectives within second-generation development and market reform proposals, this question can be disposed of relatively briefly. As late-comers to economic development and structural reform agendas, the status of CLR remains contested within the IFIs; as of yet, the normative recognition granted to CLR has not taken any concrete legal, institutional or even programmatic form.¹²¹ There is nothing in terms of a changed labour market governance agenda that reflects the incorporation of CLR. Tellingly, workers' rights are no more evident in the restated Jobs Strategy of 2006 than they were in the original.

Do those rights turn up elsewhere? The International Finance Corporation, the private-sector lending arm of the World Bank, has recently adopted performance standards that require firms which borrow from the IFC to respect the labour rights outlined in the ILO Declaration on Fundamental Principles and Rights at Work.¹²² However, the IFIs are clearly anxious about the implications of institutionalizing CLR in any way. In respect of labour market regulation, if not necessarily other forms of regulation, they remain persuaded that governments not only can but will fail.¹²³ For example, on the theory that labour standards can serve protectionist purposes, the World Bank takes the view that private and market-driven rather than "regulatory" solutions deserve investigation. Drawing a line through the debate, the Bank suggests that the best way to pursue CLR is through a broad-based development strategy.¹²⁴ In other words, improvements in labour standards are still envisaged as they were in the first-generation approach — as a consequence of economic growth rather than an objective that is independent of any labour market reform strategy, notwithstanding the incorporation of the social. The business community, for its part, is clear that regulatory solutions must be avoided in favour of alternatives such as the Global Compact

121 The ILO Declaration is expressly promotional in nature, rather than legally binding, in any event.

122 Union Network International, "Action by World Bank's IFC on Workers' Rights a Major Step Forward," online: Union Network International <<http://www.union-network.org>>.

123 IMF, *World Economic Outlook: Advancing Structural Reforms*, *supra*, note 68, at pp. 104-105.

124 *World Development Report 2000-2001*, *supra*, note 36, at pp. 73-74.

that employ CLR as platforms for learning and the basis of greater dialogue among firms for the promotion of “best practices.”¹²⁵

As these responses suggest, whatever the effects, normative or otherwise, of recognizing basic rights for workers or “core” labour standards, the regulatory agenda is destined to be shaped by the norm of greater labour market flexibility.¹²⁶ Given that labour market institutions are themselves critical to the realization of workers’ rights, it seems likely that for workers the most important stakes will lie here. But even if they were to be taken seriously at the programmatic level, or simply internalized at a normative level, CLR represent remarkably thin gruel for workers. If we contrast CLR to the panoply of workers’ rights and social rights that emerged in the industrialized world in the post-war era, this becomes more clear. Think, for example, of the rights outlined in ILO conventions or the International Covenant on Economic, Social and Cultural Rights, or even the aspirations behind the social legislation of the New Deal: to anyone familiar with the contemporary discourse of labour market reform, they seem like artefacts of a time and place that has already passed. The right to social security? Maybe, although current business strategies — notably the jettisoning of employee pensions and health benefits — are generating increasing worry about the economics of life after work. To an adequate standard of living for the worker and his family? To just and favourable conditions of work? To rest, leisure, and reasonable holiday time with pay? However relevant, even central, they may still be to economic security in the world of work,¹²⁷ not to mention values and objectives such as solidarity and equality, it is hard to make the case that they are generally recognized as *rights* — that is, as constraints upon rule-making and institution-building; as objectives with foundational legal and constitutional status; and as

125 For the preferred business strategy in regards to labour and other “social” concerns, see the United Nations *Global Compact*, described online: UN Global Compact <<http://www.unglobalcompact.org>>.

126 This is discussed in detail in Rittich, *supra*, note 21.

127 See ILO, *Report of the Director General: Decent Work*, 87th Sess. (Geneva: ILO, 1999), online: ILO <<http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>>; ILO Director General, *Reducing the Decent Work Deficit: A Global Challenge*, 89th Sess. (Geneva: ILO, 2001), online: ILO <<http://www.ilo.org/public/english/standards/relm/ilc/ilc89/rep-i-a.htm>>.

obligations assumed by states and recognized as such by other actors and institutions. Indeed, it is becoming hard to make the case that they are even still recognized as dominant *policy* concerns.

