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Modeling Informal Labor Markets and Development:
Exit, Exclusion and the Paradoxes of Labor Market Flexibility

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Fall Schedule:

November 24th: Sealing Cheng, Wellesley College, Sexual Victimhood, Citizenship and Nationhood in South Korea
December 1st: Afsaneh Najmabadi, Harvard University, The State of Science and Sin
December 8th: Janie Chuang, Washington College of Law, Rescuing Trafficking from Ideological Capture: How Prostitution Reform Debates Have Shaped U.S. Anti-Trafficking Policy

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Introduction: (situating work in development and global governance)

Labour market formalization now lies at the center of debates around labor market regulation and governance in the developing world. What is significant is that formalization is not only of concern to those actors and institutions like the International Labour Organization who are directly mandated to consider the status of workers, nor even those for whom social issues and distributive justice are the central focus. Instead, labour market formalization has now attracted the attention of development institutions such as the World Bank, and has become wrapped into a broader set of governance and market reforms that it now promotes. Indeed, it is arguably arguments that advance labor market formalization in the name of development, embraced by the World Bank but articulated elsewhere too, that are most responsible for the acute interest in the issue at the present time.

One way to understand the current focus on labour market formalization is in terms of the encounter between old and new conceptions of labour market institutions and competing, even warring, arguments about their purposes and effects: where they come from, what they are for, what consequences they generate and who they alternatively benefit or harm.

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The primacy of work within contemporary development agendas, and by extension the significance of questions of labour market governance, including debates about formalization, is best understood against the backdrop of a series of broader transformations within the field of development in recent years. Work and labour market participation now function as a hinge within market-centered conceptions of development, connecting a range of disparate objectives from greater economic growth on the one hand to collective improvements in social welfare, aspirations for individual freedom and fulfillment and responsiveness to concerns about social justice, human rights and equality on the other.

Because work is both the place in which the vast majority of people actually participate in markets and the context in which both the risks and benefits of market activity are most directly allocated and distributed, concerns about work – its conditions, its institutional context, its broader social consequences – surfaced early on in debates about the social dimension of globalization.¹ For reasons ranging from responses provoked by grassroots political challenges to theoretical reformulations of the project of development by luminaries such as Amartya Sen², development institutions now operate in a post post-Washington consensus world. In this world, the primacy of economic growth has been inflected and chastened by countervailing concerns about the social and the human, while the early commitment to simple market fundamentalism has been transformed by an increasingly complex and variegated set of claims about the relationships between governance and development. Although private sector activity and market incentives and forces retain their foundational place as engines of economic growth in mainstream narratives about development, questions of law, governance and regulation have taken center stage. This is true not only because insights about the centrality of institutions to development have been deeply internalized within development discourse but because institutions and norms have emerged as the central terrain of battle over economic development itself: who benefits and who loses, in what ways and by how much. Given its place at the intersection of the social and economic dimensions of development

¹ See the Copenhagen Declaration, the Social Summit.
² Development as Freedom
howsoever conceived, it is hardly surprising that the governance and surveillance of work have become central preoccupations.

If work has become central to economic development and social progress in virtually all of its contemporary senses and meanings, it is no mystery why informal labour markets are the focus of labour market policy and governance initiatives in the developing world: it is simply impossible to talk about work or workers for very long without thinking about the nature, structure and operation of informal markets. Although many developing states possess labour market institutions and social protection schemes that rival in ambition if not generosity those found in the industrialized world, they typically have limited scope and reach only a minority of the working population. Indeed, it is virtually a defining part of developing country status that the majority of the workforce is, if not untouched by the regulatory state then, for both legal and practical purposes, effectively denied the work-related benefits and protections extended to those in the formal sector. In Latin America, for example, about half the population in the region works in informal markets\(^3\); elsewhere in the developing world, the percentage is much greater.\(^4\) Moreover, it is increasingly clear that labour market informality and the governance issues it raises is not only a matter for the Global South. Informal markets not only dominate the world of work in developing countries, informality is a persistent, and growing, feature of the labour markets of industrialized states too.\(^5\)

For those on the left, social or progressive side of the question, the significance of informality lies in the conjunction of workplace informality with substandard working conditions and economic insecurity. The vast majority of the working poor are located in informal markets, and a disproportionate number of those in informal markets are

\(^3\) ILO, Decent Work in the Americas
\(^4\) In India, for example, less than 10% of the workforce is in the formal sector. See Kamala Sankaran, “Protecting the Worker in the Informal Economy: The Role of Labour Law”, Davidov and Langille.
\(^5\) Cites…. The growth of informal work may be a structural feature of some post-industrial economies, at least to the extent that the growth of high-end financial and technical work is associated with the growth of a low-road, service-based economy as well. The locus classicus on this phenomenon is Saskia Sassen, The Global City, 1991.
women.\textsuperscript{6} In other words, there is significant overlap between those who are excluded from the benefits typically associated with labour market formality and those who are badly compensated, without voice and influence, and/or otherwise marginalized and disadvantaged at work. For these reasons, labour market formalization has long been a significant marker of economic progress for workers. And because of the ongoing overlap between precarious or ‘bad’ work and work in the informal sector, the formalization of work is still typically regarded as the route to better wages and working conditions and overall economic security for workers. The ILO, for example, sees the progressive formalization of the informal economy as a linchpin in the promotion of its ‘decent work’ agenda in the developing world.\textsuperscript{7}

Because arguments for formalization now sound both in the registers of better work and economic development, the case for focusing on informal labor markets seems compelling if not overwhelming. Nonetheless, the current enthusiasm for the formalization of work, an enthusiasm now shared across a range of institutions, may be both misleading and misplaced. The thesis explored here is that notwithstanding the shared interest, the traditional correlation of labour market formality with better terms and conditions of work risks coming apart. Because of the conjunction between formalization and flexibilization of labour markets, formalization now raises a paradox: rather than progress for workers, it may represent the continuation of disadvantageous terms of work. Indeed, the progressive dismantling of traditional distinctions – both normative and institutional – between workers and other economic and commercial actors makes it more likely in some contexts that formalization will entail the subjection of workers to new costs and obligations with little in the way of corresponding benefits and protections.

Understanding how this might be so requires examining some of the foundational terms and questions around which the debate on informality at work turns.

The first thing to observe is that informality, both as a descriptive and as an analytic category, is losing traction and utility. To the extent that informality inclines us to think of fixed groups of workers, particular forms of work, and/or locations in the economy that are ‘beyond’ the state or outside the reach of law and policy, the category itself may be misleading, something that now serves as a conceptual barrier rather than an aid to appreciating both the actual characteristics of world of work and the forces which operate on it.

Formal and informal work are now deeply intermingled as a matter of fact and a matter of law. Within chains of production, within sectors of the economy, even within firms or workplaces, it is now as normal as not to find workers who clearly fall into the formal category, others who seem clearly informal, and for reasons to be described, still others whose status may be in question. In addition, both formality and informality at work, whether considered in terms of legal status or simply as social or economic phenomena, are partly a product of law rather than simply spaces or categories on which the law either operates or fails to operate. For example, formal status at work may be the result of a decision to extend legal protections and benefits to particular workers, while informality may be the result of the opposite decision. But as a practical matter, formality and informality may be influenced by myriad policy and regulatory decisions: here, think tax law, housing or zoning policy, the drawing of municipal boundaries, or property rules. Once we begin to observe the role of law in both creating and altering the status of those in both formal and informal markets, the utility of the categories begins to diminish; they diminish still more once we consider the choices that can be made about the different ways to structure work with and through law and the varied forms of work relations that may result.

This leads to the second observation: the increasingly uncertain factual or empirical connection between labour market formality and ‘better’ work. Because of a series of widespread and well-documented transformations in the organization of production and
regulation of work – for example, the vertical disintegration of production,8 the re contractualization of the employment relationship, the drive to ‘flexibilize’ of work and dismantle labour market institutions, all of which exert downward pressure on workers’ bargaining power and shift risk from employers to employees9 - the attribution of better work to the formal sector may now be better described as a contingent claim rather than something that can be safely maintained as a general rule. At minimum, the normalization of atypical or non-standard forms of work in the formal sector and the precarious employment that often emerges in the fragmented forms of work relations in the new economy10 has made it clear that there is no necessary connection between formal work and work that is ‘good’ or ‘decent’, as the objective is now typically described on the international plane.11 Indeed, depending on the institutional framework in which it occurs, labour market formalization as a development strategy may be in tension with the goal of better or ‘decent’ work. For both reasons, advocates of labour market reform, at least those interested in improving the current status and power of workers, now need to ask a more specific and focused set of questions. Rather than simply formal or informal, the question should be formalization for what purposes? And what in the ways of norms, practices and entitlements, for workers, for employers, and for other actors, is being formalized?12

This paper probes these questions and the potential uses and effects of labour market formalization by considering two models or narratives of informality now circulating in the international order. While these models are directed in the first instance to the question of informality in the labour markets of Latin America, they are informed by broader themes and arguments about the causes and consequences of informality and thus are useful for analyzing informality more generally. The first is the ‘exclusion’ model

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8 Collins, Hepple
10 There are a number of studies examining why it is that so much reorganized work in the new economy can be characterized as ‘precarious’ and what, specifically, this has to do with legal institutions (Alain Supiot). Many focus on gender (see, for example, Brenda Cossman and Judy Fudge, eds., Privatization, Law, and the Challenge to Feminism (Toronto: University of Toronto Press, 2002) and Judy Fudge and Rosemary Owens, Precarious Work, Women, and the New Economy (2006)).
11 ILO, Decent Work For All
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associated with the International Labour Organization. The second is the ‘exit’ model, which bears a family resemblance to arguments articulated by Hernando de Soto\(^\text{13}\) and is now circulating within the governance proposals of the World Bank. Considered in tandem, these models allow us to garner some clarity on the varying assumptions that underpin arguments for formalization and to probe just what the effort to formalize labor markets can and can’t be expected to achieve, particularly in the context of the simultaneous drive toward greater labor market flexibility. The suggestion is that it is precisely in the conjunction of formalization with the ‘flexibilization’ of work that we can locate the significance of the questions, formalization for what and what in the way of entitlements is formalized?

