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Keynes, Sen, and Hayek: Competing Approaches to International Labor Law in the ILO and the WTO, 1994–2008

Pascal McDougall*

In discussions of recent human rights-driven developments in the International Labour Organization (ILO), as well as in other international legal debates, many scholars have suggested that human rights and “neoliberalism” intrinsically tend to converge. Such purported convergence is at once deplored by critics of “globalization” and applauded by its defenders. This article offers an empirical refutation of this convergence thesis by documenting the potential for systematic divergences between human rights, neoliberalism and a third omnipresent discourse, social legal thought (i.e. tropes associated with the welfare state and Keynesianism). I support this claim by taking as a case study three interrelated and historically fateful debates about international labor standards in the World Trade Organization (WTO) and the ILO. The debates are those pertaining to (1) the failed 1990s project of conditioning WTO trade status with respect for labor standards (“trade/labor linkage”), (2) the prioritization of human rights-based labor standards in the ILO’s 1998 Declaration on Fundamental Principles and Rights at Work (1998 Declaration) and (3) the shape of the ILO corpus under the Decent Work Agenda (DWA), a social policy programmatic initiative on labor standards fiercely debated in the 2000s. I argue that human rights, neoliberalism and social legal thought diverge a great deal because they have different degrees of normative malleability. I propose a methodology, structuralist argumentative analysis, to address the question of discursive convergence and divergence, an issue of crucial importance for those interested in the political stakes of debates on international labor standards and the future trajectories of neoliberalism and human rights.

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I don't concede that "rights talk" gives employers an inherent advantage, any more than "economics talk" gives advantage to unions. Both are fields of contest, and labor advocates have to fight it out on each front.¹

Lance Compa

The 'development' of a thing, a tradition, an organ is therefore certainly not its progressus towards a goal, . . . instead it is a succession of more or less profound, more or less mutually independent processes of subjugation exacted on the thing, added to this the resistances encountered every time, the attempted transformations for the purpose of defence and reaction, and the results, too of successful countermeasures.²

Friedrich Nietzsche

INTRODUCTION

In recent decades, the International Labour Organization (ILO) was, along with the World Trade Organization (WTO), the focus of intense debates about the normative approaches used to discuss labor/employment laws at the global level. Specifically, many observers noted the use of human rights tropes to advocate for international labor standards and argued that this approach was consistent and/or complicit with "neoliberalism," and that it represented a shift away from traditional welfare state-oriented discourses. These debates were brought about in part by a series of institutional innovations designed to bring the ILO back to the center of global policy discussions on the regulation of employment markets. For instance, in 1998, ILO adopted its Declaration on Fundamental Principles and Rights at Work (1998 Declaration), in which it gave priority status to four of its labor standards over all others: (1) freedom of association and the right to collective bargaining, (2) the prohibition of forced labor, (3) the prohibition of child labor and (4) the elimination of discrimination at work.³ These four standards were to be called "core labor rights" (CLR) and recognized by many actors as the only standards to be "mainstreamed" in other international organizations.⁴ The 1998 Declaration made the innovative move of imposing a new obligation on all ILO member states, regardless of whether or not they had ratified the relevant pre-existing ILO conventions, to "respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the [CLR]."⁵

The programmatic importance of this document can scarcely be overstated. Indeed, for many

¹ Lance Compa, *Solidarity and Rights: Two to Tango-A Response to Joseph A. McCartin*, 80 INT'L LAB. & WORKING-CLASS HIST. 161, 164 (2011).

² FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY 51 (Carol Diethe trans., 1994).

³ International Labour Organization [ILO], *Declaration On Fundamental Principles And Rights At Work*, at 7 (June 18, 1998), available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm> [hereinafter 1998 Declaration].

⁴ See *infra* notes 26–28 and accompanying text.

⁵ 1998 Declaration, *supra* note 3, at 7.

actors the 1998 Declaration “emerged as the centrepiece of international efforts to remedy the plight of vulnerable workers in the global economy.”⁶ The prioritization of a restricted set of “basic” rights was considerably new for an organization committed since 1919 to a raft of international labor standards codified in over 190 conventions, from minimum unemployment insurance to working hours and occupational health and safety standards.⁷ The 1998 Declaration also represented the outcome of arguably the most ferocious debates about international labor standards since the Second World War. Indeed, the lead-up to the foundation of the WTO in 1995 catapulted labor activists and policy-makers into a decade-long debate about “linkage” of trade and labor laws through things like a system of trade sanctions for violations of labor standards. This debate, as I demonstrate in this article, directly contributed to the adoption of the 1998 ILO Declaration. After 1998, the ILO continued on the path of institutional renewal by adopting the “Decent Work Agenda” (DWA) in 1999,⁸ whereby a set of programmatic goals of social policy reshaped the pre-1998 ILO conventions corpus.

Reactions to the ILO’s 1998 Declaration and Decent Work Agenda were strong on the left. The 1998 Declaration was decried as “welcomed by multinational capital” because it “correspond[s] with a neoliberal economic view.”⁹ It privileges “a core set of largely procedural and essentially civil and political labor rights, thus conforming to the preferences of neo-liberal economic approaches.”¹⁰ It is “comfortably aligned with neo-liberal philosophy.”¹¹ Etc.¹² The Decent Work Agenda, for its part, was said to jettison “substantive material equality” in favor of “procedural justice,” conforming to “what the Employers wanted” and to the “assumptions” of the “disembedding phase of the ongoing Global Transformation, which is primarily about the creation of international markets, with all the inequalities and insecurities that this is generating.”¹³ Much of these debates have happened years after the 1998 Declaration and the DWA were adopted and fed into discussions about the ILO’s current normative agenda.

