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ORCHESTRATED EXPERIMENTALISM IN THE REGULATION OF WORK

*Orly Lobel**

WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET. By *Paul Osterman, Thomas A. Kochan, Richard M. Locke, and Michael J. Piore*. Cambridge: MIT Press. 2001. Pp. ix, 229. \$29.95.

Since the advent of the New Deal vision, work and the workplace have undergone dramatic changes. Policies and institutions that were designed to provide good working conditions and voice for workers are no longer fulfilling their promise. In *Working in America: A Blueprint for the New Labor Market* (“*Blueprint*”), four MIT economists take on the challenge of envisioning a new regulatory regime that will fit the realities of the new market. The result of several years of deliberation with various groups in business and labor, academia, and government, *Blueprint* provides a thoughtful yet unsettling vision of the future of work. Part I of this Review describes the inadequacies of current workplace structures and the challenges facing regulators of the new economy. Part II explores the implications of *Blueprint* for law reform, particularly labor and employment laws, but also other fields of law, including welfare, immigration, and taxation. Part III discusses the problem of the enforcement gap and the prevalence of dominant corporate culture even in situations where legislative reform is made consistent with new workplace realities. Finally, the Review evaluates the core structure of the vision advanced in *Blueprint* — democratic experimentalism in the field of work. I argue that while *Blueprint* premises its inquiries upon the promise of the economy as a social institution, its concrete proposals often do not adequately address the core tensions between economic and social interests.

Written by prominent labor economists, *Blueprint* starts with the recognition that the market alone is insufficient in governing the economy, and will produce neither efficient nor equitable results. *Blueprint* rejects the competitive-market model that equates economic welfare with social welfare, and instead embraces an institutional perspective, which recognizes that labor regulation should be informed by additional values that include the notion of work as a source of dignity

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and self-fulfillment, the right to worker voice, association, participation, and equity and equality of opportunity. Whether government and the public will accept, promote, and legally require significant market redistribution will determine the future of labor, employment, and welfare regulation in the United States. *Blueprint's* strength is in its recognition of the economy as an embedded social structure and its understanding that policymakers should operate within a framework that reconciles economic considerations with a set of moral values distinct from economic considerations. Yet, in the book's substantive reform proposals, as well as its organizational model of decentered experimentalism, the tensions between corporate profitability and worker protection are often lost: *Blueprint* risks reaffirming rather than resisting an ongoing process of declining governmental commitment to the regulation of the new workplace.

I. CHALLENGES AND MOTIVATION

Blueprint provides a linear description of a shift from the "old economy" to the "new economy." The old economy was based on the assumption that the U.S. economy is relatively self-contained and immune from foreign competition. It was also based on a sharp distinction between the marketplace and the household, and on the model of a male breadwinner. Employment relations were informed by the "old social contract," which viewed work as stable, secure, long-term, full-time, and typically in a large industrial firm. The new economy challenges all of these assumptions. Dramatic increases in global trade and capital mobility, as well as rapid technological innovations, augment pressure for flexibility, productivity, and competition.¹ As firms face increased risk of hostile takeovers and tough competition, employers are shifting to leaner and more flexible organizational and hiring structures, focusing on their core competencies while outsourcing other functions. The diversification of the workforce presents another dramatic change. Increased participation of women elevates the importance of work/family issues. The increased participation of immigrants, women, and minorities in the workforce contributes to the growth of contingent, part-time, temporary, leased,

1. There are two senses in which the labor market is globalizing — labor and capital are both in motion. The 1990s were marked by a rapid globalization of the workforce. According to reports of the International Labor Organization, labor migration has increased dramatically when compared to its relatively marginal numbers during the 1980s. See generally Frances Lee Ansley, *Rethinking Law in Globalization Labor Markets*, 1 U. PA. J. LAB. & EMP. L. 369 (1998); Klaus Samson, *The Standard-Setting and Supervisory System of the International Labour Organisation*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 149 (Raija Hanski & Markku Suksi eds., 1997); Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987 (1995).

and other atypical workforces.² The number of people working for temporary employment agencies on an average day is growing rapidly, and staffing and leasing firms are among the fastest growing industries in the country.³

All of these developments have dramatically altered the nature of the employment relationship. In part a result of these shifting realities and in part a result of factors such as the weaknesses of existing American labor laws and negative public attitudes toward unionism, collective bargaining has declined sharply. The New Deal assumptions that collective bargaining and employment protections sustain adequate social protections and voice for workers have proved inconsistent with current realities of economic and social life. As traditional mechanisms of employee voice eroded and new workplace conditions have emerged, many workers are experiencing material insecurity, instability, social dislocation, and a loss of balance between work and family. *Blueprint* is thus concerned that the old social contract has been broken. The authors of the book set as their goal the articulation of an updated vision of institutional and policy reform that will match the new market realities while enabling the construction of a new social contract.