If the entry into formal labour markets, on its own, holds little promise for improving the status of workers and may even impair it, there is still reason to think that labour market institutions are one of the keys. However, given the characteristics of much informal work, simply resuscitating or transposing traditional approaches to labour market institutions may take us only so far. It could be that legal norms and institutions other than those that directly regulate labour markets are of more pressing and immediate interest for the workers in these sectors. For this reason, workers’ advocates also need to keep their eye on the ‘law of work’ broadly conceived. That is, they need to consider the complete set of norms, rules and institutions that, directly or indirectly, affect the bargaining power, allocation of risk, and resources enjoyed by the parties to the employment contract.

**Contextualizing economic growth, work and equality**

“Labor is most often a poor person’s only asset. A growth process that is not associated with job creation may therefore fail to reduce poverty”.\(^\text{14}\)

While this observation captures part of the significance of labour markets, it can be restated in somewhat stronger terms. Labour markets are the most important conduit

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13 Hernando de Soto, The Other Path (1989)
between economic growth and social welfare (ILO, 2006): what happens or fails to happen in labour markets is critical to the dispersion of gains from economic growth and to economic security. The link with poverty is clear. Virtually by definition, labour is the only asset of those who are poor, unless they have access to capital, usually land, with which to engage in subsistence activities. A growth process that is indifferent to the conditions of labour or that has only an attenuated relationship to job creation is unlikely, perhaps unable, to reduce poverty, at least in the absence of robust mechanisms for redistribution. Yet this is a situation that virtually defines the state of many developing countries.

But so is the link between labour markets and economic security. Across the industrialized world, a range of regulatory reforms and policy shifts driven by an emphasis on fiscal austerity concerning ‘social’ expenditures and norms of individual responsibility for welfare have all converged to “commodify” citizens, that is to render people more reliant on participation in markets to avoid poverty and ensure basic economic security. A series of transformations in the developing world is operating to ensure that labour markets play a similarly central role in ensuring economic security there too. Subsistence and traditional economic activities are under pressure as a result of reforms to land law, trade liberalization, and development initiatives that are designed foster higher, more productive uses of resources. Family-, kinship- and community-based networks of support are shifting and/or eroding at the same time, and often because of the same forces, increasing the likelihood that, for most people, basic economic security becomes simply co-extensive with securing labour market work on adequate terms.

The same features that render labour markets central to economic security also mean that labour markets effectively produce much of the current income distribution. The (mal)distribution of the benefits of economic growth, both within and among states, is arguably the central development conundrum of our time.\textsuperscript{15} It is now clear that the fortunes of states in the global economy are diverging at an increasing rate, and that the gains to any individual state from increased trade and integration are uncertain at best. At

\textsuperscript{15} Sen, Birdsall, Pogge
least until the financial crisis, the economies of the industrialized states continued to grow, if at a slower pace than during the so-called ‘golden age’ of the post-World War II era. However, regional hegemons like India and China excepted, the position of many transitional and middle income countries has not been good for a while; many are languishing, and some have now joined the ranks of the very poorest, a group whose prospects are dire. Some states have seen negative growth, that is, their economies have literally contracted for a significant period of time during the last generation. While it is common to attribute these problems to internal deficiencies, governance deficiencies in particular, the inability of so many states to maintain their position vis-à-vis other states let alone prosper in the current order has engendered a host of questions about the justice of the international order and the sustainability of the regulatory norms and institutions around which it is organized.

The story of growing internal inequality is related and often no better. What a number of commentators have observed about the economy of the United States is true to some degree in many other places too. The gains from growth have been highly, even extraordinarily, concentrated in the last generation, with those in the upper income stratum capturing the lion’s share while those below either languish or fall further behind. Even the middle class failed to benefit from the long stretch of economic growth that lasted through the 1990s and the first half of the current decade.

Stories about the uneven face of development can also be told about the Global South, even, perhaps especially, where growth rates have been outstanding, as in China and India. Reports of the Indian development success in the papers of record in the West are likely to trumpet the emergence of a burgeoning middle class that is acquiring consumption habits much like those already entrenched in the industrialized world. Less well-advertised is the fact that as much as 70% of the Indian population may be worse off by the very transformations that provoked the success of the minority; the aggregate

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17 Pogge
18 Krugman, The Economic Policy Institute; .
picture swamping significant internal differentiation in the distribution of economic growth.

The failure of wages to keep pace with inflation and to reflect the gains in worker productivity in the last generation is part of the story. So is the shift in the distribution of income from wages to capital. But inequality is not growing everywhere, at least not at anything close to the same rate. While a series of factors - the reorganization of work, changing returns to skill and human capital, and trade-related restructuring, for example – is routinely identified as the source of workers’ woes in the West, there is evidence that the state of workers’ rights, labour market institutions and social insurance and protection policies is also part of the equation. So, too, is the larger matrix of rules and policies in which workers’ rights, labour market institutions and social protection schemes are themselves embedded.20

All this suggests that labour markets are central to the project of development, particularly one whose aims extend beyond the mere measurement of economic growth21, and that heightened attention to the specific institutional and regulatory conditions under which people are incorporated into formal labour markets is now in order. And if the state of work is a useful index of the character and trajectory of development in general, zeroing in on informal markets and contemporary debates about labour market formalization gives us a more precise window on some key issues on the horizon.

**Informal Work: Categories and definitions:**

In 2002, the ILO defined the informal economy as “all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered

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21 It is now a truism that development extends beyond the ‘merely economic’, see for example, Amartya Sen, *Development as Freedom* (1999); UNDP, Human Development Reports, various years.
by formal arrangements.” According to the ILO, this definition captures three situations or types of informal activities:

- those not included in the law, which means that they are operating outside the formal reach of the law;
- those not covered in practice, which means that although they are operating within the formal reach of the law, the law is not applied or not enforced;
- activities in which the law discourages compliance because, for example, legal rules and procedures are inappropriate, burdensome, or impose excessive costs.

One of the things that hampers discussion of informal work is the use of concepts and categories that reflect a set of assumptions about the nature and organization of work, the operation of labour markets, and the character of the worker in a particular geographic and historical context. For the most part, the ones we use reflect the norms and forms of economic organization in the industrialized North of the twentieth century. Elsewhere, and even at other times in the industrialized North itself (such as the present), these concepts and categories are much less functional; sometimes they pose profound barriers to even accurately perceiving the nature and character of the economic activity they purport to encompass and describe. For example, the concept of ‘the worker’ has traditionally referred only to those engaged in market work and, of those actors, only those in an employment relationship. In addition to the self-employed, the category has traditionally excluded those engaged in subsistence activity, barter or other non-market work. For this reason, analyses of work the pivot around such a worker are unlikely to capture contexts in which market work is intermingled with non-market work. For the same reason, they are likely to neglect unpaid work altogether, notwithstanding that such work may be effectively obligatory for those engaged in it, of economic value to the

unpaid workers themselves and to the wider community, society and state, as well as profoundly important to the forms of labour market work such workers do engage in.24

In addition, basic concepts and categories such as workers and labour markets posit stable populations of workers that can be safely distinguished from non-workers and the unemployed on the one hand and commercial actors on the other. However, in situations in which people are effectively compelled to engage in a continuously shifting range of economic activities for survival, some of which are legal, others of which occur in grey or black markets, still others of which involve home or self-production which have no connection to the market at all, those concepts and categories map poorly onto the actual economic activity in which people are involved. For related reasons, the relevant economic unit may not be the worker as much as the household. In these cases and others, traditional labour market categories distinctions can be problematic, of not misleading. With this in mind, two things are worth noting about the new ILO definition.

The first is that the revised definition reflects the fact that the informal economy encompasses a broad range of economic actors – “own account” workers, that is workers who work for themselves but don’t employ others, workers in family businesses, those engaged in marginal self-employment or subsistence activities like farming and fishing – who fall well outside the category of ‘workers’, at least as traditionally conceived in the field of labour law. Second, the definition collapses the distinction between workers and other commercial actors/entrepreneurs in the market, a distinction which has been foundational to labour and employment law. This is particularly important in the new/post-industrial or service economy, where the recontractualization of work has vastly expanded the number of market actors who are formally independent yet economically insecure and lacking in any significant amount of bargaining power. This, in turn, helps destabilize conventional conclusions about which economic actors are in need of protection through labour standards or the facilitation of collective bargaining, and which are appropriately governed simply in accordance with the normal rules and

24 A related problem was identified by Marilyn Waring in her of study of the manner in which international institutions classified and valued productive economic activity. See If Women Counted (1988).
institutions of commercial life.\textsuperscript{25} This transformed definition of informality also turns out to have implications for the domain of relevant legal fields, compelling consideration of an expanded range of rules and policies. For example, the inclusion of self-employed, nominally independent contractors within the definition of ‘the worker’ may mean that in some contexts, for example in rural communities or where there are indigenous populations, agricultural policy and land law are part of the effective ‘law of work’.