6. THE FUTURE OF WORK?

As the new Jobs Strategy indicates, social policy in the global arena is being progressively collapsed into labour market policy. Jobs are envisioned as the main, if not sole, source of economic security for citizens; labour force participation has become the central preoccupation of states and economic policy-makers on the social front; and social entitlements are increasingly geared to ensuring that citizens enter, and stay in, the labour market. Driven by the perceived demands of competitiveness and efficiency, labour policy, in turn, is increasingly merged with considerations of good economic governance. In this world, labour market institutions — in particular, collective bargaining rules and employment standards — are imagined largely as obstacles to growth that should be contained, weakened, or eliminated.

This realignment of social policy and labour market institutions with economic policy in the imagined market-centred world generates a paradox. To reiterate, social policy has traditionally been motivated by the desire to mitigate the effects of market forces on both individuals and society at large. Workers' rights and labour market institutions, too, are rooted in the well-documented limits of freedom of contract in the employment context. Yet despite the growing economic inequality both within and among states and its connection to the transformation of work, labour and social policy now appear to be symptomatically reflecting, and intensifying, the disadvantage of workers, whether measured in terms of bargaining power, economic outcomes, or simply access to the basic incidents of citizenship.

The Jobs Strategy confirms and ratifies a fundamental transformation of the social contract and a revolution in the norms concerning employment. No longer is the worker entitled to a measure of job security or even employment security, still less to any substantial resources from the state when labour markets fail to produce the promised opportunities. At best, the goal is employability in a dynamic labour market. Despite the "socialization" of the development agenda, we are at a moment when Marshall's description of the

purpose of social rights has been inverted. The task is not to intervene in the structure of social and economic inequality, but merely to “abate the nuisance of obvious destitution in the lowest ranks of society.”¹²⁸ Whatever claims citizens may still have upon the state — for example, the provision of basic education — the dominant policy and regulatory impulse is to reverse the process of decommodification which forms the basis of labour market institutions and social policy, and to *increase* the extent to which economic and social status tracks market measures, market incentives and market success. Furthering the social side of the development agenda turns into an argument for what reformers within the IFIs have always wanted — reforms that install market incentives and market ordering at the centre of social and economic life.

In this imagined world, the primary way in which citizens achieve social inclusion and affiliation to the polity is through participation in market activities such as consumption and labour market work. The celebratory attitude held by policy elites toward this state of affairs is evident in a recent anecdote proffered by former World Bank president James Wolfensohn. Describing the reactions of women in the slums of Rio de Janeiro to the receipt of a bill for their privately provided water services, he had this to say:

Many of the women I met during my trip to the *favelas* in Rio were keen to present me with the receipt proving that they had paid their water bill. What they were in fact showing me was the first official document that bore their names. Having such a document meant that they could go down into Rio and buy a bicycle or apply for a bank loan because, for the first time in their lives, they could offer proof of address. It meant that they were, all of a sudden, recognized members of society¹²⁹

For workers, the Jobs Strategy marks a recontractualization of the employment relationship: except for ongoing norms of obedience and fidelity to the employer on the part of employees, the employment relationship becomes increasingly indistinguishable, at the normative if not the practical level, from ordinary commercial relations.

128 T.H. Marshall, “Citizenship and Social Class,” in *Class, Citizenship and Social Development* (Chicago: University of Chicago Press, 1963) 106.

129 J.D. Wolfensohn, “The Undivided City,” in R. Scholar, ed., *The Oxford Amnesty Lectures 2003* (Oxford: Oxford University Press, 2006) 109.