II. NEW POLICIES FOR A NEW LABOR MARKET

Blueprint's vision for a new labor market involves broad implications both for collective labor laws and individual employment laws. Some of the more encouraging proposals in the book are the particular suggestions for policy reform. *Blueprint* describes different categories

2. See Orly Lobel, *Class and Care: The Roles of Private Intermediaries in the In-home Care Industries in the United States and Israel*, 24 HARV. WOMEN'S L.J. 89 (2001) [hereinafter Lobel, *Class and Care*]; Orly Lobel, *Between Solidarity and Individualism: Collective Efforts for Social Reform in the Heterogeneous Workplace* (2000) (unpublished manuscript, on file with author). On the characteristics of the contingent work, see CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION (Kathleen Barker & Kathleen Christensen eds., 1998); Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L.J. 1757, 1768-72 (1993); Rachel Geman, *Safeguarding Employee Rights in a Post-Union World: A New Conception of Employee Communities*, 30 COLUM. J.L. & SOC. PROBS. 369, 373 (1997) (stating that women comprise around two-thirds of all part-time workers and around three-fifths of temporary workers).

3. By the end of the 1980s, estimates placed the total number of contingent workers in the United States at a minimum of twenty-nine million people. These numbers have rapidly grown over the last decade. These shifts reflect both globalization and explicit employer strategies to subcontract work and redesign jobs. Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 571 (1997); see also Efrén Córdova, *From Full-time Wage Employment to Atypical Employment: A Major Shift in the Evolution of Labour Relations?* 125 INT'L LABOR REV. 641 (1986); Stanley D. Nollen, *Negative Aspects of Temporary Employment*, 17 J. LAB. RES. 567, 569-70 (1996); Anne E. Polivka, *Contingent and Alternative Work Arrangements, Defined*, MONTHLY LABOR REV. (Bureau of Labor Statistics, U.S. Dep't of Labor), Oct. 1996, at 3; Symposium, *Developments in the Law: Employment Discrimination*, 109 HARV. L. REV. 1568, 1652 (1996); Symposium, *The Regulatory Future of Contingent Employment*, 52 WASH. & LEE L. REV. 725 (1995).

of workers that will require different sets of reform and innovation. The first category — that of “core workers” — includes the more traditional workplace settings in which unions potentially operate. The National Labor Relations Act (“NLRA”), which has never been ideal for collective bargaining, has become particularly inadequate in today’s realities. Various limitations on the nature of the bargaining units and the bargaining process must be eliminated in order to enable unions to become effective. For example, *Blueprint* rightly suggests that there should be an elimination of the distinction between mandatory and nonmandatory subjects of collective bargaining. Under current doctrine, employers are only required to share information with the union on mandatory subjects of negotiation.⁴ Today, workers need more information about technical and strategic issues, and thus the distinction should be eliminated.

A more extensive reform that *Blueprint* advocates concerns the limitations posed by the NLRA on worker participation schemes.⁵ Currently, section 8(a)(1) of the NLRA prohibits employer practices that “interfere with, restrain, or coerce” workers in the exercise of their Section 7 rights to self-organization, collective bargaining, and other concerted activities.⁶ Section 8(a)(2) prohibits employers from “dominat[ing] or interfer[ing] with the formation or administration of any labor organization or contribut[ing] financial or other support to it.”⁷ *Blueprint* stresses that the law should be reformed to extend the same organizing protections to worker organizations that do not engage in traditional collective bargaining. The authors strongly advocate the need to recognize new types of worker organization and eliminate the limits on employee participation and consultation in the workplace. They suggest that instead of seeing employee participation as a way for employers to compete over workers’ loyalties and avoid unionization, union leaders should embrace participation and become visible champions and skilled facilitators of employee voice at work (p. 123). The authors opposed the Teamwork for Employees and Managers Act (“TEAM”), legislation that was proposed (but not enacted) during the Clinton Administration to eliminate bans on employee participation schemes, explaining that TEAM failed to

4. See generally, John D. Feerick, *Information-Sharing Obligations*, in *LABOR LAW AND BUSINESS CHANGE 45* (Samuel Estreicher & Daniel G. Collins eds., 1988).

5. National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a) (2000), prohibits employers from setting up “company unions.”

6. 29 U.S.C. § 158(a)(1).

7. 29 U.S.C. § 158(a)(2). Section 2(5) of the NLRA defines a “labor organization” as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” 29 U.S.C. § 152(5) (2000).

include adequate protections for workers' rights and address the full range of problems with existing labor law.⁸

Yet *Blueprint* rejects the more general objection of union leaders to employee-participation schemes, which are often viewed as attempts to undermine independent unionism. Rather, *Blueprint* is enthusiastic about the emergence of new business and organization models, for example, "the human-capital-based corporation" (p. 92). In these models, the role of management has shifted to "facilitator," and work is organized through new managerial structures such as flat hierarchies, dynamic problem solving, and self-directed teams.⁹ What *Blueprint* fails to question is whether these organizational shifts have indeed brought meaningful changes in the power relations between workers and employers.

