STREAM READINGS

IGL&P

INSTITUTE FOR GLOBAL LAW & POLICY
HARVARD LAW SCHOOL

Labor, Debt and Development

IGLP ASIAN REGIONAL WORKSHOP
BANGKOK, THAILAND
JANUARY 6 - 11, 2017

TIJ
THAILAND INSTITUTE OF JUSTICE

Labor, Debt and Development

Faculty

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Description

This stream will investigate the role of debt in labor markets in the developing world as modes of work and employment shift. We will focus on the policy challenges and choices opened up by recent experiences with microcredit lending in its various forms.

Stream Session

Labor, Debt and Development

Gandel, S. (2016). *Uber-nomics: Here's what it would cost Uber to pay its drivers as employees*. *Fortune*. Retrieved 30 November 2016, from http://fortune.com/2015/09/17/ubernomics/
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Kennedy, D., Rittich, K., & Becker Lorca, A. (2013). *Visa White Paper: Toward a Comprehensive Financial Inclusion Policy*. Pages 7-18

Klare, K. (n.d.). *Critical Legal Theory in a Nutshell*. Draft. Pages 19-22

Rittich, K. (In press). *Formality and Informality in the Law of Work*. Archer, Drache and Zumbansen (Eds.), *Liber Amicorum Harry Arthurs*. McGill-Queen's University Press.
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TECH FUTURE OF WORK

Uber-nomics: Here's what it would cost Uber to pay its drivers as employees

by Stephen Gandel @stephengandel SEPTEMBER 17, 2015, 2:12 PM EST

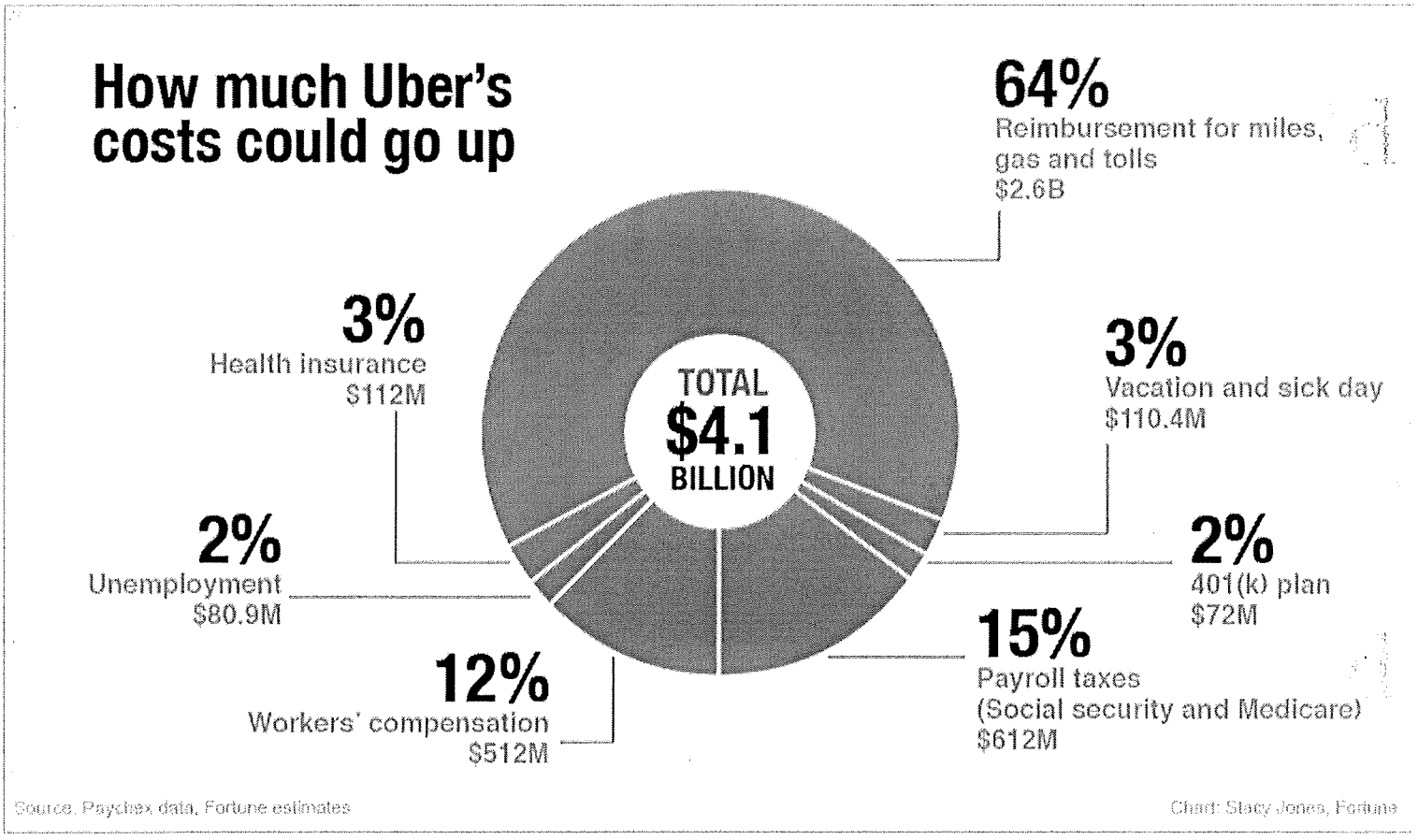


Chart by Stacy Jones

Fortune crunched the numbers. (Here's a hint: The result starts with a "b" and ends with an "s.")

When a California judge ruled earlier this month that a lawsuit brought by Uber drivers could go forward as class-action, it re-opened the biggest question about the hottest company in Unicornland: Is its business model legal? And if not, can Uber survive?

The ruling has also reignited questions about whether the sharing economy, of which Uber is by far the largest participant and its poster boy, is fair to workers. Last week, workers' advocacy group the National Employment Law Project released a report that equated Uber and other sharing economy companies to "turn of the century sweatshops" because of a lack of employee benefits and protections.

Investors think that Uber will not just survive, but thrive. They have driven Uber's valuation up to $51 billion, much higher than what Facebook was worth when it was a six-year-old private company. But the recent lawsuits against Uber raise questions about what seemed like its inevitable success.

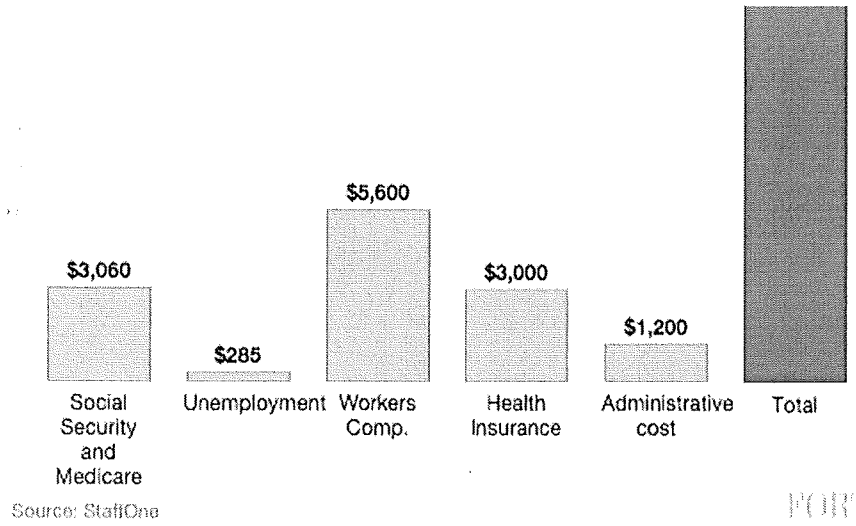
By now, many people know the debate. Uber currently classifies its drivers as independent contractors, or "1099" workers, rather than (W-2) employees. Uber says its drivers prefer the flexibility of being independent contractors. But that classification also allows Uber to avoid the taxes and insurance and other administrative expenses that companies usually have to pay to have a workforce.

How much would it cost Uber if it was forced to reclassify its drivers as employees, rather than independent contractors? By my calculations, with help from some experts, I crunched the numbers and got an answer, and it's a huge amount: $4.1 billion.

Estimated cost for Uber to add drivers as employees

Per full-time worker (based on $40,000 avg. salary)

$13,145



Uber declined to comment on my calculations. A spokesperson for the company said it's difficult to know what additional costs Uber would have to pay if it were required to turn all of its drivers into employees because doing so would force the company to completely change its business model, which is exactly the point.

The California lawsuit was brought by four former drivers who think they deserve the status of employees and reimbursement of their driving expenses. But by certifying it as a class action, the judge said the eventual ruling in the case will apply to all of Uber's California drivers, excluding only those who had specifically waved their right to participate in the current suit. Uber is fighting the lawsuit, as it has other efforts to force the company to put its drivers on its books. On Tuesday, Uber filed an appeal in the California case, asking the court to reverse the class action status.

MORE: Uber: An Oral History

Uber critics say the real reason Uber has opposed the shift is that it can't afford it. Miriam Cherry, a St. Louis University law professor who has long followed the sharing economy, says Uber's current business model is one part technology company and one part labor law workaround. The question is which part is bigger.

To figure that out, I spent the past two weeks digging into Uber's finances, employment law, and payroll realities. I enlisted the help of experts from two companies that specialize in payroll costs, Paychex and StaffOne. I also talked to SherpaShare, a third party application that helps ride-share drivers track their work, for data on the size and composition of Uber's workforce, which SherpaShare estimates at around 200,000 drivers. (Uber says it has 160,000 drivers, but those numbers were from the beginning of this year.)

To get the $4.1 billion figure, I started at the top. Uber's recently leaked numbers—the company is private, so it doesn't disclose its financials, but some have emerged—put the company's expected sales this year at about $10 billion. Uber splits what passengers pay 80-20. Uber takes a 20% cut for allowing drivers to use its platform. The rest, $8 billion, is what the drivers get, which would be their salaries if they were employees, though Uber currently does not include that figure in its finances.

Two caveats: Uber has licensing deals for its technology with other companies, and those deals may be contributing to its $2 billion in revenue. So I may be overstating driver salaries by a bit, but not by much. And, just to clarify, my calculations are

billion in revenue. So I may be overstating driver salaries by a bit—but not by much. And, just to clarify, my calculations are based on what it would hypothetically cost Uber if it had to hire all of its drivers as employees. But even a legal loss in California won't automatically mean it will have to change the status of all of its drivers, though it will add to the pressure on the company to do so.

MORE: Uber banks on world domination

Let's move on. As 1099 workers, Uber drivers are responsible for paying all of their payroll taxes. If they were employees, Uber would have to split those taxes with its employees. Uber's share: 6.2% of what it pays its drivers for Social Security and another 1.45% for Medicare taxes. And it has to pay those taxes for both its part-time and full-time workers. That would be one of Uber's largest new costs, totaling $612 million.

The next biggest cost: workers' compensation insurance. Workers' comp is regulated by each state, and not all states require it, though most states where Uber is active do. The one exception is Texas—but even there, a worker can demand that his or her employer pay for any work-related injuries, so Uber would be smart to have insurance. Rates vary by state and occupation. Those tend to be relatively high for taxi drivers, and particularly high in California, where about 20% of Uber's drivers are based, according to estimates by SherpaShare. Total bill: $512 million a year.

Next up, medical insurance. Under Obamacare, employers don't have to provide medical insurance, but starting next year that decision comes with a $2,000 penalty per employee per year. Paychex says that on average employers spend $5,000 for single employees and $12,000 for family coverage medical insurance. But employers can provide basic medical insurance (and not pay a penalty) for about $3,000 per employee. According to a filing with the federal government, Uber spent $1,275,066 on its healthcare plan, which included prescription drug benefits, for the workers (non-drivers) that it *does* classify as employees from July 2013 through June 2014. The filing said the plan covered 442 employees, which means it cost $2,885 per employee.

MORE: Meet the woman in charge of Uber's expansion

The good news for Uber is that companies only have to provide healthcare to full-time employees. Uber says that many of its drivers log less than 10 hours a week, though it's not clear if Uber is counting just the hours when the drivers have passengers, or total drive time. SherpaShare estimates only about 20% of Uber's drivers work more than 40 hours a week. (Some might even qualify for overtime, but I haven't factored that cost in.) Nonetheless, providing medical insurance for its full-time drivers at the same rate that it paid in 2014 for other employees would cost Uber $115 million a year.

NerdWallet, which published an earlier story looking at what Uber drivers stand to gain from becoming employees, said that the company would likely have to provide drivers with nine vacation days, based on what it currently offers its employees. Paychex says providing vacation days and sick leave typically costs employers 6.9% of a workers salary. For Uber, again only for its full-time drivers, that would be another $110 million a year.

Unemployment insurance varies by state. The average of what employers pay in the four states with the most Uber drivers, according to SherpaShare, was $363 per employee. That's an additional $72 million for Uber a year, plus just over $8 million a year for federal unemployment.

OK, we're nearly there.

Companies don't have to provide a retirement plan. But if they do, they have to provide it for all of their full-time employees. According to Glassdoor, Uber has a 401(k) plan for its current employees, and offers a 3% match, meaning it will match its employees' 401(k) contributions up to 3% of their salary. If all of Uber's full-time drivers-turned-employees contributed at least that much, that would be another $72 million in costs for Uber.

The last one is a big one: millage reimbursement. Not all states require companies to reimburse their employees for using their personal car for business. But California does. And since that is where Uber is based, there is a good chance that it will have to reimburse all of its employees, not just the ones based in California. Calculating this figure is tricky. Based on survey data from SherpaShare, the average Uber driver, full-time and part-time, puts in nearly 24 hours a week for the ride hailing company. The average speed in cities around the country where Uber is most used appears to be around 20 miles per hour. That means the average Uber driver covers about 475 miles a week. The IRS's mileage reimbursement rate is 57.5 cents per mile. If Uber were to reimburse its workers at that rate, which it has been ordered to do in some cases, that would be an average of $273.13 a week, or just over $13,000 a year per driver. The total mileage reimbursement bill for Uber: $2.6 billion a year.

MORE: Why I'd never want to compete with Uber's Travis Kalanick

Add all of those costs up and you get to just over $4.1 billion. Sound too high? I thought so, too. So I had StaffOne's Donna Meek, a payroll and HR expert, run her own independent calculation. Meek estimated the costs from the bottom up, looking at what it would cost Uber per worker, rather getting the total figures for each cost as I did. Meek's conclusion: nearly $1.5 billion before the cost of reimbursing drivers for their miles. So pretty close to what I got.

Could Uber afford an additional $4.1 billion in costs a year? Depends on how you measure that. Based on profits, no. Uber, by its own admission, is not profitable. So it really can't afford its current expenses, let alone another $4 billion. But as Uber has told others, startups aren't run on profits—they're run on investors' money. And they can afford their losses as along as those people are willing to keep funding them.