The Jobs Strategy contains no theory of any positive role for labour market institutions, whether in the generation of economic growth or in the pursuit of social objectives. Indeed, it signals the displacement of labour and employment law as a discipline and as a set of regulatory norms and practices. The question is whether it also represents the disappearance of specific labour law values and objectives. Concerns about bargaining power are simply absent. But norms of solidarity and equality among workers are also in abeyance. Although workers are endowed with basic rights as individuals, there is no recognition of a collectivity that might have distinct material, political or other interests that warrant protection in the current economic order. There are concessions to the need to protect the very worst off, but little to offer workers as a group other than weak suggestions for more attention to skill and training. In addition to utopian hopes for good labour market outcomes through the progressive recontractualization of the employment relationship, and the normative priority given in the regulatory calculus to efficiency over values such as distributive justice, the Jobs Strategy offers an apologetic account. This is that the entitlements and redistributive practices offered through the New Deal or Keynesian social contracts are simply unavailable in a globally integrated world, because the conditions which enabled protection and redistribution — whether through general taxation and income transfers, or through payroll taxes and labour market institutions — no longer obtain. As the now-familiar narrative goes, once upon a time the state had effective regulatory control over investment, production and exchange within its borders. However, the disjuncture between the economy and the polity generated by the enhanced possibilities of exit on the part of capital means that this control can no longer be exerted so successfully or uniformly.¹³⁰ In its strongest form, the argument is that this relationship is now inverted: states hoping to attract investment are in a regulatory market in which firms and capital themselves exert preponderant influence over the rules and norms that govern production.

The architects of the Jobs Strategy are not alone in observing that anyone who thinks about the future of labour market institutions must now consider a changed political context, a fragmented social

130 H.W. Arthurs, "Labour Law Beyond the State?" (1996), 46 U.T.L.J. 1.

consensus around the role of the state in both economy and society, new economic imperatives, and even new regulatory objectives; this is common ground, even among those who disagree about the path of reform. Yet whether in utopian or apologetic modes, the specific path outlined in the Jobs Strategy increasingly fails to persuade. It is already clear that various jurisdictions have either followed or diverged from the Jobs Strategy in myriad different ways, with little in the way of systematic labour market outcomes.¹³¹ In addition, poverty and inequality have both risen in the era of labour market “deregulation.” The survival of labour market flexibility as a regulatory ideal, despite the revelation that its empirical claims cannot be sustained, raises basic questions. Is this ideological capture? Or is it simply a preference for a particular normative or regulatory order, quite independent of its effects on jobs or growth?

As a practical matter, states face quite concrete issues. On what basis should they jettison, or desist from implementing, labour market institutions if there is no clear evidence regarding outcomes one way or the other? Should states take the merits of “deregulated” labour markets as the baseline premise or starting-point? What if increasingly deregulated markets not only fail to generate more jobs, but actively aggravate labour market inequality and/or contribute to the phenomenon of the working poor? International agencies and institutions, technocrats, academics and others engaged in global governance debates face another set of issues. Must labour (and other) market institutions be defended in any particular form across different contexts and jurisdictions? Do we need a “better” model of labour market regulation? Or is the task of attempting to ascertain “good” or “best” practice in labour market governance itself misconceived in fundamental ways? If experts cannot successfully design labour market institutions in the abstract or from afar, even assuming agreement on the objectives of such institutions, are there nevertheless forms of

131 This observation is a subset of a more general observation: it is very difficult to conclusively link the regulatory features and projects now classically associated with “good governance” — for example, security of property or judicial reforms to enhance the rule of law and increase the use of courts to resolve disputes — with enhanced economic growth; establishing causation as opposed to mere correlation between regulatory reforms and economic outcomes is even more elusive.

analysis and expertise that might be useful in sorting out these questions?