In parallel to these controversies, many observers of international human rights law and the

⁶ Kerry Rittich, *Core Labor Rights and Labor Market Flexibility: Two Paths Entwined?*, in *LABOR LAW BEYOND BORDERS: ADR AND THE INTERNATIONALIZATION OF LABOR DISPUTE SETTLEMENT* 157, 160 (The International Bureau of the Permanent Court of Arbitration eds., 2003); see also Anil Verma, *Global Labour Standards, Can We Get from Here to There?*, 19:4 INT’L J. COMP. LAB. L. & INDUS. REL. 515, 518 (2003) (observing that the 1998 Declaration “has set a high moral tone for policy debate and action around the globe”).

⁷ On this institutional history, see Virginia A. Leary, *Lessons from the Experience of the International Labour Organisation*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 580 (Philip Alston ed., 1992).

⁸ See *infra* notes 58–62 and accompanying text.

⁹ Guy Standing, *The ILO: An Agency for Globalization?*, 39:3 DEV. & CHANGE 355, 367 (2008).

¹⁰ Philip Alston & James Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?*, 36 N.Y.U. J. INT’L L. & POL. 221, 223 (2004); see also Philip Alston, ‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT’L L. 457 (2004).

¹¹ Jill Murray, *Taking Social Rights Seriously: Is there a Case for Institutional Reform of the ILO?*, in *HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW AND REGULATION* 359, 369 (Colin Fenwick & Tonia Novitz eds., 2010).

¹² Guy Mundlak, *The Transformative Weakness of Core Labor Rights in Changing Welfare Regimes*, in *THE WELFARE STATE, GLOBALIZATION, AND INTERNATIONAL LAW* 231, 233, 258 (Eyal Benvenisti & Georg Nolte eds., 2004) (observing that “the distinction [between CLR and labor standards] draws on a human rights discourse characteristic of civil and political rights at the national level” and of “negative rights” and thus “fails to integrate the jurisprudence historically associated with social and economic rights.” It “provides protection . . . against some abuses of labor but has little significance in the performance of functions relegated to the welfare state.”).

¹³ Standing, *supra* note 9, at 357–58, 369.

constitutionalization *en bloc* of many domestic jurisdictions have asserted that both human rights and constitutionalization might be intrinsically complicit, if not coterminous with “neoliberalism” and/or classical liberal individualism (the claims vary).¹⁴ These broader discussions are extremely relevant to those on the 1998 Declaration, which has been described as “the first pronouncement expressly proclaiming a ‘human rights’ orientation for the ILO.”¹⁵ Of course, such a statement reminds one that the 1998 Declaration was adopted in the context of a global *rightsification* of labor and employment law, both domestic and international, whereby human (and constitutional) rights increasingly replace other ways of talking about that field.¹⁶ And there again, the left decries the complicity of rights with neoliberalism and/or right-wing libertarianism.¹⁷ On the ideological right and center-right, there is a mirror tendency to celebrate the putative compatibility (or even mutual reinforcement) between the free market (be it called “globalization,” “growth” or something else) and human rights, both in the context of labor/employment law and more generally.¹⁸

¹⁴ See SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* 250 (2011) (arguing that in the context of international economic law, it is inevitable that “law and rights will be limited to the extent of their compatibility with prevailing economic orthodoxies”); Michèle Lamont, Jessica S. Welburn & Crystal M. Fleming, *Responses to Discrimination and Social Resilience Under Neoliberalism: The United States Compared*, in *SOCIAL RESILIENCE IN THE NEOLIBERAL AGE* 129, 148 (Peter A. Hall & Michèle Lamont eds., 2013) (observing that “neoliberalism may also encourage stigmatized group [sic] to make claims based on human rights [...] while undercutting in practice collective claims by promoting individualization”); see also RAN HIRSCHL, *TOWARDS JURISTOCRACY THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 44 (2004) (observing that “proconstitutionalization elites [...] often represent historically hegemonic enclaves of political and economic power-holders, who tend to adhere to an agenda of relative cosmopolitanism, open markets, formal equality, and Lockean-style individual autonomy”). For a different take to the effect that human rights discourse “legitimizes” neoliberalism, see Wendy Brown, “*The Most We Can Hope For . . .*”: *Human Rights and the Politics of Fatalism*, 103 S. ATLANTIC Q. 451, 461 (2004). For yet another take, claiming that neoliberalism is the central element of contemporary legal thought, to which human rights (and everything else in law since the 1970s) are but a “response,” see Christopher Tomlins, *The Presence and Absence of Legal Mind: A Commentary on Duncan Kennedy’s Three Globalizations of Law and Legal Thought, 1850–2000*, 78 L. & CONTEMP. PROBS. 1, 15 (2015).

¹⁵ Janice R. Bellace, *Achieving Social Justice: The Nexus Between the ILO’s Fundamental Rights and Decent Work*, 155 EMP. RTS. & EMP. POL’Y J. 5, 5 (2011); see also Alvaro Santos, *Three Transnational Discourses of Labor Law in Domestic Reforms*, 32 U. PA. J. INT’L L. 123, 145–46 (2010).