How long will investors be willing to fund Uber? According to leaked financial statements obtained by Gawker, Uber was on track to lose about $300 million a year, though those losses appeared to be growing. It had about $1.2 billion of cash at the end of June 2014. And it just raised an additional $1 billion this summer. That means Uber will likely have about $1.75 billion in cash in the bank at the end of this year.

Sounds like a lot. But if Uber had to swallow an additional $4 billion in costs, they would need to raise more money by the middle of next year, possibly sooner, or face extinction. And that doesn't include any money it might have to pay out in damages, or past compensation. Uber could force its workers to take a pay cut. Many of them will be getting new benefits. And Uber would be covering some expenses, like gas and payroll taxes, that its workers are covering now.

But James Kimbrough, who drives about 20 hours a week in Austin as a second job, says that Uber has already cut what its drivers make by nearly a half in the past year in order to attract more customers. Any further reduction in rates—"even just a few more cents," says Kimbrough—and driving for Uber is probably no longer worth it for him. He believes other drivers

would feel the same way. So Uber doesn't have a lot of wiggle room with the drivers.

At a $51 billion valuation, investors obviously believe that, given enough time, Uber is going to make money, and likely a lot of it. The question is how much longer will that take if the company faces an additional $4 billion in expenses—and are investors prepared to stick around for that long. Uber's cash meter is running, and it's running fast.

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Does Uber have a bad business model? We hash it out in this episode of Fortune Tech Debate:

THE REGULATORY FRAMEWORK FOR FINANCIAL INCLUSION

A. A comprehensive approach to regulation.

A comprehensive financial inclusion policy requires careful calibration of the overall regulatory environment. There is no silver bullet. Governments need to assess and adjust the available legal and institutional arrangements on an ongoing basis in light of their policy objectives. Context matters a great deal. What works in developed nations with robust governance institutions may not work in many developing contexts. The most appropriate regulatory tools may lie elsewhere: in the disciplines of market competition, in pre-existing informal institutions, in industry self-regulation, in foreign oversight of global service providers, and in more direct public involvement through the provision of services or the regulation of terms for service. Much will depend on the communities to be served: the poorest of the poor will typically need different services regulated in different ways than poor or middle income communities.

The impetus to think about regulation and financial inclusion often comes from the emergence of a new service or service provider. It is natural to ask: how should this newcomer be regulated? Will the regulatory framework we already use for analogous financial services suffice, or should we do something different? Although these are necessary and important questions to ask, framing the question this way from the outset has disadvantages. It can pit new technologies and players against established interests, focusing policy making on the terms of compromise between them rather than national financial inclusion objectives. It can isolate inquiry within regulatory entities responsible for the oversight of more traditional service providers, discouraging the kind of cross-ministry collaboration necessary for a comprehensive assessment of financial inclusion goals. It would be better to begin by articulating those objectives and assessing the broad policy context for their achievement. Once it is clear how new services relate to those objectives, it is appropriate to ask what regulatory measures might encourage or restrict their development in that light.

Financial inclusion regulation ought to be guided by the same principles of good governance as apply elsewhere. Regulation should be designed in light of the specific goals that financial inclusion seeks to further and, where necessary, with careful consideration of any tradeoffs among these goals. Regulation should be proportional to these objectives, with the cost burden kept as low as possible consistent with the aims of the regulation itself. Regulation should be transparent and regulators should be held accountable to both government and stakeholders. Regulation should be flexible enough to respond to technological and economic change and opportunity, but sufficiently stable to ensure the predictability and security required by providers and users alike. Maintaining a level playing field and ensuring competitive neutrality will also be important where service providers are innovating and markets are shifting rapidly. Most crucially, regulatory policy ought to attend to the risks and vulnerabilities of the most vulnerable.

B. Assessing the regulatory context.

Financial inclusion policy is an intervention in a complex legal and institutional terrain. Many pre-existing formal and informal institutions and legal arrangements can be expected to affect the success of financial inclusion efforts. Laws regulating telecommunications, privacy and information and the nation's communication infrastructure will clearly be relevant, as will consumer protection, bankruptcy and commercial law. Financial inclusion initiatives touch a range of regulatory concerns, from the

security of the financial system through competition policy to consumer protection and the provision of social welfare benefits. Most will already be the subject of regulation developed for other purposes, often to regulate other services and service providers service other communities. Administrative oversight is also often dispersed among a variety of agencies. These diverse measures have generally not been designed with financial inclusion objectives in mind. Nor are they typically undertaken in a coordinated manner. The first step in developing a comprehensive approach to financial inclusion regulation is to assess the institutional context and the range of available tools for intervention. This typically requires coordination across ministries and administrative agencies.

By starting with a thorough audit and assessment of the regulatory context, policy-makers will be in a position to fashion an appropriate combination of informal or private self-regulation, specifically targeted administrative or legislative initiatives, and adjustments in the full range of background private and public law regimes affecting financial inclusion. This will also permit a careful assessment of trade-offs and synergies. Striking the correct balance will often be a function of differentiating the markets, clients and services covered by various legal rules. The distribution of regulatory responsibilities should reflect the central objective: to establish a stable framework within which the risks and opportunities of the nation's financial inclusion policy can be managed.

Countries have struggled with the question whether to regulate new financial services and providers within existing laws, create special laws or issue exemptions of some kind under existing law. The right answer will almost always be some combination. Even where new regulatory structures are required, existing rules and institutions may remain important. For example, it may be helpful to develop consumer protection and network security regulations tailored to the products offered by new kinds of service providers, while also requiring that they hold floating funds in commercial accounts at regulated banks. As financial inclusion initiatives have become more common, some countries have accommodated microfinance institutions under conventional banking law while others have passed special legislation or provided specialized administrative accommodations for particular services or initiatives. In some countries, micro-credit and micro-saving institutions are subject to commercial banking regulations with specific rules given at the administrative or supervisory level.[1] Other countries have enacted special regulations for different aspects of financial inclusion, such as special microcredit, micro-saving and branchless banking laws.[2] Transfer and payment services may be regulated separately or managed administratively. Most recently, a number of governments have explicitly adopted a 'tiered approach' under which different providers of financial services are governed by different regulatory regimes.[3]

Informal regulatory practices. Informal saving, credit, payment and insurance schemes are typically embedded in social networks and governed by customary expectations about terms and enforcement. These exist before and will usually continue to exist alongside financial inclusion programs. The unbanked will typically compare the security and costs associated with formal arrangements to pre-existing mechanisms for saving, transferring funds or securing credit. Financial literacy must also be assessed across formal and informal mechanisms: the poor may well be literate in the management of finance through informal channels. These networks and practices may impede the provision of new

[1] S. Staschen, 'Regulatory Requirements for Microfinance: A Comparison of Legal Frameworks in 11 Countries Worldwide' GTZ, Eschborn (2003).
[2] Klein and Mayer, 'Mobile Banking'.
[3] K. Lauer and S. Staschen, 'Regulation', in J. Ledgerwood, J. Earne and C. Nelson eds., *The new microfinance handbook: a financial market system perspective*, (Washington, DC: World Bank, 2013) pp. 413-435.

services. But they may also advance them because, for example, they may serve as benchmarks or monitors and may be recruited as allies by new service providers or regulators. Familiarity with these networks and practices will be crucial to assessing the impact of financial inclusion policy, including on objectives such as gender equality. The gender impact of financial inclusion will depend upon the relative empowerment of men and women in the pre-existing informal financial arrangements of their families and communities as much as upon the gender distribution of access to formal financial inclusion.

At the same time, regulators will want to assess the potential to rely on industry self-regulation and market discipline. Permitting industry leaders to self-regulate or rely on regulatory standards developed elsewhere and internalized by industry leaders may in some cases substitute for costly local monitoring and enforcement.[4]

Background private law rules and procedures. Contract, property, tort and the rules governing access to courts and to the legal profession undergird any financial system. They may be more or less well developed, available or appropriate for the intended clients of financial inclusion schemes. The financial sector servicing middle class and wealthy users rests on a complex and costly system of background institutions which it may not be feasible to extend alongside financial services for the poor. It is common to observe that conduct-of-business regulation implicitly depends on financial literacy, particularly where disclosure is the primary vehicle for protection against undue risk and the principle of caveat emptor governs. It also rests on a regime of contract and property law, functioning against the background of court enforcement.

Systems for managing credit information, recovering debts, enforcing contracts and collateralization, registering property, recording and enforcing liens and other securitization arrangements, formal machinery for providing debtor relief and triaging among creditors in bankruptcy serve a range of economic and social ends but can be costly to build and maintain. It is important to assess the extent to which these mechanisms are available to support financial inclusion initiatives. Where they are not, it may be appropriate to create alternatives as in their absence, participants in financial inclusion schemes may choose to rely on informal alternatives, altering the anticipated balance of risks, vulnerabilities and opportunities associated with new financial inclusion schemes. These may be more streamlined formal systems (as India developed for collateral recovery in the 1990s), alternative safeguards built into financial inclusion product design or transfer and subsidy schemes for the poorest communities, more direct regulation of prices, terms and conditions of service as are commonly found in consumer protection laws, or measures to intensify the effectiveness of business self-regulation and market discipline, through transparency requirements or public ombudsman complaint procedures.

Public law measures governing the economic life of those targeted for financial inclusion. The economic lives of the poor are affected by a wide range of national policies which may affect their use of financial services, alter the balance and distribution of opportunities and vulnerabilities set in motion by new initiatives, or function as alternative sources of financial service. The range of potentially relevant regulatory measures is vast.

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[4] On industry self-regulation see S. Staschen and C. Nelson, 'The Role of Government and Industry in Financial Inclusion', in J. Ledgerwood, J. Earne and C. Nelson eds., *The new microfinance handbook: a financial market system perspective*, (Washington, DC: World Bank, 2013) pp. 71-95, 88 and K. Lauer and S. Staschen, 'Regulation', p. 415.

At the broadest level, overall macroeconomic stability is crucial: instability, high or unpredictable inflation can affect the willingness of service providers to take the risks and make the investments necessary for private financial inclusion systems as well as the ability and willingness of potential clients to utilize them. Overall levels of institutional trust in both the public and private sectors will also affect the success of financial inclusion policy. Absent faith in service providers, whether public or private, it is difficult to make the transition from informal to institutionalized financial services. The presence or absence of reliable public institutions, such as banks and post-offices, and social welfare or transfer systems will also affect the potential to offer subsidized financial inclusion services to the poorest.

Specific regulatory measures affecting financial inclusion policy could range from anti-money laundering rules requiring identity checks or other due diligence at the retail level through to foreign direct investment rules determining the number or nationality of potential service providers. The level and content of regulation regulating competition and ensuring a level playing field may be among the most crucial. Regulation securing information and communication infrastructure may also be important. A full inventory of regulation affecting the potential for constructing financial inclusion policy in different ways may also include labor law, laws regulating non-profits, social protection and insurance, zoning and housing regulations, family law, laws affecting retail, even transport, if they influence the distribution of informal and formal economic opportunities.

C. Calibrating regulation to financial inclusion objectives.

Financial services regulation has traditionally focused on protecting the vulnerable through consumer protection and conduct of business regulation, protecting the integrity of the system through prudential or other regulation, and achieving other economic or security objectives, most notably competition policy and anti-money laundering objectives. Discussion of financial inclusion regulation has typically followed this model, focusing on what is required to limit systemic risk and protect participants from error and fraud.

As a result, financial inclusion policy has focused on regulation aimed at service providers and designed with conventional banks in mind: prudential regulations aimed at systemic risks, particularly for deposit holding institutions which invest those deposits, and conduct of business regulation focused on consumer protection and network security. Prudential regulation secures the stability of the financial system and the health of financial institutions through capital adequacy and liquidity reserve requirements, deposit insurance schemes and information disclosure requirements. Conduct-of-business regulation aims to protect consumers, to compensate for information and bargaining power asymmetries between providers and their customers, to secure the existence of a wide range of institutions providing financial products and services, to ensure the security and interoperability of transfer networks and to obtain information to enforce economic and criminal law policies.[5] The regulation, monitoring and enforcement functions associated with these two types of regulation have generally been provided by different regulatory and administrative structures to ensure the expertise and rigor of their administration.

Financial inclusion presents a challenge to this familiar regulatory pattern in at least four ways: the costs of regulation may be incompatible with extending service to the poor; the new financial products, technologies and business models developed to make financial inclusion feasible may fragment and

[5] R. Christen, K. Lauer, T. Lyman, and R. Rosenberg, 'Microfinance Consensus Guidelines: A Guide to Regulation and Supervision of Microfinance', Washington, DC: CGAP (2012), p. 15.

recombine the services provided in ways which may not fit within conventional regulatory assumptions; and regulations designed to protect the middle class or wealthy customers of traditional banks may be ineffective in managing the risks posed by financial inclusion for poor consumers. Most importantly, the objectives of financial inclusion policy typically go beyond the management of prudential and conduct of business risk. As a result, it is not sufficient to focus only on how financial inclusion should be integrated into existing financial regulatory regimes. Financial inclusion policy requires more than balancing financial access with management of systemic risk and consumer protection.[6]

The costs of regulation. The existing regulatory burden on conventional financial service providers – generally banks – may be too costly to justify extending services to poor communities. Just as micro-lenders have needed to find less costly means of assessing creditworthiness and ensuring collection for small loans, regulators will often need to develop alternative ways to achieve both prudential and conduct of business objectives for microfinance. Policy makers should also consider whether it is cost-effective for regulators to undertake the supervision of microfinance services; in some cases, the right approach may simply be an exemption. Some conventional prudential regulation may be unnecessary in any event, particularly for service providers who are not holding deposits for investment. For example, money laundering and due diligence requirements may be set aside for transactions under given size. However, there are also costs in not regulating. Where providers do hold deposits for investment, reserve requirements and other prudential regulations remain important to mitigate systemic risk. In general, policy makers should expect that regulatory safeguards will need to be pursued in different ways to make the provision of financial services cost-effective and to protect the most vulnerable in the context of very poor communities.

Managing systemic risks for new services and technologies. The proliferation of new financial inclusion initiatives relying on new technologies and new service providers has fragmented the services to be provided in ways which require a more disaggregated and nuanced approach to regulation. New technologies, services and service providers may need to be addressed in new ways to ensure open access and create competitive markets for the unbanked. The systemic risks associated with investment of deposits and those associated with the security of transfer networks, record keeping and accounting may no longer be linked. Although many conventional regulatory objectives for ensuring the integrity of financial services in other contexts are applicable, it may be possible to manage systemic risks in other ways. By separating payment and transfer services from the holding of accounts for investment, new service providers may be able to avoid the costs of complying with prudential regulations. It may be more appropriate to focus on network security issues for new payment and transfer services while requiring that any deposits and floating funds be held in the central bank or in traditionally regulated commercial banks.

