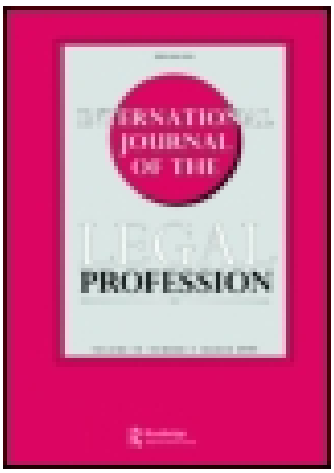

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Mentoring the other: cultural pluralist approaches to access to justice[1]

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> Myres McDougal was white, male, and from a Southern Methodist background—hardly a minority icon and certainly not an endangered species. But he was undeniably a role model. [...] Myres McDougal was our mentor, as well as our teacher. [...] By some magical process, you could over twelve or more months have metamorphosed from a baffled newcomer to someone thought by McDougal to have promise. And then his support as mentor knew no bounds. It mattered not ... that you might by now be three thousand or six thousand miles away. You had become part of the invisible reality of the Yale policy science school, which did not depend upon physical geography. Mac would write references more generous than one could hope for, [...] go to extraordinary trouble to advance one's cause. All of this often went on unseen and unsolicited. We had moved, without fanfare, from student to friend.[2]
>
> "It's only a beginning," Rodrigo said, switching off my computer. "I want to make this my life's work. Do you think anyone will listen to me?"[3]

Introduction

The central concern of this paper is to understand the potential that informal institutions, like mentorship, hold to promote diversity in the legal profession, including academe. The paper starts from the premise that informal institutions are realities. They may, to some extent, be supplanted by formal institutions; they may also be responses to them, developing even flourishing beyond the public gaze. And, despite what would appear to be a marked preference by supporters of law school diversity for formal, rights-based institutions that promote access to justice, informal mechanisms retain a degree of vibrancy. In this regard, it is necessary to look at the

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ways in which informal institutions may simultaneously be sites that reproduce exclusionary practices and affirming spaces to promote inclusion.

In this paper, I argue that proponents of greater faculty diversity in law schools should make the institution of mentoring the subject of serious, critical attention. Part I of this paper critiques the contemporary literature on the importance of role models to the project of diversifying law schools, by exploring the assumptions about representation and access inherent to role modelling; in the process, it explains why role modelling is distinct from mentoring. Part II steps into the mentoring sphere, to consider how scholarly attention to mentoring can assist in the task of rethink and complicating the notion of merit. It also grapples with the tendency of proponents of equity initiatives to favour formal, public and invariably political equity initiatives over informal, private, and personal ones, which have tended to be exclusionary. Mentoring illustrates that these divides are more accurately perceived as part of a continuum, along which access to justice questions arise. Part III issues somewhat of a challenge to members of dominant social groups to think about whether mentoring can sustain difference sufficiently to move outsiders to the centre of institutions without exacting the price of assimilation. Perhaps a story of greater transformative potential will also eventually be imaginable, if there is some commitment to engaging in this project.

Part I: mentor or role model?

The literature on role models is replete with suggestions that a significant reason for minority hiring is to fulfil a representational role. Richard Delgado and Lani Guinier have been at the forefront of the scholarly critique of role-modelling. Delgado argues that this practice, when applied to those who have historically been disenfranchised or under-represented in the legal profession, promotes a model of tokenism. Role models become exemplars of success,[4] present as much to rebuke those members of historically disadvantaged communities who fail to achieve comparable success as to encourage those who might find the wherewithal to follow along their narrow path.[5] For Guinier, this approach serves to eclipse attention to the systemic nature of exclusion.[6] Guinier adds that the role model argument "trivializes the important contribution that outsiders play in diversifying a faculty", notably through their scholarly and intellectual leadership.[7] She also rejects the 'template' approach that the discourse on role models assumes; in other words, it shifts attention to the 'singular achievement' of a person with given physical attributes attaining a particular social status who may then serve as a 'representative' inspirational figure.[8] She would prefer attention to be placed on the multiple experiences that persons from marginalised communities may draw upon to broaden, complicate and transform the role of an educator in a socially-engaged manner.[9] For Guinier, "role models need to nurture their roots not just model their roles".[10]

Delgado's 'Rodrigo chronicles' are particularly instructive, not only for what they say, but for how they convey their message. Delgado creates a narrative of a mentoring relationship, between Delgado, an established male faculty member of a racialised community,[11] and a new male colleague, Rodrigo Crenshaw, whose

background is left somewhat indeterminate.[12] Through their meetings and discussions, the reader learns not only about the pernicious nature of racial prejudice in academe and the limits of positive action programmes; the reader also experiences the potential of a solid mentoring relationship to guide a junior colleague through a budding academic career.

Through his narrative, Delgado explicitly and implicitly calls on persons of colour in academe to resist the pull to become role models.[13] In the literature surrounding and following the 'Rodrigo chronicles', some attention has been turned to defending the notion of a role model, by enlarging its scope and destabilising the way that notions like affirmative action are understood.[14] And, this broadened vision of role modelling in fact moves further along the spectrum toward the mentoring model that is the focus of this paper. Indeed, Delgado himself challenges racial minority faculty to become mentors instead of role models, narrowly defined. For Delgado, "a mentor is one who tells aspiring young persons of color truthfully what it is like to practice your profession in a society dominated by race".[15]

An important assumption in Delgado's work is that one holds a certain amount of agency over becoming a role model. True, one can affect, subvert the public representations of self;[16] however, one ultimately becomes a role model from afar, because one's way of being in the world has an impact on the lives of others one may never even have met. To a certain extent then, whether one explicitly embraces the role of a 'role-model' or not,[17] the part is likely nonetheless to come the way of those members of minority communities who have achieved a measure of mainstream 'success'. As Guinier has observed, "[t]o students who feel similarly disembodied by the traditions [. . .], my presence in legal education offers refuge. In their eyes, I am 'there for them'. Indeed, for some, I am not merely a law professor. I am a role model".[18]

Mentoring is in this sense different. Mentoring is very much about building relationships across differentials in age, experience, power, with the explicit purpose of expanding the life options or advancing the career of the mentee.[19] For Guinier, it is also a more 'active' notion, one that moves beyond 'cultural icons' toward "a process of dialogue that monitors student performance and holds those who follow to high expectations. Mentors see learning as a dynamic process that builds on students' emotional engagement and emphasizes the mutuality of their role in the educational conversation".[20] I contend that it is the potential of the mentoring model that might usefully be harnessed for a deeper access to justice project.

Delgado's call to mentor, and the mentoring relationship that he depicts through the 'Rodrigo chronicles', draw on the intuition that persons who are outsiders to the dominant paradigm will seek out mentors who are considered to be outsiders as well; moreover, gender and racial stereotypes may lead students to perceive female faculty (white women and certain women of colour) as more accessible—or necessarily more available—than most men to respond to their needs.[21] And certainly, members of historically marginalised and racialised communities have actively embraced Delgado's call.[22] Guinier's piece is a particularly compelling (and rare)[23] account of the vision that a mentor, as opposed to a mentee, has offered for the institution of mentorship. Guinier articulates her role as a mentor as a part of her

understanding of what it means to be an 'educator',[24] and, although the article focuses on mentoring persons from marginalised groups, Guinier carefully points out that she seeks "to transform the educational dialogue for *all* [of her] students", including white males.[25]

Guinier's admirable vision of mentoring merits attention in discussions of access to justice precisely because it brings to light the existence of a potentially crucial career development opportunity that is present for some meritorious candidates, but absent for others; those 'others' tend to be persons from historically marginalised/racialised communities.[26] In a pool of meritorious candidates, effectively mentored candidates may tend to be preferred;[27] indeed, and more problematically, mentored candidates may by-pass formal candidate pools altogether. Yet, the implications of suggesting that most of the mentoring of aspiring lawyers and law faculty from marginalised communities should be the responsibility of the members of historically disadvantaged communities who have entered the academic ranks runs the risk of seriously overburdening scholars of colour and other traditional outsiders; equally importantly, it obscures the impact of current mentorship practices by faculty members of dominant social groups on our understanding of merit, and the overwhelming importance of promoting equitable mentoring on the part of all faculty members.

Part II: the mentoring sphere: rethinking merit and formalism

Traditional approaches to access to justice have tended, with some reason, to focus on formal channels of access. Equity initiatives to diversify entry-level law students, and thereby to diversify the legal profession as a whole, have been put in place in many Canadian and US schools.[28] Since the 1960s, these have increasingly relied upon formal criteria, like Law School Admission Test (LSAT) scores, despite a growing body of literature challenging the objectivity of standardised testing.[29] The notion of a colour-blind meritocracy has underscored the need to rethink the criteria,[30] although the notion itself for a long time eluded sustained critical engagement.[31]

Tellingly, however, the backlash against the establishment of differential criteria for members of racialised communities in the US[32] has led proponents of proactive approaches to equity to challenge the very meaning of merit.[33] At the very heart of the critical race theory critique is the recognition of the important yet real limits of formal mechanisms to promote meaningful equality.[34] Attention to the informal sphere—and the way that power is understood, reconfigured and deployed within it—becomes crucial but troubled work.

Mentoring and meritocratic purity

Attention to the influence of mentoring is in some ways a direct challenge to the notion of merit, as it is traditionally understood. Certainly at one extreme, the notion of mentoring could be seen as profoundly in contradiction with the notion of merit, to the extent that it may seem to fall too close to the type of 'old boys' network' through which merit is but a secondary or tertiary consideration in relation

to the value placed on the 'friendship' of the *demandeur*. Indeed, it challenges the extent to which merit in its pure form existed before proactive inclusionary policies were devised,[35] and holds the potential to broaden and complicate the notion beyond "color-blind meritocratic fundamentalism",[36] or "meritocratic purity".[37]

One striking example of the contradiction between meritocratic purity and mentoring is found in a recent article about Mr. Justice Oliver Wendell Holmes' relationship with his law clerks.[38] Through his historical account, Scott Messinger poignantly illustrates the extent to which mentoring has traditionally been used to counter attempts to diversify the legal profession. According to Messinger, from his time as an associate Justice of the United States Supreme Court from 1902 through to 1932 and right up until his death in 1935, Holmes actively mentored exclusively unmarried, primarily WASP male law clerks[39] from the most prestigious institutions[40] in an attempt to actively safeguard the law as a preserve for elite 'gentlemen'.[41] The backdrop for these proactive measures was a growing diversification of the legal profession: not only were apprenticeships on the decline as legal education became professionalised through the establishment and greater reliance upon law schools;[42] the profession was also opening its doors (if only slightly) to women,[43] and to men of lesser pedigree and different race.[44] Holmes' "institutionalized mentoring" [45] was not mere friendship; it was a political act, meant to be a contribution to the betterment of society by raising lawyers who would hold a particular heroic and anti-materialistic vision of lawyering.[46] Messinger reports that "[n]o matter the area in which they prospered, or the amount of prosperity that they enjoyed, Holmes' secretaries attributed their success to their mentor".[47] Not only did Holmes demand complete devotion from his clerks; he also used the mentoring relationship to project a particular vision of Holmes to the public, defending and enhancing his own judicial reputation.[48] Messinger affirms that Holmes' approach to mentoring through clerkships was central to the establishment of the modern law clerk relationship, and suggests in his conclusion some links to contemporary hiring practices.[49]

Messinger's account provides a particularly poignant example of how mentoring can be used for the exclusionary purposes long attributed to 'old boys networks'; it also underscores the hierarchical, paternalistic character of some mentoring relationships. In these regards, it serves a cautionary note to any wholesale calls for the reification of mentoring (which is obviously not the project of this paper). But Messinger's work also provides an early, concrete illustration of the importance that mentoring played in the lives of promising young jurists, all the while furthering a particular vision of what the law should be: white and male. With due regard to the historical context, it is still fair to note the gulf between the mentoring relationships and the ideology of colour-blind meritocratic fundamentalism that pervades modern approaches to affirmative action.

A more compelling vision of merit, inclusion and access appears, however, from the contemporary mentoring model of Justice Ruth Bader Ginsburg, glimpsed at in a tribute by two of her former clerks:

> We were already married when we started our clerkships, and so the chambers became our second home. We were not married, however, when

> we accepted the job, eighteen months before. Some employers might have been discomfited by this sudden change, this intrusion of a close personal relationship into a workplace setting. By contrast, Justice Ginsburg was so delighted by this answer to the work/home conflict that she did some research to discover that we were, in her words, 'a Federal first'—the first co-clerks married before their employment began. [. . .] [W]e did not understand what an utterly remarkable workplace she created for us—a place where we could bring both our emotional and analytical lives in fullness . . .[50]

Throughout the tribute, the authors explain how seamlessly Justice Ginsburg weaved together the home/work, family/colleague divide, to provide them with a healthy mentoring relationship. The tribute provides a compelling account of Justice's academic rigour, professional support and personal caring toward these future members of academia.[51] Tributes like that to Justice Ginsburg, as well as Dame Rosalyn Higgins' tribute to Myres McDougal, unblemished by the objectionable exclusionary character of the Holmes example, allow us to consider how mentoring affects some but not all of the broadly meritorious persons seeking, or assuming, positions in legal academia. To the extent that mentoring is considered to be career enhancing, yet relationship-based, meritocratic purity becomes not only unrealistic, but also somewhat undesirable. The more compelling mentorship accounts illustrate that the world of access to justice is more textured, and warrants careful analysis.