¹⁶ On this phenomenon, see the contributions to the following collections: *HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW AND REGULATION*, *supra* note 11; *WORKERS’ RIGHTS AS HUMAN RIGHTS* (James A. Gross ed., 2003); *HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE* (Lance A. Nietzsche & Stephen F. Diamond eds., 1996).

¹⁷ See e.g., Joseph A. McCartin, *Probing the Limits of Rights Discourse in the Obama Era: A Crossroads for Labor and Liberalism*, 80 INT’L LAB. & WORKING-CLASS HIST. 148 (2011); Tonia Novitz & Colin Fenwick, *Introduction: The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice*, in *HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW AND REGULATION*, *supra* note 11, at 1, 37; see also Judy Fudge, *The New Discourse of Labor Rights: From Social to Fundamental Rights?*, 29 COMP. LAB. L. & POL’Y J. 29, 42 (2007).

¹⁸ On the 1998 Declaration, the ILO states that “recognition of these fundamental rights [CLR] appears to be based on the same principles as those underlying the international trade system itself.” ILO, G7 Conference on Employment, *The Social Dimension of the Liberalization of International Trade*, G7/E.C./1996/1, (April 1996) (cited in FRANCIS MAUPAIN, *THE FUTURE OF THE INTERNATIONAL LABOUR ORGANIZATION IN THE GLOBAL ECONOMY* 145 (2013)); see also Brian Langille, *The ILO and the New Economy – Recent Developments*, 15 INT’L J. COMP. LAB. L. & IND. REL. 229, 242 (1999) (“[T]he shift to a rights based conception is [...] a ‘market friendly’ approach which appeals to, and is grounded in, the fundamental virtues of market ordering[—]free, informed and uncoerced choice[—]which are at the normative foundation of markets.”). On human rights more broadly, see Steve Charnovitz, *The Globalization of Economic Human Rights*, 25 BROOK. J. INT’L L. 113, 115–16 (1999); Ernst-Ulrich Petersmann, *Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from*

In this Article, I argue that these views, inasmuch as they presuppose a convergence between human rights and neoliberalism, are mistaken, both in their conclusion and their implicit methodology. Taking guidance from recent work examining the contingent historical relationship between neoliberalism and human rights,¹⁹ I propose a methodology that leads me to the conclusion that human rights, in a variety of contexts that I propose to study, are not at all necessarily or even more likely to be complicit with neoliberalism or classical liberalism. I take as a case study a chain of debates in the period 1994–2008 that had profound impacts on the discursive landscape related to the promotion of international labor standards. These are the debates about (1) trade/labor “linkage” in the WTO, whereby advocates sought and failed to include respect for some labor standards as a consideration in the establishment of the trade regime in the 1990s, (2) the selection of the “core labor rights” to be included in the 1998 Declaration and (3) the shape of the ILO corpus in the context of the 1999 Decent Work Agenda and its relationship to the 1998 Declaration. I analyze contributions to these debates made by organs and officials of the WTO and ILO (in reports, statements, treaties, etc.), as well as by scholars influential in the epistemic communities of these organizations.

On each of these three interrelated controversies, I chronicle the argumentative use of three normative approaches or paradigms: human rights, neoliberalism and another omnipresent yet under-studied discourse, social legal thought (i.e. organicist tropes associated with the welfare state and Keynesianism).²⁰ I analyze potential convergence as a function of the discourses’ normative malleability, i.e. of the range of outcomes they are likely to lead to on the left-right ideological spectrum. Defining the advocated outcomes as relatively left-wing when *more labor standards promotion* is sought and relatively right-wing when the opposite is the case, I have found that in the context of my 1994–2008 debates the human rights language is the most malleable of all three, in the sense that it seems equally likely to be used to advocate for left-wing and right-wing outcomes, while neoliberalism is somewhat malleable though more often identified with the right and social legal thought most decidedly identified with the left.²¹ My exploration of the three divergent degrees of normative malleability leads me to the conclusion that on balance convergence between human rights and neoliberalism (and social legal thought) is not more likely than divergence.²² It follows that the convergence thesis is wrong. The peculiar ideological

European Integration, 13 EUR. J. INT’L L. 621.

¹⁹ Samuel Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism*, 77 L. & CONTEMP. PROBS. 147 (2014); Mary Nolan, *Human Rights and Market Fundamentalism in the Long 1970s*, in TOWARD A NEW MORAL WORLD ORDER? MENSCHENRECHTSPOLITIK UND VOLKERRECHT SEIT 172, 174 (Norbert Frei & Annette Weinke eds., 2013).

²⁰ These languages correspond to Alvaro Santos’ *Three Transnational Discourses of Labor Law in Domestic Reforms*. Santos, *supra* note 15.

²¹ This seems to confirm Duncan Kennedy’s claim that (neo)liberalism and social legal thought, which were once politically indeterminate, crystallized as respectively right-wing and left-wing in debates on economic and market-related matters (as opposed to civil society and the family). Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 L. AND CRITIQUE 91, 115–16 (2014).

