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On the Presence of the Past in the Future of International Labour Law

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It is a tremendous honour to be welcomed to Dalhousie University and onto traditional, unceded Mi'kmaq territory, to address you tonight in the context of the Horace E Read Memorial Lecture.

It is a particular honour to be able to do so during the centenary of the International Labour Organization (ILO). Before I speak specifically to that centenary, please allow me to share three ways in which Dalhousie is an inspiration to me on international labour law and its relationship to human rights law.

The first involves the late Professor and former Dalhousie law dean Ronald St. John Macdonald who I had the privilege to meet in 1992, while I was an undergraduate law student on exchange from McGill to Université Robert Schuman in Strasbourg, studying international and European social law. During that time, he was the only non-European judge of the European Court of Human Rights, representing Luxembourg. He took the time to invite me to dine with him whenever he came into town—students living in residence on a meagre budget rarely forget that kind of generosity. So much of what I learned of international and regional human rights law (and maybe, thinking of Karen Knop's lovely tribute article to him,¹ his utopianism)—and about what it means to be a good mentor—came from those times together. He was, by the way, scandalized when I was offered an *unpaid* internship at the ILO in Geneva. I am happy to report that the wonderful unit at the ILO soon found a way to pay me to write a research paper that is at the core of my work on domestic workers, and the ILO revised its policy soon after and now stands out amongst UN agencies for its generalized policy of paid internships. And I have held on to Professor Macdonald's sense of outrage, because it reminded me of how easily our sense of what is normal can shift, and what new exclusions we can unwittingly permit if we don't work to safeguard past gains while fostering broadened forms of inclusion.

The second involves Professor Emerita Moira McConnell, whom I had the privilege to meet in the past academic year when she gave an

* Professor of Law and Canada Research Chair in Transnational Labour Law and Development, McGill University. I am grateful to Zakia Jahan, B.C.L. & J.D. 2020, McGill University, for able research assistance enabling me to finalize this speech for publication.

1. Karen Knop, "Utopia without Apology: Form and Imagination in the Work of Ronald St. John Macdonald" (2002) Can YB Intl L 287.

engaging guest lecture in my course at McGill that marked the centenary of the ILO—“Transnational Futures of International Labour Law.”² Professor McConnell’s work as an academic on the ILO’s Maritime Labour Convention of 2006 paved a path for the ILO to bring academics on board to support the preparation and adoption of ILO standard setting—a stellar form of engagement that made it possible for me to get involved on domestic workers, and our colleague Katherine Lippel from the University of Ottawa to get involved in the most recent successful standard setting on Violence and Harassment at Work. There was, incidentally, some surprise at the ILO when I pointed out how similar the fields of maritime labour law and domestic work were—early, global fields requiring labour standard setting for people who tended to spend most of their time away from home—1 million mostly male seafarers resolutely in the productive economy, indispensable to global commerce; 67 million mostly female household workers, mostly in the reproductive economy, whose work is indispensable to social reproduction and enables all others. The differences in regulatory approach at the ILO could hardly have been starker, but the standard setting went some way to bridging the divide, in service of decent work.

The third way in which my focus on international labour law is linked to Dalhousie University is directly related to the themes that I wish to explore with you tonight. When we are imagining our disciplinary futures, how do we remember the past, how do we talk about it in ways that neither reduces it or overdetermines it, how do we resist “presentism” precisely to enable hard, and overdue conversations to proceed respectfully and meaningfully because they matter so much to any attempt to think through where our field bears the weight of the past in our present.

The link is the visionary Lord Dalhousie report that was recently released by your university. In referencing it, I want to salute the fact that Dalhousie University took the courageous and important decision squarely to face its history of slavery, by establishing a strong committee and commissioning a report, chaired by historian and former James R Johnston Chair in Black Canadian Studies, Dr. Afua Cooper. Dean Cameron was a member of the distinguished committee of experts.