Payment systems depend upon the reliability of information, security of transfers and the reliability of partners. Payment and clearing system reliability and security are as important for financial inclusion as elsewhere. Providers who breach obligations of settlement with other providers can cause a cascade of events placing the system at risk. As elsewhere, transaction costs and information asymmetries prevent depositors from monitoring deposits. As a response, public monitoring and oversight may be more effective than audit and disclosure requirements in the financial inclusion context, as may reliance on industry self-monitoring and reputation. Criteria for entry and participation and internal controls could be set by regulation or by networks of providers. Government oversight may be important. Interoperability requirements and other measures to ensure the openness of the system may be

[6] Christen et al, 'Microfinance Consensus Guidelines', p. 8-9.

important to achieve a level playing field and competition among providers. In some contexts, it may be necessary to mandate access and regulate fees to ensure access to systems maintained by larger banks by those providing services to the unbanked. Transparency on pricing and costs, along with interconnectivity requirements, may help to ensure openness and competition.

Consumer protection for the poor and unbanked. A new approach may be required to protect consumers who lack financial literacy and in communities where the background regimes protecting the middle class are less developed or cost-effective. It remains important to guard against fraud, inaccurate records, errors in accounting, technological errors in transmission of data and the theft of accounts or records. Because lack of security for deposits or recourse in the case of faulty or fraudulent transfers threatens both the most vulnerable and the system as a whole through depositor panic or simple loss of confidence in the formal financial system, deposit insurance schemes may be useful. Regulation providing for client access to data, procedures for updating, eliminating errors and maintaining privacy may also be important, depending on the level of information collected. The private and public background institutions and competences which support conduct of business regulation may not be present in markets targeted for financial inclusion. It may not be realistic to rely on background commercial law to protect those using new financial services from fraud. Other tools may be required to protect poor consumers. This may mean more intensive government involvement, from direct supervision of payment systems associated with public transfer payments to the regulation of prices and terms of service. It may also mean more reliance on market competitive pressures, industry self-regulation and reliance on foreign regulatory oversight in the case of reputable global service providers. Taken together, this may mean a more robust regulatory engagement on the conduct of business side using mechanisms appropriate for a population with limited formal financial literacy and limited capacity to bargain over and influence the terms of service. A more focused and potentially less intrusive hand on the prudential side for services which do not invest deposits may be appropriate for some new financial service products.

Many developing economies lack comprehensive consumer protection laws. Even where they exist, their mechanisms may not be effective for the communities targeted for financial inclusion and special rules protecting new consumers of financial products and services may be appropriate. In Peru, for example, the Superintendency of Banking, Insurance and Private Pension Funds has reduced consumer complaints regarding the financial system by nearly 32% since 2004[7] by employing a holistic, preventive approach to consumer protection. While serving as a watch-dog over the rules, policies and procedures established by financial institutions to protect their consumers, the Superintendency does not itself solve consumer complaints. Instead, under the Superintendency's supervision, the majority of initial complaints have been successfully resolved by financial institutions themselves, with a minority of cases being referred to a consumer protection commission or a financial ombudsman. The Peruvian experience also highlights the importance of publishing financial services information in newspapers and working with educational institutions and mass media to improve national financial literacy. Ultimately, financial inclusion depends upon public trust, which can be enhanced by regulatory efforts to ensure transparency.

Creating a supervisory agency to implement a holistic and preventive approach to consumer protection to accompany financial inclusion policy may be a good solution for mid-size developing countries, but might be simply unaffordable for smaller countries with other pressing needs. Even in such

[7] Alliance for Financial Inclusion, 'Consumer Protection Leveling the playing field in financial inclusion', Bangkok, Thailand: Alliance for Financial Inclusion (2010), p. 2.

circumstances, however, regulators need not leave consumers unprotected. Where social welfare and poverty alleviation efforts can be linked to financial inclusion, the government agencies administering those programs may also be able to monitor transfers and protect recipients. Where foreign services providers are contracted to provide payment of cash transfers through mobile phone or other branchless forms of payment and transfer services, they may be required to apply the same or similar consumer protection rules and practices that govern the provision of their services in the developed world. In some cases, the installation of a special ombudsman to receive reports of abuse, monitor and enforce compliance may be helpful.

Financial inclusion policy addressed to the needs of the poorest among the poor will face particular hurdles. It is important to remember that financial inclusion policy oriented to the poorest of the poor will look different from policy oriented to generating entrepreneurs or scaling from micro-finance to small and medium sized enterprise. The mix of services, the targeted communities and the preferred service providers will all be different. Levels of subsidy and provisions to ensure market access and competition will also differ. Regulatory and monitoring tools which may work for other communities may not be effective. Because the costs associated with prudential or other regulatory objectives may affect the viability of providing services, subsidization of one or another sort may be required and functional substitutes for more complex regulatory mechanisms may need to be developed. Anti-money laundering provisions requiring record keeping, "know your customer" monitoring or other due diligence may need to be set aside for the poorest communities and small transactions. Direct government action to build public infrastructure or offer subsidization may be necessary. For example, social welfare cash transfer programs linked to financial inclusion have shown great potential as poverty alleviation devices. A recent study of cash transfer programs in four middle-income economies suggests that increasing financial access by linking cash transfers to the provision of a formal financial account creates opportunities for greater use of other financial services including savings services. However, this potential is not automatically realized.[8] Without financial literacy programs and actual economic opportunities, less privileged populations are unable to realize the potential that may follow from access to a formal bank account; here, a broader range of program and policy innovation that extends beyond financial inclusion is likely required.

New risks and vulnerabilities. Policy-makers should recognize that financial inclusion initiatives create new vulnerabilities which may require novel responses. For example, the expansion of banking services (including the introduction of ATMs) into rural India, where the majority of the population is illiterate and unfamiliar with technology, has significantly increased the risk of fraud and identity theft. In response, the Reserve Bank of India allows banks to engage business correspondents in rural areas only if banks update their books daily to reflect all transactions that have been authorized by their correspondents on their behalf. The Reserve Bank also added a geographic distance limitation so that in non-metropolitan areas a bank cannot engage business correspondents to operate beyond 15 kilometers (5 km in metro areas) of a branch of the bank. The Reserve Bank believes this will allow banks to supervise their correspondents periodically. The state governments of Rajasthan and Andhra Pradesh have issued biometric smartcards to simplify branchless (and unstaffed) banking while guarding against identity theft. On the level of corporate restructuring, the Reserve Bank's 2006 guidelines[9] forbid banks from outsourcing their management functions and require that they take every necessary safeguard to

[8] See Bold et al, 'Social Cash Transfers and Financial Inclusion'.

[9] Reserve Bank of India, 'Circular on Guidelines on Managing Risks and Code of Conduct in Outsourcing of Financial Services by Banks, 3 November 2006' (DBOD.No.BP.40/21.04.158/2006).

ensure that any outsourcing neither hinders the ability of the Reserve Bank to supervise their functioning nor adversely affects customers' rights.

Microcredit also raises new systemic vulnerabilities and exposes users to new risks. For example, where creditworthiness assessment and monitoring functions are outsourced to informal networks, ensuring the accuracy of information relied upon in making assessments and providing procedures for updating and challenging that information will be particularly difficult to achieve. Other new vulnerabilities include lack of transparency in interest rates and other charges;[10] multiple lending, over-borrowing and ghost borrowers;[11] upfront collection of security deposits; and coercive methods of recovery.[12] The familiar regulatory challenges of ensuring prudential lending, counteracting bargaining power disparities, protecting consumers from usurious terms or unscrupulous practices and ensuring the flexibility necessary to avoid trapping the poor beneath unsustainable debts can all be more difficult to achieve in a cost-effective way in the micro-credit context. Regulators have responded to these challenges in novel ways. Following the microcredit crisis in Andhra Pradesh, for example, the Reserve Bank of India issued a special report outlining the vulnerabilities that excessive and unregulated micro-lending had created and suggested a number of changes to the regulation of micro-lenders. The Reserve Bank identified unjustified high rates of interest as a new vulnerability and proposed a cap on interest rates.[13]

Beyond systemic risk management and consumer protection. The goals of financial inclusion policy typically go beyond the management of systemic risk and the protection of consumers. Alleviating poverty, serving the poorest among the poor, redressing the economic marginalization of women, young people or rural communities will require a different regulatory emphasis than managing the systemic risks associated with conventional banks or protecting their largely middle class consumers. Where the goal is poverty alleviation, policy will need to be adjusted to align with other poverty reduction initiatives, including social welfare and transfer payment schemes. Expanding financial markets among the unbanked, encouraging entrepreneurship, and economic growth and development through financial inclusion may require yet again a different emphasis. Financial inclusion policy will need to be aligned with efforts to support small enterprise, from business advisory services and preferential contracting to direct and indirect forms of subsidy.

The goals of financial inclusion are only reached when access to financial services is accompanied by the use of those services. Policy initiatives will often be required to overcome barriers to access and encourage the use of new services by communities targeted for financial inclusion. For the poorest of the poor, this is often easiest to ensure by linking financial inclusion to government transfer payments and social welfare services. In other settings, other tools may be needed. Ensuring that access translates into use may require that administrative procedures be expedited and regulatory obstacles be removed or softened. In the Philippines, while mobile phone usage may be more evenly distributed, the ability of elderly, rural and poor populations to register for mobile banking services has been hindered by their inability to provide adequate identification documents—despite the fact that these

[10] Reserve Bank of India, 'Report of the Sub-Committee of the Central Board of Directors of Reserve Bank of India to Study Issues and Concerns in the MFI Sector, January 2011', ("Malegam Report"), § 8.7.

[11] Malegam Report, § 9.7, recommending, for instance, that no more than two microfinance institutions lend to the same borrower and that all sanctioning and disbursement of loans occur at a central location involving the action of more than one individual with close supervision.

[12] Malegam Report, § 11.12.

[13] Malegam Report, at § 7.11.

groups are the primary intended beneficiaries of financial inclusion policies.[14] India's anti-money laundering regulation[15] had a similar freezing effect on the *actual* inclusion of first-time customers who, as expected, were usually poor, underprivileged and often culturally distrustful of government and formal financial enterprises alike.

Regulatory sequencing and pacing. It is important to ensure that regulatory initiatives are sequenced and paced appropriately as technology changes and markets develop. Overly complex regulation at the outset may discourage first-movers from developing technologies or investing in markets. Subsidies may be necessary to ensure that targeted communities are reached. As access translates into use, social stratifications can be exacerbated without countervailing policies in place. Financial inclusion policy which aspires to strengthen access to credit by SMEs and to build entrepreneurship will need to be adjusted to transition customers up the chain to more complex financial services and products. This may require adjustment in other regulatory structures, allowing, for example, more relaxed securities regulation for SMEs in the early stages as they seek investment through stock offerings.

Attention to long term competition objectives is also important from the start. The synergistic effects of network development and the cost of providing infrastructure for new payment systems may make them seem natural monopolies at the outset. It will nevertheless be crucial to begin with a strategy for opening access and ensuring competition, through interconnectivity requirements or careful monitoring of product bundling to ensure open access to as many parts of the service cycle as possible. This is particularly important where market competitive pressures are relied upon to substitute for robust regulatory oversight. Network interoperability will need to be assured along with a level regulatory playing field to encourage new entrants, new technologies and new business models. The business model adopted may also be important. In the Kenyan M-PESA system, for example, those providing cash in/cash out services are not treated as "branches" of M-PESA, but as separate entities, allowing for more types of innovation and competition in that slice of the market.

Unbundling: calibrating regulation to communities, services and providers. A comprehensive approach to financial inclusion regulation will be sensitive to differences among targeted communities, among financial services and among service providers. Policy-makers will want to be as specific as possible in assessing the needs and vulnerabilities of various communities. Technological changes have allowed financial services to be broken down and packaged in various ways. This allows more precise targeting of services, enhancing the ability to design regulatory structures which address specific vulnerabilities without undue burden or unnecessary complexity.

The service needs and vulnerabilities of communities differ. As described, the needs of the *poorest of the poor* differ markedly from those among the poor for whom entrepreneurial opportunities are more within grasp. Linking financial inclusion to public transfer payments and social welfare systems may be particularly appropriate, as subsidization of service provision may in any event be necessary and the very poor are much less likely to be able to successfully access background private law protections against fraud and error. Savings, whether compulsory or discretionary, may be more appropriate than micro-credit. Access to secure exchange and transactions may be the most important service of all. Public entities may be most able to provide services here in countries with broad and reliable public

[14] E. Alampay, 'Mobile Banking, Mobile Money and Telecommunication Regulations' LIRNEasia (2010)
[15] Reserve Bank of India, 'Circular on Know Your Customer (KYC) Guidelines—Anti Money Laundering Standards, 23 August 2005', (DBOD.No.AML.BC.28/14.01.001/2005-06).

institutions. Elsewhere, subsidized non-profit or other private service providers may be better equipped to make the infrastructural investment. For this group, regulation will need to remain simple and focused on security of exchange and transfer and ensuring basic consumer protections.

At the other end, *lower middle income populations who are unbanked* may benefit from a wider array of services once they transition to the formal financial services sector; they are also more likely to transition from micro-credit to the full range of credit services utilized by SMEs. Here, prudential regulation will be more important, particularly where service providers take deposits for investment. When designing such regulation, it is important to consider trade-offs. Some regulatory measures designed to strengthen the broader financial sector may also promote financial inclusion, while others may increase costs in ways which restrict access. Prudential banking regulation designed with large commercial banks in mind may inhibit innovation in micropayment/finance sector if simply applied to all providers of financial services. Allowing smart-card and/or telecommunications companies to offer services which do not pose the types of systemic risk requiring costly prudential regulation may strengthen opportunities for providers to innovate in product design and to invest in new technologies.

The regulatory tools will vary with the type of service provider. Public entities – national banks, development banks, post-offices, social welfare and transfer programs – may be either easy or extremely difficult to monitor and reorient toward financial inclusion goals. Much will depend upon the reliability, reputation and relative strength of these institutions a priori. Other public institutions that could potentially be deployed as financial inclusion mechanisms include public utilities, national social insurance schemes, tax collection and return mechanisms, marketing boards, and cooperatives.