Under this expanded definition, labour market informality is now more likely to stand as a proxy for ‘bad’ work, in part because it better captures some of the following features and complexities of contemporary work. From this revised vantage point, we can also observe growing continuities between formal and informal work and perhaps the diminishing significance of the classification itself.\textsuperscript{26} Formality and informality can no longer be reliably associated with particular sectors or particular jobs, even within economies. Although some activities are traditionally informal within particular economies, informality increasingly cuts across rather than aligns with industrial and service sectors. The reorganization of work through the vertical disintegration of production\textsuperscript{27} and the rise of firms linked primarily through shorter or longer term contractual relations means that, through progressive sub-contracting, economic activity may easily end up in conditions of de facto informality, even within industrialized states and even where they are in principle covered by labour and employment laws.

In Toronto, for example, a garment industry whose production was once largely organized in unionized factories now takes place largely through ethnically organized sub-contracting that draws mainly on a shifting and fluid population of home workers who are almost certainly engaged in care work and household activity in tandem with their market work. While such workers are not formally exempt from either collective bargaining laws or employment standards – indeed, there are special regulations targeted

\textsuperscript{25} Alain Supiot, \textit{Beyond Employment} (Oxford, 2001); Guy Davidov, The Three Axes of the Employment Relationship
\textsuperscript{26} World Bank, \textit{Good Jobs, Bad Jobs, No Jobs, Jobs Concept Note}
toward these workers in the Ontario *Employment Standards Act*\(^{28}\) that attempt, among other things, to ensure that they do not work below the minimum wage - they are, for all practical purposes, ‘unregulated’ and even informal as defined by the ILO. That is, they are governed by the customary norms that operate in the industry and in the community, and indirectly by the contractual, property and other legal entitlements that structure their employers’ operations. Absent some form of collective representation, their formal employment rights are almost certainly chimerical. Even if they were to join a union, the ability of these workers to bargain collectively or otherwise exert pressure on their employer would be remote, absent some amendment to the procedures governing certification and bargaining under the Wagner Act labour relations regime that obtains in the province of Ontario. Without some third party such as a union, they are highly unlikely to ever try let alone obtain enforcement of basic entitlements to wages and vacation pay, even assuming that those wages and hours could be reliably calculated in circumstances in which, as in this sector, paid and unpaid work activities may be inextricably intermingled. In addition, the nominal employer may not be the person such workers really need to go after anyway; perhaps he too is financially squeezed by those above him in the production or supply chain who ultimately set the price that will determine much about the conditions under which these workers labour. Here too they would face another hitch – they lack any employment relationship with party in effective control of their work.

Merely rehearsing the myriad difficulties such workers face in accessing the legal rules that they do, in theory, possess makes it clear how poorly they fit within the categories, laws and assumptions of what is a fairly typical set of labour and employment laws. To turn it around, these difficulties reveal also how poorly those categories, laws and assumptions serve the workers in the working circumstances, both market and non-market, in which they actually now find themselves.

At the same time, the normalization of sub-contracting means that workers in the same industry, even in the same production chain, may work under a wide variety of

conditions, from the most standardized, secure and formal to the most contingent, precarious and informal. This almost certainly means that they have, in addition to widely varying terms and conditions of work, differential, or no, access to labour and employment norms and institutions. For related reasons, the formal and informal sectors are not distinct spaces and categories, but rather are increasingly linked and in some cases continuous. Workers may move across the boundary between formality and informality, depending on economic circumstances. Moreover, the boundary itself may be not only porous but uncertain, for example, because workers may be covered by some legal rules, but not others. To put it another way, workers may be formal for some purposes, such as tax laws, but not for others, such as labour standards or occupational health and safety requirements. Rather than exceptional, this scenario of continuity and connectedness between formal and informal work yet vast differentiation in both working conditions and entitlements seems likely to capture a significant amount of work if, as the ILO proposes, *de facto* as well as *de jure* considerations govern the classification of workers and economic activity.

In such a world, one of the major puzzles is accounting for what is a mobile and unstable boundary between formality and informality. Part of the explanation lies in the myriad fragmented forms of work that are emerging in the new economy and the sheer dynamism and change in the forms and types of work that people now do. But regulatory and policy decisions – both how rules are designed and how people respond to them - are almost certainly part of the story. This however only repeats the conundrum, as there are competing explanations for what causes or drives informality and different accounts of the effects of informality as well as different ideas about why we should care about informality.

**Situating formalization in development:**

While labour market formalization has long been associated with better work, it is now a key element of contemporary development policy as well part of global anti-poverty
strategies that rest upon strategies of legal empowerment 29. The first thing to observe is that it is not obvious that this should be the case. It was once thought, for example, that the evolution and formalization of labour markets was an incident of development, an event that simply occurred in tandem with the processes of economic ‘modernization’. Yet as Manuel Castells and others have pointed out, it is no longer possible to tell linear stories about the evolution of labour markets, and it is now evident that formalization no longer follows automatically from development. 30 It is entirely possible to have a burgeoning informal sector embedded in highly industrialized economies. It may even be that the continuity or emergence of an informal sector along side a formal labour market is now a normal facet of economic life in the global economy. Certainly, global cities in the North as well as the South now routinely appear to exhibit fairly robust informal sectors. 31

This raises a question – if increasing formality cannot be taken for granted, why might it be actively promoted as a matter of development policy? The answer, in brief is the link with productivity: formalization is associated with higher levels of productivity.

**New regulatory norms: labour market flexibility:**

Although labour market formalization has not been on the radar screen of development institutions and market reformers until recently, the same could not be said about labour market norms and institutions. Rather, labour market flexibility has been a central pillar of the policy generated by the OECD and the IMF global governance norms promulgated by the international financial institutions and policy since the 1990s. 32 Some degree of appreciation of this project is necessary to locate the two narratives about labour market formalization described below and to comprehend what formalization now might entail and, more importantly, what it might not.

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29 UNDP, Making the Law Work for Everyone, Commission on the Legal Empowerment of the Poor (2008)
32 See World Bank, World Development Report 1995 Workers in an Integrating World; OECD Jobs Study, 1994; for a discussion, see Kerry Rittich, “Rights, Risk and Reward”, in Fudge and Owen
In brief, labour market flexibility (LMF) has become a code word for a set of reforms designed to loosen or eliminate job security, decentralize collective bargaining, and tether the receipt of social benefits more tightly to labour market participation. The case for labour market reform originally grew out of a stylized comparison between the labour market institutions of the United States and those of Europe in the early 1990s, and began as a set of injunctions to European states to ‘deregulate’ labour markets and move toward the apparently superior American model. However, these reforms were quickly adopted by the international economic and financial institutions and incorporated as part of standard reform advice, and sometimes lending conditionality, to developing states as well. To put it simply, while LMF originated as a remedy for the perceived Eurosclerosis that afflicted one region of the advanced industrial world, it was quickly adopted as a general approach to the regulation and governance of labour markets.

The starting point of the flexibility agenda is the claim that fostering economic growth in a globally competitive economy requires maximizing employer flexibility and freedom in the management of labour, as well as other, resources. To the extent that policy in the area of work beyond this is in order, it should be directed to the cultivation of human capital. In addition, growth involves a reorientation of attitude on the part of workers, specifically a willingness to continually update skills, adapt to change and to forego the objective of job security, in short to accept greater risk for the possibility of greater reward through subjection to what are regarded as both largely beneficial and in any event irresistible market forces.

The assumption beneath this claim is that labour market institutions have a largely negative relationship to growth, in that they impair the efficient allocation of labour resources, reduce productivity and competitiveness, cost jobs and should be reformed or eliminated to generate greater economic growth. Despite well-founded critiques directed

33 The reference point is the OECD Jobs Study (1994).
34 IMF 1999, 2003
36 See Katherine van Wezel Stone, From widgets to Digits
at both the assumed effects of labour market institutions and the consequences of labour market reforms, these assumptions are rarely questioned; instead they are increasingly accepted as ‘facts’, even economic ‘laws’, in contemporary debates about workplace regulation and policy in the international order. 37

The significance of LMF to formalization lies in the fact that labour market formalization is now more likely to take place within a context in which employer flexibility and the creation of an attractive and competitive investment climate have regulatory priority. At the same time, concerns such as solidarity, protection, equality, concerns about countervailing worker power, distributive justice and social welfare that have traditionally grounded the development of labour market institutions and social protection schemes have been demoted.38 The argument is not that labour markets ‘really are’ flexible, at least in an ideal form. The balance between LMF objectives and norms and institutions that are directed toward worker protection and the facilitation of worker collective action varies, and the extent to which the vision behind the labour market flexibility agenda has actually been realized varies considerably in developing states, as it does in the industrialized world. Indeed, there is likely to be resistance to LMF in regions such as Latin America because of its association with the Washington Consensus39 and the unhappy combination of failed economic growth and widespread privation to which its policies led in the region.40 Nonetheless, the normalization of flexibilization as a regulatory objective means that it may be now unsafe to associate formalization as such with progression toward any significantly greater set of workplace entitlements. This is especially true where there have also been reductions in administrative and enforcement capacity.