The Ginsburg and McDougal tributes are not, however, the norm, to the extent that they are both illustrations of mentoring the other across gender. Attention to mentoring forces us to look at merit in a different way, to consider the active promotion of members of the majority culture of those who are most like them, those who are most likely to be like their sons or daughters, and to become their friends.[52] Yet this aspect of mentoring has eluded scholarly attention in law.

Situating mentoring along the public/private, personal/political, formal/informal institutional continuum

My intuition is that mentoring has escaped systematic legal analysis largely because it is understood as a primarily personal, private relationship. This characterisation abounds, despite the fact that it is a relationship forged largely through interactions within the public, workplace contexts, and the potential professional benefits to the mentee, the mentor and the institutions in which they may work suggest that the relationship is not fully personal and not fully private. To the extent that mentoring straddles the realm of the workplace and the family, it may be thought of as a hybrid, as 'quasi-private' and 'quasi-public'.

In another sphere traditionally considered to be 'private' and beyond the reach of the law, 'the nuclear family', rigorous analysis by feminist theorists has considerably broken down the rigid barriers between the public and private spheres, rendering the personal action of families in patriarchal societies matters of political concern. This essential work has been necessary both to ensure that given the power imbalance

between men and women in a patriarchal society, the private does not become a hidden site for unbridled oppression. For some, of course, the nuclear family is an unredeemable institution. For many others, though, the family is viewed with a combination of realism about its capacity for self-propagation and renewal, and optimism about the transformative potential of a broadened, more egalitarian notion of the family. The private does not disappear in these analyses; however, it is understood to be less a 'separate sphere' that should be conserved as such, and more as part of a continuum of activity ranging from matters that are fully private to those that are fully public. Institutions like the family may be situated differently along the spectrum not only in relation to how they are constituted, but also in relation to the societal context in which they arise, and the extent to which state law seeks to intervene to regulate the terms of the affective bond.

Looked at through the backdrop of the public-private continuum, the mentoring relationship can be understood more critically, and as a worthy subject of scholarly attention. In other words, the personal and private dimensions of mentoring necessarily exist because mentoring is a form of friendship; however, the impact of mentoring on career advancement renders it a potentially powerful tool through which access to the legal profession and academe may be mediated.[53] It therefore warrants attention, yet the public-private continuum is not the only likely source of the reluctance of those engaged in equity promotion to call upon cross-cultural mentoring as an access to justice tool. The informality of mentoring is also likely to be a central source of concern.

This hesitation is at one level paradoxical. Indeed, critical legal studies and subsequently critical race theory have offered profound challenges to the classic suppositions of legal liberalism. Legal formalism has been challenged on the grounds that legal rules are fundamentally indeterminate. Adjudicative neutrality has been met with the reminder that the judges and other decision-makers overwhelmingly reflect the dominant societal groups and interests; their values and world-view are the implicit but present background against which decisions are rendered. Legal abstraction has been similarly critiqued, on the grounds that broader social context is crucial to any meaningful decision-making about individual cases.[54]

For CRT scholars, the critique is a damning indictment of legal liberalism, but not an end point, as it had tended to become for those CLS scholars who failed to move on to consider transformative strategies. For CRT, the crucial task is to reconstruct an approach to law that would be of service to those groups who have traditionally been marginalised, particularly—but by no means exclusively, as much of the literature on intersections illustrates—because of their racialised identities. Awareness of law's indeterminacy, coupled with an awareness of what Patricia Williams refers to as the alchemy of race and rights, would be the threads through which more critical strategies would be devised. This 'multiple consciousness' approach[55] marks a theoretical departure from the anti-discrimination approach toward more expansive approaches that openly challenge many of the assumptions of legal liberalism, and explicitly embraces reconstruction of social justice ideals through multiple, systemic strategies.

The CRT critique of a 'mentoring strategy' would essentially mirror the critique

of the "CLS-style Utopia".[56] In relation to the CLS movement's embrace of informality, Delgado has argued that

> if racism were to surface in a CLS-style Utopia, there would be no rules, rights, federal statutes, or even courts to counteract it ... The cost of moving to a utopian society would be borne by minorities ... Utopian society would empower whites ... If we jettison rules and structures, we risk losing the gains we have made in combatting racism.[57]

Patricia Williams' account of how she and her white male academic colleague both pursued the same goals of peaceable occupation of rented accommodations in very different manners: Williams as a black women seeking to avoid misunderstanding through the security and precision of the detailed, written lease; her colleague through the establishment of an informal relationship of trust with the landlord, through which no written lease was necessary.[58] The reasons why Williams could not rely on the informal are very much like the reasons why mentoring across difference, including differences of power, may be the source of considerable hesitation on the part of outsiders. Yet the call to consider mentoring is not a call to do away with formal access to justice channels; on the contrary, scholarly attention to mentoring may assist in the task of deconstructing merit, and reconstructing it to reflect the multiple ways in which excellence is created, nurtured and recognised. Mentoring the other, subject to important correctives, may provide a valuable complement to formal access channels, to the extent that it promotes deeper educational, and cross-cultural engagements.

Part III: mentoring the other: the challenge of cultural pluralism

If we start from the premise that to allocate law teaching positions is to allocate scarce societal resources, that is access to an institution that distributes or withholds power, then equitable allocation becomes a necessary part of the equation, and requires participation by groups in a culturally pluralist society.[59] Indeed, the basic democratic principle that people should be "represented in institutions that have power over their lives[60] provides a suitable theoretical justification for considering whether mentoring really can seriously be promoted across difference. If it cannot, then mentoring itself needs to be called into question on equity grounds.

Mentoring the other[61], then, is proposed as a way to take Duncan Kennedy's argument that minority faculty are necessary for the empowerment of subordinate communities seriously. A starting point is to identify the myriad ways that inclusion can be promoted by members of dominant groups who seek to be responsive to the diversity imperative. Yet the broad spectrum of access is established not only on formal, pre-established criteria; mentoring for access also entails deeper, sustained orientation and guidance, to ensure that outsiders not only gain initial access, but also develop careers to become full members of the legal academe.[62]

At the opposite extreme to the feared reification of the old boys' network[63] would be the full politicisation of faculty whereby all professors from the majority culture actively take it upon themselves to use mentoring as a tool to promote

meritorious candidates from historically disadvantaged communities. Yet again, not only is this scenario highly unlikely to the extent that law schools overwhelmingly serve the dominant culture; it also instrumentalises the participants, in a way that sidesteps the ambiguities and transformative potential of real human, interpersonal relationships, central to meaningfully-lived mentorships. In other words, although at some level there is a necessary level of consciousness needed, indeed a (political) decision taken to mentor someone who is not 'like' oneself, the mentoring relationship itself may not make sense without something that makes it possible for the mentor and protégé to be 'friends'.

There are also challenges to the viability of mentoring the other. To the extent that the law, embodied, is white, male, and privileged,[64] the other may find some difficulty seeing herself in a mentor who reflects so starkly that dominant perception, and trusting that person to be able, and fully willing, to guide her.[65] At the heart of this concern is whether it is possible, in Peter Halewood's words, for "a white male scholar, [to be] situated (personally and 'epistemologically' . . .) so as to be able to really understand, unpack, and contribute constructively to scholarly debate on oppression and law".[66]

Halewood concludes that this kind of embodied understanding can be aspired to, but not easily attained. He counsels "more self-criticism, more listening, more learning from others".[67] Given the high potential risks to the mentee, however, some have suggested that a solution to the mentoring puzzle is to acknowledge and structure the relationships, by instituting formal mentorship programmes sponsored and officially recognised by the law schools themselves.[68] Those programmes would come equipped with guidelines and cross-cultural training for mentors. Some have gone so far as to suggest that to overcome power differentials, formalised 'peer' relationships should be preferred to conventionally defined mentors.[69]

Ultimately, though, these possibilities sidestep the deeper questions associated with a cultural pluralist vision of inclusion in relation to the educative work that academics do, including mentoring work. It is certainly true that in the mentoring context, from the protégé's perspective, some of the common features of a mentoring relationship might themselves need to be rethought; indeed, some researchers suggest that protégés from historically marginalised groups "may need to select several mentors for different purposes and develop varying levels of intimacy with them".[70] And, cross-cultural training could be valuable to faculty, for mentoring and the broader range of professional interactions in academia. However, engagement with the relational dimensions of educators' work and their impact on access to justice demands looking at mentoring on its own terms, rather than obscuring the analytical tensions through attempted formalisation, which can in any event only be partial.

The educators' mentoring work may, however, be the source of ambivalence: is it profoundly assimilative or does it have transformative potential?[71] In a compelling conversation about the unity of scholarship and pedagogy through an ethos of "liberatory activism", Charles R. Lawrence, III expresses his sense of alienation toward the role of a 'scholar' given his outsider status,[72] but also acknowledges that he is not wholly an outsider. As an African American man in the United States, he

considers his dual subjectivity to be potentially transformative, to the extent that it enables black persons to "articulate social realities that are unseen by those who live more fully within the world of privilege".[73] The dual subjectivity also carries within it an assimilative risk: having internalised insider values and succumbed to the seduction of privilege, it is possible for insider-outsiders to lose sight of any liberatory vocation that their dual subjectivity may have provided.[74]

Lawrence's assessment of assimilative and transformative potentials of insider-outsiders in legal academia is complicated further when applied to mentoring, because the potential for assimilation is increasingly strong when the mentee is expected to develop through the guidance of the mentor. However, those white men who confess their own sense of alienation in relation to their 'highly meritorious' standings may find mentoring that is 'race-conscious'[75] or similarly conscious of exclusion to be an active way to grapple with their own privilege, and their inherited ways of being in the world. In other words, mentoring the other may be a way for members of the dominant groups to acknowledge privilege, and assume a critical stance toward it precisely by sharing access with 'others'. This shared access might come at a cost: the mentored 'other' may develop a critique that fundamentally challenges the mentor's scholarly sense of self in academe. At the heart of this inquiry, however, is whether scholars who have been at the core of establishing and sustaining particular research traditions and scholarly paradigms can embrace the changes that are likely to follow if, in Kennedy's words, "people of excluded cultures and excluded ideologies were allocated power and opportunity to create research traditions and scholarly projects of their own, or to participate in those ongoing".[76] Some might respond that they have to; for, "legal education that ignores outsiders' perspectives artificially restricts and stultifies the scholarly imagination[77] as well as a failure of broader equity initiatives to recruit, retain[78] and fully integrate faculty from historically marginalised communities.

Conclusion

I have informally referred to this paper as Mentoring the Other, Part I, as it is meant as a glimpse at this relationship from the perspective of one who is relatively new to academia, and relatively new to mentoring, both as a mentee and a mentor. I would like explicitly to leave space open to consider to what extent my own conceptions of mentoring will grow as my career develops and as my experience on the inside of the mentoring relationship grows.

For now, I am prepared simply to conclude that mentoring warrants serious analysis; it can at the very least broaden the artificial terms of the merit debate, and provide a more textured understanding of institutional change. I am comfortable positing, moreover, that the promotion of diversity in legal education requires a multifaceted approach, one that does not relegate thorny matters to the closet, but engages critically and rigorously with the formal and the informal, the public and the private, in the process of seeking transformative interactions.[79] As Herma Hill Kay argues,

> our future depends on the lived out, myriad examples we dare to impart to our colleagues and our students ... that will help them to define their own lives as lawyers, judges, or law professors as well as human beings.[80]

Whether mentoring the other for access to justice will ultimately, actually be transformative cannot, of course, be the conclusion of this paper, because it will depend on the particular dynamic of the interactions that are created by persons committed to such a project; but to the extent that such persons exist, then the transformative potential is necessarily present as well.

Notes

[1] This paper was prepared for the W.G. Hart Legal Workshop: The Changing Work and Organisation of Lawyers and its Educational Implications, Institute of Advanced Legal Studies, School of Advanced Studies, University of London, June 2001. An early version of this paper was presented at a panel on access to justice at the National Association of Women and the Law Biennial Conference, Halifax, October 1997. Mentoring for equality was also the subject of a joint presentation with John Hayakawa Torok in a Legal Education Seminar, taught by Brad Karkainnen and Peter Strauss at the Columbia University School of Law, New York, autumn 1996. I thank participants in all three events for their insightful comments. I am also grateful to Amarkai Laryea and Andina van Isschot for their stellar research assistance.

[2] Dame Rosalyn Higgins, McDougal as teacher, mentor, and friend (1999) 108 *Yale Law Journal* 957, 958–959.

[3] Richard Delgado, Rodrigo's chronicle (1992) 101 *Yale Law Journal* 1357.

[4] Richard Delgado, Affirmative action as a majoritarian device: or, do you really want to be a role model? (1991) 89 *Michigan Law Review* 1222. See also Donna E. Young, Two steps removed: the paradox of diversity discourse for women of color in law teaching (1996) *UCLA Women's Law Journal* 81 and (1995) 2 *African American Law and Policy Report* 270.

[5] Delgado (1991), *op. cit.*

[6] See Lani Guinier, Models and mentors, in: Lani Guinier *et al.* (Eds) *Becoming Gentlemen* (1997), pp. 85, 93.

[7] *Ibid.*, at p. 90.

[8] *Ibid.*, at pp. 93, 94 (cautioning that "black role models may become powerful symbolic reference points for camouflaging the continued legacy of past discrimination"). See also Adeno Addis, Role models and the politics of recognition (1996) *University of Pennsylvania Law Review* 1377; and Anita Allen, On being a role model (1990–91) 6 *Berkeley Women's Law Journal* 22.