What is particularly pathbreaking about that report, and what situates it as part of a trajectory that many institutions including my own will do well to follow, is its conceptualization of slavery as a global institution. In other

2. The archived video conferences are available: McGill, “Labour Law and Development Research Laboratory,” online: <<https://www.mcgill.ca/ldrl/what-we-teach/tfill>> [<https://perma.cc/G4CS-Q3LK>].

words, it speaks not only about the number of slaves in any particular place at a particular time, although that is important; nor does it only chronicle the specific legislation in place or not to ascertain the existence of slavery or not on a particular territory. Rather, it speaks to the inevitable impact of an institution that was the central, and legal, institution worldwide for centuries—we are commemorating the quadricentennial this year. This necessarily includes being attentive to how the proceeds of the system of transatlantic slavery and the slave trade enabled institutions that we treasure to be built. It includes looking at the legacies of the institution of slavery on a people that laws sought to define by their racialized status, whose very survival needs are rendered invisible, except for their ability to serve as a cheap, disposable and servile labour pool. It makes the pivotal link, all too often overlooked in my own field, between labour, land, and dispossession. The report traces a path through important programs at Dalhousie, including the vital Indigenous Black and Mi'kmaq program, and the courage of the Hon. Corrine Sparks—Dalhousie graduate in law, first African Nova Scotian to receive appointment to the judiciary and the first African Canadian female to serve on the bench—throughout the *R(DS)* case before the Supreme Court of Canada. The contributions of the Lord Dalhousie report set a high standard for universities and communities across Canada.

And there is another particularly humanizing way to think and talk about slavery as a global institution and its legacies, and that is through literature. For much of the history chronicled in the Lord Dalhousie report resonates in the themes of another work that I suspect many of you have already read: Esi Edugyan's 2018 Scotiabank Giller Prize winning novel, *Washington Black*.

Edugyan is often described as an historical novelist, and she does work from huge historical conflagrations to find those people who are usually only seen through the shadows.

One of those people is *Washington Black*, or *Wash* for short. We follow *Wash* as a young slave boy at Faith Plantation in Barbados, through to the Canadian arctic, and on to Europe and Morocco. However, a significant portion of the book—its entire third of four parts—takes place in this place, Nova Scotia. *Wash* is self-taught, and he is a prodigy. He is also a wanted man for most of the novel, followed by a bounty hunter, John Willard, charged to find him and either kill him or bring him back to a life of slavery in Faith Plantation. *Wash* is someone for whom freedom can hardly be taken for granted, and more so, someone for whom slavery and freedom cannot be glibly dichotomized. As Edugyan has insisted, freedom does not start simply because the shackles have been taken off.

Here's the first passage I want to read to you, set in Nova Scotia, and spoken by Washington Black, himself:

The sailors talked of many islands, of free ports. But it was a life among the Loyalists, in Nova Scotia, that I most desired. I travelled south, then east, crossing the dark waters, journeying overland by cart and carriage; and I arrived finally at Shelburne, with high expectations. But I found that the free, golden existence once described to me had been used up, crushed, drained to the skin by all who'd come before. Shelburne was wet and dreadful, its mud streets teeming with the tattered and the grey-faced, displaced roamers from last century's American war. There was little land and fewer supplies, and the black-skinned were given the worst of it when they were given any at all. I worked for a time in a small-scale fishery. But my years on the plantation, and my memory of John Willard's agent on the docks, had twisted something in me—I was everywhere uneasy in my skin...

I tried to avoid all conflict... Each morning, I would gather my satchel of leads and paints, and a small collapsible chair with an easel attached that I myself had fashioned, and I would walk the quiet dirt road behind my rooming house towards the dark inlet... These early ventures had become my one pure pleasure; the sense of freedom was intense. At the easel I was a man in full, his hours his own, his preoccupations his own.³

The field of labour law that I work in is one that is largely considered to be beleaguered, although it is an esteemed colleague from Dalhousie, Bruce Archibald, who reminded me years ago that viewed from the inside, for those who were included in the paradigm, it is a system of standards and processes that have worked remarkably well—I have tested that insight repeatedly, including in places like Haiti, where the formal economy covered by the Labour Code is barely 1/10th of the workforce. Informality is normatively controlling in most of the world.

But labour law holds a particular, if often aspirational, vision of the world of work, incarnated in the International Labour Organization's conception via Article XIII of the Peace Treaty on April 11, 1919, the 1919 constitution, and the 1944 constitutional annex, the Declaration of Philadelphia: that labour is not a commodity, that Freedom of expression and of association are essential to sustained progress, that poverty anywhere constitutes a danger to prosperity everywhere, that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity—all reflecting one guiding principle: that social justice is essential to universal

3. Esi Edugyan, *Washington Black* (New York: Alfred A Knopf, 2018), part 3, chapters 2, 4.

and lasting peace. The vision is a noble, even utopian, one and I have spent much of my scholarly career seeking to foster deeper understanding of and commitment to those principles. But I must ask, how is it possible that over time, it has become a deeply exclusionary one? I have wanted to spend some time thinking about some of the decisions of the past, which established labour law's boundaries, and in the process, its margins.