**Explaining Informality: Two narratives:**

37 For a fuller discussion, see “Rights, Risk and Reward”.
38 Guy Standing, for example, calls labour market flexibility simply a code word for downward pressure on wages and working conditions. See Global Labour Flexibility.
39 John Williamson
40
There are two narratives about labour market informality, its causes and its remedies, now in circulation, one that can be associated in a stylized way with the ILO, and the other with the World Bank.

I. Informality as Exclusion

The longstanding view, one still largely maintained within the ILO, is that informal workers are members of a disadvantaged class that arises and persists because of phenomena such as economic dualism, labour market segmentation, and discrimination. Informal workers may be disadvantaged, for example, because of overt discrimination against particular classes of citizens and/or workers. They may also be excluded because of legal and administrative barriers to participation in the formal sector. For example, workers may fall outside the category of employee and in formal terms be classified as self-employed, or they may be involved in types of work that are excluded from labour and employment standards, either across the board or in selected instances. From this standpoint, labour market informality is an ill to be remedied by the extension of formalization to excluded workers, at least to the extent that such workers are not involved in illegal or illicit activity that the state has independent reasons to want to sanction or quash altogether.\(^{41}\)

Because the presumption is that such workers prefer the generally superior entitlements and benefits of formal sector work, the focus is on removing the barriers to participating in the formal sector. This primarily involves legal and regulatory reform, but may include other policy measures directed at the social and economic causes of informality. For example, some, perhaps many, people may be effectively forced to engage in informal work because of inadequate opportunities in the formal sector. Some activities may remain informal because they are neither productive enough nor profitable enough to permit the worker to comply with formal sector regulations. When engaging in self-employment, a typical alternative to formal sector employment, workers may encounter

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\(^{41}\) There may be debates about the status of some types of work, for example sex work. States may resist the classification of sex work as work, treating it instead as a problem of criminal behaviour or a violation of human rights. For a discussion, see Kemala Kempadoo
further practical barriers, such as lack of access to capital and business services; this, in turn grounds the persistence of informal activities that might otherwise come to form part of the formal sector. For women, informal labour market participation or economic activity may be effectively compelled by labour markets or enterprise structures that remains uncongenial and unaccommodating to family obligations, obligations which fall, and whose labour market consequences fall, disproportionately on women. Because informality typically maps on to poor working conditions and lack of economic security, strategies for formalization may include a wide range of different rules and policies directed at the varied sources of informality.

2. Informality as Exit

The alternative view, articulated by the World Bank, holds that informality is a function of government failure and institutional flaws. Although this view concedes that some informality may be adequately explained by the traditional exclusionary thesis, it holds that much informality results from badly designed or simply burdensome labour market institutions and social protection schemes that rational economic actors do not want and will try to evade. According to the Bank, workers make determinations about the desirability of formal sector work on such bases as: “physical accessibility (proximity) of benefits and services…; the quality of services offered within the scheme; workers’ valuations of the sometimes-complex bundle of goods and services that they are compelled to “purchase” via payroll taxes; program rules that make it difficult for workers to qualify for certain benefits; and design peculiarities that compel affiliated families to pay twice for the same services.”

Exit as an explanation of labour market informality is an extension of the more general argument that dysfunctional regulation is a barrier to entrepreneurial activity and an impediment to economic growth. An important source of this argument is Hernando de

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42 World Bank, Informality, Exit and Exclusion (2007), 193
43 World Bank, Doing Business (various years).
Soto’s account of informal markets in Latin America\textsuperscript{44}, an account that plays an increasingly central role in programs to address poverty as well.\textsuperscript{45} However, support for the exit analysis is in some senses over-determined, as it reflects the entrenched analytic bias against market ‘intervention’ or regulation that is characteristic of economic governance norms in the international order, and bears a family resemblance to well-established claims about the nature of ‘government failure’ and theories of state capture by special interests in public choice theory as well.

This competing ‘exit’ view is best illustrated by quoting \textit{in extenso} from the Bank’s explanation for the persistence of informality in Latin America:

“[W]orkers and firms make implicit cost–benefit analyses about whether to cross the margin into formality, and they frequently decide against it. In this lens, much of the informal sector, in fact, offers jobs that are equally valued by workers to those they could get in the formal sector. Contrary to the predictions of the exclusion view, this implies that many informal workers are equally well-off (in broad welfare terms) as in other formal jobs fit to their skills; and, being ‘voluntarily’ informal, they can move to the formal sector but choose not to.”\textsuperscript{46}

In addition, the Bank places great stress on the non-pecuniary benefits available in the informal sector that workers are presumed to desire, such as greater autonomy, flexibility, and mobility. Noteworthy about the exit analysis, particularly in contrast to the exclusionary view, are the analogy between the decisions of workers and those of firms and the emphasis on rational calculation on the part of workers akin to that exercised by commercial actors. Rather than a function of discrimination or the segmentation of labour markets, participation in informal markets is imagined to result from personal characteristics as well as choice exercised by workers in light of a clearly preferable option.

While informality is regarded as a problem under the exit as well as the exclusion model, the differing assumptions about why informality arises leads to diverging prescriptions about what to do about it. Much of the answer to labour market informality, according to

\textsuperscript{44} Hernando de Soto, \textit{The Other Path} (1989)
\textsuperscript{45} See for example the Commission on the Legal Empowerment of the Poor, \textit{Making the Law Work for Everyone} (New York: UNDP, 2008)
\textsuperscript{46}Id. at 45.
the Bank, lies in labour market ‘deregulation’ or flexibility: states should get rid of labour market institutions as they are disincentives to formality, and institute in their place regimes of flexible, dynamic work relations that, rather than guarantee benefits, simply permit workers to buy what they want on the market. In addition, states must re-engineer their social protection schemes to ensure that they do not deter labor market participation. While there is a place for “risk management”\(^{47}\), that is, schemes that assist households in responding to shocks and smoothing income over a lifetime, the role of social protection is not, in this analysis, to supplement labour market income or, still less, provide alternatives to work. According to the Bank, ill-designed interventions that court precisely these risks as well as other forms of “government failure” abound in Latin America.\(^{48}\) Brazil, Mexico and Colombia, for example, have all instituted programs directed at groups such as rural farmers, low-income families and older citizens.\(^{49}\) While they have been quite successful at reducing poverty levels in their target populations and often do a better job of reaching the poor than do traditional employment- or work-based benefits\(^{50}\), there is concern that schemes delivering non-contributory benefits, especially those only available to those outside the labour market, will operate to deter labour market participation, create disincentives to labour market formalization and, by extension, generate adverse effects on productivity.\(^{51}\)

For the ILO and others interested remedying the social deficit associated with first-generation development policy\(^{52}\), by contrast, one of the central tasks has been to find ways to extend benefits and services and allocate resources to the sectors of the population that are now excluded, those working in informal markets or engaged in subsistence activities in particular. The delivery of benefits is an end in itself, and delivering social protection so as to ‘decommodify’ workers, that is to render workers


\(^{48}\) Informality: Exit and Exclusion, 193

\(^{49}\) See for example the Bolsa Familia in Brazil; Familias En Action in Columbia; Opportunidas in Mexico

\(^{50}\) Although there may be participation requirements – keeping kids in school; taking them for vaccinations/health checks – that turn out to impose costs on women, impede women’s economic independence and enforce traditional gender roles. See Helena Alviar.

\(^{51}\) Informality, Exit and Exclusion, 184-190

less vulnerable to the vagaries of markets, is part of the very purpose of formalization, at least to the extent that formal sector work functions as a platform for the delivery of social benefits.

For related reasons, the ILO also resists labour market ‘deregulation’ as a strategy for formalizing the economy. Instead, the ILO takes the view that states should adopt policies that improve the ability of those in informal markets to comply with the demands of formality:

“It should not, however, be assumed from this that those operating in the informal economy are deliberately evading their obligations (which can lead to strategies of deregulation or prosecution). Rather, it should be recognized that the main reason for the failure of informal workers to comply with their obligations is their inability to afford the costs involved, given their current production levels. The challenge is, therefore, to draw up strategies which create the conditions to enable those in the informal economy to meet the costs of compliance with administrative and fiscal obligations”. 53

These models provide alternative ways of both explaining and tackling informality. It is worth stressing that they are models, narratives and devices for thinking about the world of work. How much they explain, whether about labour markets or the decisions of the people within them, should be taken as questions rather than facts. Each can be read on a number of levels – both programmatically and institutionally on the one hand and analytically on the other – and each model, as an analytic, might also lead to different types of policies and reforms with which each is commonly associated.

Let’s start with the political and programmatic. The exclusion thesis is fairly strait forward. How should we read the exit thesis, the newcomer on the block?

One possibility is that it is, in the first instance, a response to informality as exclusion, more particularly, an effort to manage, both discursively and institutionally, concerns about the social deficit in the area of work.