[9] Guinier, *op. cit.*, at pp. 90, 92–93.

[10] *Ibid.*, at p. 94.

[11] Delgado (1992), *op. cit.*

[12] Delgado's protégé is of decidedly indeterminate age ("somewhere between twenty and forty") and ethnicity ("[h]is tightly curled hair and olive complexion suggested that he might be African American. But he could also be Latino ..."). He adds that Rodrigo was raised and educated largely in Italy.

[13] In an article outside of the 'Rodrigo chronicles', Delgado itemises his resistance to role modelling. See Delgado (1991), *op. cit.* He is particularly concerned about the assimilationist expectations of role models by members of the dominant groups who may hire them to fulfil such roles.

[14] See in particular Enrique Carrasco, Collective recognition as a communitarian device: or, of course we want to be role models! 9 *La Raza Law Journal* 81.

[15] Delgado (1991), *op. cit.* For Delgado, role models are required, in contrast, to lie, by suggesting to aspiring members of the profession "that if they study hard and stay out of trouble, they can become a law professor like me. [...] Fortunately, most kids are smart enough to figure out that

the system does not work this way. If I were honest, I would advise them to become major league baseball players, or to practice their hook shots". (It might of course be fair to wager that there are more minority women in academia than on major league sports like baseball and basketball in Canada and the US.)

[16] See, for example, Regina Austin, Resistance tactics for tokens (1986) 3 *Harvard The BlackLetter Journal* 52, 53 (" 'token resistance' should not only challenge erroneous premises; it should also alter the terms of the discourse entirely. . . . The best sort of resistance criticizes and wrestles power in favor of a substitute norm").

[17] *Ibid.*

[18] Guinier, *op. cit.*, at p. 89.

[19] See also Guinier, *op. cit.*, at p. 95. Messinger characterises mentoring of the variety offered by Justice Holmes, within the specific context of the judge-law clerk relationship, as "an intergenerational bargain in which wisdom, advice, and a certain amount of social capital are exchanged by an elderly judge for the companionship and affection of an ambitious young lawyer". See Scott Messinger, The judge as mentor: Oliver Wendell Holmes, Jr. and his law clerks (1999) 11 *Yale Journal of Law & the Humanities* 119, 121.

[20] Guinier, *op. cit.*, at p. 95.

[21] See, for example, Morrison Torrey *et al.*, What every first-year female law student should know (1998) 7 *Columbia Journal of Gender & Law* 267, 292; See also Christine Haight Farley, Confronting expectations: women in the legal academy (1996) 8 *Yale Journal of Law & Feminism* 333, 348-352.

[22] For example, Margaret Chon notes that "all tributes to [Judge A. Leon Higginbotham Jr.] that I have come across emphasize his mentoring, as well as his message". See Margaret Chon, Symposia: a tribute to Judge A. Leon Higginbotham Jr. A symposium tribute to Judge A. Leon Higginbotham Jr.: the mentor and his message (2000) 33 *Loy. Los Angeles Law Review* 973, 974. See also Guinier, *op. cit.*, at p. 90.

[23] The invisibility of mentoring in formal legal articles is palpable. Mentoring tends to be uttered primarily by mentees in tributes to former mentors. Guinier's piece is therefore all the more valuable, as it provides an express discussion of the aims of a particular mentor in the mentoring relationship. In part because Guinier's piece is not in the form of a tribute, however, the ways in which mentoring may concretely lead to the promotion of a candidate's career within given institutional settings are not discussed.

[24] Interestingly, though, her choice of terminology to describe her mentoring role is strikingly more 'formal' than that encountered in the canvassed tributes, written by protégés. Perhaps the different positions of the authors and nature of the publications account for the difference. It is plausible, however, that the difference may be linked to a different conception of the appropriate parameters of a mentoring relationship.

[25] Guinier, *op. cit.*, at pp. 96-97.

[26] See Deborah L. Rhode, Myths of meritocracy (1996) 65 *Fordham Law Review* 585 (noting that women have fewer mentoring opportunities than men); Deborah L. Rhode, Gender and professional roles (1994) 63 *Fordham Law Review* 39, 68 (noting that women "still do not have access to the same informal networks of advice, collaboration and contacts on which successful careers depend"); Stacy Blake, At the crossroads of race and gender: lessons from the mentoring experiences of professional black women, in: Audrey J. Murrell *et al.* (Eds) *Mentoring Dilemmas: Developmental Relationships within Multicultural Organizations* (Lawrence Erlbaum Associates, Inc, 1999), pp. 83, 85 at p. 86 (concluding that "there is a general lack of Black role models who might serve as mentors for the women involved in the study and that Black women's relationship with White women mentors are largely characterized by mistrust"); Sharon R. Bowman *et al.*, Developmental relationships of black Americans in the academy, in: Murrell *et al.*, *op. cit.*, 21, 31 (noting that "Although Black American graduate students may prefer Black American faculty as mentors, many academic departments have no Black American faculty member at all"); and David A. Thomas, Mentoring and irrationality: the role of racial taboos (1989) 28 *Human Resources Management* 279 (focusing on the 'taboos' that prevent in particular blacks and whites in the US context from engaging in less intense ways of mentoring).

[27] See Valerie Fontaine, Progress report: women and people of color in legal education and the legal

profession (1995) 6 *Hastings Women's Law Journal* 27 (discussing the dearth of mentoring for women as a factor that may contribute to men's tendency to attain superior performance to women in law school). The data from the management and psychology disciplines seem to suggest that this intuition is accurate, but the extent and prevalence of this outcome are quite logically disputed. See Blake, *op. cit.*, pp. 83, 85 (noting that "[I]n the organizational mentoring literature, there is a conspicuous absence of research on Black women").

[28] See generally AALS, *Perspectives on Diversity: AALS Special Commission on Meeting the Challenges of Diversity in an Academic Democracy* (1997) available at http://www.aals.org. But see Marty B. Lorenzo, Race-conscious diversity admissions programs: furthering a compelling interest (1997) 2 *Michigan Journal of Race & Law* 361 (arguing for a broadened approach to merit in admissions, through programmes that adopts a race-conscious approach to look beyond traditional academic indicators and consider the whole candidate, including racial, gender, class and other backgrounds).

[29] See Note, The relationship between equality and access in law school admissions (2000) 113 *Harvard Law Review* 1449-1456.

[30] *Ibid.*, at pp. 1449-1450.

[31] *Ibid.*

[32] See most recently in relation to law school admissions programmes: Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000), cert. denied 533 U.S. 929, 121 S.Ct. 2550 (25 June 2001); Smith v. University of Washington Law School, 2 F. Supp. 2d 1324, cert denied 532 U.S. 1051, 121 S.Ct. 2192 (29 May 2001); Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) & Grutter v. Bollinger, 137 F. Supp. 2d 821 (2001), hearing en banc ordered by Gratz v. Bollinger, 277 F.3d 803 (6th Cir. Oct 19, 2001).

[33] See, for example, Duncan Kennedy, A cultural pluralist case for affirmative action in legal academia, in (1990) *Duke Law Journal* 705, 712-721 (arguing that entitlements according to the 'rough proxies' currently used to hire legal academics "are worthy of only limited respect" given their track record, as well as in relation to their exclusionary screening along race and class lines); Guinier *et al.*, *op. cit.* See also Margaret Y.K. Woo, Reaffirming merit in affirmative action (1997) 47 *Journal of Legal Education* 451 (challenging the "numerical education-based meritocracy" and calling for a broadened base of arguments justifying affirmative action measures).

[34] See Delgado (1991), *op. cit.* (for a fundamental critique of the ahistorical nature and limited reach of affirmative action policies, difficult to reconcile with the tremendous backlash that they have engendered from even liberals and moderates).

[35] See Messinger, *op. cit.*

[36] See Kennedy, *op. cit.*, at p. 709.

[37] *Ibid.*, at p. 718.

[38] They were referred to at the time as secretaries.

[39] See Messinger, *op. cit.*, at pp. 126, 127. Messinger indicates that at least three of Holmes' clerks were of Jewish heritage, and at least three others were Irish, but adds that "these men were hardly prototypical immigrants" (at p. 140).

[40] They were almost all Harvard trained recruits, see *Ibid.* at p. 128.

[41] *Ibid.*

[42] *Ibid.*, at p. 121.

[43] *Ibid.*

[44] See *Ibid.*, at p. 130 (noting that "Holmes bemoaned both the crass materialism that he felt accompanied this development and the degradation of the scholar-thinker produced by the increasing stratification of the bar along axes of specialty and ethnicity").

[45] *Ibid.*, at p. 122.

[46] Messinger refers to this as the " 'noble nursery of humanity', wherein a young lawyer's intellectual curiosities could be awakened and valuable social and professional skills should be acquired". See *Ibid.*, at p. 120.

[47] *Ibid.* at p. 142.

[48] See *Ibid.* at pp. 122, 143-148 (noting that Holmes capitalised on his protégés' gratefulness, "deploy[ing] them as a battalion of reputation crafters in a campaign to enhance his stature as a judicial figure").

[49] See *Ibid.* Messinger posits as well that clerkships may well have "emerged as an internal mechanism by which the American court system can maintain its integrity and defend itself from attack".

[50] See Susan H. Williams & David C. Williams, Sense and sensibility: Justice Ruth Bader Ginsburg's mentoring style as a blend of rigor and compassion (1998) *University of Hawaii Law Review* 589 at 591, 593. The authors insist, nonetheless, that she was widely regarded not as a "women's judge, much less a 'political' judge, but as a judge's judge".

[51] *Ibid.*

[52] See Bella Rose Ragins, Diversified mentoring relationships in organizations: a power perspective (1997) 22 *Academy of Management Review* 482.

[53] *Ibid.*, at p. 485 (noting through her analysis of power that mentoring "relationships ... are reciprocal but not necessarily symmetrical").

[54] For a particularly helpful synthesis of these ideas, see Carol A. Aylward, *Canadian Critical Race Theory: Racism and the Law* (1999), pp. 19-24. Where CLS and CRT part paths is on the role of legal scholars in the face of this critique; in other words, having identified legal liberalism's 'fundamental contradictions', CLS scholars—who were overwhelmingly white, relatively-privileged males—seemed prepared to end their deconstructionist project at that stage. In contrast, CRT scholars considered that to adopt that stance would be to leave those subject to the law but rendered invisible in the face of it without recourse. Instead, attention was given to the reasons why persons from disadvantaged groups—particularly African Americans and members of other racialised communities—readily embraced the language of rig conditions of persons subject to the law but whose realities were rendered invisible by the law.

[55] See Mari Matsuda, When the first quail calls: multiple consciousness in jurisprudential method (1989) 11 *Women's Rights Law Report* 7, 9. See also bell hooks, *Feminist Theory: From Margin to Center* (1984). The term draws upon W.E.B. Dubois' notion of "double consciousness", coined to explain the need of black persons and other historically disadvantaged groups to see the world at once through the perspective of the dominant group, through which they are oppressed outsiders, and from their own perspective, which reaffirms their normality and worth. See W.E.B. DuBois, *The Souls of Black Folk* (1903), pp. 16-17.

[56] See Richard Delgado, The ethereal scholar: does critical legal studies have what minorities want? (1987) 22 *Harvard C.R.-C.L. Law Review* 301.

[57] *Ibid.*

[58] See Patricia J. Williams, *The Alchemy of Race and Rights*... (1991), pp. 146-165.

[59] See Kennedy, *op. cit.*, 705, p. 162.

[60] *Ibid.*, at p. 159 (arguing that law schools need to expand their basic commitment to cultural diversity because they are political institutions and democracy demands that "people should be represented in the institutions that have power over their lives").

[61] I understand the notion of the 'other' broadly, and suggest that although everyone is the 'other', certain group identities are central to one's definition of self. Although I refer not only to persons from racialised communities, most of my materials refer to these groups. I consider mentoring to be of potential benefit for members of all historically marginalised groups. See, for example, Robert Murphy, The personal is the pedagogical: a very brief life of Professor Stoddard (1997) 72 *New York University Law Review* 1027 [tribute to a (white) gay male academic, discussion of both the mentoring that he received, and the mentoring that he provided to his protégés). I do consider, however, that in post-colonial societies, race is "a key cultural marker, a central signifier in the reproduction and expression of identity, collectivity, language and agency itself. Race generates an 'inside' and an 'outside' of society, and mediates the unclear borders between these zones: all social space [...] is fair ground for racial dilemmas, doubts, fears and desires". Howard Winant, *Racial Conditions, Theories, Politics, Comparisons* (1994) 30; See also Keith Aoki, Colloquy: the scholarship of reconstruction and the politics of backlash (1996) 81 *Iowa Law Review* 1467, 1471. Mentoring across racial lines is therefore not politically neutral.

[62] See Heather A. Carlson, Book Review: Faculty mentoring as a way to end the alienation of women in legal academia: becoming gentlemen: women, law school and institutional change (Lani Guinier *et al.* (1997) 18 *Boston College Third World Law Journal* 317, 338 (arguing that "[a]ffirmative action is needed to create more visible, prominent positions for women faculty who will then be able to

facilitate the debated systemic changes. Only when the institutions end the alienation of women on their faculty can efforts to curb the alienation of students be a reality").

[63] But see Kennedy, *op. cit.*, at p. 718 (underscoring the continuing importance of "old-boyism and arbitrary clique preference as between white males").

[64] The literature on this topic is abundant. For a thoughtful discussion on the 'law is male', see Farley, *op. cit.* See also Frances Olsen, The sex of law, in: David Kairys (Ed.) *The Politics of Law* (1990), pp. 453, 454 ("justice may be depicted as a woman, but, according to the dominant ideology, law is male, not female").