In light of the experience so far, two observations about the analytic foundations of the Jobs Strategy seem in order. The first concerns the approach to economic analysis; the second, the mode of legal analysis. What is most striking about the Jobs Strategy, in its 2006 version as much as in the 1994 one, is how much, and how exclusively, it relies upon assumptions that have been persuasively challenged from so many standpoints, normative, theoretical and empirical, within the disciplines of economics and law. The Jobs Strategy reflects much of the mainstream approach to the question of market regulation in the international economic and financial institutions at the present time. However, even within that analytic framework, the empirical findings that emerged in the *OECD Employment Outlook 2006* are not especially surprising. In advocating “deregulation” as the route to better labour market outcomes, the 1994 Jobs Strategy bracketed a host of restrictive assumptions within neo-classical and institutional economic theory and their possible implications for labour market policy and regulation. For example, the presence of information deficiencies on the part of workers, the externalities that low wages and poor labour standards may generate for communities at large, as well as the free-rider problems that lead to the systematic under-provision of health and safety measures and other collective goods at work, are all recognized sources of market “imperfection”; they are also ubiquitous features of labour markets. Thus, even on the standard analysis, ensuring the optimal operation of labour markets is likely to require something other than the embrace of labour market flexibility norms translated into injunctions to “deregulate.” The fact that all these issues arise on a routine rather than occasional basis might suggest not that labour market institutions should be dismantled wholesale and employers permitted relatively unfettered authority to set the terms of work on the strength of their property and contract rights alone; instead, it indicates the persistence of problems, the response to which labour market institutions in some form might usefully play a role.¹³²

132 For a discussion of this issue, see S. Deakin & F. Wilkinson, “Labour Law and Economic Theory: A Reappraisal,” in H. Collins, P. Davies & R. Rideout, eds., *Legal Regulation of the Employment Relation* (London: Kluwer Law International, 2000) 29.

A variety of economic analyses better account for many of the specific (and quite complex) properties of labour markets that remain invisible in the regulatory calculus of the Jobs Strategy. On a range of different bases, all call into question the easy assumption that greater labour market flexibility, understood as maximizing employer control and entitlements and minimizing employer risk within the employment bargain, represents the path to progress. In addition to those analyses that challenge the assumption that labour market institutions are necessarily impediments to efficiency consider, for example, the following: work on the role of social norms in determining wages and working conditions, including the notion of the “fair wage/effort bargain”;¹³³ analyses of labour markets as conduits for social and cultural preferences and biases that work to the disadvantage of some groups, such as women;¹³⁴ explorations of the role of unions as vehicles for collective voice;¹³⁵ insights from behavioural economics questioning the centrality of a rational maximizer in the employment contract;¹³⁶ and descriptions of the labour contract as a partial gift exchange.¹³⁷ Many of these accounts and explanations not only have distinguished pedigrees, but shed light on persistent features of labour markets that the Jobs Strategy leaves unplumbed, and even unrecognized.

The divergence that is clearly evident between the Jobs Strategy and actual labour market outcomes may also reflect deficiencies in the underlying legal analysis. To put it bluntly, basic errors in how regulatory flexibility is assessed are compounded by unsafe claims about the consequences of regulatory reform. These shortcomings become especially evident on examining the legal foundation of benchmarks and rankings on labour market flexibility such as those constructed in the *Doing Business* report series of the

133 R. Solow, *The Labour Market as a Social Institution* (Cambridge, MA: Basil Blackwell, 1990).

134 Elson, *supra*, note 55.

135 A.O. Hirschman, *Exit, Voice and Loyalty* (Cambridge, MA: Harvard University Press, 1970).

136 C. Jolls, C. Sunstein & R. Thaler, “A Behavioral Approach to Law and Economics” (1988), 50 Stanford L. Rev. 1471.

137 G. Akerlof, “Labor Contracts as Partial Gift Exchange,” in *An Economic Theorist's Book of Tales* (Cambridge: Cambridge University Press, 1984) 145.

World Bank — now the dominant template for assessing labour market governance across different jurisdictions.¹³⁸ One problem with these benchmarks is that labour market flexibility is measured without attention to the multiple sources of law that effectively regulate the contract of employment. For example, in Anglo-American jurisdictions, the rules that affect job security may be found in common law contract rights, statutory human rights and employment standards provisions, constitutional laws, and the legal regimes that govern collective bargaining. Within each of these regimes, legal entitlements can be allocated in different ways, and decisions about how they are allocated will affect the degree of actual or practical flexibility that the employer enjoys in managing the employment relationship. Because these regimes interact in complex ways with each other, the actual “law of work” in a jurisdiction is a function not simply of the presence or absence of any particular employment rule, but of its relation to many other rules and regimes. Without attention to the multiple sources of law and the resulting complexity of determining what the law actually “is” in a given case, such analyses risk making basic errors about the nature of the labour market regimes that they purport to evaluate and the content of the rules that govern the employment relationship.¹³⁹