53 ILO, Decent Work in the Americas, p. 58.
To reiterate, questions about work and workers’ rights have been central to debates about the social dimension of globalization since the mid-1990s and they are likely to become stronger rather than weaker; in addition, it is now uncontroversial that jobs are an important conduit to poverty alleviation, an objective that not only the Bank has placed at centre stage but one to which the international community as a whole is committed. In short, there is pressure to attend to work, and in the developing world, that means attending to informality. However, for the Bank and other international financial and economic institutions, engagement with jobs and labour market informality, indeed labour markets in general, generates a number of dilemmas. As the exclusion thesis and the ILO’s Decent Work agenda discloses, the mainstream approach to bad work has been to strengthen and broaden labour market institutions and anti-discrimination provisions and extend social protection schemes to the excluded, strategies that run counter to the Bank’s well-entrenched labour market governance agenda based on LMF. In view of the belief that these traditional responses to informality slow growth, ‘cost jobs’ and create labour market insiders and outsiders to boot, the question arises: is there a ‘market-friendly’ alternative? Enter “informality as exit”. Whatever its other attractions, one surley lies in the fact that it provides a way to both engage with the problem of informality yet avoid or counter resort to traditional labour market solutions.

Second, and in a related vein, it could be that the exit analysis is simply a back-formation of the pre-existing commitment to labour market flexibility, another vantage point from which to press arguments for deregulation. Indeed, it may be possible that the current preoccupation with informality is itself largely a consequence of larger debate labour market governance, a specific instance in which to advance or refute claims about the place and function of labour market institutions in market-ordered economies. If so, it bears a family resemblance to developments in other governance and policy debates. Efforts to address the social deficit – whether defined as poverty, gender inequality, or bad work – often become yet another basis to promote rules and policy preferences that

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54 Jobs Concept note
55 Halving the number of people living on $1 a day is the first of the Millenium Development Goals.
56 There are parallel examples – see Engendering Equality, for example.
57 See also Trebilcock, in Davidov and Langille
have long been on the table for other purposes and objectives such as promoting growth. Protecting property rights, for example, becomes rebranded as legal empowerment of the poor\textsuperscript{58}, or market integration becomes a vehicle for greater gender equality.

The interest in informal labour markets might also reflect an increasingly capacious governance agenda, an effort to bring all economic spaces and activities under surveillance and regulation and to subject those that lie on the ‘outside’ to norms and institutions that connect them more securely to global spaces and processes. But the commitment to formalization, under both the exit and the exclusion theses, may also reflect the fact that the formalization of labour (and other) markets has to some degree become an ‘end in itself’, simply part of what it means to operate under the rule of law.

Whatever the rationale, the analytic of informality as exit seems to lead ineluctably to the prescription of deregulation or labour market flexibilization; this, in turn, has the effect of collapsing much of the distinction between formal and informal markets, at least from the standpoint of workers if not their employers. For the result is formal work that is stripped of many of its benefits and attractions, formal work that pays less and is much less secure, formal work that perhaps should be (and sometimes is) called informal for the degree to which it provides workers with greater voice, protection or bargaining power.\textsuperscript{59} While from a legal standpoint this is not surprising – under the resulting regulatory framework, employer property and contract rights largely structure the terms and conditions of work – it does raise in a central way questions about the whole project of formalization, namely, what is it for? What do we expect of it?

It is worth emphasizing that this is not an argument ‘against’ formalization. Formalization has, as a historical matter, been correlated with better work, and there are reasons to suppose that it might still be useful even where it does not provide a platform for the delivery of work-related benefits. The exit analysis, however, does make clear the increasingly unsafe assumptions about what formalization might entail or bring with it. If

\textsuperscript{58} UNDP, Commission for the Legal Empowerment of the Poor
nothing else, it is a caution not to take formalization per se as an index of good work, not to mistake form for substance.

But to return to the earlier discussion of contemporary labour markets, it is also possible that the growing instability of the boundary between formal and informal work is a function of the fact that participation in the formal economy may mean less, and offer less, to workers than it once did. To put it another way, the transformation of regulatory norms within the formal sector may itself be helping to collapse the boundary between formal and informal work and at the same time lessen the attractions of formality, at least for some workers. If so, the arguments that link the formalization of labour markets with greater economic development may also be less persuasive than they now seem; if formalized work is less attractive to workers, arguments for formalization may become self-undermining. Although its authors do not themselves come to this conclusion, the exit analytic may help explain these possibilities.

The exit model captures some important dimensions and complexities of labour market dynamics that the traditional exclusion model does not explain. For example, it distinguishes between the intent or motive behind a law or regulation and its effect. It allows us to imagine how people might use rules to structure their own behavior, rather than merely being subject to those rules. It provides one way to explain some of the visible properties of formal and informal markets in the new economy, namely that the border between them is fluid and moveable, ‘made’ in ways that a focus merely on the formal presence or absence of law does not reflect. It also provides a mechanism to explain how the formal and informal sectors might change. Whether it provides the most plausible explanation about either the effects of legal regulation or the changes and interconnections between formal and informal labour markets is open to more doubt.

**Problematizing choice and productivity in labour markets:**

The exit model makes a number of claims about the contributions of formalization and labour market institutions to the value of worker choice and freedom in labour markets
and to productivity gains and, by extension, economic growth. Given the central role that choice and productivity play in the exit explanation of labour market informality, it seems worth analyzing the concepts themselves as well as the assumptions on which they rest. As applied to labour markets, both seem problematic in quite foreseeable ways.

“Choosing” Informality:

There are a number of reasons to cast a skeptical eye on models of labour market informality that presuppose a “choosing actor” who has the option of participating in formal labour markets and decides against it. Most are connected in some way to one of two issues: first, the lack of bargaining power that characterizes the position of most low wage workers and second, the way that labour market choices are structured by legal rules and informal norms, both inside and beyond the labour market.

The first is that it is simply a fantasy that workers, low wage workers in particular, exercise anything like the unfettered choice – whether in determining the location of work, setting its terms and conditions, or choosing among alternatives - attributed to them under the informality as exit thesis. Largely due to reasons of the balance of bargaining power in labour markets, it is safer to assume the opposite. It has been uncontentious among most scholars of labour markets for some time that, high-end employees excepted, the vast majority of employees even in the formalized markets of the industrialized world enter into employment contracts on a ‘take it or leave it’ basis. Indeed, it has long been recognized that economic circumstances – in particular, the presence or absence of alternatives to wage labor - largely dictate whether there is any real choice whether to enter into an employment contract at all.60 Workers do not, for the most part, choose the structure of work, but take it on the terms on offer; this almost certainly extends to whether work is formal or informal. While no doubt there is room for some degree of innovation on the part of the individual worker, work in both the formal and informal economies tends to be already structured by myriad norms, conventions and practices that constrain any individual’s margin for choice.

60 See Adam Smith, An Inquiry into the Wealth of Nations, on this point.
Among the implications that we might draw are that workers are unlikely to simply ‘choose’ whether to work in formal or informal sector, particular where entire sectors are located in one or the other. This simple exercise of choice is even more unlikely if the worker is but one link in a production chain. In this case, the party in effective control of the work, whether that person is an employer or merely a superior in the contracting chain, can be expected to make the decision about formality versus informality, and it may very well have its own reasons to avoid formality. One reason to opt for informality is that it may be impossible to be ‘formal’ for one purpose and ‘informal’ for another. For example, the employer or contractor, especially one that is marginal in terms of profits, may wish to avoid other rules and regulations, such as environmental standards or tax obligations, if not the regulatory net *tout court*, and for that reason be reluctant to place itself on the radar screen of any state agency or administration. And it is not uncommon, of course, for employers to try to avoid payroll costs; the employer may find itself in an economic context in which there are relentless pressures to cut costs. As the ILO has observed, it is the continual downward pressure on costs in competitive markets that now feeds the growth of precarious, informal work and which, at the extreme, leads to work under conditions of forced labour.61

The other reason that choice seems an inadequate explanation of informality lies with the problem of assuming knowledge of workers’ ‘real’ desires – for particular entitlements at work, for social protections schemes or anything else – simply on the basis of the choices that workers make in actually existing labour markets. This is not to claim that workers don’t know their own preferences. Nor is it to mount a paternalistic defence of labour market rules on the basis that they are ‘good’ for workers, whether workers want them or not. Rather it is a point about the endogeneity of legal rules and policies – including labour market rules and social policy – to workers’ choices as expressed in their actions and decisions about where, and how, to work. Choices about work are not made simply in the air, rather, they are (partly) a function of labour market institutions themselves. That is, as the exit model suggests, choice about work is exercised in light of the available

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alternatives. However, the attractiveness of the alternatives can’t be separated from ease and difficulty of pursuing them; the costs and benefits that are attached to them; and how different costs and risks are allocated and benefits determined or distributed.\textsuperscript{62} The attractions, costs, risks and benefits of different options, in turn, are deeply connected to, if not inseparable from, the institutional structures in which they are embedded and the micro details of those rules, regulations, norms and practices through which they operate. Moreover, choices are also not fixed or stable over time; instead, they can be expected to change as the background regulatory structure changes. Small details may make a difference to the cost and attractiveness of different options. In addition, the rules are inter-operative insofar as workers’ choices are concerned: change to one rule or policy may alter the significance of others, and at the same time change the overall calculus about the desirability of different options about when and where to work.

What this means is that worker choices are structured in myriad ways by a complex matrix of formal and informal rules and norms. Why we would think that labour market institutions are uniquely problematic or responsible for workers’ choices and how we could safely isolate them from the many other forces and institutions in play is a puzzle. Given the relational character and effects of these rules, it is unclear whether such a conclusion could ever be a fact rather than a decision.