[65] See Ragins, *op. cit.* (discussing the importance of the trust dimension). There may be different concerns as well, linked potentially to sexual harassment. Indeed, some potential mentors raise the concern of facing false charges of sexual harassment as a reason not to mentor. Without dismissing this concern, Susan Sturm and Lani Guinier note that "faculty and students frequently lack shared understandings about fair, respectful, non-exploitive supervisory relationships [...]" and suggest that "[a]dressing sexual harassment [...] can prompt a conversation on ways to promote productive and successful working relationships more generally." See Susan Sturm & Lani Guinier, The future of affirmative action: reclaiming the innovative ideal (1996) 84 *California Law Review* 953, 1026. See also Susan Sturm, Second generation employment discrimination: a structural approach (2001) 101 *Columbia Law Review* 458, 477.

[66] See Peter Halewood, White men can't jump: critical epistemology, embodiment, and the praxis of legal scholarship (1995) 7 *Yale Journal of Law & Feminism* 1.

[67] See *Ibid.*

[68] For example, the Bar of the State of Minnesota has adopted rather elaborate guidelines to promote mentoring; the work has been done expressly to promote the status of women in the legal profession. See Gina E. Chan, Mentoring programs: varied approach to sharing experience (1997) 8 *Fall Experience* 14; and Daniel Keating, A comprehensive approach to orientation and mentoring for new faculty (1996) 46 *Journal of Legal Education* 59, 63, 64 (noting, however, that the mentoring programme, although useful in the first 2 years, is less so after then as mentees know to whom they can turn for regular advice).

[69] See Kathy E. Kram & Lynn A. Isabella, Mentoring alternatives: the role of peer relationships in career development (1985) 28 *Academy of Management Journal* 110. What to do when persons from racialised communities are severely under-represented remains to be considered, and, the extent to which a peer relationship could withstand the invariably present pull of being the protégé of an established professor remains to be seen.

[70] See Bowman *et al.*, *op. cit.*, at p. 40. Bowman *et al.* further note that "[s]ome mentors may be perfect for discussing the politics of the system and learning how to navigate it. Other mentors may be more comfortable and more available for issues related to race and gender". See also Ragins, *op. cit.*, at pp. 503, 510, 514 (observing that some empirical evidence suggests that mentoring across difference may provide less psychological support than relatively more homogeneous relationships and finding that minority protégés are likely to get specialised success strategies from other minorities, not majority members who have had rather different experiences.

[71] For Matsuda, "[a]ssimilation is not possible in a world that is, unfortunately, still poisoned by resilient racism, sexism, class bias, and homophobia. Outsiders are all too frequently reminded of their difference. They are likely to remain aware and active *qua* outsiders until Frederick Douglass' dreamed of millennium—the time of true equality that is the reward for constant struggle". Matsuda, *op. cit.*, at p. 13.

[72] See Charles R. Lawrence, III, Toward a pedagogy of diversity, in: Association of American Law Schools, *Perspectives on Diversity: AALS Special Commission on Meeting the Challenges of Diversity in an Academic Democracy* (1997), Ch. 5, available at http://www.aals.org/lawrence.html (expressing his "strong sense of alienation ... from the role of 'scholar'" and his concern that that role may be "in direct opposition to that of the Word", "an interdisciplinary tradition wherein healers are concerned with the soul and preachers with the pedagogy of the oppressed; a tradition that eschews hierarchy in the face of the need for all of us who seek liberation to be both teachers and students ... It is a vocation of struggle against dehumanization, a practice of raising questions about reasons for oppression, an inheritance of passion and hope").

[73] *Ibid.*

[74] *Ibid.* For Lawrence, the value of this dual subjectivity in the academic context is the ability that it provides to African Americans "to imagine a different world—to offer alternative values—if only because we are not inhabited by the delusion that we are well served by the status quo".

[75] Gary Peller, Race consciousness (1990) *Duke Law Journal* 758.

[76] See Kennedy, *op. cit.*, at p. 733 (arguing also that there "are no meta criteria of merit that determine which among culturally and ideologically specific research traditions or scholarly paradigms is 'better' or 'truer'. Judgments of merit are inevitably culturally and ideologically contingent because they are inevitably paradigm-dependent").

[77] See Mari Matsuda, Affirmative action and legal knowledge: planting seeds in plowed-up ground (1988) 11 *Harvard Women's Law Journal* 1, 3. Matsuda later elaborates on how "citing outsider scholarship is a political act" (at p. 5).

[78] *Ibid.*, at p. 4.

[79] *Ibid.*, at p. 11 (suggesting that "[e]xposure will chip away at the walls between us, and academic insiders and outsiders will benefit from scholarly exchange across those crumbling walls").

[80] See Herma Hill Kay, Symposium: the voices of women: a symposium on women in legal education: the future of women law professors (1991) 77 *Iowa Law Review* 5, 18.

SITUATED REFLECTIONS ON INTERNATIONAL LABOUR LAW, CAPABILITIES, AND DECENT WORK: THE CASE OF *CENTRE MARAÎCHER EUGÈNE GUINOIS*

Par Adelle Blackett[*]

This article engages the contemporary transformation of international labour normativity by refocusing debates between civil/political rights and economic/social rights on a contextualized discussion on social inequalities. It traces the persistent labour market inequality experienced by one historically marginalized group, the black community in Canada, though the lens of a particularly problematic recent human rights decision. It first contends that efforts to reconceptualize labour law as fundamentally procedural in nature run the risk of undermining attempts to protect the economic and social rights of those most in need of labour law. It adds that neither are economic and social rights a panacea. Instead it suggests that notions of equality and decent work must play a guiding role in rethinking the indivisibility of rights, to ensure that labour law (national and transnational) fulfil both its protection and worker empowerment mandates.

Cet article traite de la transformation contemporaine de la normativité du droit international du travail en recentrant le débat entre les droits civils et politiques, d'une part, et les droits économiques et sociaux, d'autre part, par une discussion sur les inégalités sociales. Il retrace l'inégalité persistante du marché du travail à l'égard d'un groupe historiquement marginalisé, la communauté noire du Canada, et l'analyse à l'aune d'une décision récente et particulièrement problématique en matière de droits de la personne. Cet article défend l'idée suivant laquelle les efforts de reconceptualisation du droit du travail comme un droit de nature fondamentalement procédurale s'accompagnent du risque de saper les tentatives visant à protéger les droits économiques et sociaux des travailleurs qui en ont le plus besoin. Il suggère plutôt d'employer les concepts phares d'égalité et de travail décent dans la réflexion sur l'indivisibilité des droits, afin d'assurer que le droit du travail (national et transnational) puisse remplir ses mandats de protection et d'outillage des travailleurs.

[*] Associate Professor and William Dawson Scholar, Faculty of Law, McGill University. This essay is dedicated to the memory of the late Professor Katia Boustany, one of my first mentors when I left my position as a labour law and labour relations specialist at the ILO to enter the legal academy in Quebec. Katia, a former ILO official as well, cultivated a sophisticated knowledge of and appreciation for the ILO's normative universe, which was recognized and appreciated both within the ILO and in academia. Katia also shared with me her conviction about the openness of Quebec's multicultural society. I am grateful for her guidance, which inspires the reflections in this essay. Also, I gratefully acknowledge the support of the Wainwright Memorial Fund, Faculty of Law, McGill University, and the 2006 Law Commission of Canada's Legal Dimension Initiative. This paper was presented at the LCC's 2006 Legal Dimension Initiative Panel entitled "Social and Economic Rights: Addressing Social Inequalities," Canadian Association of Law Teachers and Canadian Law and Society Association's Annual Meeting. It benefited from insightful comments by Judy Fudge and David Weisman, as well as the research assistance of Alison Adam and Adrienne Gibson. Of course, any errors or omissions remain my own.

Labour law, nationally and internationally, is at a crossroads. The high level debate underway regarding the transformation of international labour normativity is critical to understandings of labour law as embracing both civil and political rights and economic and social rights. I contend in Part I of this paper that contemporary efforts to reconceptualize labour law as fundamentally procedural in nature run the risk of undermining efforts to protect the economic and social rights of those most in need of labour rights.

Yet, this paper does not consider that explicit recognition of economic and social rights constitutes a panacea for redressing social inequalities. Indeed, it seeks to engage the international debate by starting at the beginning, and in concrete terms, with a focused inquiry into the social inequalities that national and international labour regulations are meant to counter. In Part II, it traces the persistent labour market inequality experienced by one historically marginalized group, the black community in Canada. Through the lens of a particularly problematic recent decision, *Commission des droits de la personne et droits de la jeunesse (Cupidon Lumène)* c. *Centre Maraîcher Eugène Guinois Jr inc.*[1], it illustrates how the existing economic and social rights were underutilized and abandoned, thereby exacerbating rather than redressing societal inequality. The argument is therefore that we need to grapple with the question of identity as racialized[2] status, and evaluate how rights capture and address the lived experience of members of disenfranchised communities. Labour law is not the terrain of atomized individualism.

In Part III, it argues for the notion of equality to play a guiding role in rethinking the indivisibility of civil/political rights from economic/social rights. It contends that identity (notably, racial status) matters, and that focusing on identity is a critical way to ensure that labour law fulfils both its protection and worker empowerment functions. Arguably, the language of "dignity at work" holds the seeds to ensuring that this dual mandate remains central to labour law in the new economy.

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1 *Commission des droits de la personne et droits de la jeunesse (Cupidon Lumène)* c. *Centre Maraîcher Eugène Guinois Jr inc.*,Quebec [2005] R.J.Q. 1315, J.E. 2005-779, D.T.E. 2005T-399, [2005] R.J.D.T. 1087, [2005] R.R.A. 687 (T.D.P.Q.), online: <http://www.canlii.org/qc/jug/qctdp/2005/2005qctdp 10005.html> [*Centre Maraîcher*].

2 The language of racialization is introduced through the work of sociologist Robert Miles, *Racism* (London: Routledge, 1989) to capture the changing historical meanings of the categorization of race and, as a result, to detach the focus from biological phenomena. In other words, race is a social construct. Law professor Joanne St. Lewis has applied the language to speak of communities in Canada that were previously referred to as "visible minorities", seeing the language as an opportunity to move beyond inaccurate geopolitical descriptors to capture how race is constructed in particular places at particular historical moments. The language of racialization, race, and, indeed, blackness, are used with these analytical frameworks in mind. See Joanne St. Lewis, "Virtual Justice: Systemic Racism and the Canadian Legal Profession" in Canadian Bar Association, *Racial Equality in the Legal Profession*, online: (1999) <http://www.cba.org/CBA/Pubs/pdf/RacialEquality.pdf>.

I. The Indivisibility of Labour Rights as Civil/Political and Economic/Social Rights

Labour rights provide a critical starting point for discussions of the interface between civil/political and economic/social rights. Indeed, labour rights have traditionally straddled the divide between civil and political rights on the one hand, and economic, social and cultural rights on the other hand. Labour law is both procedural and substantively re-distributional, and is a reminder that the two functions are mutually enhancing. Labour law is, in this regard, a distinct form of market regulation, which by its nature challenges the view that the labour market alone provides an efficient and socially acceptable sorting of human resources. Through the "productive" process, people enter the market system in their capacity as a factor of production. However, their subordinated participation is expected to be other than that of a commodity merely bought and sold in relation to supply and demand. Labour law, therefore, mediates their access, infusing it with the dignity that the market alone cannot provide.[3]

Since the dual purpose of labour law is to provide worker protection (through legislation on minimum wage and minimum labour standards, as well as basic human rights norms against discrimination in the workplace) and worker agency through democratic participation (traditionally understood through access to collective bargaining mechanisms),[4] the divide between civil/political rights and economic, social and cultural rights is difficult to sustain. Labour rights, particularly as they were historically articulated and supported through the normative framework of the International Labour Organization (ILO), had avoided, in an integral way, the polemic surrounding the argued distinction between enforceable, priority covenants on civil and political rights and programmable, aspirational economic and social rights, imagined as social outcomes. The ILO, by contrast, simply created ratifiable conventions and non-ratifiable recommendations (somewhat cafeteria style, as Alain Supiot apparently characterized it)[5] that took little account of the civil/political and economic/social divide, reinforcing in practice the view that as far as labour rights were concerned, they were indivisible.

Contemporary labour law, however, at both the national and international levels, has not escaped hard questions about its role in a context of shifting labour law paradigms. If labour law is indeed where the role of market ordering and public policy is traditionally mediated, then in light of changing production and trade patterns, the relative role of labour regulation in an increasingly interdependent economic environment (the "new economy") is at the forefront. And while the debate

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3 Adelle Blackett, "Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct" (2001) 8:2 Ind. J. Global Legal Stud. 401 at 418.

4 See *ibid.* at 419, for a succinct description of the traditional industrial relations account of collective bargaining. See also Harry W. Arthurs, "Labour Law Without the State?" (1996) 46 U.T.L.J. 1, for a critical account arguing that the unraveling of the welfare state in a post-Keynesian era calls for this paradigm to be reconsidered.