On the private side, the regulatory challenges vary with both the services provided and the form of service provider. Those who take deposits for investment require different prudential regulation and oversight than those who take deposits not for investment or those who merely provide payment services. Payment service providers usually require minimal prudential regulation, although systemic risk mitigation may counsel a variety of measures to secure transactions and prevent error and fraud. Requirements that float funds held for settlement be sequestered, deposited in regulated banks and/or invested in government securities or public funds may substitute for reserve and other prudential requirements typical of commercial banking. Scale will often be important: cooperatives and non-profits may benefit from a lighter regulatory hand so long as their membership requirements reduce the potential for fraud or systemic risk and their scale makes supervision infeasible. With wider membership and scale, however, auditing and other requirements may be necessary. Micro-lenders have generally benefited from less demanding prudential requirements than banks, as the small scale of their transactions makes monitoring not cost-effective and, where they provide only credit, there are no deposits to be protected. When cash collateral or compulsory savings components are added, requirements that these funds be segregated and/or held in regulated institutions may provide sufficient protection.

Financial sector regulation in developing economies. In many ways, the most important variable in regulatory policy is the larger national administrative and regulatory context. Discussions of financial inclusion regulation often seem to assume that regulatory forms appropriate in developed economies will be also be appropriate when transferred to the developing world. Although this may be true, often it will not. Much depends on the skill, depth and reputation of local regulators and the degree to which formal law penetrates the communities where financial inclusion policy is to be undertaken. Characteristics of the community – financial literacy, mobility, informal alternatives – also affect the use that can be made of formal regulation even in contexts with strong and reliable public sector institutions.

As a rule of thumb, where possible keep it simple. The more complex the regulatory mechanism, the less likely it will translate well from developed financial sectors serving the wealthy to financial inclusion policy in the poor communities of the developing world. Complex regulatory schemes may fail and may introduce rigidities or opportunities for administrative rent seeking which impede useful innovations and obstruct new entrants who may deliver services more efficiently. It is particularly important to be open to alternative modes of achieving regulatory objectives. Where regulatory infrastructure and background legal regimes are weak or underutilized, policy-makers will need to find alternative.

Informal practices are often more relevant in developing countries than the formal legal infrastructure, especially for the marginal constituencies targeted by financial inclusion. Micro-lending has long relied on informal groups and networks for monitoring and creditworthiness assessment. Regulators may also find ways to harness informal mechanisms to financial inclusion. The gains in transparency promised by replacing informal community practices of monitoring and enforcement with formal mechanisms need to be balanced against the costs of infrastructure required to obtain information by formal means. In countries without a widespread formal property registry, for example, informal methods of property identification may allow property to serve as collateral if title formalization efforts prove ineffective or too costly. Schemes for local communal or cooperative creditworthiness assessment, dispersal and monitoring may help alleviate politicization pressures in micro-credit programs, but may exacerbate them when these mechanisms are themselves subject to capture.

Formal programs and administrative arrangements developed for other purposes may also play a role in financial inclusion policy. Where identity cards are not widespread, for example, branchless banking initiatives that depend on public records to identify consumers will need to address the problem of documentation and verification of identity elsewhere in the legal infrastructure. In some cases, records held in connection with other state programs and benefits or other provided services may suffice.

State involvement, whether in service delivery, monitoring and/or regulation, will be a necessary and inevitable part of financial inclusion, if in new forms and sometimes in collaboration with the private sector. Government provision of credit through state development banks, for example, may be necessary to ensure the availability of resources for economic expansion, especially to the poorest and most underserved communities. It is also likely to be necessary to enable such communities to link forge links with leading sectors of the economy. Government involvement in the provision of loans can also work as a subsidy to micro-credit, although care must be taken to ensure that it is extended on an even-handed basis to those who need it most. In the absence of a robust bankruptcy system, public lending may also provide mechanisms for both loan forgiveness and triage and settlement among creditors. This may be particularly significant for financial inclusion policies targeting small enterprise and encouraging entrepreneurship where some degree of loan failure is to be expected. Where state banks are already established, it may be politically more plausible to subsidize financial inclusion through their engagement. Although they tend to have fewer services, branches or automated teller services, they also usually have lower fee levels.

Where private sector service providers are involved, conflicts over the costs of services may need to be addressed through regulation, especially where there are significant disparities in financial literacy and bargaining power, for example between poor consumers and large commercial services providers. Here, caps on interest rates and other price controls may be more effective than disclosure and consumer protection based in private law. For the extension of services to be viable however, fees must be set at sustainable levels unless subsidization is provided in one or another way. Although requirements that service providers offer universal access may help, subsidization may be required in order for access to

translate effectively into use by marginal communities. Loan forgiveness requirements and limits on securitization and collateralization may substitute for bankruptcy in managing over-indebtedness, although at some cost to the availability of credit.

Particularly where poverty alleviation goals orient financial inclusion to the poorest among the poor, linking financial access to state transfer payment schemes may be appropriate. Transfers of public funds ensure the viability of financial inclusion services provided to these communities. Where public administration is robust, monitoring and protection against error, fraud and abuse may be available through the existing public welfare system, although problems may arise when postal or other public funds are intermingled with funds used for financial services. Where public administrative infrastructure is unsuited or inefficient, partnering with private service providers may be a more cost-effective means of linking public transfers with financial inclusion.

In some cases, it may be better to rely on private sector self-enforcement, particularly where there are established and operative industry standards and/or strong external pressures on private sector actors ensuring reliability. This may be the case, for example, in small scale cooperative non-profits that are disciplined by their membership. It may also be the case for leading global brands facing robust regulation elsewhere and which have internalized controls throughout their operations. Where some services remain in the public domain and where first movers have monopoly advantages, providing a transition to a more competitive environment will help to ensure that these providers face market pressure to respond to technological change and provide competitive levels of efficiency and security of service.

In this sense, competition policy may substitute for direct regulation where competition from non-profit and global actors raises levels of risk management and consumer protection. Ensuring openness, transparency as to costs and fees, network interoperability and a level regulatory playing field will often go a long way to ensuring competition among providers. Liberality on entry, particularly for well-reputed private actors with track records of service provision, can encourage the development of the necessary infrastructure and financial literacy for a long term successful financial inclusion policy.

Assessment: ensuring that it works. Even the most well intentioned and carefully designed policies rarely perform as anticipated. Measures must be implemented to assess the effects of financial inclusion projects and initiatives. While there are cross-national lessons to be learned, what is successful in one context may not be in another. Like the policy itself, assessment mechanisms must be designed with the objectives of national financial inclusion policy in mind. Was poverty alleviated? Were the poor more able to manage the risks and vulnerabilities associated with poverty? Were entrepreneurs created? Did micro and small enterprise grow? This means that it will rarely be sufficient to evaluate financial inclusion on the basis of access provided, or the use made of financial services alone. It is important to ask whether the communities targeted for financial inclusion were among the users, and whether the use of new services translated into poverty alleviation, empowerment or the emergence of sustainable entrepreneurial enterprise. For example, microcredit is frequently deemed a success due to high loan repayment rates characteristic of group lending. While it is tempting to focus on such metrics, the real question is whether greater access to credit has, in fact, contributed usefully to alleviating poverty or to borrowers' capacity to manage social and economic risk and engage in valuable entrepreneurial activity. Here efforts to link financial inclusion to broader measures of welfare and economic growth may be necessary.

Karl Klare
Critical Legal Theory in a Nutshell (draft)

§ 1. Law (partially) structures social life.

Legal rules and practices play a part in constructing social life. Societies do not have a 'natural' form of organization. They are organized by humanly crafted and culturally transmitted norms and practices which, in modern societies, are typically embodied in legal rules. All institutions, power relationships and interactions in contemporary societies are at least partially constituted by rules of law. For example, markets cannot exist without legal ground rules to define capacity, allocate property entitlements, distinguish voluntary exchange from coerced transfer, divide the outputs of joint productive activity, and so on. There is no such thing as "the" market. There are only "markets," discrete institutional arrangements, each structured by a particular set of background rules. Similarly, there is no "the" family. Family life is structured by myriads of rules which determine who may marry, what constitutes a family, how decisions are taken within families, whether wives have capacity to contract or own property, and so on. (These propositions are referred to by the phrase "constitutive theory of law.")

Likewise, there is no such thing as a "free market" (a market unregulated by law) or "family privacy" (defined as family arrangements unregulated by law). The law does not "stay out of" or "enter into" markets and families. One way or another, it is always "in" from the start. One cannot even talk about what a market or a family is without sooner or later, usually sooner, getting to questions of law.

§ 2. Backgrounding.

The nature and importance of these rules is pushed very far into the background of legal and popular consciousness, so far, indeed, that such rules are virtually invisible and not thought of as rules at all. Examples of rules backgrounded to the point of invisibility: the default rule that employers own the products made by factory workers; the rule that parents may determine their child's place of residence.

§ 3. Legal rules dispose distributive stakes.

Rules that establish ground rules of social and economic interaction often play a significant role in shaping distributive outcomes—who gets how much of what?—within relationships (employer/employee, owner/neighbor, railroad/adjoining farmer, landlord/tenant, seller/consumer, husband/wife, parents/children, etc.) that implicate the pursuit of well-being (wealth, income, knowledge, fulfillment, etc.). Defining entitlements, privileges and liabilities one way rather than another may produce quite different consequences for the distribution of power and welfare. For example, the particular array of background rules that structure a market will have differential distributive consequences for various market-participants (e.g., the rules may tend to favor employers vis-à-vis employees, sellers vis-à-vis buyers, landlords vis-à-vis tenants, and so on). Therefore, legal decisions can alter or sustain the prevailing social distribution of power and well-being. With differently formulated background legal rules, we would observe over the long run different power relationships and a different distribution of welfare.

§ 4. Legal rules and practices dispose cultural and ideological stakes.

Legal practices play a part in constituting social life in a second way (besides setting background rules that distribute power (see § 3 supra)). Legal practices and discourses create meanings and thereby contribute to the store of culturally-available symbols and artifacts which comprise the medium within which people understand and interpret ("have") their experiences and enact their identities. To the extent

they are salient and diffused in society, legal discourses and practices orient consciousness and construct identities.

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§ 5. Law as legitimating ideology.

Historians have discussed important instances in which the cultural and psychological impact of legal discourses and practices spread to grass roots level. But typically, legal discourses are elite discourses, and therefore the most common cultural effect of legal discourses is to legitimate the status quo, that is, to induce people to believe that existing social arrangements are fair or, at any rate, the best we can do. Elite legal discourses "naturalize" the background rules that sustain the social status quo. For example, legal practices that treat women in certain ways induce people to believe that such legal treatment is appropriate to the identity of "being a woman." Similarly, it takes a moment of reflection to realize that an employer normally has the power to fire an employee, not because this is the only or a particularly good way to run a society, but because the common law decisions taken by identifiable persons (judges and others) grant the employer permission to do so.

§ 6. Transformative possibilities (I)—Foregrounding.

Transformative possibilities flow from the distributive and socially constitutive powers of law. True, many rules exist so far in the background of consciousness that we hardly think of them as rules of law at all. We forget that each and every common law rules is a humanly-crafted artifact. An example is the default rule of property by virtue of which employers own the commodities produced through the joint activity of management and factory employees. There is nothing 'natural' about this principle of social organization—it was centuries in the making.

However, just because they are products of human agency, judge-made, legal rules can be brought out of the background and into the spotlight of foreground, where their distributional and ideological consequences can reconsidered. Legal practices may alter the social distribution of power and well-being by altering the background, institution- and relationship-structuring rules ("market reconstruction"). As appropriate, the rules should be revised so as to aim for more egalitarian and solidaristic outcomes.

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§ 7. The content of legal rules is not meta-historically determined.

The precise content of the background legal rules which structure social institutions and relationships is <u>not</u> determined by the "inherent nature" of the institution or the "type" of society in which it is found (e.g. capitalist, feudalist, socialist). A social institution of a particular type—say, a market for the purchase and sale of labor power in a capitalist society, or for the purchase and sale of goods, or for the leasing of residential property—can be grounded upon a wide variety of foundational legal rule-sets, including rule-sets with quite different distributive consequences (rule-sets that are more or less favorable, as the case may be, to workers or employers, consumers or merchants, tenants or landlords).

§ 8. Rules and rule-applications are chosen, not discovered.

The program of foregrounding, reassessment and transformative development assumes that background legal rules and outcomes are not *tightly* determined by neutral decision procedures. Decision makers must make choices when they are engaged in translating general principles into specific legal rules and/or applying rules to specific cases. These choices are and must be referred, self-consciously or un-self-consciously, to culturally transmitted values, sensibilities, and experiences external to legal reasoning. In particular, the background rules that structure economic activity, family life, gender relations, and racial

interaction cannot be neutrally derived. The background legal rules and arrangements that structure social life are *chosen* in the course of legal practices that are value-laden (political) and context-sensitive.

§ 9. Adjudicators are responsible.

It follows that adjudicators bear some responsibility for the texture of social life and the distribution of power and well-being. Often they deny this or are genuinely unaware of it.

§ 10. Legal analysis is under-determined.

The Legal Realists were responsible for the seminal finding that gaps, conflicts, and ambiguities are pervasive in legal discourse. A "gap" is a situation of uncertainty about which authoritative norms, if any, govern a particular legal problem. A "conflict" is a situation in which respectable, lawyers' arguments can be made that each of two or more conflicting rules or lines of authority govern a particular case. "Ambiguity" refers to situations of uncertainty as to the meaning of a norm and/or its proper application to a given case. The Realists decisively demonstrated the presence of gaps, conflicts and ambiguities in substantive field after substantive field and in all the standard decision methods. Most of fancy jurisprudence over the second half of the 20th century consisted of (unsuccessful) efforts to restore the fiction of "gaplessness" or to disarm and confine such "interstitial" gaps as were acknowledged.

§ 11. The conventions of legal argument constrain.

So-called "legal reasoning" consists of a repertoire of conventional, traditionally recognized rhetorical strategies and argumentative moves—e.g., following precedent, applying canons of textual interpretation, making deductions from foundational principles or rights-concepts, reasoning from assumptions about social policy, judicial administration, institutional competence or separation of powers, and deciding by "balancing" or by reference to considerations of economic-efficiency. The rhetorical conventions embraced by a particular legal culture are experienced by participants in that culture as constraining legal analysis and outcomes.

However, the conventions of legal reasoning are neither rigidly constraining nor infinitely plastic. The degree to which legal authorities constrain the solution to a given legal problem is an experience induced by an interpretation of the authorities, not an inherent property of the authorities themselves. Indeed, no objective process exists to discover *which* authorities bear on a given legal problem; this determination is itself influenced by interpretive activity engaged in by the decision maker. Because there are no un-interpreted legal authorities, the decision maker to some extent constitutes the law which constrains him/her.

§ 12. Indeterminacy of legal reasoning—legal practices as medium.