This relationship between the exercise of choice and the structure of legal rules is, of course, recognized on one level by the proponents of the exit thesis. However, the implications of this relationship go well beyond the conclusions that they have drawn: that workers ‘choose’ informal work because they don’t like the benefits on offer in the formal sector and are unwilling to pay for them. It is not difficult to imagine a much wider range of possibilities. Workers may indeed want the benefits, or if not those benefits then some others. Some of those benefits or protections may currently be

\textsuperscript{62} For example, it is impossible to read workers’ desires for unionization simply off of unionization rates; instead, it is crucial to know how difficult it is for workers to organize; whether workplace entitlements have changed or not; and whether unionization is discouraged by other means. In addition, both worker’s rights and level of organization may be affected by local or national norms. As entitlements are eroded or non-union workplaces become normalized, it may become more difficult for workers who wish to organize and bargain collectively to do so.
difficult or costly to obtain. But this may be a function of how benefits and protections are organized and who is currently paying for them. Thus, ‘choice’, at least as evidenced by the distribution of workers across the formal and informal sectors, cannot itself be a basis to settle the nature of the institutions that partly determine those what choices will themselves be.

The exit model appears to rest on a number of presumptions which seem unsafe when applied to labour markets, whatever their theoretical attraction or application to economic actors in general. The first is that labour market institutions now provide the ‘wrong’ package of protections and benefits from the standpoint of workers. This may or may not be true in particular contexts. But it is unlikely to be true of all workplace benefits and protections, or of all workers, or of all or even very many labour markets. But even assuming a degree of truth to the claim, respect for workers’ decisions to reject them can hardly stand as they now do: as a general indictment of labour market institutions and/or a general injunction to ‘deregulate’ labour markets. Given the role of labour market institutions in reconstituting, and in general improving, workers’ bargaining power, proponents should bear a large theoretical burden in establishing why workers’ would reject them out right. And given the historical record – overwhelmingly one of workers’ struggles for not against labour market institutions – it is unclear why the exit thesis should be accepted as a plausible baseline account of workers’ relation to labour and employment standards at the present moment.

The second presumption is that workers both can, and will, simply pay for any benefits, protections and forms of insurance that they desire through the market. This seems manifestly unsafe at the empirical level, nor is it well-founded even as a matter of economic theory. There may be collective action problems – think of health and safety, for example – as well as myriad other market failures that impede the purchase of goods and services, even assuming that there are markets for all goods and all the things that

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63 Otto Kahn-Freund
workers might desire could in fact be obtained by decentralized, individual purchases in the market.\textsuperscript{64}

Third, it seems to be assumed that workplace benefits and protections serve no wider social or public interest and/or that the benefits of formalization outweigh those interests. However, the presence of externalities, both positive and negative, to better and worse terms and conditions of work make this, too, seem demonstrably unsafe. It has long been understood that unemployment and low wages produce a raft of associated social problems whose effects are experienced well beyond the people most directly affected. And workplace benefits that seem to reduce efficiency by one calculus may be defensible by another, for example sustaining consumer demand.

Fourth, it assumes that workers are rationally motivated and engaged in maximizing their material or broader welfare goals in the labour market. But as countless labour economists and sociologists have already noted, workers may be engaged in ‘satisficing’ rather than the optimization or maximization of gains at work.\textsuperscript{65} That is, they may take the easier, more available option as long as it is acceptable rather than the ‘best’ option. Workers also have notoriously imperfect information about job availability and rates of pay; this makes them prone to decisions that would look irrational under the informality as exit thesis. In addition, the exit model presumes a work force in which, the determinants of human capital aside, workers are largely fungible; it also assumes high mobility among sectors. But labour markets are almost universally segmented, if segmented along different lines in different contexts and at different times, and some sectors may be for all practical purposes ‘closed’ to many classes of workers, including women and ethnic, racial and religious minorities; this remains true even where there are formal entitlements to protection from discrimination.

Labour market entry and exit is far from costless or easy; rather, transaction costs abound that discourage both searches for alternatives and transfers to other work except where

\textsuperscript{64} Willborn, Dau-Schmidt
\textsuperscript{65} Herbert Simon
there are clear and substantial improvements. Finally, many jobs are filled through
personal connections and networks rather than in the open market; this, too, complicates
the narrative about, or at least the understanding of, ‘choice’ about work in myriad ways.

These are only the best known, general observations about labour markets and the ways
in which they depart from standard assumptions about the availability and operation of
choice in markets. In any particular market, there may well be additional features that add
to the complexity of figuring out how people make decisions about jobs and why they
end up in the formal and informal sectors. How, exactly, all of these complexities are to
be accommodated within the exit thesis is unclear. But if unfettered choice about
formality versus informality is a fantasy, then it is a productive fantasy: locating the
problem of informality in dysfunctional labour market institutions draws attention away
from many other things that are almost certainly implicated.

**Productivity and Informality:**

Both the ILO and the Bank now approach the question of labour market institutions and
policy in terms of the dual goals of ensuring growth and increasing worker productivity.
Despite their different orientations to the question of labour market informality and
labour market regulation in general, both accept the claim that informality is connected to
the general question of development. Having accepted that a principal remedy to
informality is simply higher levels of economic growth, both take rising productivity to
be the key issue.

According to the ILO, the problem is that growth fails to promote quality employment for
all; while growth is essential, it can take a long time for the benefits to ‘trickle down’. 66
Moreover, low labour productivity is described as the main reason for the problem of
‘bad work’: productivity is “one of the main components of labour demand, and the main
determinant of conditions of work”. 67 Raising productivity is also a central objective of

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66 Id. at 8.
67 Id.
the Bank; indeed, the interest in informality may itself be essentially derivative of the overriding objective of raising productivity in order to stimulate growth.

While there are differences in emphasis, on both analyses better wages and working conditions for workers follow largely from reforms that foster higher labour productivity. Perhaps because of their shared belief in supporting growth through higher productivity, the ILO and the Bank end up converging to a greater degree than might otherwise be expected in respect of the overall legal, policy and institutional reforms that are required to address labour market issues in Latin America. The ILO’s main macroeconomic prescription is to improve the investment climate, an objective that is perfectly consonant with that of the Bank.68 In the ILO’s view, “mesoeconomic” policies, that is the mid-level legal rules and institutional structures that affect the operation of the economy should be focused on providing a favourable investment climate; again, this is standard advice from the Bank. For the ILO too, the regulatory focus is centered on property rights, tax incentives for investment, and other regulations to generate economic growth. Thus, a large part of the policy task of producing decent work appears to be a function of implementing the regulatory infrastructure that generates investment in the hopes that it will provide quality employment as well. For the Bank, this means eliminating labour market institutions. Yet despite the resistance to the ‘deregulatory’ agenda promoted by the Bank, labour market institutions receive little discussion in the ILO’s analysis of informality. And there is correspondingly little positive vision of labour market institutions, notwithstanding observations at the outset that the weakening of labour market institutions corresponded with the emergence of more precarious work and higher levels of economic insecurity. Thus, hopes for improvements in wages and working conditions in the analyses of both institutions end up heavily freighted on raising worker productivity.

Yet if ‘productivity’ is now central to labour market analysis, as the above account suggests, it is also one of the most inadequately theorized elements. For the ILO in particular, there is a tension between the ongoing endorsement of the exclusionary

68 Id at 28
explanations of labour market informality and the new focus on raising productivity as the remedy for ‘bad work’.

Even if we accept that raising productivity is part of the task of producing ‘better’ work, productivity is as much the question as the answer. This is because worker productivity appears to stand in an ambivalent and multi-faceted relationship to objectives such as producing jobs, tackling informality and generating increased growth. Sorting out the different dimensions of this relationship is key to labour market and other governance issues. As the ILO notes, for example, not all informal work in Latin America is characterized by low productivity. Moreover, both higher and lower productivity may be the effect or output of different policy and regulatory choices. Without laying out all the complexities of these relationships, what follows are some observations that bear on the debate about productivity and, by extension, labour market and other policy.

First, it bears stating outright that in some cases it is possible to raise productivity simply by having workers work for less, or having fewer workers work harder. What higher productivity means, how is obtained and what costs it might exact is, I think, relevant to the whether more productivity is always good.

Second, higher worker productivity can, and does, sometimes lead to falling demand for labour. For this reason, it is unclear that raising worker productivity would be the answer to the main problem identified in Latin America, which is growth that fails to generate much in the way of quality employment. It also seems entirely possible that rising productivity in sectors could co-exist with the growth of relatively low-paid, low-security jobs. Raising productivity is also no (necessary) answer to the phenomenon of ‘jobless’ growth; this too is a growing problem in both developed and developing countries. For example, it is estimated that since 1990, only about one-third of growth in output has resulted in growth in jobs, a number that has declined over time.\(^69\) This suggests that a labour market strategy anchored primarily in policies designed to generate growth must be inadequate for labour advocates. The ILO, in fact, recognizes this problem when it

\(^{69}\) Kapsos (2005), cited in World Bank Concept note
observes that fiscal and macroeconomic policy has been almost exclusively focused on inflation control rather than sustainable growth, often at the cost of jobs. Nonetheless, the analysis fails to engage in any serious way with what, in regulatory and policy terms, a different and better approach to economic growth, one that would place the creation of good jobs at the centre of the project, would look like. Instead, and to reiterate, the ILO largely replicates the advice of the Bank on how to generate growth.