²² I treat the degree of normative malleability as an empirical question depending not on the discourses’ internal properties but on the work performed by situated actors developing them in certain directions over time. This amounts to saying that current uses of, say, neoliberalism are limited by the weight of past arguments. Though of course such constraint is never total, the freedom to innovate is itself structured by past perceptions of what arguments are convincing in a repertoire. The analogy here is to the phenomenological view of the indeterminacy of legal doctrine. Duncan Kennedy, *A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation*, in LEGAL REASONING: COLLECTED ESSAYS 153, 160 (2008).

configuration I found, whereby human rights can be both left and right, neoliberalism is mostly right-wing but can also be center-left and social legal thought is consistently left-wing, was by no means inevitable. It is the result of work by situated actors with ideological projects. As I will outline in my conclusion, it is also the product of many trends in the intellectual history of labor law. Nevertheless, it is likely to significantly influence the outcome of future policy discussions. As such, it deserves attentive and empirical study, and not mere blanket assertions of systematic convergence or divergence.

Indeed, one important reason for my reading together of the three debates is that I have found that various arguments invoked in one controversy can be invoked in the others, and that the succession of disputes has created a cumulative repertoire of sedimented arguments that are still with us, to this day. As a result, the best way to understand how a given normative language works is to study it in a series of discussions that cumulatively produce its political valence and structure.²³ This also suggests that since path dependence and cumulative causation are bound to play a role in any succession of controversies, the recent past has much to tell us about how future debates might play out.²⁴ With this in mind, this article provides a systematic appraisal of some fourteen years of argumentation on the intersection of labor and international economic law.

In fact, these three specific discussions seem particularly fateful for the future of international labor standards debates. I take for granted the importance of the WTO trade/labor linkage polemic, on which so much ink has been spilled.²⁵ But the adoption of the 1998 Declaration, as well as subsequent disagreement as to its meaning and relationship to the broader ILO corpus and the Decent Work Agenda, are also influential global debates. Indeed, the core labor rights were incorporated (“mainstreamed”) across the international legal landscape by a plethora of institutions, from the International Monetary Fund (IMF) and the World Bank to codes of corporate social responsibility and the U.N. Global Compact.²⁶ The Decent Work Agenda and non-core ILO conventions were also incorporated into the U.N. Millennium Development Goals²⁷ and the U.N. Office of the High Commissioner for Human Rights’ directives on the “right to work” under the International Covenant on Economic, Social and Cultural Rights.²⁸ The 1994–2008 labor standards debates therefore also seem fateful for many different international legal contexts where ILO law has been directly incorporated.

The methodology I use is “structuralist,” in that I focus on how the normative and ideological structure of my three languages has evolved and not on other historical factors that may have

²³ I follow Foucault in treating a given discourse’s structure as the product of work by situated actors, of “exegesis” by subsequent “commentators” not wholly constrained by an original “definitive statement” guiding the discourse. MICHEL FOUCAULT, *THE ORDER OF THINGS* 44–46 (2002).

²⁴ On this methodological point, see Justin Desautels-Stein, *Structuralist Legal Histories*, 78 L. AND CONTEMP. PROBS. 37, 53–54 (2015).

²⁵ See *infra* Part I.

²⁶ See CHRISTINE KAUFMANN, *GLOBALISATION AND LABOUR RIGHTS THE CONFLICT BETWEEN CORE LABOUR RIGHTS AND INTERNATIONAL ECONOMIC LAW* 160–61 (2007); Mark Anner & Teri Caraway, *International Institutions and Workers’ Rights: Between Labor Standards and Market Flexibility*, 45 ST. COMP. INT’L DEV. 151, 151 (2010).

²⁷ See Gillian MacNaughton & Diane F. Frey, *Decent Work, Human Rights and the Millennium Development Goals*, 7 HASTINGS RACE & POVERTY L. J. 303, 306 (2010).

²⁸ U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *PRINCIPLES AND GUIDELINES FOR A HUMAN RIGHTS APPROACH TO POVERTY REDUCTION STRATEGIES*, 23–26, U.N. Doc. HR/PUB/06/12 (2006). See MacNaughton & Frey, *supra* note 27, at 328, for discussion of the distinctions between the High Commissioner for Human Rights and the ILO’s approaches.

steered the course of policy debates. I do think these other factors are of paramount importance and should be carefully studied. Argumentative structure is no more (but probably no less) important as a driving force of history than things like economic interests, historical accidents and political struggles.²⁹ Yet I find it valuable to focus on argumentative structure, because it very often becomes historically salient by constraining and orienting future uses of legal discourse.³⁰ I draw considerable inspiration from structuralist analyses which model legal discourse as a mechanism which to some extent constrains actors who want to employ it.³¹

The application of such a structuralist methodology to debates about international labor standards is quite unprecedented in an otherwise rich literature. There are analyses documenting the various arguments made in the trade/labor linkage debates³² and controversies on the ILO's 1998 Declaration and Decent Work Agenda.³³ These studies are invaluable, yet, in addition to tending to focus on one debate and failing to attend to the way various discourses are constructed by successive uses, none of them maps the arguments according to the normative approaches used. The one exception to this is Brian Langille's 1997 article on trade/labor linkage debates, *Eight Ways to Think About International Labour Standards*, which categorizes arguments about trade/labor linkage according to the "conceptual schemes or paradigms" to which they belong.³⁴ Yet, that article is quite dated, does not deal with ILO debates per se and does not propose to map the normative malleability of the "paradigms" identified. That is, it does not catalogue the outcomes advocated for in the various discourses in order to categorize them politically. This is precisely the added value of my structuralist methodology, which allows us to empirically tackle the question of the relationship between human rights and neoliberalism, as well as to better understand the political stakes of uses of various normative languages in current and future debates about labor standards.