Legal reasoning does not and cannot provide neutral, uncontroversial, or determinate decision-procedures for generating concrete legal rules and applications from general legal principles. Judge-made legal rules and advocates' arguments are crafted within a medium (or "discourse") that is both *constraining* and *plastic*. Legal practices comprise a medium in which the participants (including common law judges and the advocates who seek to persuade them) must make choices that may be guided but cannot be entirely determined by legal norms and authorities. Accumulated, these choices have the distributive and cultural effects previously described. Because of the (relative) plasticity of legal media, legal practices can be appreciated as an arena of conflict, often implicit or unconscious, between competing social visions.

§ 13. Following precedent.

For example, following precedent (*stare decisis*) is not one idea (follow past decisions) but two, *contradictory* ideas (follow past decisions *except* when you distinguish past decisions). The meaning of any past decision as a precedent, and indeed, whether it is a precedent, are unclear until the past decision is interpreted by a legal actor (e.g., a judge, an attorney) using the repertoire of standard tools including following, extending, distinguishing, narrowing, and overruling precedents. (Llewellyn).

§ 14. Interpretation of texts.

Similarly, for every canon of statutory or documentary construction, there is usually an equally respectable counter canon that points in the opposite direction (Llewellyn).

§ 15. Indeterminacy of foundational concepts.

People disagree about what the foundational concepts and values of the legal system are and should be. But put that aside for the moment, and instead assume consensus on the foundational concepts or a rigorously democratic process for specifying them. That is, assume that legal decision makers commence analysis and argument with an authoritative set of foundational concepts and values. The interpretation and application of such concepts is indeterminate.

Decision makers cannot simply deduce the rules that should govern particular cases from foundational principles or rights-concepts like "private property," "freedom of contract," "reasonable expectations," "good faith," "efficiency," *sic utere*, "family privacy," "freedom of speech," or "due process." These conceptual building blocks of legal discourse are not self-defining, and the meaning of each is elastic (although not infinitely so, within the experience of any particular legal culture). Often basic legal concepts embody *conflicting* ideas and values. Consequently, much of what passes for "deduction" in legal discourse is actually circular or conclusory argument (Felix Cohen's "transcendental nonsense").

§ 16. Private property.

For example, "private property" embodies the idea of protecting the owner's freedom to act self-interestedly, but it *also* embodies the idea an owner's use of his/her property is subject to duties to neighbors and even strangers. For example, private-property law empowers owners to evict trespassers—except in those cases where private-property law prohibits owners from doing so (*Shack*, *Matthews*). When and why private property owners have the right to exclude trespassers are questions of public policy the answers to which depend on all the facts and relevant policy considerations in context. When and why owners may evict trespassers cannot be determined by deduction from the concept of private property itself, since the concept of private property points in two directions. Likewise, the idea of private property by itself cannot tell us whether I may use my land without regard to my neighbor's interests (*Thurston*, re: the neighbor's house; *Rylands*, re: mining for coal in communicating shafts), or whether I must so use my land as to protect my neighbor's interests (*Thurston*, re: my neighbor's soil; *Rylands*, re: installing a reservoir).

§ 17. Contract.

Similar observations can be made with respect to all the other building blocks. Thus, freedom of contract protects *both* freedom of action (offers revocable until accepted) *and* security of expectations (unaccepted offer sometimes irrevocable to protect reliance or substantial-performance commenced). Parties must keep their bargains, except in the well-known cases where the law permits breaching defendants to escape (impossibility, impracticability), permits breaching plaintiffs to recover (*Britton*, *Hayward*, *Jacob & Youngs*), or limits damages to less than full expectation (*Hadley v. Baxendale*, *Peevyhouse*).....

Formality and Informality in the Law of Work

Kerry Rittich

Draft: Please do not circulate beyond the Workshop

"[T]hat paradigm of employment which underpinned much postwar labor legislation in advanced economies became increasingly anachronistic. ... No longer, therefore, could public policy platforms, legal entitlements or union strategies be usefully constructed on the old paradigm. True, the nature of the new paradigm is even now not yet clear. .... Which vision of social justice, whose aspirations, whose interests should labor scholarship be concerned to protect? We know only that the old paradigm is likely gone forever, not what will take its place. ...."[1]

If the emerging paradigm of work remains shrouded in mist and still hidden from view, one thing seems reasonably certain: informal work is sure to form a constituent part of that paradigm, making its mark on the discipline of labour law at the same time.

Locating informal work within labour law:

Informality at work might be described as the new frontier of labour law. Enormous numbers of workers around the world labour in conditions of informality,[2] and anyone who attempts to grapple with the field at the global or transnational level is now compelled to recognize the significance, both normative and practical, of informality to the project and problems of workplace governance. Informal markets are, for many workers, not simply the normal site of work; informality is a condition that is associated with economic disadvantage and insecurity at work. Relative to work in the formal sector, work in the informal sector remains, in general, characterized by poor working conditions, low pay, economic insecurity and limited options for mobility and advancement. Informality, moreover, often overlaps significantly with the conditions of social exclusion and political disadvantage.

Stated this way, informality would seem to lie at the very center of labour law's historic concerns. Yet the attention to informality within the field of labour law itself represents something of a change. For labour law has its origins in the industrialized world and it is the forms of work that consolidated and prevailed there during the twentieth century that provided the paradigm for the field, even if that paradigm is now in disarray. Informality, by contrast, has historically been associated with the labour markets of the Global South and, in contradistinction to work in the North, framed primarily as an aspect of development. Some of the earliest analyses of what we now call informal work can be found in discussions of colonial governance practices. For example, the well-known British imperial administrator, Lord Lugard, located the management of the native labour force as an issue to be addressed within the 'dual mandate' to promote commerce and civilization.[3] This

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[1] Harry Arthurs, "Compared to What? The UCLA Comparative Labor Law Project and the Future of Comparative Labor Law", (2006-07) 28 Comp. Labor L. and Policy J. 521).

[2] Anne Trebilcock, "Using Development Approaches to Address the Challenge of the Informal Economy for Labour Law", Guy Davidov and Brian Langille, eds., *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford and Portland, OR: Hart, 2006), 63; Colin C. Williams and Mark A. Lansky, "Informal employment in developed and developing economies: Perspectives and policy responses", 152 International Labour Review, 355 (2013)

[3] Frederick J.D. Lugard, *The Dual Mandate in British Tropical Africa* (1922)

history casts a long shadow: rather than a matter that demands focused attention on the conditions of work or the powers and disabilities of workers, the idea that informality is something to be addressed in the course of advancing social and economic modernization retains immense appeal within influential international institutions and constituencies.[4]

Conceptualized primarily as a problem of development, informality has occupied a distinctly marginal - we might say underdeveloped - place within the field of labour and employment law. To the extent that the problems of informality *do* surface expressly as issues of work, the longstanding view has been that the primary task is formalization and the 'inclusion' of informal workers by extending labour standards and other rights at work to classes of workers now outside them.[5]

Reorganizing the relationship between formal and informal work

Both conceptual and empirical shifts, however, are disturbing the traditionally bifurcated treatment of formal and informal labour markets and bringing informality more centrally into discussions about work. And at the centre of these conceptual shifts are discussions of law's relation to informality: as the ILO has noted, "informality is principally a governance issue".[6]

First, new claims are being advanced on the international plane about law's capacity to remedy the ills associated with informal work and informal markets. One is that the rule of law can be used to empower poor and disenfranchised informal workers;[7] another is that informality itself is a result of badly designed legal rules and regulations.[8] Yet despite the embrace of formalization across the transnational policy elite, informed by the belief that, as a policy mechanism, formalization has the virtue of simultaneously advancing growth, poverty alleviation, equality and empowerment[9], what formalization might mean in terms of the relevant law remains surprisingly open. Displaced from these narratives, moreover, are questions that historically have been central to the concerns of labour law, for example, how formalization might affect the capacity of workers to associate and act collectively or control or influence the terms under which they work.

Second, informality's putative relation to development has been upended and, along with it, so has the association of informality with the labour markets of the Global South. Contrary to previous assumptions, informality no longer appears destined to disappear in tandem with economic development –by contrast, it may well increase. New, or newly expanded, informal labour markets are a routine feature of urban landscapes across the Global South, and increases in informal employment are by now a quite foreseeable outcome of property reforms and trade liberalization as well as changes in rural land use, increased domestic and transnational migration and other transformations related to globalization and enhanced market integration. But informality has become an entrenched, even growing,

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[4] Perry et al, *Informality: Exit and Exclusion* (Washington, D.C: World Bank, 2007), available at: http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/0,,contentMDK:21345369~pagePK:146736~piPK:146830~theSitePK:258554,00.html

[5] See for example, ILO, Resolution on Decent Work in the Informal Economy (2002), para. 24-25, available at: http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25res.pdf

[6] ILO, Resolution on Decent Work in the Informal Economy (2002), para. 14

[7] United National Development Program, Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone* (2008)

[8] Hernando de Soto, *The Other Path* (1989); Perry et al, *Informality: Exit and Exclusion* (2007); David Kucera and Leanne Roncolato, "Informal Employment: Two contested policy issues", 147 International Labour Review 321 (2008); Williams and Lansky, supra.

[9] UNDP, *Making the Law Work for Everyone*, *supra*

phenomenon in the labour markets of postindustrial economies too; there too, it often expands in times of crisis. Since 2008, many (more) people in the periphery of Europe work under conditions and in contexts that labour law has traditionally left untouched, as they engage in informal economic arrangements, subsistence activity and barter in order to get by.

Third, and relatedly, labour law's unique capacity to respond to problems at work is in question within industrialized as well as developed states. Precisely because informality has been imagined as a dimension of underdevelopment, it has long been observed that it is macroeconomic governance rather than labour law, that tends to matter most to informal workers.[10] But the financial and economic upheavals of the last several decades have revealed the broader significance of macroeconomic policy-making to workers in a wide range of regions, locales and circumstances: in times of crisis, labour law can be orthogonal, if not irrelevant, to the pressing issues that workers face, while decisions about fiscal and monetary policy effectively dispose of their fate.[11]

Yet even as it has become apparent that geography is an increasingly poor basis on which to differentiate among either workers or labour markets, the association of informality with the South and formality with the advanced labour markets of the North remains entrenched. This distinction creates a raft of barriers: to conceptualizing alternative futures at work; to engaging in policy analyses and institutional design that might aid both workers and others involved in labour markets and, ultimately, to pursuing legal and political transformation in the most informed way possible. For workers within formal markets, a preoccupation with the discipline and possibilities of labour law not only limits the conceptual and the regulatory tools available to address problems of work; it can make it extraordinarily difficult to locate where the action is when it comes to the relevant or operative law *of* work. For one, policy and regulatory shifts that seem remote from both work-a-day lives and the concerns of labour law may generate cataclysmic transformations on the ground. For another, change in norms and practices at work are as likely now to come from the private as from the public sphere.
Is there a way to put the diverse situations of workers together, if not to reconcile them, then to contemplate them within a common legal frame and to make them legible as part of a shared universe of normative and political concerns? One intuition is that, rather than a marginal issue, an examination of informality may provide a useful lens on the nature and challenges of regulating contemporary work *in general*. Informal workers share more with formal workers in terms of characteristic problems and predicaments than we typically acknowledge. But rather than merely seek to 'include' informal workers and address their problems within labour law, we might reverse the lens and take the condition of informality as a vantage point from which to grapple with the broader set of legal challenges surrounding work, particularly precarious work. At the same time, we can use the practical and theoretical insights garnered within labour law to shed light on the claim that formalization will address the problems of informal workers.

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[10] W. Arthur Lewis, "The causes of unemployment in less developed countries and some research topics", 101 *International Labour Review* 547 (1970)
[11] K. Rittich, Fragmenting Work and Multilevel Governance, de Burca, Kilpatrick and Scott, *Critical Legal Perspectives on Global Governance* (Hart, 2013); K. Rittich, "Labour Market Governance in Wake of the Crisis: Reflections and Possibilities", C. Joerges and C. Glinska, *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism versus Democratic Governance* (Oxford and Portland, OR: Hart, 2014)

Before we do that, however, we need to come to grips with some of the conceptual attachments that surround informality, namely, the idea that informality *is* something and that it is something is fundamentally *different* from formal work. In the spirit of advancing the search for the new paradigm, what follows is a short ground-clearing exercise designed to disturb, even refuse, the bases on which we typically position formal and informal workers within different conceptual and policy categories. Think of this as a provocation to thought, an indication of directions of inquiry, rather than an effort to work through the implications for the field of labour law.

Informality and precarious work

Informality has become a heavily normative rather than merely descriptive term: it typically serves as a proxy for forms and condition s of work that we think of as warranting change or improvement. Thus, to speak of informality is somehow *already* to invite intervention of one form or another. The term might refer to work at the bottom of value and supply chains, to domestic work, to agricultural or other forms of subsistence work, or to work performed within grey or illegal markets. Informality might also refer to work that has become worse, in terms of working conditions and economic rewards, due to changes in the legal framework of the labour market, the capacity of the broader economy to support or generate jobs, the manner in which production and service delivery is organized (think of the move from vertically integrated to networked production), or some combination of the above events.

Yet rather than unique, many of these features and processes are now directly associated with formal work as well. There is a huge, and growing, class of workers in the industrialized world with marginal status at, and attachment to, work.[12] As is the case with informal workers, the minimal income and benefits such workers typically derive from participating in the labour market arises from a combination of structural and socio-political factors, including insufficient demand for labour, lack of 'capital', human and social, as well as labour market stratification in accordance with customary or social norms and outright discrimination on ascriptive grounds. The poor bargaining power they experience as a result is then exacerbated by inadequacies of the legal framework in which they operate. So if informality is a convenient mode of pointing to problems at work, informality also overlaps substantially with what is often identified as precarious work: work in which workers lack standard protections and workplace entitlements, voice or control over the conditions of work, and economic mobility and security.[13] Informality is sometimes described as the product of 'deregulation' or the rise of sub-contracting; indeed, processes of deregulation may themselves be called 'informalization' or 'deformalization'.[14] But so, very often, is precarious work.