Labour law scholars spend considerable time working through key writings from the 1940s—with Otto Kahn Freund, Hugo Sinzheimer and increasingly Karl Polanyi at the centre, alongside leading theorists of transnational law—Phillip Jessup and the ILO's 6th director general and leading public international law scholar, C Wilfred Jenks. The pivotal work from 1944 by Eric Williams, who later in life became the prime minister of the newly independent Trinidad and Tobago, on *Capitalism and Slavery*, has occupied a less central place (that is an understatement, of course). Williams insisted that his work was “not a study of the institution of slavery but of the contribution of slavery to the development of British capitalism.”⁴ Williams' watershed work established that the institution of transatlantic slavery was at the heart of economic development and prosperity—that is, the Industrial Revolution,⁵ an insight that flows through some of the leading contemporary writing about slavery as a global institution. Moreover, there is no question that the plantation itself was industrial. As Emeritus Professor of Economics, Kari Polanyi Levitt affirms, “the technical advantages of the division of labour were pioneered on the plantations of the West Indies. Plantation slavery was a forerunner of capitalist industry,”⁶ yet another insight that has been developed through contemporary historical analyses of management techniques on slave plantations as precursors of Taylorism.⁷ For labour law, these insights are hardly neutral. What they offer is at once the prospect of telling the story of labour law with a longer, and more interconnected trajectory, while holding on to the necessary dimension of any labour law narrative, which is rooted in resistance, or emancipation, a notion around which much of my scholarship in labour law has focused. The objective has been transparent:

4. Eric Williams, *Capitalism and Slavery* (New York: Capricorn Books, 1994).

5. Colin Palmer, “‘Capitalism and Slavery’ and the Politics of History” (2012) 35:2 Review (Fernand Braudel Center) 95 at 11.

6. “Karl Polanyi's Ideas and the Contemporary World System Transformation” (Inaugural lecture delivered at the International Conference on Development and Regionalism, 5-6 November 2004), online (pdf): <<https://www.concordia.ca/content/dam/artsci/research/polanyi/docs/Kari-Budapest-2004.pdf>> [<https://perma.cc/68JK-EVFR>].

7. Caitlin Rosenthal, *Accounting for Slavery: Masters and Management* (Cambridge, Mass: Harvard University Press, 2018).

to reimagine and contribute to the reconstruction of an inclusive labour law, built from labour law's margins.

My goal this evening is to tie an emancipatory approach to labour law specifically into understandings of international labour law. I posit that the International Labour Organization needs to go back and deliberately unsettle some of the margins that it tacitly reproduced in its first century, if its future, its second century, is to live up to its constitutional commitments.

So now, let me say a little bit more about the ILO. You have heard from one of my mentors in international labour law already, the ILO's former legal advisor, Anne Trebilcock, who visited last month in the context of the Innis Christie labour law lecture and intensive course, and who reminded her Schulich law school audience that the ILO was invited by the government of Canada to take its wartime refuge at McGill University, from 1940–1948. During that time, the League of Nations institution that survived to become the first specialized agency of the United Nations in 1948, elaborated the Declaration of Philadelphia on the aims and purposes of the ILO from which I just read; it developed the organization's position and terms of cooperative engagement with other international institutions on international economic law; and it honed the ILO's approach to decolonization.

The US lawyer David Morse, who was the ILO's Director General for most of the heyday of the social experiment that was the welfare state, from 1948–1970, accepted a Nobel Peace Prize for the ILO's 50th birthday, affirming that in a world that had shown itself more disposed to address matters by force than by talk, “[t]he ILO has provided the nations of the world with a meeting ground, an instrument for cooperation and for dialogue among very different interests.”⁸ In other words, it is well known that the ILO has adopted hundreds of international labour standards with a view to teaching the world, in the first director general, Albert Thomas' words, to speak something of the same language on social policy. But as Morse insists, ILO tripartism was an early form of transnational cooperation, beyond states. He recalled that the ILO was born as a product of different 19th and early 20th century currents in Europe, at once humanitarian, reformist and socialist. The ILO's structure reflects this. In particular he acknowledged that:

[W]orkers' demands for effective international action have often been in contrast with the views of governments which have seen in the ILO an instrument for strengthening the stability of the sovereign nation