The participatory umbrella, which has been described as "self-management," "comanagement," "workplace democracy," "codetermination," "employee representation," and "employee-involvement plans" ("EIPs"), should be understood as a wide continuum, ranging from shop-floor operational consulting to strategic policy-making.¹⁰ In fact, many of these participatory schemes have not had any significant impact on the employment conditions of workers. In some cases, such as "Quality Circles" and employee-action committees (both modeled after the Japanese Total Quality Management ("TQM") model), the focus has been mostly on quality of production.¹¹ And the business world has deemed other types of participatory initiatives — which have been more than empty promises for workers — inefficient. In fact, while *Blueprint* discusses the potential of employee participation, it does not discuss employee-ownership initiatives — initiatives that are likely to involve significant shifts in power.

Indeed, when *Blueprint* describes actual examples of participatory employment, such as Xerox and the Saturn corporation (described in the book as the most comprehensive labor-management model found in the United States), the authors leave the reader unsure of the potential of such models (pp. 84-89). In the case of Xerox, *Blueprint*

8. P. 98. In June 1996, Congress passed the TEAM Act. However, the Act was vetoed by President Clinton. Without sufficient votes in Congress to override the presidential veto, TEAM was not enacted. TEAM offered to amend § 8(a)(2) of the NLRA to allow nonunionized employers to establish and participate in worker-management groups. See Teamwork for Employees and Management Act, S. 669, 103d Cong. (1993); see also Alvin L. Goldman, *Potential Refinements of Employment Relations Law in the 21st Century*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 269 (1999); Michael H. Leroy, *Can TEAM Work? Implications of an Electromation and Dupont Compliance Analysis for the TEAM Act*, 71 NOTRE DAME L. REV. 215. (1996).

9. On these organizational structures, see generally Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work*, 4 U. PA. J. LAB. & EMP. L. 121 (2001).

10. *Id.*

11. *Id.* at 151-52, 185-87.

describes a successful implementation of employee involvement, yet adds that rumors about moving production to Mexico signal the risks of globalization and the need to think globally about fair labor standards (p. 87). With respect to Saturn, the authors refer to the corporation's uncertain future, stating: "Whether Saturn's limited profitability to date implies that this organizational model inevitably redistributes some of the financial rewards across different stakeholders at the expense of shareholders is still an open question — one that is likely to be the subject of considerable debate in the future" (p. 86).

It is this very question about the relationship between employee involvement and profitability, however — which *Blueprint* leaves open — that is precisely the key challenge to any legal reform in the new market realities. Initiatives to improve working conditions depend on larger economic and political processes and on a strong public commitment to a new social contract. The reader is left with a big question mark as to the ability of firms to remain competitive while ensuring real voice and benefits to their workers. But more than that, *Blueprint* leaves the reader wishing for more explicit acknowledgment that such novel arrangements in the employment relationship, whether initiated by the market or by government, will not result simply in "efficient" outcomes in the narrow economic sense. The tension between social provision and economic competition continues to underlie other suggestions that are part of *Blueprint's* comprehensive vision. This is precisely the tension that the authors, themselves prominent economists, do not sufficiently engage.

In addition to the core category of workers, a second category of workers with whom *Blueprint* is concerned is that of professionals and managers. *Blueprint* explores the internal debates currently raging within professional associations, such as the American Medical Association, over whether they should establish a collective-bargaining arm (p. 112). Such professionals — classifiable at times as independent contractors, consultants, or part-time employed by multiple employers — pose a challenge to labor organizations. *Blueprint* thus explains the need for creating continuity in representation and accommodating these employment variations, by proposing a model that takes a "full career life cycle approach" (pp. 113-14). Such an approach would take into account the realities of mobile professionals. It would also reach other types of workers who experience contingency in their careers and enable union membership to be perceived as a lifelong partnership through which the union provides services aimed at maintaining employability and access to changing job opportunities (p. 124).