²⁹ See, e.g., Robert O' Brien, *Workers and World Order: The Tentative Transformation of the International Union Movement*, 26 REV. INT'L STUDIES 533, 553 (2000) (giving an account of international union campaigns for trade/labor linkage as being part of a radicalization of global unions after they were "expelled from the corridors of power in key states" of the West after the end of the Cold War, thereby abandoning their past role as defenders of Western capitalism against Soviet communism); see also Alston, *supra* note 10, at 466–69 (discussing the symbolic and economic motivations of the American government in pushing for the CLR agenda in the ILO).

³⁰ See Desautels-Stein, *supra* note 24, at 53–54.

³¹ See Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950); Jack M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986); Duncan Kennedy, *A Semiotics of Legal Argument*, in COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 309 (1994); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989); DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987).

³² See Brian A. Langille, *Eight Ways to Think about International Labour Standards*, 31 J. WORLD TRADE 27 (1997); Raj Bhala, *Clarifying the Trade-Labor Link*, 37 COLUM. J. TRANSNAT'L L. 11 (1998); Rajib N. Sanyal, *The Social Clause in Trade Treaties: Implications for International Firms*, 29 J. BUS. ETHICS 379, 381 (2001); Sope Williams, *The WTO and Labour Rights Revisited*, 14 SRI LANKA J. OF INT'L LAW 135, 146 (2002); Junlin Ho, *The International Labour Organization's Role in Nationalizing the International Movement to Abolish Child Labor*, 7 CHI. J. INT'L L. 337, 343 (2006); ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER 29–30 (2011).

³³ On the ILO's 1998 Declaration, see Murray, *supra* note 11, at 364. For analyses that track arguments from trade/labor linkage through to ILO debates, see Mundlak, *supra* note 12, at 258; Alston, *supra* note 10, at 471–76. For analyses tracing the 1998 Declaration debates to those on the Decent Work Agenda, see Standing *supra* note 9; STEVE HUGHES & NIGEL HAWORTH, THE INTERNATIONAL LABOUR ORGANISATION (ILO): COMING IN FROM THE COLD [ch. 4–6] (2010). For an exceptional integrated treatment of my three debates which nevertheless abstains from engaging in a structural analysis of legal arguments, see KAUFMANN, *supra* note 26.

³⁴ Langille, *supra* note 32, at 29.

I proceed in four parts. Part I presents a brief chronology of the three debates to provide the minimal background necessary to understand the content of the arguments made. Parts II, III and IV contain the bulk of my analysis, dealing with arguments based on the neoliberal, human rights and social legal thought paradigms. Each of these parts presents arguments from the three debates, emphasizing resonance between the positions from each discussion and suggesting a cumulative process of discourse construction. The normative malleability of the discourse is strongly suggested in the case of human rights, much less strongly for neoliberalism, and almost not at all for social legal thought. Keeping track of these divergent structures is part of the intellectual *démarche* I propose to lawyers striving to better understand the political stakes of law, as well as those assessing how they should go about “speaking” labor standards to further partisan ideological goals through legal discourse. However, in the latter case, the difficulty is that the sedimented legal arguments I catalogue are not mere legal material to be assessed strategically from the outside. They also structure the extra-legal choices we must make in order to decide what to do with labor markets as an ideological or political matter. These conflicting arguments are both inside and outside of us, so to speak. They are both a strategic medium to be used and a source of ideological uncertainty as to how we might want to strategically use them. It thus seems imperative to get to know these arguments better.

I. A CHRONOLOGY OF THREE DEBATES

This part briefly traces a chronology of the debates I analyze from the period of 1994–2008, in order to make my analysis of the claims made during that period more intelligible. This chronology lays out the context in which actors used human rights, neoliberalism and social legal thought to confront each other, thereby bringing about the configuration described above whereby the three paradigms have different political valences that render any convergence between them unlikely.

This historical sequence starts in 1994, with the closing of the Uruguay round of negotiations on the newly-founded WTO and discussions around the ILO’s 75th anniversary, and ends in 2008 with the adoption of the ILO’s 2008 Declaration on Social Justice for a Fair Globalization (2008 Declaration) and the outbreak of the Great Recession. I start with the debate on trade/labor linkage in the WTO and then assess ILO discussions on the 1998 Declaration’s “core labor rights,” the 1999 Decent Work Agenda and the related 2008 Declaration, the chronological end point of my inquiry.

A. *Trade/Labor Linkage in the WTO*

During the 1986–1994 Uruguay round of negotiations which led to the founding of the WTO in 1995 and again at the first ministerial conference of the WTO in 1996, some Western states sought and failed to condition some forms of trading status on respect for labor standards.³⁵ The mechanism most commonly put forward for such “linkage” proposals was the enabling of the imposition of trade sanctions on countries violating labor standards.³⁶ Though the idea of linking trade and labor/employment laws had been around since at least the 19th century in domestic contexts,³⁷ the first real (but failed) prospect for multilateral trade labor linkage was the never-

³⁵ See generally Sarah H. Cleveland, *Why International Labor Standards?*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY 129, 148–49 (Robert J. Flanagan & William B. Gould eds., 2003).