5 See Francis Maupain, "Revitalization Not Retreat: The Real Potential of the 1998 ILO *Declaration for the Universal Protection of Workers' Rights*" (2005) 16 E.J.I.L. 439 [Maupain, "Revitalization"].

on labour rights has in an era of liberalization and privatization been characterized as one of trade offs (simply put, greater labour rights with fewer jobs, according to the European model, or fewer labour rights with more jobs, according to the American model), the interface is much more complex and harnesses within it a vision about the role of the state in mediating the role of the market, as it relates to people's entitlements as they have traditionally been mediated through the work relationship.[6] This has invariably led to a re-prioritization, which at the international level has arguably reinforced the civil and political, to the detriment of the economic and social. An atomistic vision of labour law has taken over the debate concerning international standard setting and the articulation of fundamental principles and rights at work.

Yet, the inexorable thrust toward the civil and political is not without contestation. Indeed, it became apparent that in a real world that tolerates working conditions that make a mockery of the ILO's goal of social justice, the ILO needed to extract from the 400 odd paper conventions and recommendations a small set of fundamental principles and rights at work that would be prioritized. The question is how the prioritization was undertaken and what it means. In its 1998 *Declaration on Fundamental Principles and Rights at Work* (*ILO Declaration*), the ILO isolated four key principles: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination with respect to employment and occupation.[7]

This turn has been heavily critiqued most ardently (and as he admits somewhat polemically) by human rights scholar Philip Alston.[8] The critique sweeps across a number of political and institutional issues that are beyond the scope of the paper, but the sharply diverging visions on the role of labour law are at the heart of the discussion on economic and social rights. And, indeed, it is in the virulent response to Alston's critique that an official institutional vision of the anticipated meaning of this policy shift can be most readily appreciated. Both Canadian labour law scholar Brian Langille, a visitor at the ILO's International Institute for Labour Studies during 2004-05 and the ILO's former legal advisor during the drafting of the 1998 *ILO Declaration*, and current special advisor, Francis Maupain, argue fervently

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6 Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001).

7 *Declaration on Fundamental Principles and Rights at Work*, 18 June 1998, 37 I.L.M. 1233, art. 2 [*ILO Declaration*].

8 Philip Alston, "'Core Labour Standards' and the Transformation of the International Labour Rights Regime" (2004) 15 E.J.I.L. 457 [Alston, "Core Labour Standards"]; Philip Alston and James Heenan, "Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO *Declaration on Fundamental Principles and Rights at Work*?" (2004) 36 N.Y.U.J. Int'l L. & Pol. 221 (Alston and Heenan acknowledge the intentionally polemical tone at p. 224). See also Philip Alston, "Facing Up to the Complexities of the ILO's Core Labour Standards Agenda" (2005) 16 E.J.I.L. 467 [Alston, "Complexities"].

for a vision of "fundamental" labour rights that emphasizes their procedural, enabling character.[9]

Certainly, Langille accepts "the objective of labour law to be justice in employment, or at work, or perhaps most broadly in productive relations."[10] The problem, for Langille, is that there is a bargaining power disadvantage in the free market contract of exchange. Langille acknowledges the procedural and substantive dimensions of labour law, yet relegates the substantive to the level of outcomes (standards) rather than rights :

> [L]abour law responds in two ways. The first way to secure justice in the face of this problem is by simply rewriting the substantive deal (mostly by statute) between workers and employers – providing for maximum hours, vacations, minimum wages, health and safety regulations, and so on. This is substantive intervention and the results are compendiously called labour standards. Labour law's second technique of responding to the perceived problem is not via the creation of substantive entitlements, but rather by way of procedural protection: in short, protecting rights to a fair bargaining process. […] The ethic of substantive labour law is strict paternalism and the results are standards imposed upon the parties whether they like it or not. The ethic of procedural labour law is freedom of contract and self-determination – what people call industrial democracy – and its results are basic rights, which, it is believed, lead to better, but self-determined, outcomes.[11]

The core is redefined to become a set of "fundamental" procedural rights. Therefore, "by removing barriers to self-help"[12] like discrimination, forced labour and child labour, labour law can "unleash the power of *individuals* themselves to pursue their own freedoms."[13]

Maupain, bearing the hat of the "practitioner" of law,[14] makes comparable arguments with an attempt to ground them in ILO practice. He, therefore, points concretely to the case of occupational safety and health, which may be theorized as a concrete incarnation of the principle of the right to life and security of the person.[15]

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9 Brian A. Langille, "Core Labour Rights – The True Story (Reply to Alston)" (2005) 16 E.J.I.L. 409 at 428-433; See also Maupain, "Revitalization", *supra* note 5 at 448-449.

10 Maupain, "Revitalization", *ibid.* at 428. Interestingly, there is no reference to the deeply gendered divide between productive and "reproductive" relations. For a discussion, see Adelle Blackett and Colleen Sheppard, "Collective Bargaining and Equality: Making Connections" (2003) 142 Int'l Labour Rev. 419 at 424 [Blackett & Sheppard, "Making Connections"].

11 Langille, *supra* note 9 at 428-429.

12 *Ibid*. at 434.

13 *Ibid*. [emphasis added]. On this vision of fundamental enabling labour rights, the free movement of persons (a political non-starter, a paler version to which migrant workers rights was alluded in the 1998 *ILO Declaration*'s preamble), is omitted. See also Alston, "Core Labour Standards", *supra* note 8 at 487.

14 See the excellent analysis by Isabelle Duplessis in this issue of the Q.J.I.L.

15 See Adelle Blackett, "Mapping the Equilibrium Line: Fundamental Principles and Rights at Work and the Interpretive Universe of the World Trade Organization" (2002) 65 Sask. L. Rev. 369. See also Bob Hepple, *Labour Law and Global Trade* (Cambridge: Hart Publishing, 2005).

For Maupain, while occupational safety and health is "vital" in the strict sense, it is not "'fundamental' in the sense of enabling rights."[16] In other words, once enabling rights are secured, then *individuals* may seek to secure other "capabilities".

In this regard, we note that Langille stakes out his claim on the basis of liberal theory, citing Nobel laureate Amartya Sen[17] at length as the guiding inspiration for his reflections. It is fair to state, though, that Langille shows a marked preference for the language of human freedom over Sen's intertwined use of the language of capabilities. Maupain's analysis is similar, positing none the less that his vision of individual freedoms is broader than a Rawlsian account.[18]

Simon Deakin's engagement with both the uses and limits of Sen's capabilities approach assists the mapping of capabilities onto the social and economic rights landscape.[19] For Deakin, the capabilities approach enables accounts to move beyond "purely formal guarantees of market access of the kind provided by contract and property rights;"[20] the approach problematizes a demarcation of only civil and political rights as natural, market-enabling prioritizations. Deakin adds that:

> a capability-oriented perspective helps us to see that social rights are not different in their essence from the civil and political rights […] [S]ocial, civil, and political rights, far from being in fundamental opposition to each other, are to be found at different points along a single continuum.[21]

Even if we were to accept that the list of rights should be prioritized, there remains deep contestation as to whether they can (or more importantly should) be considered simply procedural rights. To require as does the *ILO Declaration* that governments must ensure the "*effective* recognition of the right to collective bargaining", and "the *elimination* of discrimination in respect of employment and occupation" is to place positive obligations on the state to act to attain a substantive result.[22] In addition, there is much debate as to whether they can (and again more importantly should) be considered rights that are held by "individuals" in the abstract sense, divorced from the contexts in which they exist.[23] And, it is through these contestations, through an insistence upon the embodiment of rights,[24] that an attempt

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16 Maupain, "Revitalization", *supra* note 5 at 449.

17 Amartya Sen, *Development as Freedom* (New York: Random House, 1999) [Sen, "Development as Freedom"].

18 See Francis Maupain, "L'OIT, la justice sociale et la mondialisation" (1999) 278 Rec. des Cours 201 at 395-396. Maupain also argues that the ILO does not either pretend to express an abstract, disembodied vision of social justice as reflected in the Rawlsian veil of ignorance (*ibid*. at 392).

19 Simon Deakin, "Social Rights in a Globalized Economy" in Philip Alston, ed., *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005) at 25.

20 *Ibid.* at 58.

21 *Ibid.* at 59.

22 See Blackett & Sheppard, "Making Connections", *supra* note 10 at 419-420.

23 One need look no further than the Supreme Court of Canada's decision in *A. G. (Ont.) v. Dunmore* [2001] 3 S.C.R. 1016, to identify the diverging positions on whether a collective rights framework is necessary to understand collective bargaining.

24 See Lucie Lamarche, *Perspectives occidentales du droit international des droits économiques de la personne* (Bruxelles: Bruylant, 1995) at 169.

to rethink the prioritization in terms of *individual* access to procedural freedoms raises cause for concern.

In many ways, this is the shift that defenders of the indivisibility of international human rights decry. Social and economic rights are argued to move us beyond a hierarchy of norms, beyond a vision of the economic and social as mere outcomes that the state need not guarantee, and beyond liberal values (freedom of contract) as the starting point for articulating sustaining core values, which should be facilitated with liberal rights. While Langille acknowledges that "there is much room for and need of other laws and institutions to make for a just workplace,"[25] Langille's faith rests in the individual. That faith alone, however, may be viewed as deeply challenging a vision of labour law, industrial democracy and citizenship at work that places the collectivity (notably, the union) at the centre (and not without challenge from equality-seeking groups), as the basis through which rights can be meaningfully attributed (i.e. collective bargaining).[26]

In contrast, Deakin cautions, alongside Supiot, against an exclusively individualized-capabilities approach to social rights, affirming that "little will be gained if individualized claims to access to resources are used to undermine still further the principal institutions of the welfare state."[27] This is not a new debate, and has at times unnecessarily pitted equality-seeking groups against solidarity-seeking groups in the labour law context, and by extension, workers in the North against claims of need from global redistribution to benefit the South.[28] But, Deakin's distinction could hardly be more timely :

> It will therefore be important, in any discussion about social rights and capabilities, to insist on a distinction between the empowerment of persons that results from an extension of their *individual* capability sets, and the *collective* mechanisms through which this empowerment is achieved.[29]

In this regard, a focus on labour rights that moves beyond its liberal, "enabling" character toward one that identifies how institutions may be marshalled to

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[25] Langille, *supra* note 9 at 433.

[26] See Harry Arthurs, "Developing Industrial Citizenship: A Challenge for Canada's Second Century" (1967) 45 Can. Bar Rev. 786; Michel Coutu, "Industrial Citizenship, Human Rights and the Transformation of Labour Law: A Critical Assessment of Harry Arthur's Legalization Thesis" (2004) 19 C.J.L.S. 73.

[27] Deakin, *supra* note 19 at 59-60.

[28] Nancy Fraser, "Rethinking Recognition" (2000) 3 New Left Review 107. As Nancy Fraser argues, "insofar as the politics of recognition displaces the politics of redistribution, it may actually promote economic inequality… Such reactions are understandable: they are also deeply misguided" (*ibid.* at 108). Amartya Sen's new work, *Identity and Violence: The Illusion of Destiny* (New York: W.W.Norton, 2006) will hopefully garner comparable attention. ("There is a compelling need in the contemporary world to ask questions not only about the economics and politics of globalization, but also about the values, ethics, and sense of belonging that shape our conception of the global world" *ibid.* at 185).

[29] Deakin, *supra* note 19 at 60. See also Hepple, *supra* note 15 at 256-257.

foster human capabilities[30] resonates with Craig Scott and Patrick Macklem's poignant affirmation in the South African context, that civil and political rights alone "[project] an image of truncated humanity. Symbolically, but still brutally[,] it excludes those segments of society for whom autonomy means little without the necessities of life."[31] In other words, a vision of labour rights that privileges social rights would put the emphasis not only on questions of "empowerment and mobilization"[32] but, as Deakin argues, on achieving empowerment through collective mechanisms.

This paper suggests that the incorporation of the social must go yet one step further. An analysis of the relationship between civil/political and economic/social rights must grapple with identity. Collective institutions for empowerment may still privilege those groups who hold relatively more entrenched bargaining power, leaving out those equality-seeking groups most in need of dignity at work.[33] An approach that is attentive to identity offers a more robust vision of the relationship between strands of human rights law that should be understood as indivisible, is in keeping with the ILO's historic labour rights tradition, and should reflect its human rights direction. The two strands must act in concert. It is because of this need to understand the connections between fundamental principles and rights at work that I argue for identity to be an integral part of the ILO's recent normative and technical cooperation focus on the notion of "decent work". It requires, in Dianne Otto's words, "an ethical commitment to address the *material* aspects of human dignity, and thus to promote global economic justice and substantive equality."[34] That materiality requires attention to the lived experience of particular communities, notably communities that have had the most difficulty attaining the decent work objective. In Canada, the black community and a recent case involving some of its most precarious members is an important starting point for these discussions.

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30 Sen, "Development as Freedom", *supra* note 17. One notes, strikingly, that Sen's work includes a rather deep systemic critique of (in)equality, drawing frequently on references to African Americans, which leads one to question whether freedom can stand inequality. Martha C. Nussbaum engages this relationship in her different but related use of the capabilities approach in *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000). See also Martha C. Nussbaum, "Women and Equality: The Capabilities Approach" (1999) 138 Int'l L. Rev. 227 [Nussbaum, "Women and Equality"] (drawing on human dignity as a starting point for cross-cultural applications of the capabilities approach to the question of equality).

31 Craig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 U. Penn. L. R. 1 at 29.

32 Alston, "Complexities", *supra* note 8 at 473; Philip Alston and Mary Robinson, eds., *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005).

33 See David Beatty, "Ideology, Politics and Unionism" in Ken Swan and Katherine Swinton, eds., *Studies in Labour Law* (Toronto: Butterworths, 1983) 299.