This second category also includes many low-income workers who are increasingly employed through various sorts of temporary-help, staffing, and leasing companies. To protect such workers, it is especially important that labor law allows for the organization of tempo-

rary and leased employees, as well as of those defined as independent contractors.¹² In this context, *Blueprint* makes an illuminating analogy to the university model, in which a worker remains a member of an extended community for her entire life and is entitled to access job market information data banks and career networks. The “next-generation unions” that *Blueprint* envisions would provide direct services and benefits to their members, delinked from a specific workplace (p. 98). This new approach would require a “networked model of unionism,” allowing lifelong membership without attachment to a particular workplace, or even industry. It would also support the elimination of the strict separation between different types of workers currently embodied in the NLRA’s “managerial exclusion” rule. Under existing law, section 2(3) of the NLRA excludes “managerial employees” or “supervisors” from the definition of employees that can form a bargaining unit.¹³ Although in today’s realities the distinction between nonmanagerial workers and managers/supervisors is no longer valid in many workplace settings, both labor and employment laws continue to form exempt categories around the definition of managerial employees.

Blueprint also considers workers in low-income labor markets. In such markets, it is the legal definition of “employer,” perhaps more than that of “employee,” which presents the challenge to employment regulation. Small unstable employers (e.g., single, in-home family employers such as care workers, housekeepers, and home maintenance), as well as small contingent businesses (e.g., sweatshops in the garment industry, and janitorial and food services) are often left uncovered by employment regulations because of statutory minimum-size requirements. For example, Title VII only covers employers with fifteen or more employees.¹⁴ The Family and Medical Leave Act only applies to employers of fifty or more employees.¹⁵ Moreover, small businesses

12. See Bitu Rahebi, *Rethinking the National Labor Relations Board’s Treatment of Temporary Workers: Granting Greater Access to Unionization*, 47 UCLA L. REV. 1105 (2000).

13. Section 2(3) of the NLRA states: “The term ‘employee’ . . . shall not include . . . any individual employed as a supervisor.” National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (2000). Section 2(11) defines the term “supervisor” as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

§ 2(11), 29 U.S.C. § 152(11) (2000).

14. 42 U.S.C. § 2000e(b) (2000) (defining “employer” as a “person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks [per year] in the current or preceding calendar year”).

15. Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(2)(B)(ii) (2000).

often do not have deep enough pockets to afford appropriate relief in the case of monetary judgments against them. In the context of industries in which employers are particularly small and unstable, such as the home-healthcare industry, *Blueprint* points to interesting initiatives in which worker organizations successfully worked towards passing state legislation that allows for the creation of a public authority to serve as the “employer of record.” (p. 114). Recent legislation in California, for example, requires counties to create by 2003 a public “employer of record” to enable worker organizations in the in-home-care industry to bargain collectively with a centralized public employer.¹⁶

Drawing on empirical studies and economic research, *Blueprint* maintains that for a substantial fraction of workers, low-wage, low-skill jobs will not be a staging area but a final, dead-end destination in their worklife.¹⁷ This is one of the reasons that *Blueprint* recognizes that any successful reform of the labor market must extend to issues beyond those presented by employment laws. Particularly in the United States, it is an anomaly that welfare benefits such as health insurance and pensions are employer-based.¹⁸ The decline of the employer welfare state (or “welfare capitalism”) has marked the current crisis of the American welfare regime. The tax treatment of fringe benefits currently creates incentives for employers to outsource work to individual freelancers and subcontracting companies and to employ part-time workers. Therefore, *Blueprint* argues that either fringe benefits are better off detached from employment, or tax incentives must be changed to include temps and part-time employees (p. 162). Under a “next-generation unionism,” pensions could be detached and mobile through jobs, and the law could permit employee pretax payments to pension funds not tied to particular employers. Similarly, medical insurance and other welfare benefits need to be decoupled from any single workplace.

In the context of unemployment, *Blueprint* rightly recognizes the importance of the ability of a welfare recipient to move from welfare to work. Globalization and technology advancements have exposed a new fault line in the workforce.¹⁹ Highly skilled professionals have shifted the notion of job security from the ability to maintain a stable job to the ability to get jobs, while firms now offer increased premiums

16. CAL. WELF. & INST. CODE § 12302.25(a) (West 2001 & Supp. 2003).

17. P. 52. Paul Osterman has found that 49.2 percent of men who were in the bottom earnings quintile in 1979 remained in that quintile in 1995. Paul Osterman, *Skill Training and Work Organization in American Establishments*, 34 INDUS. REL. 125 (1995).

18. See generally David Charny, *The Employee Welfare State in Transition*, 74 TEXAS L. REV. 1601 (1996).

19. See generally DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? (1997).

for skill and experience.²⁰ *Blueprint* argues for modernizing unemployment insurance, which currently covers less than half of the unemployed (p. 160). But more than just expanding coverage, unemployment insurance could be broadened to be viewed as part of an effort for structural adjustment, which would include investment in training and other measures designed to foster job mobility for the unemployed. In one of the book's more ambitious and exciting proposals it suggests the possibility of setting up funds that would allow workers to take time off work to refresh their skills (p. 155). Such ideas would expand the coverage of the special fund that currently exists under the Trade Adjustment Act, which provides unemployment and training assistance for workers who have lost their jobs because of foreign competition, to include any worker in need of adjustment assistance (p. 161).