Third, while productivity is part of the story, wages and working conditions do not map onto productivity in any simple way. Moreover, the focus on productivity is not responsive to the growing disconnect between wages and worker productivity already identified in the U.S.. To put it simply, there is nothing about the ‘fact’ of increased productivity which determines how the economic gains from that increase will be distributed. And if the gains are not distributed to workers, or if the distribution of rewards is significantly skewed, then there will be little, if any, connection between rising productivity and rising workplace standards. The possible divergence between productivity and worker rewards is clearly evident in a globalized economy, where firms now routinely offshore production precisely to exploit the possibility of obtaining lower cost labour elsewhere. But firms also pursue similar strategies within jurisdictions, for example by sub-contracting work formerly done ‘in house’. The observations easily made in the context of outsourcing demonstrate what scholars have long observed, which is that labour markets often exhibit a fundamental lack of correspondence between output and rewards. This suggests that variables such as firm size and organizational structure, as well as other considerations that impinge on the nature of work relationships and labour contracts – from social norms to bargaining power and legal entitlements - are part of the equation. It has long been argued that higher labour standards, at least under some circumstances, might lead to greater productivity. The theoretical case for a potentially positive relationship between labour market institutions and productivity may be as

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70 Id. at 25  
71 Krugman blog – stats and charts  
72 Deakin
strong as the negative relationship posited by the Bank.\textsuperscript{73} The arguments for supporting labour market institutions in particular contexts are almost certainly persuasive, particularly if dynamic efficiency and the quality of the workforce are considerations. Nonetheless, by omitting to explore this in any detail, the ILO effectively cedes the argument about growth to the Bank.

Fourth, the relationship between productivity and working conditions likely goes in both directions. Bad work is not only a function of low productivity; low productivity is partly a result of poor working conditions and inadequate access to resources, including income. There may be all kinds of constraints on workers’ mobility, constraints ranging from lack of adequate transport, to childcare services (especially critical for women).\textsuperscript{74} This suggests is that the connection between social protection schemes and labour market productivity is, at minimum, more complicated than presented by the Bank; it may even be inverted. Rather than a disincentive to labour market participation, sometimes social protection schemes may be its condition precedent. This is, again, partly recognized in some of the literature of the Bank that analyzes Latin American labour markets. But such issues are treated as marginal rather than central, and any programs or initiatives designed to respond to them are generally directed towards specific ‘at risk’ groups rather than the population at large.

Whatever its benefits, the focus on productivity in its current form appears to generate the following effects.

First, it works to entrench the dominant narrative about the relationship between labour market institutions and growth that lingers on from the Washington consensus era, a result that is problematic if the narrative does not, in fact, merit the deference which it is so often given. The Bank may have independent reasons to cling to the claim about the pernicious role played by labour market institutions in efforts to advance growth.

\textsuperscript{73} Deakin and Wilkinson; Willborn; Dau-Schmidt; Hirschman. Under certain conditions, collective worker voice may lead to efficiency gains; limits on working time as preserving the human capital of the workforce

\textsuperscript{74} World Bank concept note, \textit{Good Jobs, Bad Jobs, No Jobs} p. 9
However, there is no reason for the ILO to simply accept the claim without scrutinizing the conceptual framework or the evidentiary claims on which it rests.

Here is where it gets interesting. There may well be particular labour market rules and standards that are dysfunctional in particular contexts; there may even be some that are ill-advised in general in the current economy. For example, it is widely accepted that states face distinct challenges, and some degree of policy constraint, in regulating work in a globally or regionally integrated economy. In particular, policy makers need to keep an eye on the enhanced possibilities of relocation or ‘exit’ by firms and investors in the face of regulatory regimes that such actors prefer to avoid. In addition, the structure and operation of a post-industrial, service-based economy is different enough from its predecessor that many existing rules and regimes cannot be expected to serve the objectives for which they were designed, even assuming that the objectives themselves remain desirable.

However, the overall claims about the nature of ‘good labour market governance’ require the acceptance of a set of linked, and contested, assumptions: about the theories that best explain the operation of labour markets; about the proper objects and objectives of labour market governance; about the best means to achieve those objectives through law and policy; and about the effects of regulatory reform in the world. Still more, it requires the rejection of competing explanations, objectives, and mechanisms, no matter how illuminating and compelling they may seem with respect to issues such as labour market informality.

But even an internal defense of labour market ‘deregulation’, at least one based on neoclassical economic principles, is difficult to maintain in a coherent and non-arbitrary way: labour markets simply vary too much, and too routinely, from the markets presupposed in the underlying analytic framework for that framework to be applied to the generation of workplace rules and policies in the manner in which it now is. Instead, a whole host of assumptions about the propensity to ‘government failure’ and the demerits of market ‘intervention’ are required in order to shore up arguments in favor of labor
market deregulation. However, these assumptions are analytically problematic; they may also be politically or ideologically motivated, something that is increasingly clear in a context in which regulatory interventions for other purposes are once again returning to the zone of the normal. They are also empirically unsustainable. Despite the claims of those who favor ‘liberalizing’ labour market reforms, neither causal nor merely correlative claims about the benefits of labour market ‘deregulation’ appear to be borne out in fact with any degree of reliability.\textsuperscript{75}

Second, the fixation on productivity, even if useful for some purposes, may divert attention from a host of other policies and regulations that play both positive and negative roles in job creation, job quality and economic growth.

Third, the drive to enhance productivity via the currently popular route, LMF, is likely to lead, fairly directly and predictably to worse, not better, working conditions in some circumstances.

\textbf{Formalizing work: what’s in it for workers?}

As the two models indicate, formalization may have very different implications for workers, depending on how formal sector participation is conceptualized, what assumptions are made about the drivers of informality, and what strategies are adopted to promote the transition from informal to formal work. The presumption that badly-designed labour market institutions are the cause of informality ultimately devolves into an argument for ‘deregulated’ labour markets per se. For if rational actors will always seek to avoid the unnecessary costs associated with mandated employment terms and benefits, then such costs must be reduced in order to reduce the inexorable pull of informality.

\textsuperscript{75} OECD, 2006; Rittich, Global Labour Policy as Social Policy, Canadian J. of Employment and Labour Law (2008)
Juxtaposed to the traditional model, the exit model raises squarely the question: what is the objective of formalization? Is it to alleviate poverty and ensure voice and better terms and conditions at work? Is it, by contrast, to maximize participation in markets or promote growth? Or is it for some yet other end? The exit model also poses a conundrum for labour advocates: Should we care about labour market formality and informality in the abstract? Despite the historical correlation between formalization and better work on the one hand and informalization and economic insecurity on the other, is formalization still the route to progress, or should we be looking in some other direction? To return to the opening questions, formality for what, and what is formalized?

The exit strategy is predicated on the assumption that formalization is a benefit, yet is remarkably indifferent to the terms of formalization for workers. Whether formalization does benefit workers and by how much, however, depends in part on the regime under which workers in fact labour.

**Formalization and the Rise of Precarious Work:**

As described earlier, the distinction between formal and informal work is collapsing, in content if not in form. Much new economy work is contingent and insecure in a variety of ways. The recontractualization of the work relationship means that workers may work on short term contracts with no job security; they may have highly variable hours resulting in variable pay; they often lack contractual benefits of any kind, and hence individually bear the risk of foreseeable events ranging from pregnancy to illness to diminished earning capacity in old age; they may be required to buy tools or pay for training prior to doing even relatively menial and poorly paid work. While there are multiple intersecting drivers of this process, work typically becomes more precarious as well as less remunerative when labour markets are ‘deregulated’. That is, whatever costs are imposed upon workers as a consequence of the reorganization of work, the liberalization of trade, or the elimination of subsidies, there are still more adverse effects
for workers, measured in terms of risks and rewards, flowing from a legal regime at work that is designed to promote flexibility\textsuperscript{76}.

There is little that is mysterious about this process: in structuring the employment bargain purely through property and contract, ‘good’ labour market governance norms repose effective power in the employer to set the terms of the bargain.\textsuperscript{77} It should hardly be surprising in an increasingly dynamic, volatile and uncertain economy if firms and employers systematically take the opportunity to offload risk to other parties, including workers, wherever possible. The temptation to do so may be virtually irresistible in many cases. The exit strategy is predicated on the view that workers will benefit simply through broader economic growth, and through the rising pay levels and living standards that it makes possible. While this may have been a convincing narrative in the past, it seems inadequate and unpersuasive given that many of the mechanisms that ensured the transmission of these benefits to workers and their diffusion throughout the wider community are being dismantled and new ones have yet to be constructed.\textsuperscript{78} There is no reason to imagine that benefit to workers, or all workers equally, is a natural or inevitable result. The dispersion of income so visible in many economies is already evidence of the myriad ways in which this transmission and diffusion may be blocked, interrupted or simply go awry.

Moreover, the analysis is not responsive to the structural impediments which growing numbers of workers face. Anyone who has obligations of care, a normal rather than exceptional condition for the growing number of female workers but true for some male workers as well, will be systematically disadvantaged under a system in which that labour isn’t priced in the labour contract.