8. David A Morse, “ILO and the Social Infrastructure of Peace” in Federick W Haberman, ed, *Nobel Lectures in Peace 1951–1970* (1999) 424 at 427.

state. And while the ILO has of course lived and operated in a world of sovereign states, it has nevertheless gradually extended the scope and possibilities of transnational action.⁹

For Morse, this growing transnationalism was part of how the ILO “patiently, undramatically, but not unsuccessfully, worked to build an *infrastructure of peace*.”¹⁰

Morse’s reflections in the Nobel lecture suggest a cautious sensibility at the height of the expansion of a vision that combined an Adam Smith-inspired approach to liberalization through trade abroad, alongside a Keynesian approach to redistribution domestically. But it would barely take another decade before countries of the global North would begin to wonder whether the social welfare state that the ILO helped to foster after the Second World War in some parts of the global North was the historical aberration.

Morse was writing at the end of the 1960s, and received the prize on behalf of the ILO five years after the Reverend Dr. Martin Luther King Jr. accepted the Nobel Peace prize, and barely a year after he was assassinated. Morse did not mention Dr. King’s work or legacy, but it should not be surprising that Morse acknowledged the need for the ILO to pay attention to those within industrialized societies who live at the margins—those who are forgotten, or dispossessed. He mentioned specifically those who are low paid, racialized and religious minorities, and migrant workers. He argued that it was necessary and feasible to redress racial discrimination and eliminate poverty in the global North, and that such action would become a basis for a deepened “international solidarity” with the global South.

The ILO has also been sanguine about its own limits and contribution to this vision. Consider what David Morse had to say during that same Nobel Peace Prize lecture, to explain the ILO’s approach to development assistance as peace-building:

What concerns the ILO in particular is the fact that the economic progress which has been achieved has benefited only a small sector of the population. To some extent, the ILO itself may have contributed to this situation. By assisting in the development of institutions similar to those existing in the industrialized societies of Europe and North America—such as social security systems, trade unions, and collective bargaining—it may have helped to strengthen the position of the privileged sectors of society: the civil servants, the managers, and the

9. *Ibid* at 426–427.

10. *Ibid* at 427 [emphasis in original].

skilled workers. I am not suggesting that the ILO should now abandon its fundamental principles; but I am suggesting that it should make every effort to redress the alarming imbalances that have arisen in the societies of developing countries.¹¹

Morse's speech, written precisely when the ILO was stepping up its role in providing development cooperation, is disarmingly prescient, and in this moment of rethinking the boundaries of the field for the future of international labour law, merits a second look.

What Morse did not do, however, was revisit the familiar founding narrative that is in fact challenged by Williams' thesis alongside the work on racial capitalism that has subsequently grown in relation to it, and which posits that the transatlantic slave trade was NOT an historical aberration. From the latter literature, we learn that with the "formal" end of slavery, various forms of forced labour persisted or were organized, and included the displacement of Blacks from the most productive lands. The literature on racial capitalism forces us to move beyond the familiar, exploitation-centered conceptions of capitalism that fail to explain, in Nancy Fraser's terms, the "persistent entanglement with racial oppression."¹² For Cedric Robinson, racialization is a phenomenon that can be traced back through Europe; it is a phenomenon that has persisted, and is part of the fabric of Western civilization. As cultural theorist Stuart Hall has insisted, "racial discourses constitute one of the great, persistent classificatory systems... for the representation of, and the organization of practices around...the fact of difference."¹³ Globalization is fostered precisely because it can advance on such contradictory terrain. Moreover, historians of capital and labour increasingly underscore one of Polanyi's central points: economic liberalism and unfree labour emerged *not* as polar opposites. Rather, economic liberalism has historically and systemically depended on multiple, overlapping forms of free and forced labour.

So what did the ILO understand of the foundations of international labour law? Did it merely consider slavery to be irrelevant to its mandate, which takes its origins in the industrial revolution?

As the newly formed League of Nations rushed off to construct what became its 1926 Slavery Convention, taking largely at their word League member states from former slaveholding countries who insisted that slavery no longer existed—the under-secretary of state for external affairs

11. *Ibid* at 432-433.

12. Nancy Fraser, "Expropriation and Exploitation in Racialized Capitalism: A Reply to Michael Dawson" (2016) 3:1 *Critical Historical Studies* 163.