³⁶ See *id.* at 149–50.

³⁷ Edward Potter, *The Growing Significance of International Labor Standards on the Global Economy*, 28 SUFFOLK

adopted 1948 Havana Charter for the never-created International Trade Organization.³⁸ The Havana Charter contained a clause mandating “fair labour standards” and providing for a dispute settlement mechanism to adjudicate complaints that a member state’s labor standards are insufficient.³⁹ Throughout the history of the General Agreement on Tariffs and Trade (GATT), there have been many proposals (often from the United States) for multilateral trade/labor linkage, but no such proposal succeeded.⁴⁰

That being said, individual countries “unilaterally” linked trade status to respect for some labor standards throughout the period. For example, in 1984, the United States’ Generalized System of Preferences was amended to require conformity with a series of “internationally recognized workers’ rights” in order to enjoy beneficial tariff treatment for exports, and the U.S. has obtained inclusion of such clauses in many of its bilateral trade agreements, as well as in the North American Free Trade Agreement.⁴¹ There have been many other unilateral trade/labor linkages, by countries as diverse as Cuba, Czechoslovakia and the United Kingdom, throughout the 20th century.⁴²

This was the historical background against which, during the 1986–1994 Uruguay round of negotiations, US and EU representatives pushed for a WTO trade/labor linkage and failed in the face of developing country opposition.⁴³ WTO Member state representatives then met for the 1996 Ministerial Conference in Singapore, where the agenda for the new organization was to be operationalized. A proposition was submitted to require members of the WTO to comply with seven ILO conventions covering four labor standards (those that would become the ILO “core labor rights”): freedom of association and collective bargaining, the prohibition of child labor and forced labor as well as equality rights at work.⁴⁴ The proposition was defeated, and the Conference adopted the following epoch-making statement as part of the Singapore Declaration:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries,

TRANSNAT’L L. REV. 243, 244 (2005).

³⁸ MAUPAIN, *supra* note 18, at 127.

³⁹ United Nations Conference on Trade and Employment, Havana, Cuba, Nov. 21, 1947 – March 24, 1948, *Final Act and Related Documents, Havana Charter for an International Trade Organization*, U.N. Doc. E/CONF.2/78, art. 5 & art. 7 (Apr. 1948).

⁴⁰ MAUPAIN, *supra* note 18, at 574.

⁴¹ See generally Lance Compa, *From Chile to Vietnam: International Labour Law and Workers’ Rights in International Trade*, in CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE: LIBER AMICORUM DAVID M. TRUBEK 143 (Gráinne de Búrca, Claire Kilpatrick & Joanne Scott, eds., 2014) [hereinafter CRITICAL LEGAL PERSPECTIVES].

⁴² Steve Charnovitz, *The Influence of International Labor Standards on the World Trading System: A Historical Overview*, 126 INT’L LAB. REV. 565, 569 (1987).

⁴³ See generally Peter Watson, *The Framework for the New Trade Agenda*, 25 LAW & POL’Y. INT’L BUS. 1237, 1252, 1255, 1257 (1994).

⁴⁴ Rorden Wilkinson & Steve Hughes, *Labor Standards and Global Governance: Examining the Dimensions of Institutional Engagement*, 6 GLOBAL GOVERNANCE 259, 261 (2000).

particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.⁴⁵

This was to be a decisive nail in the coffin of trade/labor linkage in the WTO. Yet, the lead-up to 1996 had generated such scholarly and political interest that linkage advocates and opponents have continued to debate each other beyond 1996, up to today. Evidence that pressures for trade/labor linkage did not go away can be found in the fact that some WTO member states thought it appropriate to “reaffirm” the 1996 statement in the 2001 Doha Ministerial Declaration⁴⁶ and that the WTO Director-General did the same thing in a 2002 speech at the ILO.⁴⁷ Of course, along with scholarly and technocratic interest came northern social movements, which have maintained a vigorous campaign in favor of trade/labor linkage well beyond the 1990s.⁴⁸ This undoubtedly also contributed to keeping the issue on the agenda. As we will see, the debates concern both the very desirability of linking trade and labor, as well as the determination of which labor standards should and should not be linked to trade law. There is a spectrum of views one can take on this issue, from very broad (left-wing) proposals to link many labor standards to (right-wing) views that either oppose linkage or only accept it for a select few labor standards. Whether human rights, neoliberalism and social legal thought tend to converge on this issue is one of the questions I address in this article.

B. *The 1998 Declaration and Core Labor Rights*

It is generally accepted that the idea of “core labor rights” (CLR) originates in the consensus generated by the WTO’s *renvoi* of the issue to the ILO in the above-quoted 1996 Singapore Ministerial Declaration, as well as in the Program of Action adopted at the 1995 U.N. World Summit for Social Development in Copenhagen, which explicitly embraced what would become the four CLR.⁴⁹ Other important origins include the Organisation for Economic Co-operation and Development’s (OECD) 1996 and 2000 reports on the economic impact of labor standards, which already used the idea of “core” rights to refer to freedom of association, child labor, forced labor and non-discrimination.⁵⁰

Whatever the exact genesis, it is clear that by 1996 a strong consensus existed among various

⁴⁵ WORLD TRADE ORGANIZATION, SINGAPORE MINISTERIAL DECLARATION, (Dec. 13 1996) (WT/MIN(96)/DEC), art. 4, http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm.