34 See Dianne Otto, "Rethinking the 'Universality' of Human Rights Law" (1997) 29 Colum. H.R.L. Rev. 1 at 34.

II. New Economy Labour Market Inequality in the Black Community in Canada

A. The Literature

As a colonial society, Canada was explicitly founded on the premise that a white settler nation would be established. In other words, an overseas replica of Britain (and France) would be created and maintained, despite the original, aboriginal inhabitants, and through restrictive immigration policies.[35] This has important implications for the "place" of members of the black population in the domestic labour market.

While the black population in Canada is traced back to Matthew da Costa who accompanied the first European explorers, free Black Loyalists enticed by the unfulfilled promise of equal treatment arrived in important numbers.[36] The black population also came in significant numbers to fight in the First and Second World Wars and, in a segregated economy, to work as porters on the railway system. The most significant wave of immigration began with domestic workers' schemes, notably that of 1956,[37] which became a foot in the door for more open immigration options for racialized immigrants in the *1962 Immigration Act* (family reunification and admission of skilled immigrants) and the *1967 Immigration Act*, which introduced a facially neutral points system.

Throughout this segment of Canadian history, evidence of a split labour market has remained.[38] Recent reports on the conditions of racialized workers in the Canadian labour market paint a uniformly troubling picture of "large, disturbing, and growing gaps in economic security and opportunity which are based upon racial status."[39] Racialized workers are "over-represented in lower paid occupations usually

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35 See generally Sherene Razack, ed., *Race, Space and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines Press, 2002).

36 They received one acre of land whereas their white counterparts received one hundred acres.

37 The first domestic workers' scheme was in 1910, when 100 women from Guadeloupe were sent to Quebec. It is telling that at the time, the women arrived with permanent resident status; among other reasons, the Minister of Citizenship and Immigration and Minister of Labour referenced the following: "To deprive those coming forward under this plan of the status of landed immigrants would be interpreted by many as an attempt at forced labour and charges of discrimination would inevitably result." See Canada, Department of Foreign Affairs and International Trade, *Documents on Canadian External Relations*, "Admission of Domestics from the B.W.I.: Memorandum from the Minister of Citizenship and Immigration and Minister of Labour to Cabinet," (Confidential Cabinet Document No. 131-55, Vol. 21), online: <http://www.dfait-maeci.gc.ca/department/history/dcer/detailsen.asp?intRefid=1354>.

38 Grace-Edward Galabuzi, "Canada's Creeping Economic Apartheid: The Economic Segregation and Social Marginalization of Racialised Groups" CSJ Foundation for Research and Education (May 2001) at 62 and note 127, online: Centre for Social Justice <http://www.socialjustice.org/pdfs/economicapartheid.pdf>, citing Edna Bonachich's work [Galabuzi, "Economic Apartheid"]. See also Agnes Calliste, "Sleeping Car Porters in Canada: An Ethnically Submerged Split Labour Market" (1987) 19 Canadian Ethnic Studies 1-20.

39 Andrew Jackson, "Is Work Working for Workers of Colour?" Canadian Labour Congress (April 2005) at 1, online: Canadian Labour Congress <http://canadianlabour.ca/updir/AJ-paper-Is-Work-Working-for-Workers-of-Colour-ENG.pdf>. See also Leslie Cheung, "Racial Status and Employment

requiring less education and training, such as semi-skilled and other manual workers, sales and service workers, and clerical personnel."[40] For example, according to one study 40 % of the harvesting labourers are from racialized groups.[41] They are similarly more likely to experience employment gaps than all other workers, with only 54 % of racialized workers employed for an entire year as compared with 59 % of all other workers.[42] Their jobs are more precarious, requiring dependence on employment insurance that is greater than all workers, but also increasing the likelihood that they will not qualify for employment insurance benefits because they worked an insufficient number of hours.[43]

Three findings are of particular importance, and respond to the kind of critique that suggests that educational attainment and integration into Canadian society do not account for the disparity. First, the levels of educational attainment is not a factor; indeed,

> [o]verall, workers of colour are much more highly educated than all other workers, with similarly small proportions who have less than a high school education and a significantly higher proportion (32.5 % vs. 20.0 % or one in three vs. one in five) having a university degree or higher.[44]

Second, while one recent study finds that two-thirds of immigrant populations may earn employment that corresponds with their levels of competency within five years of arrival in Quebec,[45] studies that disaggregate data on the workforce participation of racialized minorities find significant disparities in employment levels, income, and full time versus part time status, not only for

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Outcomes" Canadian Labour Congress (October 2005) at 1, online: Canadian Labour Congress <http://canadianlabour.ca/index.php/Wokers_of_Colour/834>.

40 Jackson, *ibid.* at 4. See also Cheryl Teelucksingh and Grace-Edward Galabuzi, "Working Precariously: The Impact of Race and Immigrants Status on Employment Opportunities and Outcomes in Canada" Canadian Race Relations Foundation (May 2005), online: Centre for Social Justice <http://www.socialjustice.org/pdfs/WorkingPrecariously.pdf>. ("The labour market is segmented along racial lines, with racialized group members over represented in many low paying occupations, with high levels of precariousness while they are under represented in the better paying, more secure jobs" *ibid.* at 4).

41 Galabuzi, "Economic Apartheid", *supra* note 38 at 55.

42 Jackson, *supra* note 39 at 6. Racialized women workers were the least likely to be employed all year (*ibid*.). See also Michel Audet, Jérome Fradette & Aziz Ramzi, "L'intégration des immigrants au marché du travail dans la région de la capitale nationale: bilan et pratiques d'entreprises" (February 2002) ch. 2, online: Chambre du commerce du Québec <http://www.ccquebec.ca/images/upload/Memoire_Immigrant.pdf>, who note that economic integration in Quebec depends on the country of origin, with the situation for visible minorities being apparently worse; unemployment rates amongst those from sub-Saharan Africa and the Caribbean are notably high (*ibid.* at 44).

43 Jackson, *ibid.* at 6.

44 Cheung, *supra* note 39 at 27-28. Moreover, only 9.3 % of the Canadian–born workers of colour have less than high school, while 37.5 % have at least a bachelor degree (*ibid.* at 27). See also Jackson, *supra* note 39 at 1; Galabuzi, "Economic Apartheid", *supra* note 38 at 59-60 and 65-66.

45 See Québec, Ministère de l'Immigration et des Communautés culturelles, *Un emploi correspondant à ses compétences? Les travailleurs sélectionnés et l'accès à un emploi qualifié au Québec* by Jean Renaud and Tristan Cayn (Montréal: Ministère de l'Immigration et des Communautés culturelles, 2006) at 10.

racialized immigrants, but also for Canadian-born racialized workers.[46] The latter reports explicitly call the "catch up" theory into question, noting that :

> [i]mmigrants used to catch up quickly. But racialized people who came to Canada in the 1980's have still not caught up. […] And, racialized workers who are not immigrants, but were born in Canada and educated in Canada, still have lower earnings than comparable Canadian workers.[47]

Indeed, data suggest that "immigrant members of racialized groups have more in common, in terms of unemployment and incidence of low income, with Canadian-born racialized group members than with immigrants from Europe arriving in the same period."[48]

Third, although unionization can contribute significantly to the rights that workers enjoy, the Canadian Labour Congress study recognizes the disparity that exists between unionized jobs and the participation of workers from racialized communities :

> There are some occupations where unionization rates are relatively high, but workers of colour are significantly under-represented. These include teaching, skilled trades in construction, and some transportation occupations such as truck driving. There are other occupations where unionization tends to be low, but workers of colour are very over-represented in the workforce compared to their share of all workers. These include low paid jobs as child care workers, cleaners and janitors, taxi drivers, garment workers, and agricultural labourers.[49]

In other words, the representation gap is symptomatic of the problem of racial discrimination in the workplace and exacerbates it.[50] Indeed, the cultural impact of racism may also account for "the failure of social justice and labour organizations to mobilize effectively to respond to the crisis of racial inequality."[51] In sum, the fact that Canadian-born and educated, racialized workers face these gaps leads the reports

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46 See Jackson, *supra* note 39 at 1-2; Galabuzi, "Economic Apartheid", *supra* note 38 at 60.

47 Jackson, *supra* note 39 at 1-2. See also Cheung, *supra* note 39 at 24; Department of Human Resources and Skills Development Canada, Applied Research Bulletin "Employment-equity group" (Summer 2001) at 19; Galabuzi, "Economic Apartheid", *supra* note 38 at 25.

48 Galabuzi, "Economic Apartheid", *supra* note 38 at 16.

49 Jackson, *supra* note 39 at 16-17. The report further notes that racialized workers, "are found in significant numbers in some higher paid but largely non-union jobs, such as computer programmers. Finally, there are a few occupations where workers of colour are well-represented and unionization is high, such as nursing (though women of colour are more likely to be nurses aides than nurses)" (*ibid.* at 17).

50 For a theoretical analysis of the relationship between collective representation and systemic discrimination, see generally Blackett & Sheppard, "Making Connections", *supra* note 10.

51 Galabuzi, "Economic Apartheid", *supra* note 38 at 19.

to conclude that "[r]acial discrimination is a large contributing factor."[52] One analyst has gone so far as to refer to this as "Canada's creeping economic apartheid."[53]

Although most of the studies speak generally about racialized workers, one study has taken care to note that the black population of Canada is more heavily concentrated in the Canadian-born category than the category of immigrants.[54] It is little surprise, therefore, that in the March 2006 Quebec Task Force Report on the Full Participation of Black Communities in Quebec Society (the Report),[55] access to employment was characterized as one of the main themes raised during the hearings, and that access both to public and parapublic services as well as private enterprises became a central feature of the report's recommendations. Although it may be considered striking that the Ministry of Labour was not associated with the initiative, the Report specifically called upon the "Minister of Labour [to] make a request that the Commission de la construction du Québec create a position within its organization to oversee the interests and fair representation of Quebecers from visible minorities in construction trades,"[56] where racialized groups have tended to be underrepresented. It also strongly recommended that the Government of Quebec, as a large employer, should set an example to arrive at hiring in the civil service so that it reflects the diversity of the Quebec population.[57] Finally and strikingly for the following discussion in this paper, the Task Force questioned why there is a low number of racial discrimination complaints filed with the Commission des droits de la personne et des droits de la jeunesse and forwarded to the Tribunal des droits de la personne (Human Rights Tribunal).[58]

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52 *Ibid.* See also Carol Agocs and Harish Jain, *Systemic Racism in Employment in Canada: Diagnosing Systemic Racism in Organizational Culture* (Toronto: Canadian Race Relations Foundation, 2001), who argue that "racial discrimination in employment is a serious problem that prevents the efficient operation of the labor market and causes significant losses for the national economy in terms of underutilized human resources as well as the personal suffering and loss of fair opportunities to a large segment of the society" (*ibid.* at 16). Both the Galabuzi and the Agocs & Jain accounts offer thoughtful, synoptic discussions of the various economic theories of racial discrimination, and their challenges.

53 Galabuzi, "Economic Apartheid", *supra* note 38.

54 Cheung, *supra* note 39 at 6. The black population comprises 15.6 % of all persons of colour aged 15–64, and 29.4 % of whom are Canadian-born (*ibid.* at 7). See also Cynthia J. Cranford, Leah F. Vosko & Nancy Zukewich, "Precarious Employment in the Canadian Labour Market: A Statistical Portrait" (2003) 3 Just Labour 6 at 16-17, for an account which disaggregates data on the basis of racial origin, albeit in summary form with racial and ethnic origin sometimes overlapping.

55 Yolande James (Chair) *et al.*, "Task Force Report on the Full Participation of Black Communities in Quebec Society" Ministry of Immigration and Cultural Communities (March 2006), online: Ministry of Immigration and Cultural Communities <http://www.micc.gouv.qc.ca/publications/fr/dossiers/CommunautesNoires-RapportGroupeTravail-en.pdf>.

56 *Ibid.* at 17.

57 *Ibid.* at 16.

58 *Ibid.* at 11. It intimated that it might be appropriate to undertake legislative amendments to ensure that complainants can directly address the Tribunal. See also Carol Agocs, *Surfacing Racism in the Workplace: Qualitative and Quantitative Evidence of Systemic Discrimination* (December 2004), online: Ontario Human Rights Commission Race Policy Dialogue Conference Paper <http://www.ohrc.on.ca/english/consultations/race-policy-dialogue-papers.shtml> (noting that few cases on racial discrimination appear before human rights tribunals in part because of the difficulty associated with the evidentiary requirements).

With the paucity of formal complaints in the background, the importance of an analysis of a particular case is even greater. More poignant than any labour market overview is the vision of precarious employment[59] that unfolds through this recent Quebec Human Rights Tribunal decision.

B. The Case Study of *Centre Maraîcher*[60]

No recent case captures the importance of status as a regulator of labour market segmentation on the basis of race more starkly than *Centre Maraîcher*. In that decision, five Canadian citizens/permanent residents of Haïtian origin ostensibly won their human rights complaint alleging particularly blatant racial segregation in their workplace, a multi-million dollar, Châteauguay-based, export-oriented agricultural factory, Canada's largest producer of lettuce.[61] Yet, the decision is shocking for how much it does not address, and for the window that it provides onto how conditions that deny the most basic social and economic rights in Canada can fall through the cracks of the very legal mechanisms set up to eradicate inequalities. It leads us to the conclusion that identity and status continue to matter in the Canadian labour market; legal tools that purport to offer alternative approaches to address societal inequalities must in fact consider the root causes of the societal inequalities. Status is one such pervasive root cause, that predates and postdates industrialization. The *Centre Maraîcher* example is pivotal because it reflects work in an industry that epitomizes both the pre-industrial, feudal period in which "status" was determinative, and the post-industrial workforce of the new economy, in which agro-business commodifies labour as it does goods for production and trade across borders. The persistence of racism is juxtaposed with the new commodification of the global economy.