13. Stuart Hall, *The Fateful Triangle: Race, Ethnicity, Nation* (Cambridge, Massachusetts: Harvard University Press, 2017) at 46.

of Canada reported that “slavery does not exist in this country, and has long ceased to be a subject of any practical interest”—but looking with particular acuity at the behest of the British colonial administrator turned commissioner, into the conditions in Ethiopia (which was repeatedly referred to by the name of the historical kingdom, Abyssinia). The push for a convention on slavery appears to have caught the ILO by surprise, and the ILO’s first director general, Albert Thomas, wrote to the first secretary general of the League of Nations, Sir Eric Drummond, to gently express those views. When an initial League of Nations consultative committee on slavery’s report was formally deemed to have an insufficient textual basis on which to move forward with a new convention, two options remained open to the international community. The first was to situate a commission within the pre-existing Mandates commission of the League of Nations. The other was to confide the matter to the ILO. For Albert Thomas, as he recounted to Professor Edouard Benes when he was a delegate at the League, and before he became President of Czechoslovakia, as well as to Swedish Prime Minister Hjalmar Branting who brought his country into the League, the choice was clear: the ILO had the constitutional competence to address slavery, as the term “slavery” designated “nothing other than conditions of work, over which the ILO had jurisdiction according to the preamble of Part XIII of the Treaty [of Versailles].” Conditions of work needed to be understood broadly. He added that the ILO could most assuredly, under Article 421 of the Peace Treaty, foresee application of decisions of the ILO to possessions and protectorates, with appropriate modifications. But beyond the jurisdictional question, Thomas argued that the ILO, through its secretariat, possessed the technical skill to make this work possible. To confide to the ILO a matter previously considered by the Assembly of the League of Nations would, Thomas affirmed, demonstrate clearly that the two organizations form part of an integrated ensemble, which would yield public approbation. But the matter was already in the League of Nations’ hands, and it chose cooperation on its own terms. In its 4th Assembly held in 1923, it decided to form a Committee of Experts within the Permanent Mandates Commission, to again study the matter of slavery, with a view to elaborating a convention. Those experts were to have expertise in colonial administration. The ILO was invited to communicate the name of one person, who would represent it on the committee. Albert Thomas’ response was gracious, but clearly still a lament. The ILO’s jurisdictional space would come later, in the relay between the framework left for forced labour, and ultimately in the division of powers that saw the ILO take responsibility for the topic referred to as “native labour.”

In other words, the ILO wanted to be charged with the mandate to investigate and set standards on slavery, seeing this as in deep continuity with its understanding of labour law. Its constituents, in particular dimensions of the labour movement and some civil society organizations, also reached out to ask the ILO to take up this work in a manner that would be seen as more responsive than that adopted by the League of Nations—through ILO tripartism. But would situating this work within the ILO have been likely to be more attentive to the insights of racial capitalism?

The genesis and ultimate conduct of the investigations and standard setting on native labour suggest, maybe not. The first African American to earn a PhD from Harvard University and who studied in Germany under Max Weber, but whose rightful place as the father of US sociology was largely overlooked, WEB Du Bois, interacted with both the League of Nations and the ILO. He called on Albert Thomas to address the issue of Indigenous labour, and in particular Black labour. And perhaps even more memorably, Albert Thomas opined, in an apparent reflection on Professor WEB DuBois' well known affirmation that the question of the 20th century is the question of the colour line, that, "he considers that there will be no true protection of labour if we do not concern ourselves with the conditions of Black labour."¹⁴ You will forgive me for wondering what the course of history would have been, had DuBois' gently penned offer to the ILO to consider his candidacy to head that unit actually made it past the ILO official who presented himself as Dr. DuBois' friend, and into Albert Thomas' hands. So far, the archives offer no indication that it did.

Here's another short passage from *Washington Black*:

Oh, what this meant to me, seeing my idea come into the world. Even the Cloud-cutter had not moved me as much—it had never been mine, despite all my work on it; it had always been Titch's vision. But here, finally, was a thing of my own making—the invention of a boy born for obliteration, for toil and for death. What vindication, to think I might leave this mark.