⁴⁶ WORLD TRADE ORGANIZATION, DOHA MINISTERIAL DECLARATION, (Nov. 14, 2001) (WTO Doc. WT/MIN(01)/DEC/1) (“We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards. We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization.”).

⁴⁷ Mike Moore, then WTO Director-General, said the following:

I’m sure members would like me to reiterate the WTO’s commitment to the observance of internationally recognized labour standards, and of course, our belief that the ILO is the competent body to deal with these standards. As you are all aware, the WTO provides an agreed set of rules for the orderly conduct of trade between its members, allowing them to efficiently enhance and reap the gains from trade. This is, and will remain, our core business.

Mike Moore, *How Trade Liberalisation Impacts Employment: Speech to the International Labour Organization (ILO)* (Geneva, 18 March 2002), https://www.wto.org/english/news_e/spmm_e/spmm80_e.htm.

⁴⁸ See LANG, *supra* note 32, at 81.

⁴⁹ See Alston, *supra* note 10, at 465–66.

⁵⁰ See KAUFMANN, *supra* note 26, at 70. For discussion of these reports, see *infra* notes 158–68 and accompanying text.

international organizations on the definition of the “core labor standards”⁵¹ and what they should include, and that consensus fed into the trade/labor linkage polemic.⁵² Still, it took work to build sufficient internal support in the ILO in favor of prioritizing certain labor standards. It is reported that the United States ILO representatives were a primordial force in the lead-up to the adoption of the 1998 Declaration.⁵³ But influential critiques of the ILO’s standard-setting activities and their purported ineffectiveness must also have had an influence in garnering support for a “refocusing” of ILO activities through the adoption of CLR.⁵⁴

This brings us to the internal discussions around the adoption of the 1998 Declaration in the ILO’s “tripartite” International Labour Conference, a decision-making body composed of representatives of national employers, unions and governments.⁵⁵ There, ILO Director-General Michel Hansenne, the Declaration’s main proponent, had to defend the idea of making certain standards (or, rather, the “principles” they embody) universally binding regardless of ratification of the underlying conventions dealing with these standards. On this last point, the employer and government groups in the International Labour Conference were initially reluctant.⁵⁶ Hansenne also had to reassure the workers’ representatives group that prioritization of certain standards would not undermine the corpus of conventions and the ILO’s “standard-setting” activities.⁵⁷ The Declaration was then adopted in June 1998, but the choice of the four core labor rights continued to be debated way beyond that date, up to today, by both critics and defenders of the shift to CLR. The debates often relate to the choice of labor standards to prioritize, with the left valuing many labor standards and often being hostile to the idea of a narrow “core” and the right defending the selection of a few “core” rights as principled and/or economically justified.

C. *The Decent Work Agenda and the 2008 Declaration in the ILO*

In 1999, the newly appointed ILO Director-General, Juan Somavia, proposed the “Decent Work Agenda.” Introduced as encompassing the four prongs/pillars of (1) “employment [creation],” (2) “rights at work,” (3) “social dialogue” and (4) “social protection,”⁵⁸ the concept is

⁵¹ I will seldom use the expression “core labor standards,” which is more frequent than “core labor rights” but which I find does not capture the distinction many actors have tried to draw between the core *rights* and non-core *standards*.

⁵² Walker reported already in 1996 that there had emerged a consensus that discussion of labor standards globally should focus only on the four CLR. Paul Walker, *Social Clauses in International Trade: The Debate in the European Union*, 30: 4 J. WORLD TRADE 25, 36–39 (1996).

⁵³ Alston, *supra* note 10, at 466–69.

⁵⁴ Some of these critiques from ILO insiders focused on the “overproduction” of irrelevant labor standards. *E.g.*, Efrén Cordova, *Some Reflections on the Over-Production of International Labour Standards*, 14 COMP. LAB. L. 138, 139 (1993). Others advocated the selection of a “core” set of labor standards for the ILO to promote *as human rights* (ironically given his ulterior critique of the 1998 Declaration). See Philip Alston, *Post-Post-Modernism and International Labour Standards: The Quest for a New Complexity*, in INTERNATIONAL LABOUR STANDARDS AND ECONOMIC INTERDEPENDENCE 95, 102 (Werner Sengenberger & Duncan Campbell, eds., 1994). On the role of such criticism in the genesis of the 1998 Declaration, see HUGHES & HAWORTH, *supra* note 33, at 47–51.

⁵⁵ For more background on this aspect of the ILO’s structure, see GERRY RODGERS ET AL., *THE ILO AND THE QUEST FOR SOCIAL JUSTICE, 1919–2009* 15–17 (2009).

⁵⁶ Vidy Kumar, *Rethinking the Convergence of Human Rights and Labour Rights in International Law: Depoliticization and Excess*, in LAW IN TRANSITION: HUMAN RIGHTS, DEVELOPMENT AND TRANSITIONAL JUSTICE 127, 135–36 (Ruth Buchanan & Peer Zumbansen eds., 2014); see also HUGHES & HAWORTH, *supra* note 33, at 50–51.

⁵⁷ See HUGHES & HAWORTH, *supra* note 33, at 51.