While the role of training is indeed crucial to any reform proposal in the new labor market realities, *Blueprint* would benefit from a discussion of how training programs and other labor market intermediaries can reduce skill disparities as well as information imbalances and cultural biases that impede the employment of disadvantaged workers. Although *Blueprint* is sensitive to the existence of the many types of workers that constitute today's workforce, it does not sufficiently explore the vast inequalities between different social classes and between workers employed in various industries. Moreover, many of the book's structural-reform proposals do not adequately take into account the pervasive racial, gendered, and cross-generational gaps, and the inadequacy of antidiscrimination laws to address these ongoing structural inequalities. Historically, part of the weakness of the labor movement has been its failure to encompass the diversity of the workforce. The American Labor Movement has a complex history of discrimination against women, people of color, and migrants.²¹ Today, the new fault lines dividing the labor market remain patterned along gender, race, and national origin lines. A comprehensive reform agenda of workplace regulation, as well as a revival of work-reform activism, must include a systematic rethinking of antidiscrimination regulation and its enforcement.

20. See generally Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001).

21. See PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT OF THE UNITED STATES: THE POLICIES AND PRACTICES OF THE AMERICAN FEDERATION OF LABOR, 1900-1909*, at 219-32, 256-81 (1964).

III. BEYOND REGULATION: THE ENFORCEMENT GAP AND PREVAILING WORKPLACE CULTURE

The problems of the new labor market are not only those of inadequate laws. Any reform agenda for the new market must be attentive to the problems of increasing labor-market informalization and the underenforcement of existing regulations. Within a globalized contingent workforce, an underground economy thrives.²² The main problem in such informal sectors is not the lack of protective labor legislation, but the lack of enforcement of such legislation. Most labor standards are not linked to citizenship or residency. Therefore, in theory, even undocumented workers are protected by fair-labor-standards laws, such as those involving minimum wage, overtime pay, and leave.²³ Similarly, all workers, including undocumented workers, are protected by employment-discrimination laws.²⁴ Yet, in practice, many workers are paid less than the minimum wage, receive no overtime or health-care benefits, and do not find adequate venues to resist discrimination and abusive practices.²⁵ When employed informally, these workers are unable to receive social-security benefits upon retirement, unemployment benefits, or workers' compensation and disability benefits in case of illness or accident.²⁶

22. See generally Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289 (1994).

23. See, e.g., A.P.R.A. Fuel Oil Buyers Group, 320 N.L.R.B. 408, *aff'd*, 134 F.3d 50 (2d Cir. 1997) (stating that unauthorized workers are eligible for back pay under the National Labor Relations Act); Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988) (stating that undocumented worker can bring action for unpaid wages under Fair Labor Standards Act); *In re Reyes*, 814 F.2d 168 (5th Cir. 1987) (finding immigration status completely irrelevant to determination of Fair Labor Standards Act claim); Contreras v. Corinthian Vigor Ins. Brokerage, 25 F. Supp. 2d 1053, 1056 (N.D. Cal. 1998) (stating that protections provided by the Fair Labor Standards Act apply to undocumented aliens).

24. The U.S. Equal Employment Opportunity Commission has recently replaced its 1989 guidance on Title VII remedies for undocumented workers. U.S. Equal Employment Opportunity Comm'n, U.S. Dep't of Labor, Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (October, 26, 1999), available at <http://www.eeoc.gov/docs/undoc.html>. The Commission now concludes that unauthorized workers who are subjected to unlawful employment discrimination in violation of Title VII of the Civil Rights of 1964, the Americans with Disabilities Act ("ADA"), § 501 of the Rehabilitation Act, the Age Discrimination in Employment Act ("ADEA"), and the Equal Pay Act ("EPA") are entitled to the same relief as other victims of discrimination. See Elizabeth Grossman, *Issues in EEOC Agency Litigation*, in LITIGATING EMPLOYMENT DISCRIMINATION CASES 2000 (PLI Litig. & Admin. Practice Course, Handbook Series No. H0-006W, 2000).

25. Taunya Lovell Banks, *Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate*, 3 J. GENDER RACE & JUST. 1 (1999); Melanie Ryan, *Swept Under the Carpet: Lack of Legal Protections for Household Workers — A Call for Justice*, 20 WOMEN'S RTS. L. REP. 159 (1999).

26. Lobel, *Class and Care*, *supra* note 2, at 99-100; see also Debra Cohen-Whelan, *Protecting the Hand that Rocks the Cradle: Ensuring the Delivery of Work Related Benefits to Child Care Workers*, 32 IND. L. REV. 1187, 1188-89 (1999).