This case concerns members of the black community working in the agricultural sector just outside of Montreal. Often lost in discussions of this case is the fact that these workers are not migrant workers on temporary schemes that ensure their precariousness and segregation by confining them to the jobs for which they have entered the workforce. Of the four workers profiled in the case, three were permanent residents of Canada for many years, and one was a Canadian citizen. In

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59 Leah Vosko and Judy Fudge have been leading contributors in efforts to reconceptualize debates away from the language of "vulnerability" or "atypical"/"non-standard" employment toward a concept that both challenges the implied "norm" and emphasizes structural characteristics of labour market inequality. See Leah F. Vosko, "Gender Differentiation and the Standard/Non-Standard Employment Distinction in Canada, 1945 to the Present" in Danielle Juteau, ed., *Social Differentiation: Patterns and Processes* (Toronto: University of Toronto Press, 2003) 25; Judy Fudge and L. F. Vosko, "Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law and Policy" (2001) 22 Economic and Industrial Democracy 271.

60 I offer a more detailed discussion of this decision in Adelle Blackett, "Human Rights at Work, Legal Indeterminacy, and the Black Community in Canada: Critical Reflections on *Centre Maraîcher Eugène Guinois*" in David Divine, ed., *Multiple Lenses: Voices from the Diaspora Located in Canada* (Cambridge: Cambridge Scholars' Press, 2007) [forthcoming]. This section draws heavily on that analysis.

61 See Power Manager, "Oceans of lettuce in the St. Lawrence River Valley: Largest producer of lettuce in Canada" *Power Manager News Letter* (November/December 2001), online: New Holland <http://www.newholland.com/na/News/powermanager/issue42/PwrMgr_2.htm>.

other words, these workers had no immigration restriction on the kind of work that they could do. And, in a study conducted by the intermediary, the Union des producteurs agricoles (Union of Agricultural Producers or UPA), many of the day labourers are new immigrants, and 25 % of the day labourers had completed a university degree.[62] Yet, these people were required to accept some of the most precarious work that is presumed only to exist in the developing world. In the locally-rooted but export-oriented industries like agriculture, however, cheap labour is used to subsidize production and create "competitive" conditions for export abroad. While temporary labour schemes facilitate the importation of Third World labour, labour market inequality and the stereotypes that feed it, notably in the black community, permit this kind of labour-market condition to be perpetuated.

The four workers and approximately 92 other workers of Haitian origin worked largely as "day labourers" (a condition that is not supposed to exist any longer with the advent of modern labour laws), and in a few cases as workers paid on a weekly basis to pack carrots. They were not the only workers on this farm, the largest lettuce and carrot farm in Canada, an eight-million dollar per year agro-industrial factory (characterized in the media as a "family farm") located on 1300 acres of land in Ste-Clothilde de Châteauguay, Quebec, which services both local and export markets. The striking feature is the heavy labour-market segmentation. First, there are the permanent employees, who are the family members and are white. Second, there are the regular employees, referred to in the decision as "local workers". Yet, there is nothing unifying about the jobs that they perform – they range from mechanics, sales clerks, book-keepers and carrot packers. The regular employees are essentially the white employees who are not related to the permanent employees. Third, there are temporary or seasonal workers brought in on a specific immigration scheme from Mexico, and more recently Guatemala, who reside on the farm in separate accommodations from the others.[63] The Human Rights Tribunal decision mentions these workers but does not elaborate. And finally, there are the workers of Haitian origin – hired ostensibly on a daily basis,[64] through a middleman,

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[62] UPA, Comité sectoriel de main d'œuvre de la production agricole, "Étude sur les conditions de travail en production maraîchère (légumes de plein champ)" (September 2005), online: <http://www.cose.upa.qc.ca/pages/SerieRapportEtudes.aspx?lang=Fr-Ca>. According to the report: "*Le niveau de scolarité des répondants apparaît relativement élevé compte tenu des exigences de l'emploi. Ainsi, 17 % des saisonniers et 25 % des journaliers ont une formation de niveau universitaire. Il est connu qu'un bon nombre de travailleurs inscrits à Agrijob sont des immigrants récents et que plusieurs d'entre eux ont une bonne formation. Plusieurs de ces immigrants seraient en attente d'une reconnaissance d'équivalence de leur formation. À titre de comparaison, au Québec, le nombre de personnes ayant atteint un niveau de formation universitaire représentait 18,6% de la population des 20 ans et plus en 2001*" (*ibid.* at 70).

[63] The particular precarity of the migrant workers is beyond the scope of this paper but has been the subject of significant recent analysis. For a broader policy discussion at the international level, see Ryszard Cholewinski, "International Labour Law and the Protection of Migrant Workers: Revitalizing the Agenda in the Era of Globalization" in John D.R. Craig and S. Michael Lynk, eds., *Globalization and the Future of Labour Law* (Cambridge: Cambridge University Press, 2006) at 445.

[64] The very notion of the "day labourer", who is subordinated to the employer's will but offered no employment security and, indeed, often recruited and paid by an intermediary owning little more than a truck and a driver's license, runs contrary to the theoretical foundations of labour law. Labour law in its most rudimentary protective function is meant to resist the abject commodification of workers'

a professional syndicate called the UPA. These workers congregated at the Longueuil metro station in the greater Montreal area after receiving a boarding pass from the UPA, were "recruited" and transported early in the morning to the various farms,[65] then returned to the metro station late at night. They were responsible, alongside the Mexican and Guatemalan workers, for much of the harvesting, although one of the claimants was transferred to the packing of carrots and, as a result, later paid on a weekly basis. However, the details of the facts suggest that even when transferred to the packing of carrots, the work was segregated by race, as those workers of Haitian origin were the only ones responsible for moving the 50 pound bags once they were full of carrots.

The decision is subject to three forms of compartmentalization that call into question the efficacy of adopting an economic and social rights framework, as opposed to a civil and political rights framework without paying adequate attention to the issue of status. First, the decision focuses exclusively on the inequality of conditions of work between categories of workers without questioning the inherent segregation of the hiring. Strikingly, the Quebec Human Rights Tribunal appears to overlook entirely the blatant evidence of occupational segregation on the basis of race. In language familiar to civil rights litigation, it focuses on the separate but unequal facilities, without actually challenging the separate but unequal distribution of employment. The intrinsic status elements of the hiring practice remain invisible. The common sense understanding of the place of black workers in the agricultural economy is arguably so palpable, that it is simply not seen, and remains unchallenged by the legal body most specialized in recognizing discrimination. Indeed, in one newspaper article, an agricultural industry employer explained the labour market "preference" for black workers by stating that they were naturally more suited to this kind of backbreaking work.[66] The workplace is racialized, and the racialization is so much a part of the common sense in the workplace that it is not even "seen" or challenged in this case.

Instead, *Centre Maraîcher* is considered a human rights case that can be litigated because the agricultural factory had a heated, clean cafeteria and functioning toilet facilities for its white workers only. Black workers were refused access to these spots and were, instead, expected to use an unheated, insalubrious, green shack, an unsuitable place to change and unequipped with a functioning refrigerator, conventional toilet facilities, or even hot running water. At one moment, a sign, which the defendant farm admitted to posting, showing five smiling black people dressed in

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terms of exchange of their human labour on the market. Strikingly though, the status is implicitly accepted at a regulatory level by the « normes du travail ». See Québec, Commission des normes du travail, online: <http://www.cnt.gouv.qc.ca/en/fiches/salaires_agricoles.asp>.

65 For a discussion of the transportation of essentially immigrant workers, see Myriam Simard and Isabelle Mimeault, "Exclusions légales et sociales des travailleurs agricoles saisonniers vehiculés quotidiennement au Québec" (1999) 54 Relations Industrielles 388.

66 See Jeff Heinrich, "Migrants backbone of farm labour: Fatal crash shines light on middlemen. Support groups for field workers want rules on who bears responsibility for safety" *The (Montreal) Gazette* (8 July 2005) A12. ("If we didn't have these people in Quebec, we'd be in deep s—t", Les Jardins co-owner Simon Le Hesran said: "We've hired locals in the past, but they don't last more than three days" *ibid.* at A12).

suits and ties with the logo of the Centre Maraîcher, was posted in French and Creole and was addressed to "all workers from Longueuil", making it abundantly clear that there were indeed separate facilities for black workers, irrespective of what work they actually were doing, and that they should not go into the room reserved for "regular" (read white) workers.

The degrading conditions experienced by these workers, including further incidents of harassment, are chronicled at some length in the case and will not be repeated for the purposes of this paper.[67] The Human Rights Tribunal focused on the inequality of the conditions, without considering that the unequal employment itself reflected racism.

Second, the decision identifies and pays damages on the basis of individual wages, without questioning whether those damages correspond to a basic living minimum, and whether they are decent. In this regard, the human rights decision does not seek to consider whether the social and economic rights of the workers have been infringed, and indeed whether its award legitimates the infringements. Yet, arguably, if the human rights norms were being interpreted in a manner that considered both the symbolism of rights as well as the reasons for social regulation, then the damage awards themselves might have become the basis for problematization, rather than blind acceptance, of the status quo. For example, in the case of one of the workers, damages based on wages as limited as $29.15 a day or $145.75 a week were calculated. Note that the workers in this decision testified that they rose at 3:30 each morning to get to work and did not leave until the evening.[68]

The damage award in *Centre Maraîcher* only underscores the fact that these workers also fall through the cracks of other laws that are supposed to offer a protective shield, the provincial labour standards legislation.[69] In Quebec, those standards have partially excluded those who harvest, but include those who perform mechanized tasks.[70] In *Centre Maraîcher*, workers cut off the lettuce by hand so prior to 1 May 2003, were excluded from minimum wage protections.[71] Moreover, agricultural workers remain excluded from overtime pay,[72] a legislative exclusion that continues to date. The laws reflect historical forms of exclusion that perpetuate labour market inequality on the basis of race.[73]

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67 For a thorough account of working conditions, see Simard & Mimeault, *supra* note 65.

68 See also Chris Gramstromt, "Heads Roll by the Millions, Lettuce Heads, That Is" *New Holland News Online* (April 2002), online: New Holland <http://www.newholland.com/na/news/nhn/Apr02/V48No3_1.htm>. Referring specifically to the Centre Maraîcher Eugène Guinois, the article reports that "[a] normal work day for harvest crews is from 6am to 6pm. If rain is forecast for the next day, they may be asked to put in an extra hour or two the evening before"(*ibid.*).

69 *Act respecting labour standards*, L.R.Q., c. N-1.1 [*Act respecting labour standards*].

70 See notably *Regulation respecting labour standards*, R.R.Q., 1981, c. N-1.1, r.3, art. 2(6) [*Regulation*], which excludes employees performing non-mechanized operations linked to the picking of processing vegetables from minimum wage protections.

71 For example, complainant Celianne Michel had damages based on a salary of $145.75 per week, or $29.15 per day. The minimum wage at the time was $7.00 per hour.

72 *Act respecting labour standards*, *supra* note 59 art. 54 (5) and (7).

73 Prior to 1990, agricultural workers were excluded from minimum wage protections. Since 1990, agricultural workers were included, but numerous exclusions remained. On 1 May 2003, many

No expert testimony was called in the decision. Notably, though, industrial relations specialists Simard & Mimeault documented the conditions in the industry, and concluded that they fall below the level of what is legally and humanly tolerable.[74] The UPA itself, in a recent report on the vegetable farms, noted that employers considered the physical demands of the job (43 %) of farms questioned), the poor remuneration (35 %) and the poor working conditions (23 %) as the leading factors explaining why it is difficult to recruit workers.[75] Yet, the large firm employers responded that to resolve these recruitment difficulties, the majority took measures to hire foreign employees (50 %); another 23 % of respondents used intermediaries to find workers.[76] Only 13 % considered mechanization, and an even smaller number (barely 11 %) considered offering better working conditions.[77]

All damage awards considered, the multi-million dollar factory was condemned to pay less than $65,000, including all moral and punitive damages, meant to underscore the severity of the acts and the seriousness of the Charter in its quest to eliminate racial discrimination.[78] There was no call for ongoing reporting by

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exclusions were removed. The *Centre Maraîcher* facts took place prior to the latest legislative reforms. One of the last remaining exclusion, for hand vegetable pickers, is to be removed from the legislation on 1 January 2007. The Minister of Labour has mandated a committee to examine the question of the appropriate wage standard that should apply to these forms of production. After that date, the only remaining legislative exception to the minimum wage law for agricultural employees will be for raspberry, strawberry and apple pickers; however, the workers are still expected to earn at least the general minimum wage rate if "for reasons beyond the employee's control and linked to the state of the field or fruit" that worker cannot receive at least the same amount by using the piece rate to calculate the remuneration (*Regulation, supra* note 70, art. 4.1 par. 2). See art. 4.1 par. 1 of the *Regulation*, which provides a piece-rate minimum wage for those who manually harvest apples, strawberries and raspberries but is careful to ensure that the piece-rate system does not result in a lower minimum wage than that proscribed for general workers in art. 3 of the *Regulation*. See also Québec, Commission des normes du travail, "Les normes du travail dans les entreprises agricoles" Labour Law Analysis, Human Resources and Skills Development Canada (1 May 2005), online: Human Resources and Development Canada <http://www110.hrdcdrhc.gc.ca/psait_spila/lmnec_esic/esic/salaire_minwage/intro/index.cfm/doc/english>.