Using informality to either identify or diagnose problems at work turns out to be difficult as well. Informality is a heterogeneous socio-legal condition encompassing immensely varied forms of work, embedded in equally varied institutional settings and resulting from myriad social, political and economic processes. There are no consistent markers or measures of

[12] Guy Standing, The Precariat: The New Dangerous Class (2011).
[13] K. van Wezel Stone and Harry Arthurs, *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (Russell Sage, 2013).
[14] Judy Fudge, "Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation", 44 Osgoode Hall L.J. 609 (2006); Williams and Lansky, supra.

informality: it has been identified by enterprise, by job, and by activity.[15] Nor is there any sharp dichotomy between the formal and informal sectors. Instead, they are better mapped as points on a continuum[16], even as fluid and intermingled spheres. Formality is also a highly uneven condition. Workers may be part of the formal economy for one purpose but informal for others.[17] Or they may be informal at one moment and formal at another.[18] One result, as Ravi Kanbur has observed, is that informality "has the dubious distinction of combining maximum policy importance and political salience with minimal conceptual clarity and coherence in the analytical literature".[19] Rather than simply an unfortunate and complicating feature, Kanbur's observation reveals an unavoidable conundrum at the heart of debates about informal markets. There is no way to make all the different work situations that travel under the name 'informal' commensurable in any fundamental sense; nor is there any way to usefully distinguish them from many types of *formal* work. The attempt to do so, moreover, risks conflating – and confusing – distinct issues which may be better identified and examined as legal, social, political and economic concerns in themselves. At the same time, imagining informality as a distinct and unifying category also separates some forms of work from others to which they are, in fact, deeply connected.

Informality as a legal category:

This conceptual confusion is mirrored in the legal analysis of informality; far from providing useful analytic traction, as a legal category informality turns out to be distracting, even confusing. The problems of informality are often attributed to the absence of legal rules, sometimes the rule of law *tout court.*[20] Underpinning these claims is the idea that the informal is a zone in which state authority is either absent or imperfect in its reach. Laws do not apply or, if they apply in theory are not actually enforced. Or the reach of law is uneven: some laws apply while others do not.[21] Yet, rather than exceptional, the uneven reach of rules and regulations and highly variable enforcement of the law are all standard-issue problems of work in the formal sector too. The fact that informal work is untouched by a particular law tells us little or nothing about its general relation to law in any event. Like formal markets, informal markets are crosscut with myriad freedoms, permissions, prohibitions and constraints which both endow the actors within them with powers and immunities and subject them to duties and obligations.[22] Some can be located in customary norms or social practices, others owe their force to formal law, and still others are effectively an indissoluble amalgam of both. The inescapable conclusion is that, far from unregulated, informal work *is* regulated, and it may be regulated as much by formal law as by informal norms.

The attribution of informality to 'deregulation' raises similar problems. Whatever the truth of the observation that deregulation commonly results in a deterioration in the legal protections for workers and/or an increase in workers outside the protective reach of

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[15] Williams and Lansky, supra.
[16] Basudeb Guha-Khasnobis, Ravi Kanbur, and Elinor Ostrom, "Beyond Formality and Informality", Basudeb Guha-Khasnobis, Ravi Kanbur, and Elinor Ostrom, *Linking the Formal and Informal Economy: Concepts and Policies* (2006), 1.ILO, Resolution on Decent Work and the Informal Economy (2002).
[17] Keith Hart, "Bureaucratic Form and the Informal Economy", Guha-Khasnobis, Kanbur and Ostrom, *Linking the Formal and the Informal Economy* (2006)
[18] Lucy Williams, "Poor Women's Work Experiences: Gaps in the 'Work/Family' Discussion, J.Conaghan and K. Rittich, *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford 2005), 195.
[19] R. Kanbur, "Conceptualising Informality: Regulation and Enforcement", February 2009
[20] R. Kanbur, "Conceptualizing Informality" supra.
[21] ILO Resolution Concerning Decent Work in the Informal Economy, 2002
[22] W. N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1913) 23 Yale Law J. 16.

labour and employment law,[23] it is unsafe, even mistaken, to imagine that workers lie beyond the *law* as a result. For one, the potential for direct, formal regulation of informal work is, in theory, omnipresent. Numerous laws are destined to touch on informal markets in any event, and these may be as - or more -important than those that are missing. For example, informal workers typically remain subject to police harassment and the threat of prosecution under the criminal law even where they do not receive the benefit of labour and employment law protections.[24] Municipal zoning laws – or their lack - may affect where informal workers set up shop and ply their trade. Housing, landlord/tenant laws, land titling and property rights may render them vulnerable to eviction or otherwise place them at risk of losing access to resources and opportunities crucial to their economic well-being. [25] And as these possibilities indicate, informal workers decisions and activities will inevitably be structured by the legal entitlements of those with whom they transact and interact. In short, far from absent, the imprint of the law can be detected all over informal markets. More importantly, the exclusion or 'exceptionalizing' of informal workers from particular classes of rules, a condition often identified with informality, may itself be the consequence of some political, bureaucratic or administrative decision. Why, however, should we think of workers like domestic and agricultural workers who lack access to collective bargaining or other rights at work as 'outside' the law, when such disabilities are embedded in – and may be directly a product of - legal rules themselves?

This brings us to the second observation. Formalization is conceptually and functionally open. Different actors and institutions mean different things *by* formalization, and they expect to advance different - and sometimes incompatible - objectives *from* formalization. Entrepreneurs may want to eliminate the economic advantages enjoyed by competitors who profit by avoiding regulatory fees, licenses, and income and payroll taxes; they may also seek to capture a greater share of the profits through entitlements and regulations that deliver them low costs and high levels of control over their workforces. States may pursue formalization to expand their tax base, especially where the growing capacity of capital to escape taxation makes other avenues to raise revenue seem unpromising. Workers and their advocates, for their part, typically see in formalization a means of gaining higher workplace standards as well as recognition of their associations and a measure of voice at work. Formalization itself, however, tells us nothing about which of these objectives will prevail. Nor does it dispose of the crucial matter, how any new legal powers and entitlements that *are* recognized will be designed and institutionalized. Instead it merely poses the central question: what powers, for whom, and to what ends?

Thirdly, it seems unavoidably clear that formalization may bring disadvantages as well as benefits to workers. Here, it turns out that the history of labour and employment law is instructive. Although formalization is now routinely advanced as the route to decent or 'better' work, such claims should induce caution, if not immediately create flashing lights, for anyone in the field of labour. The (more) visible presence of law and the state and the recognition of formal rights at work have never tracked improvements in working conditions or bargaining power for workers in any simple or unidirectional way.[26] Even within industrialized states, the rule of law and the constitutionalization of workers' rights have proved to be decidedly mixed blessings,

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[23] Williams and Lansky, supra.
[24] P. Kotiswaran, *Dangerous Sex, Invisible Labour: Sex Work and the Law in India* (Princeton 2012)
[25] Jorge Esquirol, "Titling and Untitled Housing in Panama City", 4:2 Tennessee Journal of Law and Policy 1 (2008)
[26] Harry Arthurs, Labour Law Without the State? (1996) 46 U.T.L.J. 1

often entailing disabilities for workers that are as significant as any advantages.[27] It has long been recognized that rights that hold transformative promise may, through interpretive strictures, become devices to either uphold the status quo or further entrench the rights of capital.[28] Formalization under norms of greater labour market flexibility – a distinct possibility, given the state of conventional political and technocratic wisdom about the nature of good labour market governance – poses still further risks; for some workers, the outcome may even be a net loss. For example, prior informal understandings that worked to workers' advantage, including flexibility to manage competing household obligations,[29] may be disrupted. New private law rights may be legally entrenched that place significant constraints on the pursuit of traditional economic activities and/or impose new risks on workers. Regulation and bureaucratic oversight may provide enhanced opportunities for both public and private actors to exact rents or subject workers to obligations and constraints, with little in the way of countervailing power or benefits. The possibilities – in both directions - are legion. Greater economic security and enhanced voice and control over the terms and conditions of work are, then, a highly contingent rather than inevitable outcome of formalization. What is at stake within debates over the regulation of informal markets is better understood as a struggle over the content and purposes of the law rather than simply its presence. Whether workers are imagined as formal or informal, what is typically at issue is its burdens and benefits.

At the same time, work now designated 'informal' can be improved by policy or regulatory changes that either directly target particular groups or extend to excluded workers some of the benefits available to labour market 'insiders'. Domestic workers, for example, may gain access to social protection, even vacation pay and limits on working time, through legislative interventions.[30] Low-income households whose members are engaged in subsistence or other forms of informal work may have access to subsidies like Brazil's *bolsa familia* provided by the state.[31] Workers in sub-contracting situations who are effectively without legal remedies may have new options for redress in the case of contract disputes over non-payment of wages or for services rendered as a result of legislation that enables collective bargaining or that extends liability for the debts of sub-contractors to those higher up in the production chain.[32] Given the many avenues to improve their situation through law and policy, for what reasons does it make sense either to think of informal workers as outside the law and beyond the reach of the state or to differentiate them from other workers?

The enduring puzzle: the place of law in work

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[27] D. Carter *et al, Labour Law in Canada*, 5th ed. (Markham, Ont.: Butterworths, 2002); Fudge and Tucker, *Labour Before the Law* (Toronto: University of Toronto, 2004)

[28] K. Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41", Minn. Law Rev (1978); Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan und Svenska Elektrikerförbundet* [2007] ECR I-11767; Case C-346/06 *Rechtsanwalt Dr Dirk Rüffert v Land Niedersachsen* [2008] ECR I-01989; Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I- 10779

[29] W. Maloney, "Informality Revisited", 32 *World Development* 1159 (2004)

[30] D. Gallin and P. Horn, "Organizing Informal women workers", cited in Kucera and Roncolato, supra

[31] See D. Coutinho, "Decentralization and Coordination in Social Law and Policy: The *Bolsa Familia* Program" and H. Alviar Garcia, "Social Policy and the New Developmental State: The Case of Colombia" in Trubek et al, *Law and the New Developmental State: The Brazilian Experience in Latin American Context* (Cambridge: CUP, 2013)

[32] Cranford et al, *Self-Employed Workers Organize: Law, Policy and Unions* (McGill-Queens, 2005).

Buried within these questions is a series of nested conceptual problems of immense significance to the regulation of work in all its forms. Although they cannot be explored in any depth or detail here, it is worth at least noting their presence.

There is now a wide range of theories - normative, sociological, economic and behavioural - purporting to explain law's relation to informality, both actual and proper; from these theories flow, inevitably, different assessments of the purposes, effects and wisdom of regulatory interventions designed to remedy informality. Although they differ in many other respects, virtually all such theories proceed on the assumption that it makes sense to think of law and informal markets as functionally and analytically distinct. However, this has long been a suspect starting point.[33] Law is endogenous rather than external to informal markets, as it is to other markets. All references to informal markets must therefore imply something about what is missing and what must be added in the way of legal rules or institutions in order to reach a state of formality; put simply, they imply some idea of a legally 'normal' market. This brings us immediately to the baseline problem:[34] just as there is no agreement about the indicia of informality, there is no consensus on the legal structure and content of *formal* labour markets. Instead, their form and substance is both contested and contingent, reflecting competing normative and political visions as well as the accreted institutional forms of capitalist development in different locales and at different historical periods. Nor is any merely technical, rather than ideological or political, determination of the formal legal structure of a 'normal' labour market available for use as a benchmark or standard, whether in debates about informality or the regulation of work in general. Rather, the opposite is true: the effects of legal rules and institutions on the bargaining power and resources of informal sector workers make any such standard inherently contentious. In addition to affecting the distribution of economic gains and political power among market participants, each will encode some – perhaps several - normative visions of a just future of work as well. It is this internal, deeply constitutive relationship between laws, work, and power that must be cracked open to build the new paradigm – and this is true whether we are talking about formal or informal work or if we even recognize the difference between them at all.

Toward a (more) complete law of work?

We might draw some interlinked observations at this point. First, the space – conceptual and practical – between formal and informal work is badly eroded if not entirely collapsed. Informality may well serve as a placeholder for workers and work-related predicaments that warrant our attention. But at the level of law and policy, informal markets are difficult if not impossible to distinguish in any analytically robust way from formal markets. Second, once it is recognized that formalization involves 'bringing the law' to those who are *already* subject to law in a variety of ways, we can cease to rely so heavily on the prevailing strategy of exceptionalism. Moving informal work more directly into the frameworks and heuristics applied to other markets and other forms of work, we are then in a position to consider how legal rules also help create the very problems that we often seek to solve through formalization.

Nothing inevitable, of course, flows from these observations. Categorical distinctions set aside, however, it becomes easier to see, on the one hand, how the legal and practical issues

[33] Robert W. Gordon, Critical Legal Histories (1984) 36 Stanford Law Rev. 57.
[34] The locus classicus on the concept of the normal market is Daniel K. Tarullo, "Beyond Normalcy in the Regulation of International Trade", 100 Harvard Law Rev. 546 (1987).

facing formal workers –impaired bargaining power and lack of control over the terms and conditions of work - might mirror those faced by workers in informal labour markets and, on the other, why concerns long understood to be relevant to informal workers – macroeconomic structures as well as access to capital, credit and broader markets, for example - might affect those in the formal sector too. Reframed in terms of the normative concerns of labour law, debates about informality should of course seem entirely familiar to labour lawyers, especially those already grappling with the legal predicaments around non-standard and precarious work. But the inclusion of informality should be expected to change the discipline of labour law too: the limits of its characteristic preoccupations, its preferred strategies, and its familial reference points may seem both more evident and more problematic once informal work becomes fully integrated into the field. Like those needed address to precarious work, interventions to address informality will engage a range of converging and competing values and policy considerations: questions of equity and efficiency, administrative capacity, and normative commitments to fundamental rights will all be part of the mix.[35] But working conditions, for example, may seem less important than access to property or social protection. And enhanced security within contracting chains may prevail over changes to the bilateral contract relationship in the overall calculus. Indeed the reform agendas of *both* informal and precarious work might be transformed, especially if, as Harry has suggested, they were to be placed within a larger conversation around the 'law of economic subordination and resistance'.[36] Relocated, a broad range of rules that go well beyond labour law to include economic life in general will then seem pertinent, not only to informal work but to formal work as well, and not merely to its 'regulation' but to its design, construction and conditions of possibility as well.

[35] Harry Arthurs, Fairness at Work: Federal Labour Standards for the 21st Century (2006); K. van Wezel Stone and Harry Arthurs, *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (Russell Sage, 2013)

[36] Harry Arthurs, Making Bricks Without Straw: The Creation of a Transnational Labour Regime, G. de Burca, C. Kilpatrick and J. Scott, *Critical Legal Perspectives on Global Governance* (Hart 2014), 129; Harry Arthurs, "Labor Law as the Law of Economic Subordination and Resistance", 34 Comp. Labor Law and Policy J. 585 (2013).

Urban Informality
Toward an Epistemology of Planning

Ananya Roy

Policy Epistemology 2: Underwriting the Right to Participate in the Market

In the 1990s there was policy interest in the formalization of land rights. World Bank researchers argue that numerous benefits accrue from enforceable property rights—from the sustainable use of natural resources to household food security to political stability. But the argument that tops the list is one quite similar to that posed by De Soto: that such rights make possible the transferability of property and thereby the participation of the poor in credit and financial markets (Deininger & Binswanger, 1999). This is a powerful and seductive policy argument, one that appeals to those interested in market efficiency as well as to those interested in the distribution of resources. It is based on two auras: the community and the market.