Even in affluent settings, American workplace culture is an obstacle for workplace reform. Data suggests that despite the popular rhetoric of a shift to a new social contract in which employees are expected to take responsibility for their own career security, a large percentage of the workforce continues to hold the expectations of the old social contract — that employers will provide long-term secure employment. Yet, prevailing cultural images of work relations inhibit most workers from initiating comprehensive workplace-reform agendas. As *Blueprint* rightly acknowledges, the term “union” itself carries many negative images in American culture that are not necessarily connected with the particular functions and nature of unionism (p. 98). Another striking example of the prevailing gap between what people value and what workers actually receive comes from work/family regulation. As *Blueprint* describes, work and family issues have been given a prominent place in public discussions and in the media, yet an overwhelming majority of Americans receive little support from their employers on family-related issues (p. 32). Even where family-friendly benefits and flexible work schedules are provided by an industry, the use of these benefits is in fact very low. Employees do not seem to feel free to make use of worker-friendly regulations, often because they fear negative consequences to their career.

An ongoing obstacle to comprehensive labor-market reform is the lack of constructive public debate on workplace issues. Despite periodical coverage of distinct issues such as work/family balance, there has been little public discussion about the underlying fundamental questions of workplace justice. According to *Blueprint*, the lack of public debate has stemmed both from the prosperity during most of the 1990s as well as a lack of an adequate framework of thinking about the new economy. Indeed, some of the most challenging questions left unanswered by the book concern the ability of different types and classes of workers to view themselves as part of one workforce and to collaborate in challenging the prevailing conceptions of work relations and the declining commitment to market redistribution. In the context of enforcement, some of *Blueprint's* most important suggestions focus on the ability of workers to challenge actual practices, focusing less on substantive provisions of employment standards, but rather on process rights, including the right to organize and the encouragement of participation, self-regulation, and engagement of multiple nongovernmental actors (pp. 181-90). A central part of *Blueprint's* vision concerns a model in which government draws on the potentials of private institutions, including individual firms, union-based dispute-resolution institutions, and community-based organizations to assist the traditional enforcement mechanisms (pp. 165-68). As will be discussed in the following Part, these proposals resonate with recent legal scholarship that envisions a new process of generating accountability and a new organizational framework of decentered experimentalism.

IV. NEW STRUCTURES IN SEARCH OF AN ARCHITECT: DEMOCRATIC EXPERIMENTALISM AND THE LABOR MARKET

Blueprint joins a growing body of recent scholarship that advocates the adoption of democratic bottom-up experimentalism as a vehicle for social reform. A constant theme throughout the book is the urge for greater experimentation and for a wide variety of approaches toward the organization of work. The authors advocate more decentralized and informal institutions or processes (p. 35), and more "experimentation with and evaluation of multiple approaches before settling on one or a few approaches that demonstrate superior performance" (p. 165). *Blueprint* links the need for experimentalism to several different aspects of the new economy.

First, the authors continuously argue that in today's reality, no single model of work relations exists and thus unitary conceptions of the workplace and unitary employment policies are impossible. Indeed, *Blueprint* argues that the central challenge of reforming the labor market today is the heterogeneity of the workplace and the workforce, which require the adoption of a wide range of organizational forms and policies. The book stresses that there is no one-size-fits-all solution to the crisis facing the labor market and that standard regulations cannot effectively govern the multiplicity of settings in which work is performed today (p. 34). *Blueprint* contends that although existing legal and social institutions are based on the assumptions of a former era, in which uniformity and stability were much more widespread, the nature of the new labor market requires flexible and diverse institutions. An experimental approach is also needed to address a rapidly changing environment in which flexibility and adaptability are key to remaining competitive in the new globalized market. Technological innovations as well as unpredictable strains of heightened competition require the capacity of constant change and adaptation. A third reason for decentralized experimentation is the expectation of Americans that their government provide a policy environment that reflects their moral values and sense of fairness, but does so "efficiently, leaving the greatest possible amount of control in the hands of those closest to the problems" (p. 152).

A growing body of legal scholarship similarly urges the redesign of government power to reflect the importance of decentralized experiments. Michael Dorf and Charles Sabel have offered the most extensive account of what democratic experimentalism might mean as a key organizing principle of a democratic society.²⁷ Jody Freeman has explored the new "business" of agencies as "regulatory research and development," rather than regulatory decisionmaking, which requires

27. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

“an ethic of experimentalism in which errors are not viewed as failures.”²⁸ The legislative branch has also recently endorsed the spirit of experimentalism by embracing regulatory negotiation in the Negotiated Rulemaking Act of 1990, which was permanently reauthorized in 1996.²⁹ Legal scholarship has begun to shift its attention to the exploration of private ordering and self-regulation in a broad range of contexts. In particular, scholars are pointing to new instances of private standard setting, accreditation, certification, and monitoring by nongovernmental organizations, including nonprofits and for-profit firms.³⁰ Parallel to the increasing interest in the participation of multiple actors, scholars are also increasingly attentive to the importance of soft-law regimes in the new economic market, comprised of interwoven rules of conduct and nontraditional mechanisms of accountability.³¹