\textsuperscript{76} There are different forms of flexibility at work; see Fredman, for example. It is unclear that the ‘numerical’ flexibility preferred by employers rather than ‘functional’ flexibility in terms of job tasks does anything more than shift economic risk to workers. For this reason, it is unclear why as a matter of general public policy it is a good thing

\textsuperscript{77} This has been observed at least since the time of Adam Smith….

\textsuperscript{78} Ruggie, Cornia, Kapstein, Paul
To the extent that it replicates most of the pre-existing terms and conditions of work in the informal sector, formalization in the context of flexibilization seems likely to not only continue the trend to collapse the distinctions between formal and informal work. Rather, it is likely to ensure that the convergence between the terms and conditions of work in the formal and informal sectors occurs at a lower rather than higher level. The risk under labour market flexibility norms is that formalization, rather than a component of a decent work strategy as imagined by the ILO, may be neutral at best as to the persistence of precarious work. Formalization may even produce more precarious work in the formal sector, to the extent that it induces more people to participate in formal markets and, in so doing, reduces workers’ bargaining power and puts downward pressure on wages in that sector as well.

Finally, it seems possible that formalization could result in outright economic disadvantage for workers, although not for the reason that the Bank suggest - because they could be compelled to pay for work-related benefits that they do not desire. Rather, the risk may be the imposition of new work-related obligations with no correlative or countervailing benefit to workers. For example, because workers will now be formally ‘counted’, one of the most likely effects of formalization, on any terms, is that workers will be subject to income tax. Unless some corresponding work-related or other social benefit accrues to workers at the same time, all other things being equal, formalization may result in less in the way of disposable income and/or simply a worse overall deal for workers. This is, of course, also an outcome that is likely to induce workers to do the very thing that proponents of formalization purport to avoid: vote with their feet to remain in the informal sector.

It is probably important to notice that securing new sources of tax revenue is likely to be one of the arguments for formalization, even if that argument does not always come to the surface in debates about labour market policy.

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79 Informal markets are undesirable in some quarter because they impair the tax base. See World Bank, *Doing Business in 2004*, p. 87.
The general point is that the same calculus that leads the Bank to assume that labour market institutions are a bad idea – they are incentives to informality - may also be an indictment of other rules and regulations. Sometimes this is recognized; this is the basis for its well-entrenched view that regulations impeding the entry and exit of firms should be abolished.\(^{80}\) Yet sometimes it is not or, if it is recognized, other considerations turn out to be more important. For example, broadening the tax basis is one of the objectives of the mainstream approach to fiscal reform, one that the Bank endorses in Latin America and elsewhere.

If we attempt to track the incentives argument consistently, and carry it through as the exit analysis invites us to do, one conclusion might be that labour market formalization cannot, in fact, be easily disconnected from a commitment to labour market institutions that generate some additional entitlements of value for workers. Put otherwise, the narrative about worker choice suggests that labour market flexibility is also likely to impede formalization: not only is formalization without entitlements normatively problematic from the traditional exclusionary standpoint; it may also simply not work. The absence of any parallel analysis of the need to eliminate taxes to avoid the same exercise in rational calculation on the part of workers at least raises the question: whether extending the tax base might not be part of the point of formalization.\(^{81}\) It is no secret that the mobility of capital has made it more difficult to tax capital and shifted the burden to immobile factors such as labour. Yet, some baseline level of taxation, however minimal, is still required by all states, and securing that base is an increasingly pressing problem, in the developing and the industrialized worlds. If taxing capital is not only less possible but, under the current governance agenda, also undesirable due to the adverse effects generated on investment, then it is not hard to imagine that the formalization of work might seem attractive for fiscal reasons too.

The conjunction of labour market flexibility with formalization means that it is now unsafe to assume that formalization will lead to improvements in wages and working

\(^{80}\) For the foundational argument, see H. de Soto, The Other Path. See World Bank, *Doing Business* (various years).

\(^{81}\) John Williamson, the Washington Consensus
conditions, indeed, it is unsafe to think that formalization tells us anything at all about the
terms and conditions of work. This raises a question: do we need to pursue formalization
as an independent goal at all if wages, working conditions and voice at work are our
principal concern? Or should strategies simply be directed toward improving conditions
‘on the ground’ for workers, strategies that may include, but are not limited to, extending
the reach of labour market rules?

However, the substantive emptiness of the category also means that formalization cannot
necessarily be associated with greater productivity either. This suggests that debates
about formalization may function as a proxy for other objectives, for example simply
lower labour costs. If so, should we not simply be talking directly about the merits and
drawbacks of labour market ‘flexibility’ for objectives that included but are not limited to productivity?

II. Land Reform as part of the Law of Work?

As indicated above, transformations in the new economy have already functioned to
break the existing conceptions and categories upon which labour law rests, and impelled
us to consider a wider range of rules in connection to work. There is a very wide range of
policy and regulatory instruments that might affect the position of workers: trade law,
financial regulation, bankruptcy and debtor/creditor law, zoning and municipal law, for
example. Indeed, it is now clear that, at least in times of crisis, some of these rules and
policy may affect both individual and household economic fortunes, the economic
choices that they make and the activities in which they engage more directly than what is
or isn’t present in the way of labour market institutions. Here I consider one type of law
that might, especially in Latin America, be plausibly examined as part of the larger
matrix of rules that contribute to formality and informality.

If one part of the governance for development agenda is directed at the formalization of
labour markets, then another part is firmly fixed on the regulation of markets for land.

82 As the ILO observes, not all informal work suffers from low productivity. See Decent Work.
The deep links between labour and land markets in many developing countries suggest that reforms to land law, the drive to land formalization in particular, are also part of the emerging ‘law of work’. The tentative thesis advanced here is that, if labour market institutions seem inadequate as an explanation of labour market informality, perhaps we need to think of land reform to promote the higher value uses of land as effectively a labour market policy, part of the ‘law of work’ in Latin America and elsewhere.

The basic idea is as follows. In many developing countries, transformations in land use are often quite directly linked to the creation of new flows of labour, while those transformed land uses can themselves be increasingly linked to reforms to underlying property laws. A focus on land law may be particularly useful for capturing the legal underpinnings of informality as a labour market phenomenon, particularly the burgeoning informal labour markets of the urban centres of the Global South.

Like the formalization of labour markets, the formalization of land titles is also at the centre of development policies. And like the drive to eliminate inefficient business and labour market regulations, the recent enthusiasm displayed for land formalization as a development strategy can also be attributed to the evangelizing by Hernando de Soto concerning the merits of regulatory reform as a relatively costless, high value-added development strategy. The idea behind the formalization of title is to ‘commodify’ land, to create new markets in land, especially in rural areas, and to move land from subsistence to ‘higher-value’ uses. Securing land through title is intended to enable the transformation of land from a ‘dead’ – that is, non-marketable – asset into a source of capital that can be used as collateral for loans and investments. A major concern is to eliminate the uncertainties and inefficiencies that impede the easy alienation of property. Because these inefficiencies are thought to include collective entitlements, ideally reforms should include the individualization of title, that is, the vesting of land title in a single owner.

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83 See also Decent Work in the Americas, p. 59. The condition of land assets as key in agricultural areas…
85 De Soto, The Mystery of Capital, 2000
Why might land titling be a labour market policy? There are at least two reasons. The first is that land titling can be thought of as an ‘anti-subsistence’ policy. It is designed to move people from subsistence to market-based economic activities. It is uncongenial to traditional uses of land, and deliberately seeks to alter the complex entitlements on which those activities typically rest.

This leads to the second reason. One of the major effects of land titling appears to be change in land use and/or widespread land dispossession. For example, because of economic and social pressure, people routinely sell land for below what it may be worth to better positioned or more financially sophisticated buyers; they often miscalculate the risks of the economic ventures for which they take out loans, and end up losing the land as a result.

The transfer of title, the new economic uses to which land is put and the alienation of land for both good and bad reasons all combine to create new pools of workers looking for work. A classic recent example is the labour migration, both internal and over the border, in Mexico occasioned by the property and reforms introduced at the advent of NAFTA. Such workers typically enter labour markets on very disadvantageous terms. For many, the prospects are petty trading or low wage, casual employment in unstable labour markets at best. There are real questions about the capacity of labour markets to absorb all the people who are displaced; absent any attention to where all the displaced people will go, such policies may amount to what Hans Binswanger has called in reference to Brazil “the premature expulsion model of the workforce from agriculture”.

Reforms can engender massive conflicts over competing traditional and ‘modern’ uses of land, conflicts that themselves engender further social concerns and sometimes fuel violent conflict. But even if they don’t lead to such consequences, land reform may

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86 Belize, Honduras, Tanzania
87 Mexican corn markets.
89 The Evictions at Nyamuma
also properly be though of as social policy in the developing world, although social policy of a somewhat perverse kind. This is because land is the main asset, the source of capital in the developing world. For both families and communities, it is the only real source of economic security. It functions as the major source of insurance, a critical function where there is little internal redistribution through the state. The alienation of that land, even its use as collateral for loans, puts that source of insurance at risk, eliminating a crucial safety net and point of fallback for economic survival. The elimination of the alternative itself fuels the growth of labour markets, putting downward pressure on wages and conditions on the informal sector to which such workers often move. Thus whatever the benefits of land titling for development, a more refined and critical lens on the project suggests problems on the labour market horizon.