The aura of the community suggests that local institutions are harmonious and nonhierarchical entities where there can be consensus regarding resources. But on the ground, such assumptions usually do not hold. The process of formalization is never as straightforward as simply converting informal documentation into formal titles. Usually there are numerous types of informal documentation, of varying legitimacy, and there are often multiple claims to a single plot of land. In my work on Calcutta (2003a), I have documented in detail how the moment of formalization can be one of great internal conflict for squatter settlements, a bloody and brutal sorting out of "legitimate" claims. Formalization can also trigger conflicts within households. Most land titling programs vest property rights in the head of household, who is assumed to be male. Land policy can therefore consolidate and formalize gendered divisions and hierarchies, deepening the insecurity of female members of households. I am not suggesting that informal property systems embody values of equity and harmony and thus must be kept intact. Rather I am arguing that formal property systems can also be rife with patriarchal and class power.

But perhaps the most enduring aura is that of the market. Like De Soto, World Bank researchers present the inequalities of property ownership as created by "nonmarket" forces (Deininger & Binswanger, 1999). They argue that property markets reduce poverty and in fact empower the poor.[9] This, of course, overlooks the fact that informality is already a domain of intense market transactions. The issue then is how formalization occurs not in a vacuum, but rather amidst a complex system of existing "property interests" (Razzaz, 1997).

At first glance, De Soto's call for formalization seems to be a call for property rights, possibly even for the redistribution of property. However, a closer look shows that the approach is not so much about property rights as it is about the right to participate in property markets. This became apparent in a debate that played out recently in this journal. In a review of De Soto's *The Mystery of Capital*, Keyes (2003) argued that his scheme was unfeasible because "accumulation-hungry capitalists, by the logic of capital, do not wish to dilute their wealth, and the distribution of capital to the world's poor would do just that" (p. 104). In a response, Schaefer (2003), director of the Washington, DC, branch of De Soto's Institute of Liberty and Democracy, pointed out that Keyes had confused De Soto's efforts with traditional land reform programs:

> De Soto's proposal is not wealth transfer but wealth legalization. The poor of the world already hold trillions in assets now. De Soto is

> not distributing capital to anyone. By making them liquid, everyone's capital pool grows dramatically. (p. 316)

I will not take on the rather ludicrous point that the poor already hold trillions in assets and that the end of poverty is just a matter of legally recognizing these assets. But I will underscore Schaefer's blunt statement about the difference between wealth transfer and wealth legalization. De Soto's ideas are seductive precisely because they only guarantee the latter but in doing so promise the former.

This approach can be critiqued in at least two different ways. A number of studies have highlighted the limits of legalization. Gilbert (2002), for example, argues that De Soto perpetuates a myth of popular capitalism in which policymakers can believe that "all they have to do is to offer title deeds, and that they can leave the market to do everything else" (p. 16). Using the case of informal settlements in Bogota, he shows how little formal finance is forthcoming after legalization and thereby casts doubt on the notion that ending informality can end poverty. Similarly, in the case of Peru, De Soto's home territory, the research indicates that the poor, despite land titles, face limited employment opportunities and thus continue to be a credit risk (Kagawa & Tukstra, 2002).

But these critiques of the limits of property markets bypass a more fundamental question: Is the right to participate in property markets the same thing as participation in property markets? Can wealth legalization have any significant impact if there is no talk of wealth transfer? If we situate these questions not in the abstract space of the free market but rather in the real space of unequal cities, it becomes clear that the issue of property is rather sticky. Krueckeberg (1995) rightly notes that property is not just an object but rather a set of relationships between the owner of something and everyone else's claims to that same thing. In other words, property is a "set of rules and sanctions that determine an individual's power to dispose of an object in the act of exchange. The rules also establish his or her power to exclude or limit the claims that others may make upon that object" (T. Mitchell, 2003, p. 11). In this sense, property systems are monopolistic. Indeed, following Braudel (1982), it can be argued that capitalism itself is a system of monopolies rather than a free-flowing circulation of capital,[10] a point that De Soto misses despite his declared affinity to Braudel.[11] It is not enough then, in this context, to simply assert the right to participate in property markets. Given the monopolistic nature of property, it is imperative for policymakers to underwrite the right to participate in the market by directly addressing inequality.

Policy Epistemology 3: Strategically Using the State of Exception

One of the great challenges of formalization is that it can displace the most vulnerable residents of an informal settlement. Higher income groups can "raid" regularized settlements, displacing original residents (Burgess, 1982). Or formalization can make land markets less affordable (Payne, 2002). Indeed, if informality is a differentiated structure, then formalization can be a moment when inequality is deepened. Take for example the case of the Community Mortgage Program (CMP), an innovative policy launched in Manila in 1989, which offers squatters the opportunity to buy the land they occupy. The CMP operates through collective lending in which entire communities apply for credit, with the process managed by resident associations and supervised by NGOs. However, as discussed by Berner (2000), there are some important constraints. For example, the CMP seems to have worked primarily on public land where residents have paid only 15-20% of market price. But perhaps most significant is Berner's finding that the poorest one third of squatters, unable to make regular mortgage payments, are displaced by the program. The CMP then serves primarily the upper and middle ranks of squatter communities.

Such findings raise the question: How can policymakers proceed with the task of

formalization while keeping an eye on affordability and preventing gentrification and displacement? Some of this displacement might, of course involve squatters capitalizing on rising property values (Eckstein, 1990). This entrepreneurship is inevitable, and in my opinion, welcome. If the argument made by the World Bank, De Soto, and others is that land titles allow the buying and selling of property, then surely such forms of mobility indicate the success of these policies? But in many cases the mobility indicates displacement of the poorest residents. Such questions can be contemplated in relation to the state of exception. I have earlier argued that informality is the state of exception determined by the sovereign power of the planning apparatus. I am now arguing that it is possible to strategically use the state of exception to frame policy. There are two forms of exception that are worth noting: regulatory exceptions and regularity exceptions.

The need for regulatory exceptions is carefully articulated by Peter Ward (1999) in the case of the colonias of Texas. The colonias are informal subdivisions, carved out by developers in extraterritorial jurisdictions. Lots are then sold to those unable to afford housing in formal neighborhoods, often through the Contract for Deed, a poor man's mortgage that allows access to credit but provides few protections. The colonias usually lack services, and most of the homes are built by the residents. Ward points out the cruel irony of how water and wastewater services were extended to some of the colonias through an EPA demonstration grant, but that this infrastructure went up to the colonias and not into the homes. Since the housing was not code compliant, the county would not authorize individual hookups to the EPA infrastructure.[12] However, if it had been code compliant it would not have been affordable. Looking across the border at the colonias of Mexico, where services often arrive well before formalization and well before housing meets regulatory standards, Ward suggests a state of exception. His policy recommendation is to have a 5-year moratorium on codes while infrastructure is extended to the colonias and at the same time to provide financing mechanisms for these settlements to upgrade to code. Each component of this policy recommendation is important—that this is a limited moratorium and that institutional resources are provided to allow upgrading. This ensures that the state of exception recognizes incrementalism but does not become a generalized condition where those unable to afford formal housing are condemned to a second-tier set of standards and codes.

Incrementalism also makes possible exceptions of regularity. One important reason for displacement is that formalization regularizes the irregularity of payments and transactions. Without formal jobs, such regular mortgage or interest payments are difficult to sustain. Over the years, many studies have shown that when squatters are relocated to subsidized public housing, they sell off their rights to this housing in order to profit on the transaction and to avoid a system where the failure to make regular payments results in evictions (Eckstein, 1990, p. 173; Hollnsteiner, 1977, p. 310). As Hardoy and Sattherwaite (1986, p. 247) note, this is not just an issue of affordability but rather of the temporal rhythm of payments. It is a mismatch between the systemic irregularity of employment and the institutionalized regularity of payment. Thus, in a telling anecdote, Varley (2002, p. 455) shows how in Mexico City the urban poor refer to repaying a formal loan or making monthly rent or mortgage payments as *endrogar*—a term that not only means to borrow but also refers to drug addiction.

There are different ways of mitigating the unrelenting regularity of monthly rents, mortgages, and service payments. One way is to reduce the penalties of eviction (Eckstein, 1990). Yet another is to institute community- based land trusts in which the burden of coping falls not simply on an individual but on groups and communities. A third option is to provide microloans for housing, and such microfinance policies at times adopt models of community lending. However, microloans are usually given for investment in housing improvement and

infrastructure (Ferguson & Navarrete, 2003), and usually not for making mortgage or service payments. Furthermore, it can be asked whether such programs encourage the poor to take out loans to service old debts, thereby perpetuating cycles of indebtedness. A fourth route is to pay more serious attention to security of tenure policies. Unlike land titling programs, security of tenure is not an absolute condition but rather a continuum of rights and claims that can include the right to remain, the claim to services and credit, and the application of market values to property (McAuslan, 2002; Sims, 2002). These mid-level rights and claims can be quite powerful. Indeed, as Varley (2002) points out, housing improvement often occurs not with legalization and formalization but rather with high de facto security of tenure. It is possible for policy to recognize, in incremental fashion, various stages of secure tenure without implementing the formal and absolute condition of land titling with regular payments. Such forms of incrementalism are predicated on the recognition that for the poorest segments of informal settlements, secure rights can be more insecure than informal claims.

As a cautionary note it is important to add that at times such regularity exceptions have to be applied not only to land titling but also to service provision. Brazil's favela-bairro program comes to mind. Here, in addition to the provision of services, residents are provided security of tenure through the concession of use rights (Pamuk & Cavallieri, 1998, p. 456), a system that seeks to keep land ownership in the public domain and prevent marketization and displacement. However, it seems that formalization creates pressure on the poorest favela residents, who are often unable to make regular payments for the new services, leading to their displacement (Guimaraes, 2002).

The 21st-Century Metropolis: New Geographies of Theory

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CONCEPTS FOR THE 21ST-CENTURY METROPOLIS

It was noted above that the dominant narrative shaping the study of global city-regions is the global/world city theory of Sassen and Taylor. This section revisits this framework, but through the conceptual vectors that have emerged from 'area studies'. It is shown that there are other ways of 'worlding' cities and that these geographies of connections give a more relevant and dynamic theory of the 21st-century metropolis. Two other strands of theorization that are often mobilized are also engaged to make sense of the contemporary urban experience. The first, led by HARVEY (1989) and SMITH (1996), presents a Marxist analysis of urban accumulation and regulation. Particularly beholden to Lefebvre, it seeks to explain the production of space through forms of urban redevelopment and gentrification. The concern here is not only with uneven spatial development, but also with modes of regulation that manage and displace the crises of capitalism, as in the work of BRENNER (2004), BRENNER and THEODORE (2002), and JESSOP (1994). The second strand, often dubbed the 'Los Angeles school', traces the explosion and implosion of the metropolis: the exurban landscapes of the exopolis (SOJA, 1992), the enclaves of the fortress city (DAVIS, 1990), and the border geographies of the 'postborder' city (DEAR and LECLERC, 2003). In a Debordian analysis of late capitalism, this framework draws attention to the symbolic economies of the city-region: the alienation of production, reproduction, and regulation in the spectacle that is the postmodern metropolis (SORKIN, 1992). Through an engagement with new geographies of theory, it is sought to update and rework these theorizations.

Worlding of cities

In urban theory, the analytical practice of 'worlding' is dominated by the framework of global cities and world cities. This ecology of globalization pays attention to the circuits of finance capital and informational capital but ignores other circuitries of the world economy. It is not surprising then that global/world cities mapping drops all other cities from the map, arguing that they are structurally irrelevant to the functioning of economic globalization (ROBINSON, 2002). But the immense body of work being done in various world-regions indicates that there are many other ways of 'worlding' cities and that these are of crucial significance in the world economy. For example, theorists of 'transnational urbanism' are examining the ways in which gentrification and urban redevelopment are embedded in global property markets, the globalization of Lefebvre's 'production of space' (OLDS, 2001a). Others are studying 'transnationalism from below', the practices and strategies of migrants as they cross borders and produce space (SMITH, 2001). Particularly significant is the work of JACOBS (1996) on post-colonial urbanism. Jacobs interprets global cities such as London as 'postcolonial' cities and shows how London's colonial past shapes its contemporary spaces – in 'ethnic enclaves', in struggles over urban redevelopment, and in negotiations over cultural identity. This is the unstable and profound 'edge of empire', one that exists not at the margins, but rather at the heart of the global city. Similarly, MITCHELL's (2004) study of globalized Vancouver reveals contestations over urban space that are also contestations around nation and homeland. Vancouver's Pacific Rim urbanism, driven by wealthy and middle-class Chinese transnational entrepreneurs, disrupts the models/myths of assimilation and interculturalism that constitute Canadian citizenship.

Such forms of 'worlding' are crucial because they move urban theory from the mapping of 'world cities' to the historicized analysis of 'world systems'. The global/world cities framework asserts a hierarchy of cities but is unable to account fully for the materialization of such a hierarchy, and even less so in relation to the long histories of colonialism and

imperialism. Space is a 'container' in these theoretical reports; its 'production' remains unexplained (SMITH, 2002). For example, TAYLOR (2000), following Braudel, rightly notes that capitalism is a world of multiple monopolies and that global/world cities represent a 'monopoly of place'. This is a refreshing recalibration of the rather simplistic narrative of 'agglomeration economies'. Yet, Taylor is unable to explain the formation of such power configurations and monopolistic complexes. The frameworks of transnational urbanism and postcolonial urbanism ply precisely such explanatory power. Through a study of imperial geographies, Jacobs can explain the production of London as a global city. Through and analysis of Pacific Rim elites, Olds can account for the global accumulation that is taking place in Vancouver. But it is interesting to note that even this work remains centred in 'First World' cities, though they represent an important effort to transnationalize and globalize the study of these cities. While such efforts at 'worlding' cities are of considerable significance, a second type of 'worlding' is being proposed that is less conventional.

The 'worlding' of cities has typically adopted a core-periphery model of globalization. This is the case with nee/liberal frameworks and this is the case with post/colonial frameworks. However, 'area studies' research indicates an urgent need to rethink the model of core and periphery. APPADURAI (1996) suggests a theory of 'scapes': overlapping, disjunctive orders (mediascapes, ethnoscapes, financescapes) as an analytics of globalization and as an alternative to core-periphery mappings. However, his theme of 'scapes' narrates globalization as a process of deterritorialization without taking into account the rather obvious forms of reterritorialization that are at work in the world system. A 'worlding' of cities has now to take account of multiple cores and peripheries, and more provocatively has to note the emergence of core-periphery structures *within* the global South. Two examples of such 'worlding' will be cited.