The basic idea behind experimentalism is the *principle of subsidiarity*: “that those closest to the problem possess the best information about the problem and the best idea of how to proceed toward a solution” (p. 13). Therefore, *Blueprint* is enthusiastic about local, decentralized experimentation with new forms of business and new forms of worker organization and regulation that are currently underway. *Blueprint* describes “[t]he growing importance of new community-level actors in the labor market” as “dramatic and exciting” (p. 20). New market intermediaries, including work/family initiatives, training and education programs, employment agencies, employee advocacy groups, and mediation and conciliation services, are key actors in determining the nature of work relations. These institutions have the potential to provide mobility, ongoing education, retraining, and cross-firm coordination. The next-generation unions that *Blueprint* envisions will rely on these intermediaries as “coalition partners offering politi-

28. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 31 (1997).

29. 5 U.S.C. §§ 561-570 (1994 & Supp. I 1995); Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 11(a), 110 Stat. 3870, 3873 (1996).

30. See, e.g., LESTER M. SALAMON ET AL., JOHNS HOPKINS COMPARATIVE NONPROFIT SECTOR PROJECT, GLOBAL CIVIL SOCIETY 14 (1999); Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015 (2001); Symposium, *Globalization, Accountability, and the Future of Administrative Law*, 8 IND. J. GLOBAL LEGAL STUD. 341 (2001); *Sweatshop Wars*, ECONOMIST, Feb. 27, 1999, at 62 (discussing monitoring by firms such as Pricewaterhouse-Coopers, Ernst & Young, and KPMG, including for SA8000 certificates); Teresa Fabian, *Social Accountability 800 (SA8000) — The First Auditable, Global Stand for Ethical Sourcing Driven by CEPAA* (1998), at http://www.citinv.it/associazioni/cnms/archivio/lavoro/presentazione_SA800.html.

31. On the term “soft law” in international law, see Steven R. Ratner, *International Law: The Trials of Global Norms*, 110 FOREIGN POL’Y 65 (1998). See also David Trubek et al., *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 LAW & SOC. INQUIRY 1187 (2000). On soft-law labor regimes, see Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93, 121-23 (1999).

cal voice, direct participation, collective bargaining, strategic partnerships, mobility, and occupational community” (p. 98).

Blueprint also recognizes that unionized settings still require ongoing traditional collective bargaining, but also innovative strategies to reduce employer antiunion resistance as well as recruit more union members. Traditional unions, such as industrial and construction unions, will need to experiment more with mobilization campaigns and strengthen their ties to the community. *Blueprint* describes such initiatives in various settings, such as the efforts of the Communications Workers of America as well as the electrical-workers’ union and the carpenters’ unions (pp. 105-11). But the book offers very little evidence that these efforts have been successful. In fact, the examples included in the book are quite somber, and the authors recognize that despite the broad range of strategies some unions have been applying, the vast majority of workers in many of these industries are not represented today. As *Blueprint* admits, all recent experimentation efforts have not done much to reverse the decline of unionism (p. 122). The authors attribute this to the fact that:

Each of the innovative efforts . . . can contribute to the building of next-generation unions, but they are independent isolated efforts. As far as we know, no effort is being made to think about how they might be linked to create a network of opportunities for representing workers throughout their working lives. (p. 123)

Thus, *Blueprint* argues unions must build in scale and scope, requiring more varied forms of organizing and coalition building with other worker organizations and community groups, and pressing more varied issues treating the wide needs of workers (p. 128). The book urges dialogue “at all levels of the economy” — local, cross-sectoral, national, and transnational, and encourages more links with the human-rights movement, consumer movements, and various global-social movements (pp. 149-51). Indeed, *Blueprint* envisions a model of experimentalism even in the international arena, suggesting that the United States play a key role in “fostering more experimentation” (p. 158). Experimentalism thus assumes as its key foundation the notion of collaboration — between labor-market institutions, firms, government, unions, and community organizations.