74 See Simard & Mimeault, *supra* note 65. ("*Notre étude a permis de constater que les conditions de travail offertes sur certaines fermes au Québec sont, par surcroît, en deçà du seuil légalement et humainement admissible*" *ibid.* at 396). The study in question was undertaken in May-June 1995.

75 UPA, *supra* note 62 at 61.

76 One notes that the intermediaries themselves may be from immigrant and visible minority communities and may bear a level of precarity of work that has been the subject of recent analyses, truck drivers. See Heinrich, *supra* note 66 at A12. In the case discussed in the article, the middleman is described as "a Punjabi firm in LaSalle" which "negotiates a price for the day's work with the farmers, collects the workers in the early morning hours from a couple of metro stations in Montreal, takes them to the farm and returns hours later to bring them back to Montreal. The workers are paid cash at the end of each day." Lines of responsibility are complex and leave room for considerable exploitation.

77 UPA, *supra* note 62 at 63.

78 Moral damages were $10,000 for each of three complainants in *Centre Maraîcher* and $12,500 for the fourth complainant. By contrast, *in C.D.P. c. Compagnie minière Québec Cartier* (1994) J.T.D.P.Q., no. 24, $15,000 in moral damages was awarded to each employee for discrimination on the basis of age; $15,000 in moral damages was awarded for discrimination on the basis of national or ethnic origin in *CDP c. Collége Montmorency* (2004) J.T.D.P.Q. no. 4, where the complainant was not accepted into a multimedia training program; and $20,000 was awarded in moral damages for discrimination on the basis of handicap, when a boy was not allowed to attend regular classes, in *C.D.P. c. Commission scolaire régionale Chaveau* (1993) R.J.Q. 929.

the company, no investigation into systemic practices in the industry, no educational initiatives, no measures taken with respect to the over 90 remaining "workers from Longueuil" rendered easy targets for reprisals once the decision was rendered and media attention focused (temporarily) on the farm.[79]

Third, in what may be read as a parody of "representation" without equality and "protection" without rights, the decision sidesteps the question of how the panoply of "human rights at work", including the economic and social, need appropriate regulatory and representational vehicles. In *Centre Maraîcher* and as is strikingly common in the new economy, "soft law" normative instruments are called upon as the basis through which "liability" may be avoided. As a result, another source of law increasingly prevalent in off-shore labour relations surfaces in this case.

The intermediary, the UPA, represents itself as a socially-conscious, representative body, protecting society's common good through a respect for the land and the farming tradition, and promoting a non-discriminatory society. Yet, as the supplier of this temporary immigrant labour force to its agro-business membership each year, the UPA also assumes responsibility for the conditions under which those workers labour. The UPA is both the employers' representative and the guardian of certain workplace norms. And, it has lobbied to prevent other representation of agricultural industry workers.[80]

To mediate this inherently conflicting role, the UPA has called upon a form of soft law, a self-regulatory instrument[81]–a "code of conduct". And, when the indecent working conditions came to light in the decision and the UPA was asked to account for the situation, it sought refuge behind the existence of its *Code of good practices in human relations in the horticultural production sector of Quebec*.[82]

Funded in part by the Québec Ministry of Agriculture, the *Code of good practices* sets out some of the most basic working conditions imaginable; for example, it asks that the employers provide fresh water, functioning toilets, a change room, and a refrigerator. The conditions as listed are so basic that one cannot help but arrive at the conclusion that the UPA, and the government, is aware of the inhuman working conditions faced by day labourers recruited by the UPA. Yet, the UPA representative in this case could brandish the existence of this code.

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79 It is not surprising that some of these workers sought to denounce the four who had complained and the limited public protest actions that ensued.

80 See Simard & Mimeault, *supra* note 65, who note that: "*Au Québec, les salariés agricoles n'ont aucun représentant présent à la table du Comité sectoriel de main-d'œuvre de la production agricole ce qui devrait pourtant être le cas, d'après la Politique d'intervention sectorielle d'Emploi Québec. Pour l'heure, ce Comité est formé de 38 membres, tous de l'UPA […] Il importe donc, dans ce contexte, de questionner le monopole de la représentation accordé à l'UPA en vertu de la Loi sur les producteurs agricoles*" at 405-406.

81 For a compelling analysis of the use of *soft law* in international law, see Katia Boustany and Normand Halde, "Mondialisation et mutations normatives: quelques réflexions en droit international" in François Crépeau, ed., *Mondialisation des échanges et fonctions de l'état* (Bruxelles: Bruylant, 1997) at 37.

82 The code, which appears not to be available on the UPA's website, is available upon request from the UPA.

The code contains no complaints procedure. In *Centre Maraîcher*, the UPA representative testified that it inspects the farms only once every three years.[83] Moreover, the code emphasizes its purely voluntary character. The code, as a "soft" form of law that is increasingly prevalent in the new, globalizing economy, is relied upon not to provide these workers with rights that they would not otherwise have, but rather to protect those who defend the status quo from any further liability. In this sense, the "severe degradation" of the quality of legal rules over time, theorized by Boustany and Halde in respect of North-South relations, is paralleled in respect of working conditions that replicate the "South" in the post-industrialized countries of the "North". For this reason, Boustany and Halde remind readers that those who dismiss soft law as somehow less than law in its quality overlook–at their peril–the time factor, notably the impact over time of the norms that the soft law contains on States and other subjects of law.[84]

III. Equality, Capabilities and the Decent Work Agenda

The *Centre Maraîcher* decision, particularly in the absence of a systemic, proactive, investigative approach to racial segregation in the industry, is a sobering reminder that both economic and social rights, and the procedural framework associated with the civil and political rights framework, even in the robust labour law field, can be hollow for particular groups of precarious workers. It serves as a pessimistic reminder that neither economic and social rights nor civil and political rights constitute a panacea.

These are the insights of critical theory, which remind us both of the potential and limits of rights discourse. As Patricia J. Williams has eloquently insisted :

> To say that blacks never fully believed in rights is true. Yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before; we held onto them, but the hope of them into our wombs, mothered them and not the notion of them. And this was not the dry process of reification, for which life is drained and reality fades as the cement of conceptual determinism hardens round–but its opposite […] The making of something out of nothing took immense alchemical fire.[85]

Critical race theory has been at the forefront of capturing both the limits and the potential of rights, recognizing that "the battle is not deconstructing rights, in a world of no rights; nor of constructing statements of need, in a world of abundantly

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[83] *Centre Maraîcher*, *supra* note 1 at para. 149.

[84] See Boustany & Halde, *supra* note 81 at 40.

[85] Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge, MA): Harvard University Press, 1991) at 163.

apparent need. Rather, the goal is to find a political mechanism that can confront the denial of need."[86]

A normative framework that assesses the effectiveness of rights on the basis of their actual ability to redress the inequality faced by its most marginalized members is therefore necessary. Of course, critical race theory will deeply challenge the ability of any notion, inherently, to achieve in the abstract a result independent of notions of racial status and other structural factors. Yet, critical race theory insists on the need to reconstruct rights once their fundamental contradictions have been isolated, precisely out of a concern for fostering societal inclusion.[87]

The notion of "decent work", therefore, despite a need for some caution, is argued to hold the potential to provide an important corrective to abstract articulations (and applications) of rights. The notion, while drawing on the "human dignity" language that emanates from the Preambles of both the *International Covenant on Economic, Social and Cultural Rights*[88] and the *International Covenant on Civil and Political Rights*,[89] is particular to the international labour law universe. And, while human dignity has also been critiqued for its sometimes abstract and potentially reductionist, articulations of rights,[90] cautious optimists who consider the normative reform process underway at the ILO might be inclined to consider the potential that decent work for all may have to root legal and policy prioritizations in the concrete lived experiences of marginalized workers.

The decent work language is not to be found in the *ILO Declaration*. Rather, it is encapsulated in the work of the ILO's Director General Juan Somavía[91] and has been drawn upon to reformulate policy directions and outcomes throughout the organization, beyond the heavily re-conceptualized standard-setting function.[92]

The emphasis is, at once, on decent work and on "for all". All is meant to include workers who fall outside of traditional employment relationships and, arguably, productive and reproductive labour. All includes, as well, refocusing attention on ensuring that "people" are not commodified in their work relationships in

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86 *Ibid.* at 152.

87 Angela P. Harris, "Foreword: The Jurisprudence of Reconstruction" (1994) 82 Cal. L. Rev. 741.

88 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 3 January 1976).

89 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976).

90 See Susie Cowen, "Can 'Dignity' Guide South Africa's Equality Jurisprudence" (2001) 17 S.A.J.H.R. 34, arguing that the notion of human dignity is irretrievably linked to negative freedom and autonomy, thus discouraging positive, redistributive measures. But see Sandra Liebenberg, "The Value of Human Dignity in Interpreting Socio-Economic Rights" (2005) 21 S.A.J.H.R. 1, for a robust defense of the potential of the human dignity as a value that reinforces human capabilities and equality. See also in the Canadian context Denise Réaume, "Discrimination and Dignity" (2003) 63 Louisiana L. Rev. 645, naming the conceptual difficulties underlying the Supreme Court of Canada's interpretation of dignity as the principle underlying equality, but offering a fuller vision of dignity for the way forward.

91 International Labour Conference, "Report of the Director-General: Decent Work" (June 1999) 87th Session, Geneva.

92 See generally Jean-Claude Javillier and Bernard Gernigon, eds., *Les normes internationales du travail: un patrimoine pour l'avenir*: *Mélanges en l'honneur de Nicolas Valticos* (Geneva: ILO, 2004).

the new economy as well as the old. Arguably, the focus on decent work for all provides simply a different entry point for thinking carefully about the indivisibility of rights while prioritizing the operation of rights in terms of societal groups that are structurally the most marginalized. It meets the challenge of individualistic, abstract visions of rights in its apparent call to a level of empiricism that would consider the lived experience of workers. Asking whether member States like Canada sufficiently protect the economic and social interests of all Canadians, therefore, entails, in the labour rights context, asking whether labour regulation appropriately bridges the divide between civil/political rights and economic/social rights to ensure that marginalized societal groups reach the promise that decent work offers.

Significantly, though, the decent work aspiration calls upon a broader panoply of "implementation" devices than the civil/political rights versus economic/social rights dichotomy might otherwise allow. Calling them all "rights" does not quite capture the emphasis that even the *ILO Declaration* tries to place on "standard-setting, technical cooperation, and research resources […] in the context of a global strategy for economic and social development […]"[93] But, moving beyond the abstract articulation of liberal rights toward a more critical analysis of both the potential and limits of rights with a standpoint that considers societal discrimination from the perspective of disadvantaged groups is critical to harnessing the decent work potential.

I argue that an embodied rather than an abstract vision of decent work comes closer to a vision of human capabilities that sees equality (including the opposable right to equality) at its core.[94] Capabilities particularly as theorized by Nussbaum to ensure attention to equality seeking groups may be understood to lend to the notion of decent work an inherently distributional character.[95]

Decent work for all holds the potential to re-centre the painfully abstract international debate on the lived experiences of marginalized workers and would set normative prioritizations in terms of what human beings are empowered to do. The norm of equality, in particular, would move beyond merely "enabling" status; it would encompass substantive equality as both a process and a goal, substantive equality as inherent to an understanding of work itself as decent. This has transformative implications for fundamental principles and rights at work.[96] And, it calls domestic legislators, when faced with labour standards exclusions that perpetuate the marginalization of precisely those societal groups that require legal

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93 *ILO Declaration*, *supra* note 7, preamble.

94 Nussbaum, "Women and Equality", *supra* note 30 at 240.

95 *Ibid.* at 241. The late Oscar Schachter argued persuasively that the notion of human dignity requires a minimal distributive justice component, to ensure that the essential needs of everyone are satisfied. See Oscar Schachter, "Human Dignity as a Normative Concept" (1983) 77 A.J.I.L. 848.

96 See Blackett & Sheppard, "Making Connections", *supra* note 10, where I have argued that "the term 'effective' [in ILO Convention No. 98 on Collective Bargaining] must be understood in a way that is sensitive to the interface between fundamental principles and rights at work. In other words, collective bargaining mechanisms cannot be considered to be effective if they structurally exclude from access to collective bargaining those disadvantaged workers to whom Convention No. 111 guarantees equality" (*ibid.* at 429).

empowerment, to reconsider the legitimacy of their prioritizations. Indeed, how a human rights tribunal in *Centre Maraîcher* might have called attention to the decent work deficit, when faced with a request to calculate damages on the basis of societal marginalization, is only one aspect of how "implementation" may be reconceived. Whether a commission and a tribunal would be galvanized to use their statutory powers to adopt measures beyond an individualized "victory", with devastating consequences in terms of alleged firing of the remaining workers, would also be a part of this dialectic.

The decent work mandate, if it is understood not only to reinforce the indivisibility of economic and social rights with civil and political rights, but also to enable meaningful prioritizations on the basis of human capabilities, is potentially transformative. But, the architects and foot soldiers of fundamental principles and rights at work need then to be emboldened to imagine those principles and rights in a way that embraces worker empowerment. That notion needs to be infused at its core with a vision of equality that is substantive in character. Focusing on marginalized workers as well as the quality of their lives and the capabilities that they have to enhance it offers a palpable, promising way to ensure that social/economic rights share centre stage with civil and political rights on our understandings of what labour law is all about.