Efforts to taxonomize labour market regimes according to their relative flexibility may also be misleading because of a blindness to, or lack of interest in, the wide range of factors that affects the manner in which legal rules generate effects in the world. Such efforts typically fail to account for the plurality of normative orders and the impact of informal norms on the efficacy and operation of formal law;¹⁴⁰ the role of judges and other decision-makers in the resolution of employment (and other) disputes, and thus the element of ineluctable uncertainty about the scope and application of the law

138 See for example, World Bank, *Doing Business in 2004*, *supra*, note 80.

139 For example, a common law jurisdiction such as Canada may be erroneously identified as having “at will” employment, and thus ranked highly in terms of flexibility in job termination, despite the implied term of reasonable notice in contracts of employment, which may entitle an employee to a significant notice period or pay in lieu when the contract is terminated.

140 S.E. Merry, “Legal Pluralism” (1988), 22 *Law & Soc’y Rev.* 869.

itself until the decision in any particular case;¹⁴¹ the role that a wide range of legal rules *other* than those that directly regulate the employment contract may play in the labour market as a whole and in workers' decisions about when, where, whether and how much to work;¹⁴² and the existence of gaps between the "law on the books" and the "law in action," which makes it difficult, if not impossible, to ascertain the concrete consequences of any legal rule in the absence of a detailed sociological study of the regulated field.¹⁴³

At least two things seem abundantly clear. First, states have good reason to retain labour market institutions within the regulatory tool kit, even assuming that efficiency is a dominant concern. Employment demand, and therefore workers' economic prospects, are ultimately a function of myriad different rules and policies. It is worth recalling that in the contemporary global economy, firms make investment decisions based on a range of considerations and according to a complex regulatory and policy calculus; labour market institutions are not always, or even usually, the dominant consideration in these decisions. However, workers are often the first to feel the impact of regulatory changes that affect labour demand, whether in the short term or in a more sustained way. In the absence of a commitment to redistribute the costs and gains of economic restructuring by other means,¹⁴⁴ the adoption of a labour market flexibility strategy removes some of the most important mechanisms for alleviating those effects.

141 D. Kennedy, *A Critique of Adjudication [fin de siècle]* (Cambridge, MA: Harvard University Press, 1997).

142 Women's employment decisions, for example, may be affected by the accessibility and cost of child care. In theory, though, they may also be affected by a wide range of other rules, such as those that govern child custody and support, and tax codes.

143 A. Santos, "What Kind of 'Flexibility' in Labor and Employment Regulation for Economic Development?" (paper presented at the Globalization Workshop, Faculty of Law, University of Toronto, October 11, 2006).

144 One proposal is to abandon the strategy of pursuing distributive justice through labour market institutions, and to pursue more egalitarian forms of capitalism, either through basic income grants or guaranteed annual income. See, for example, B. Ackerman, A. Alstott & P. Van Parijs, *Redesigning Distribution: Basic Income and Stakeholder Grants as Cornerstones for an Egalitarian Capitalism* (London: Verso, 2006).

Second, efficiency is, clearly, not the only regulatory consideration. The claim that labour market participation is the road to social justice itself provokes a deeper, wider and more varied analysis of the legal foundations of market transactions. For reasons that have been indicated, if labour market institutions are analyzed solely through the lens of efficiency, we are likely to miss many of the distributive properties of those rules.¹⁴⁵ Attention to the role of legal rules in the allocation of bargaining power and the constitution of workplace norms quite readily brings those properties to the surface. Even a gentle tug on the legal fabric of the Jobs Strategy reveals that the ties between labour market participation and social justice are likely to unravel for many workers. But at the same time, forms of analysis that are now absent from the Jobs Strategy, and from many related programs for legal and economic reform, provide the means to reconstruct the connection between the regulation of work and more egalitarian social and economic outcomes.

145 K. Rittich, *Recharacterizing Restructuring*, *supra*, note 113.