The first is the case of global circuits of domestic work that link 'peripheries' such as the Philippines to 'cores' such as Hong Kong and Singapore. It is a well-established fact that there is a gender order to the geographies of late capitalism. EHRENREICH and HOCHSCHILD (2003) bestow the term 'Global Woman' on the labouring bodies (maids, nannies, sex workers, assembly line workers) through which global accumulation is facilitated and reproduced. The valuation and exchange of these bodies takes place not only in South-North flows, but also in South-South flows. The work of CONSTABLE (1997) and YEOH *et al.* (2000) details the feminization and racialization of domestic service in Hong Kong and Singapore, such that maidhood becomes synonymous with national and gender typifications (in these cases, usually with the type 'Filipina'). The Philippines, on the one hand, facilitates the 'export' of its women and relies heavily on their remittances, but on the other hand, gingerly negotiates wages and working conditions with Hong Kong and Singapore, and is often threatened with the spectre of 'returned' Filipinas.

The second is the case of the routes of migration, lines of evacuation, and exchanges of commodities that connect the cities of sub-Saharan Africa to cities such as Mumbai, Dubai, Bangkok , Kuala Lumpur, and Jeddah, elaborated by SIMONE (2001) in an illuminating article titled 'On the worlding of African cities'. Africans deploy 'the city as a resource for reaching and operating at the level of the world' (p. 22), thereby creating everyday strategies of 'worlding', a 'worlding from below'. Some of these circuits 'spin out and link themselves to the more conventional migratory paths' of Europe and North America' (p. 22), but many of them remain connected primarily to other sites in the global South. These networks are facilitated not by the usual agents and firms of finance capital and informational capital, but by other equally relevant economic and social agents, in this case, the *'zawiyyah'* or Sufi brotherhood. It is worth reading the following passage from SIMONE (2001, p. 28) as a counterpoint to the Darwinian mappings produced by the global/world cities framework:

> Thus in Treichville, where I visited a Tidiane *zawiyyah* in 1993, a large world map was placed on a wall in one of the common rooms. On the map, hundreds of cities were circled with magic markers and 'tagged' with numbers. On a table below the map were heavily worn and numbered cardboard files corresponding to the numbers on the map. In these files were various lists of names of followers living in these cities with brief profiles of each one.

Such forms of 'worlding' move one away from simple core-periphery models of globalized urbanization. Instead, one is left with what ONG (1999) terms

'differentiated zones of sovereignty'. The 21st-century metropolis arbitrates this geography of multiplicity and differentiation. And in doing so it is, as Abbas would have one imagine, a 'para-site'. It is dependent on the circuits of global capital and yet it also produces and mediates these circuits.

Production of space

There is a sophisticated body of theory on the 'production of space', Lefebvre's shorthand for the ways in which surplus value is produced through the commodification and exchange of space. Of course, for Lefebvre, the production of space also takes place through representations of space (the abstract spatial conceptions of experts and planners), through the everyday, lived experience of space, and through the collective meanings of representational spaces. However, the primary appropriation of his work has centred on how property capital, once deemed to be a 'secondary' circuit, is today a 'primary' circuit, notable not simply for its role in expanded reproduction, but rather for its central role in the production of value (SMITH, 2002) and in the ever-expanding frontier of primitive accumulation (HARVEY, 2005). From such a conceptualization follows a host of corollary concepts about forms of regulation and formations of space. SMITH (1996) characterizes the contemporary city as 'revanchist', with zero tolerance for the urban poor. HARVEY (1990) charts the shift from 'urban managerialism' to 'urban entrepreneurialism', noting that the state is now an agent, rather than regulator, of the market. GRAHAM and MARVIN (2001) demonstrate that such productions of space yield a highly uneven metropolitan landscape, a 'splintering urbanism' of 'secessionary networked spaces' and 'black holes'. But of course it is this unevenness that makes possible new rounds of gentrification and urban redevelopment, with the revalorization of devalorized property (SMITH, 1996). The 'regulation' theorists (BRENNER and THEODORE, 2002) designate such practices as a 'spatial fix', whereby the crisis of over-accumulation is remedied through investments in new sites of value.

These theoretical positions have been produced in the context of the EuroAmerican urban experience. This is not to say that this analysis is not applicable to the cities of the global South. Indeed, it is highly relevant. The argument is less about transnational relevance and more about the scope and range of analysis. By being embedded in the EuroAmerican urban experience, this theoretical work bypasses some of the key ways in which the production of space takes place in other urban and metropolitan contexts. Further, this 'other' experience has considerable relevance for EuroAmerican city-regions and can provide insights into hitherto unexplained processes in these cities. One such mode of the production of space is highlighted: informality. 'First World' urban and metropolitan theory is curiously silent on the issue of informality. Or there is a tendency to imagine the 'informal' as a sphere of unregulated, even illegal, activity, outside the scope of the state, a domain of survival by the poor and marginalized, often wiped out by gentrification and redevelopment. But a large body of 'Third World' literature provides a sophisticated and rather different understanding of informality. It is worth highlighting three contributions of this analytical framework.

First, informality lies within the scope of the state rather than outside it. It is often the power of the state that determines what is informal and what is not (PORTES *et al.*, 1989). And in many instances the state itself operates in informalized ways, thereby gaining a territorialized flexibility that it does not fully have with merely formal mechanisms of accumulation and legitimation. These too are, to borrow a term from BRENNER (2004), 'state spaces'. For example, the rapid peri-urbanization that is unfolding at the edges of the world's largest cities is an informalized process, often in violation of master plans and state norms but often informally sanctioned by the state (ROY, 2003). This means that informality is not an unregulated domain but rather is structured through various forms of extra-legal, social, and discursive regulation. Second, informality is much more than an economic sector; it is a 'mode' of the production of space (ROY and ALSAYYAD, 2003). Informality produces an uneven geography of spatial value thereby facilitating the urban logic of creative destruction. The differential value attached to what is 'formal' and what is 'informal' creates the patchwork of valorized and devalorized spaces that is in turn the frontier of primitive accumulation and gentrification. In other words, informality is a fully capitalized domain of property and is often a highly effective 'spatial fix' in the production of value and profits. Third, informality is internally differentiated. The splintering of urbanism does not

take place at the fissure between formality and informality but rather, in fractal fashion, within the informalized production of space. With the consolidation of neoliberalism, there has also been a 'privatization of informality'. While informality was once primarily located on public land and practised in public space, it is today a crucial mechanism in wholly privatized and marketized urban formations, as in the informal subdivisions that constitute the peri-urbanization of so many cities (ALSAYYAD and ROY, 2003, p. 4). These forms of informality are no more legal than squatter settlements and shantytowns. But they are expressions of class power and can thus command infrastructure, services, and legitimacy in a way that marks them as substantially different than the landscape of slums.

Such issues are obviously of pressing concern for the cities of the global South where informality is often the primary mode of the production of 21st-century metropolitan space. But they are also of relevance to *all* cities because they draw attention to some key features of urbanism: the extralegal territoriality and flexibility of the state; modes of social and discursive regulation; and the production of differentiated spatial value. In this sense, informality is not a pre-capitalist relic or an icon of 'backward' economies. Rather, it is a capitalist mode of production, par excellence.

An equally significant contribution of the 'informality' framework to one's understanding of the 21st-century metropolis is the insight into forms of mobilization, agency, and resistance. Urban theory has long been concerned with the ways in which the poor and marginalized act in the face of power. However, it has been better able to explain acts of power than acts of resistance, as in concepts of growth machines, political regimes of redevelopment, modes of regulation, and urban entrepreneurialism. The 'Third World' literature on informality is a treasure-trove of conceptual work on the 'grassroots' of the city, and is thus able to expand considerably the analysis of 'urban politics' or 'metropolitics'. For example, BAYAT (2000) working in the context of Middle East cities, delineates the repertoire of tactics through which urban 'informals' appropriate and claim space (the influence of DE CERTEAU, 1984, is obvious). This 'quiet encroachment of the ordinary' by subaltern groups, according to him, creates a 'street politics' that shapes the city in fundamental ways. Similarly, CHATTERJEE (2006), writing about Indian cities, makes a distinction between 'civil' and 'political' societies. For him, civil society groups make claims as fully enfranchised citizens, a 'bourgeois governmentality' if you will. Political society on the other hand are the claims of the disenfranchised and marginalized, what APPADURAI (2002) has termed 'governmentality from below'.

Perhaps the most complex articulations of agency and subaltern subjecthood come from a growing body of work on African cities. On the one hand, this literature is concerned with the 'figures of the subject in the time of crisis', with 'registers of improvisation' where 'every law enacted is submerged by an ensemble of techniques of avoidance, circumvention, and envelopment' (MBEMBE and ROITMAN, 2003, p. 114). Here informality becomes a mode of subjectivity, a way of 'operating more resourcefully in underresourced cities'; cities thereby become 'pirate towns' (SIMONE, 2006, p. 357); and infrastructure must be understood not as steel and concrete but rather as fields of action and social networks (SIMONE, 2004a). On the other hand, this framework is more than an analysis of poverty and necessity. MBEMBE (2004, p. 378) thus designates it as an analytics of 'superfluity'. It is an analysis of the very material basis of the 'social' – of the ways in which the 'social' must be understood as 'the locus of experiment and artifice' rather than 'a matter of order and contract' (MBEMBE and NUTTALL, 2004, p. 349). How else can one understand situations where order is an artifice and the contract is an experiment, where contract is an artifice and order is an experiment? In his critique of this work, WATTS (2005) despairs:

> Is this 'really about a "collective system" or a desperate search for human agency (improvisation, incessant convertability) in the face of a neoliberal grand slam? Open and flexible, if provisional, is what used to be called self-exploitation'.
>
> (p. 184)

But this is perhaps the point. The Africanist debates about agency, subjectivity, and politics defy the easy categorizations of power and resistance. Under conditions of crisis, the subaltern subject is simultaneously strategic and self-exploitative, simultaneously a political agent and a subject of the neoliberal grand slam.

The Atlantic

Uber's Troubled Kenyan Expansion

The company began services in Mombasa last week amid protests.

An Uber taxi driver sits in his car in Nairobi.

Noor Khamis / Reuters

NSHIRA TURKSON

MAR 28, 2016 | GLOBAL

TEXT SIZE

Uber's expansion in Kenya is being met with some of the same kinds of protests that greeted the ride-hailing service elsewhere in the world.

On March 23, an Uber taxi was burned in the Kenyan capital, Nairobi, the same day the service was launched in Mombasa, the country's second-largest city.

The driver was directed into an alley by his passenger. He "sensed danger" when four men approached the car, Japheth Koome, Nairobi's police commander, told reporters. The driver was able to escape without injury, but the car was burned. Nairobi's police force is "determined to end this madness where people are maliciously attacking and damaging other people's property," Koome said.

Uber is in "open dialogue with authorities," about the incident, Samantha Allenberg, an Uber spokeswoman, said.

"Any situation where driver or rider safety is put at risk is unacceptable to us," she told Kenya's *Daily Nation*. "Safety, reliability and choice, not violence, are what continue to draw people towards Uber's driver-partners as well as alternative transportation service providers."

The attack, the second of its kind in the past few weeks, continues Uber's brief, but tense history in Kenya.

Uber drivers reported harassment in January 2015, when the company introduced the service in Nairobi. The app officially launched there last June, and since then there have been sporadic complaints, including smashed windows, and passengers being harassed while attempting to enter Ubers.

Mwangi Mubea, a spokesman for United Kenya Taxi Organization (UKTO), a lobbying group for taxi drivers, denied allegations that taxis drivers perpetrated these attacks.

"We cannot attack drivers who are employed just like us. In fact they worked with us before going to Uber. We have no problem with them," Mubea said after an UKTO meeting. "Our only issue is the strategy used by their management to attract customers, which is driving us out of business."

Under that strategy, Uber is registered as a technology company and therefore isn't subject to government regulations, including taxation, that are demanded of a public-service provider in Kenya. The company does not pay the monthly fee

required of taxi drivers. This business model, *Quartz* reports, contributes to Uber's ability to provide a much cheaper service than local taxis.

Ashford Mwangi, another UKTO spokesman, said at a press conference those who want to become Uber drivers face other restrictions.

"First they demand the car to be almost new, making it hard for anyone who bought there taxi in 2009 to join them because we all cannot afford new cars," he said.

UKTO wants President Uhuru Kenyatta to ban Uber, saying its members will otherwise paralyze Mombasa by blocking roads with their cars. Uber, the group said, "threatened the livelihood of 15,000 of" its members. It's unclear if the ultimatum will have traction.

"We are in a liberalized environment and those who offer competitive services must be protected," James Macharia, the minister of transport and infrastructure, said in a statement. "Uber operators and their clients will be protected."

But Mwangi, the UKTO spokesman, points out that his group's fight isn't against ride-sharing companies, in general, but the way Uber operates in Kenya. Other ride-hailing apps that predate Uber have peacefully coexisted with taxis, he said.

"We have the likes of Maramoja and Easy Taxi apps working well within the industry simply because they involved stakeholders to determine rates," he said. "So far, we have never had any issues with those apps for the two years they have been operational in Nairobi."

Allenberg, the Uber spokeswoman, told Nairobi's *Business Daily* the company has been "engaging with taxi associations since last year to find a way that we can partner with them.

"We are happy that many taxi drivers are already using our technology to boost their incomes and we would welcome more who wish to join their colleagues," she said.

Besides Mombasa, Uber also expanded last week to Abuja, the Nigerian capital. The company says it plans to use Nigeria and Kenya as "hubs of expansion," to eventually launch the app in Ghana, Uganda, and Tanzania. The service is now available in 400 cities globally, and Uber faces protests from taxi drivers worldwide.

South African Uber drivers are entangled in tensions similar to those in Kenya. Reports of threats and intimidation pushed the app to provide security for South African drivers. Earlier this year, taxi drivers in several French cities refused to drive, slowing traffic "to a crawl."

Other governments have been more responsive to taxi drivers' complaints. Rio de Janiero Mayor Eduardo Paes signed legislation, declaring the app "forbidden." Sao Paulo's city council passed legislation barring Uber, though its mayor has yet to sign it into law. The South Korean government charged the app's founder, Travis Kalanick, with operating an illegal taxi service in 2014.

Mwangi, the UKTO spokesman, insists the group's fight isn't with Uber.

"We are not at war and have no problem with Uber staying," he said. "But the problem comes in because they have not strategized on accommodating local players."

ABOUT THE AUTHOR

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