Even if I alone would know it. For I was not naïve. My name, I understood, would never be known in the history of the place. It would be Goff, not a slight, disfigured black man, who would forever be celebrated as the father of Ocean House. When I allowed myself to truly think of it, a tightness rose behind my eyes. Goff was not a bad man—he did not like to take credit for my discoveries in principle, but I understood... I did not dwell on it, in those slow, hazy days.¹⁵

14. Archives of the ILO, 1921 [author's translation].

15. Edugyan, *supra* note 2, part 4, chapter 1.

The work that followed, and in particular the work on forced labour and native labour at the ILO, remained resolutely in the hands of colonial administrators, despite the prospects offered by ILO tripartism. Albert Thomas continued to sign letters of appointment that indicated that members of the forced labour committee served in their individual capacity as experts, but each major colonial power insisted on having its representative. There was some advocacy for a woman to be represented on each of these committees, and despite herculean efforts and startling but not unexpected stereotyping, the requests were mostly ultimately successful once the suggestion of a woman who was “part native” herself was abandoned. Historian Daniel Maul notes that Albert Thomas was sharply reprimanded when he expressed consternation about labour conditions after visiting Dutch rubber plantations in Indonesia. He adds that even into the post-war period, colonial powers enjoyed a kid glove treatment at the ILO for far longer than they did within the UN.¹⁶

Dantes Bellegarde, a high-ranking diplomat from independent Haiti, participated in the initial consultative committee on slavery, and put forward a distinct vision of slavery in the meetings that questioned what is meant by free labour conditions. While some of the key colonial administrators on the committee were subsequently appointed to the committee that drafted the convention, and the ILO’s forced labour committee, Bellegarde was not. The label of slavery, through the redefinition, tended no longer to attach to those who had spent centuries engaged in the slave trade and that were mandate holders, but rather in Ethiopia, conveniently paving the way for Italian invasion justified in part as a response to seek to eliminate slavery. Both the 1926 Slavery Convention, and the subsequent ILO Forced Labour Convention, 1930, (No. 29) were seen to provide the latitude that colonial powers needed to compel natives to work. Definitions of slavery have tended to turn on possessing the powers of ownership as required in Article 1 of the Slavery Convention, or the public vs private dichotomy in the framework adopted to review prison labour under Convention No. 29, largely leaving states that have formally legislated against slavery, alone. When the US ratified the League of Nations’ Slavery Convention (without actually ever joining the League of Nations), it included a reservation designed to enable it to extract convict labour—a system linked to the interpretation of the 13th Amendment that authors ranging from Douglas Blackmon, Michelle Alexander, and filmmaker Ava Duvernay have referred to as slavery by another name. Although it became

16. Daniel Maul, “At Arm’s Length: The ILO and Late Colonial Social Policy” in ILO, *Human Rights, Development and Decolonization* (London: Palgrave Macmillan, 2012).

an ILO Member in 1934, it never ratified the ILO's 1930 Forced Labour Convention (No. 29).

So this is the past that surrounded the ILO's first decades, a past that has been underexplored. I have taken a deep dive into it, because it is part and parcel of a reflection on why the proliferation of contemporary forms of human exploitation and suffering so violent and intense that they evoke the ready characterization of modern slavery, are expanding. Our state-focused 70-year-old human rights arsenal, and a century's carefully developed international labour standards, seem ill equipped—or at least insufficient—to curtail them. There has been a decided recent turn, through international action on trafficking, to evoke a different, Wilberforcian vision of curtailing the slave trade at high seas. A potential transnationalized labour law vision—what some in the US are referring to as a positive labour vision in their rereading of the 13th Amendment—built around robust labour inspection, proactive enforcement of labour rights rather than leaving everything to complaints-based mechanisms, empowering of unions and workers' centres to support migrant or other workers susceptible to labour exploitation, and cooperation between labour administration actors across borders to ensure that cases can be completed even when migrants move, has been decentred. Yet this, if anything, is meant to be the ILO's standard-setting legacy. The tensions of both approaches can be seen in the 2014 ILO protocol to Convention No. 29, which includes specific reference to trafficking, recalls the importance of penal measures, but also, importantly, affirms the need to pay attention to root causes of forced labour.

Read through the literature on racial capitalism, the contemporary penchant to treat “modern slavery” as criminal activity undertaken by illiberal subjects sometimes in but definitely not of Western civilization, who must be stopped by the virtuous state, not only operates an act of historical amnesia. As migration scholar Bridget Anderson astutely observes, modern slavery and trafficking discourse depoliticizes; that is, it focuses on the individualized victim, placing her beyond politics. The modern slavery frame can come to mean something so dichotomized from freedom that it is unmoored from any understanding of their “perpetual, unfinished” character.¹⁷ I argue that an emancipatory approach to labour law calls out less for focusing on the exceptionality of illegality, and more on the structural challenge that is attentive both to exploitation, and to historical forms of dispossession. In other words, the anxiety over contemporary slavery in Europe specifically, and the global North

17. Neil Roberts, *Freedom as Marronage* (Chicago: University of Chicago Press, 2015) at 181.

more generally, is inseparable from a globalization that fails to face the conditions under which people continue to move, across territory, and how asymmetrical migration law and global governance makes people illegal.