Yet the book would benefit from more practical discussion as to how such collaboration can be fostered, especially in the setting of work, where vast power imbalances exist. Similarly, with regard to new labor-market intermediaries, it should be noted that, as *Blueprint* recognizes, most of these new actors operate locally or regionally, and there is therefore a need to rethink market institutions nationally. Little is said about how such a shift to the national level might be made. Rather, the authors vaguely suggest:

We may be at such an early stage in the development of many of these institutions that the best government policy would be to support them to

the point where they can be evaluated carefully for sustainability, performance, and generalizability to other settings. Then, with this information in hand, those that pass these tests could be targeted for diffusion to a scale large enough to benefit the overall national economy. (p. 147)

Although the new economy is at an early stage, it is important to recognize that case studies do exist and might help us evaluate the potential, as well as the limitations, of the experimentalist model. When the interests of various actors are more likely to converge, experimental decentralization is likely to be effective. For example, this is the case when labor and capital have a mutual interest in promoting workplace health and safety.³² The more problematic, yet common, case is when interests conflict. Similarly, with regard to the potential of intermediary institutions, it is important to note that while some of these new actors have in fact contributed to increased accountability in the market, others, like in some cases new temporary help agencies, have in fact enabled the production of new vulnerable frameworks of employment.³³ It is therefore crucial that any description of experimentalism in the new market be context-sensitive and avoid generalizations that romanticize its potential. It is equally crucial to focus on the ongoing role of government agencies in such settings.

In the envisioned experimental regime of the modern labor market, the role of government is to facilitate, support, and standardize innovations that began locally and privately. Policymakers should observe and encourage a variety of practices that emerge in the market, and then take up the question of how to best support and complement what the private sector is already doing. The federal government's role, according to *Blueprint*, "is less one of direct action than one of providing financial support, strategic direction, and leadership for other governmental actors . . . less in championing particular institutions and practices than in mobilizing resources, encouraging experimentation, facilitating comparison and evaluation of alternative approaches, and diffusing the best practices" (p. 151).

The idea that government should research and replicate success stories in the local or private level is indeed appealing. The authors of *Blueprint* imagine experimentations resulting in a "virtuous cycle of innovation and improvement" (p 178). This cycle would warrant the promotion of broader diffusion of regulatory and institutional processes.

The authors recognize, however, that there is also the possibility that in some cases such initiatives may produce a vicious *cycle*, which would tilt more and more power in favor of employers. They admit that if this is the result, the solution would be "a return to stiffer

32. See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 50-52 (1997).

33. Lobel, *Class and Care*, *supra* note 2, at 89.

controls and regulations of inappropriate behavior and increased resources for traditional enforcement procedure” (p. 179). Indeed, recent years have shown that some federal and state reform projects may merely be “attempts to reduce benefits under the *guise of experimentation*.”³⁴ From the 1960s to the 1980s, as unionism declined, employment law has expanded, and specific federal labor regulations increased during that period from about 44 to over 200.³⁵ Yet commitment to employment regulation and its enforcement has eroded, and during the 1990s government began to withdraw from its role as an active player in the labor market. It is therefore critical to ask how much of the devolution of decisionmaking processes from government to private actors has involved an adaptation of the regulatory regime to the new economic realities, or whether it is rather the political environment and the legal regime that has served as the initiating force of much of the current transformation. To conclude, reform agendas for the new economy must not confuse labor empowerment with declining commitment to top-down standards.

V. CONCLUSION

In its broad vision, *Blueprint* confirms the need to think about economic and social needs as complementary concerns rather than as a zero-sum game. Yet to do so requires political commitment to intervene publicly in market processes and direct distributive outcomes. *Blueprint* begins its exploration of the new market with a mixed description (pp. 1-3). On the one hand, it describes the prosperity that the United States has experienced in the last decade. On the other hand, many American workers are facing great difficulties and dissatisfaction in their work lives due to the persistence of a large low-wage market, the growing gaps in earnings, and a general lack of voice and participation in the workplace. This paradox with which the book opens is key to understanding the problems underlying the regulation of work. The vast power imbalances between workers and the perseverance of dominant market ideologies systematically prevail over local attempts to produce significant change in the workplace. *Blueprint* provides interesting case studies of different firms, from Kodak to United Airlines, which demonstrate the vast variations in business organization in today's American corporations. Yet, it is perhaps the weakness of *Blueprint* that it insists on focusing on the great variety and differences among workplaces. Emphasizing diversity often conceals the ongoing links within the labor market and the nature of work relations that affect all workers and inhibits broader coalition

34. Susan Bennett & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and Welfare Reform*, 26 U. MICH. J.L. REFORM 741, 745 (1993) (emphasis added).

35. P. 47 (citing John Dunlop, *The Limits of Legal Compulsion*, 27 LAB. L.J. 67 (1976)).

building and a comprehensive vision for labor-market reform. In order to provide a blueprint for the new labor market, policymakers must recognize that the needs of the workforce have changed but are still often in direct conflict with those of business. Enabling market flexibility and global competitiveness are not seamlessly aligned with ensuring fair employment practices. By returning to the book's initial notions of work as a social institution, it is possible to articulate the need for equitable distribution among the competing stakeholders of the new economy and to advocate an orchestrated scaling-up of local democratic experimentalism.