Domestic work is a good example of this, and it operates along another of the perennial margins that for some time remained in labour law, nationally and internationally: the intersectional care economy. This is a good place to read from another passage of *Washington Black*, from when Wash was still enslaved on Faith plantation, and which captures a dimension of servitude that I theorize in my own book on domestic work,¹⁸ historical forms of invisibility that of course are gendered, but are also deeply racialized, and that emerge out of the relationship of master and servant, and master and slave:

Titch could not begin his experiment without one last element, he said.

“Workers, Washington,” he explained to me. “... We cannot carry the apparatus on our own, can we?”

And so we found ourselves in the entrance of Wilde Hall, quietly sweating. The air smelled of tea leaves, as if the house rugs had been recently cleaned. Titch had grown impatient; I watched him pace the scuffed parquet, the wood creaking faintly under his steps. He would then return to me and pause to lay a soft, tentative hand on my shoulder. His eyes kept drifting to the far corridor. Time seemed to slow, distend around us.

I do not know how long we waited. At last a silhouetted figure flitted distantly across a corridor. Titch called out to it.

His voice seemed to drift off into the shadows. There came a pause, then Gaius materialized from some unseen place, his uniform crisp as an English envelope. Seeing him, I thought he must possess more bones than the average man, so full of knots and angles was he. I imagined I could hear the light crack of his joints as he approached.

His fine, hard face stared up at Titch, betraying nothing.¹⁹

The work of social reproduction is at once subsumed in a lived history of servitude, but also fundamentally market enabling. And from the perspective of the ILO, the need for standard setting for the currently 67 million domestic workers worldwide had come up repeatedly at the ILO. As early as 1936, the International Labour Conference set about establishing

18. Adelle Blackett, *Everyday Transgressions: Domestic Workers' Transactional Challenge to International Labor Law* (Ithaca, NY: Cornell University Press, 2019).

19. Edugyan, *supra* note 2, part 1, chapter 8.

a standard on holidays with pay and wondered whether domestic workers could be covered—rather than include them, the International Labour Conference resolved to ask the Governing Body to *consider* putting the protection of domestic workers on the agenda for future sessions. There were several similar episodes. In 1965, the ILO even adopted the Resolution Concerning the Conditions of Employment of Domestic Workers. It observed that there was an “urgent need” for standards “compatible with the self-respect and human dignity which are essential to social justice” for domestic workers.²⁰ Ultimately it was domestic workers themselves who, although missing from the ILO’s 2008 Governing Body members who represented labor ministries, national employers’ federations, and traditional trade unions, had literally done their homework. They constituted a global, well-organized, and dynamic social movement that had planned long and hard to enable the ILO to set standards that would unsettle the common sense way in which the domestic work relationship is understood and regulated, from a legal pluralist perspective, as part of a global legacy of subordination and servitude that operates in particular places and in particular ways on particular women’s bodies. I refer to it as the asymmetrical, unequal, and largely invisible law of the household workplace, illustrated in the passage from *Washington Black*. The standard setting concluded in 2011 with detailed new standards on decent work for domestic workers—and the Convention (No. 189) has been ratified by 29 states to date, from countries with significant domestic work populations, in the global South and global North, and countries that receive and send domestic workers, and in some cases, both. Canada is currently studying its laws, as part of the process to move toward ratification of this instrument. Ratifying Convention No. 189 helps to put in place a transnational learning community for governments and other tripartite actors surrounding the ILO, with a view to looking closely at norms that entrench servitude as subordination, by challenging structural inequality.

The adoption of Convention No. 189 in 2011 could have signaled closer ILO attention to the importance of not assuming that there is an absence of subordination as servitude in modern workplaces, and to make such a sharp distinction between it and subordination as control and as it is a complex, multifaceted international institution, it still might.

20. ILO, *Resolution Concerning the Conditions of Employment of Domestic Workers*, Official Bulletin (Geneva, 23 June 1965) Vol XLVIII, No 3, Supplement I, 20-21, online (pdf): <http://www.ilo.org/public/english/support/lib/resource/subject/resolution_dw.pdf> [<https://perma.cc/R8UN-Y4BX>].

However, the ILO has spent its 2019 annual International Labour Conference adopting a Centenary Declaration for the Future of Work. It is not a constitutional text, and you will not turn to it for the kind of beautifully articulated, noble aspirations found in the 1944 Declaration of Philadelphia that I quoted near the outset. I witnessed the last hours of the Centenary Declaration's negotiation, and can say that I have experienced finer moments for tripartite wordsmithing at the ILO. But while the text is lengthy and rather watered down, the Declaration references a number of important issues centred around a "human-centred approach to the future of work" including just transitions, gender equality, strengthening social protection, and social dialogue. The ILO is to take an increased role in multilateralism and the promotion of international cooperation. The Centenary Declaration calls for the ILO to scale up its work on labour migration in response to constituents' needs, and take a leadership role in "decent work in labour migration" as well as to eliminate forced labour. Yet remarkably, in this moment of rising populism and explicit politicking that deploys racial difference as a way to emancipate hatred, the ILO's Centenary Declaration makes no mention of racial discrimination.

Perhaps in a focus on the future of work that has a tendency to centre technology, there might be an assumption that artificial intelligence is colour blind, but even there, a growing body of current research reminds us that machines are programmed to inherit the biases that follow their creators and that emerge from inequality and asymmetrical access. To make the future of work resonate for those who live the stark inequality that exists within and between states, and that is re-racialized in a global context, thinking transnationally offers important possibilities. There is potential in a transnational approach to international labour law to unbundle the field from the narrow narrative that has rooted its emergence exclusively in the Industrial Revolution, has excluded care work, and has deracinated the field from attention to that other fictive commodity, land. I have sought, tonight, to offer a thicker history, based on an archive that points to the need for engagement with slavery and forced labour alongside free labour conditions—and engagement with servitude alongside the subordinated control that is at the centre of the employment relationship—and engagement with the persistence of racialization in a field that aspires to equality. Each is a reminder of the persisting presence of the past in international labour law. I have challenged the ILO to take a closer, more careful look at the historical forms of invisibility in its own past boundary-making decisions. As to the future, we saw through Director General Morse's 1969 Nobel lecture, that the transnational at the ILO has been observed for some time. But to acknowledge the impact of histories of

transatlantic trade in labour (and not just products) through slavery between and beyond European territories and across the Black Atlantic can be an antidote to methodological nationalism. The contemporary spatialization of labour—particularly through migration and including to provide care—similarly evokes the transnational. Close attention needs to be paid to these issues that have tended to be relegated to labour law’s margins, to avoid misframing justice concerns as national, when they can only really be understood transnationally. To rethink labour transnationally is also to call attention to a distinctly important part of any narrative in the history of enslavement: the enslaved’s insistence on their humanity by resisting commodification, often by moving, or migrating. This is, fundamentally, the story of international labour law, and the portal to its transnational futures.

I ended my Winter 2019 course on the Transnational Futures of International Labour Law by recalling that we are in a moment where we have to profoundly unsettle some of the starting understandings of the field of international labour law, and challenge some of the starting asymmetries that may have given us a sense of solidarity in the past but so deeply exclude working people, worldwide. We need to unsettle, some would say decolonize, before we can begin to imagine how a second centenary for social justice toward peace can become a reality.

On that note, let me conclude this lecture, with Esi Edugyan’s protagonist’s closing words in *Washington Black*:

Through the badly nailed boards of the door a hissing threaded in like voices. Exhausted, I rose unthinkingly to my feet. I pressed my palm to the door, felt its vibrations. And then I was dragging it open, so that the grand yellow air rose before me, buzzing. A tree’s branch whipped past, splintered apart against the harsh stone house. The wind was furious, rasping and singing over the pale ground, whipping sprays of sand into the whitening east. There was no trace of human presence anywhere, neither trail nor footstep. It was so cold I expected to see my breath.

I stepped out onto the threshold, the sand stinging me, blinding my eyes. Behind me I thought I heard Tanna call my name, but I did not turn, could not take my gaze from the orange blur of the horizon. I gripped my arms about myself, went a few steps forward. The wind across my forehead was like a living thing.²¹

Thank you.

21. Edugyan, *supra* note 2, part 4, chapter 17.