⁵⁸ See ILO, *Report of the Director-General: Decent Work* (International Labour Conference, 87th Session, Geneva, June 1999), <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>.

said to have been partly motivated by a concern that “the traditional ILO approach of standard-setting was too much driven by developed world country agendas.”⁵⁹ The idea was to move away from strict standard-setting towards technical assistance in the Global South⁶⁰ and to focus on all forms of “work” rather than formal “labor” markets in order to be more relevant to Southern economies marked by labor market informality.⁶¹ But the DWA was also clearly intended to play a substantive programmatic role, that of “consolidating” existing ILO activities and remarketing them under new vocabularies and concepts.⁶² The crucial question then becomes how to frame the relationship between the Decent Work Agenda and existing labor standard conventions, as well as the 1998 Declaration. Debates on that question are what I address at length below as I track the arguments made throughout the years on the content and meaning of the Decent Work Agenda.

The last event in my period of 1994–2008 is the adoption of the ILO’s 2008 Declaration on Social Justice for a Fair Globalization (2008 Declaration). It is reported that the 2008 Declaration was put forward by Director General Somavia out of fears of a “potential negative impact of [the 2008] recession on the Decent Work initiative”.⁶³ The 2008 Declaration gave “constitutional” imprimatur to the Decent Work Agenda, up to then a mere programmatic set of slogans unilaterally adopted by the Director-General and which had not been formally adopted by the tripartite International Labour Conference, the ILO’s “parliament”. The 2008 Declaration did so by formally adopting a statement to the effect that “the commitments and efforts of Members and the Organization to implement the ILO’s constitutional mandate, including through international labour standards”, “should be based on the . . . Decent Work Agenda”.⁶⁴ The debates I analyze concern the relationship between the core labor rights and the other pillars of the Decent Work Agenda. For some, the “core” rights need to be given pre-eminence within the DWA structure, while for others the four pillars should be equally prioritized, such that, say, measures of “social protection” are no less important than the fight against forced labor. The latter position is more left-wing and the former is more right-wing, as they respectively favor a more ambitious and a more restrictive agenda for international labor standards promotion.

The period of 1994–2008 thus ended with the ILO having substantially modified its normative documents and machinery, in addition to having arguably been thrown at the center of international disputes on the regulation of work, thereby influencing a raft of other institutions and settings. Given this influence, it is important to track ILO debates on labor standards and read them together with discussions from other forum such as the WTO to assess how they have influenced our current historical and intellectual condition and how they might affect future policy discussions. I now proceed with my analysis of the three approaches and their ideological valences in the ILO and WTO debates from 1994 to 2008.

⁵⁹ HUGHES & HAWORTH, *supra* note 33, at 75.

⁶⁰ *Id.*

⁶¹ Standing, *supra* note 9, at 370.

⁶² JEAN-MICHEL SERVAIS, INTERNATIONAL LABOUR ORGANIZATION (ILO) 33 (2011); SUPRIYA ROUTH, ENHANCING CAPABILITIES THROUGH LABOUR LAW: INFORMAL WORKERS IN INDIA 120–21 (2014); HUGHES & HAWORTH, *supra* note 33, at 78–79.

⁶³ Bellace, *supra* note 15, at 22–23.

⁶⁴ ILO, *Declaration on Social Justice for a Fair Globalization*, (97th Session, Geneva, 10 June 2008) [http://www.ilo.org/global/about-the-ilo/mission-and-objectives/WCMS_099766/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/mission-and-objectives/WCMS_099766/lang-en/index.htm) [hereinafter 2008 Declaration].

II. NEOLIBERAL ARGUMENTS

This part presents the arguments relying on a neoliberal language across the three debates with which I am concerned, namely the trade/labor linkage controversy, the core labor rights (CLR) polemic pertaining to the ILO's aforementioned 1998 Declaration and exchanges on the ILO's Decent Work Agenda and the place of the core labor rights in that broader scheme. But first, it presents a definition of what I mean by neoliberalism.

A. A Definition of Neoliberalism

"Neoliberalism" is a word often used to describe a new policy approach that rose to considerable influence in the 1970s in many national governments as well as in international organizations such as the IMF, the World Bank and the OECD, among others. One important definitional point is the distinction between *neoliberalism* and classical liberalism, as it is broadly accepted that neoliberalism historically entailed *both* a revival of classical liberalism and new innovations.⁶⁵

Classical liberalism, often referred to as "classical legal thought" in the legal context,⁶⁶ is said to have been intensely preoccupied with "the distinction between public and private law," the goal being to "establish a separate, 'natural' realm of non-coercive and non-political transactions free from the dangers of state interference and redistribution."⁶⁷ An important part of the grammar of classical liberalism was the "will theory," which entailed that "the private law rules of the 'advanced' Western nation states were well understood as a set of rational derivations from the notion that government should help individuals realize their wills, restrained only as necessary to permit others to do the same."⁶⁸ It has been argued that this trait, combined with the idea of wills as "powers absolute within their spheres," fueled classical liberalism and the infamous *laissez-faire* orientation of *some* of its proponents.⁶⁹ For classical jurists, the will theory was definitional of "law" and opposed to "morality," meaning duties towards the other (and oneself) *beyond* not intruding on the other's own sphere of private will (e.g. duties to share and redistribute wealth).

I think this frame is the one that drove developments like the infamous *Lochner v. New York* case, for many a symbol of classical liberalism's *laissez-faire* version,⁷⁰ where one finds statements like that according to which workers should not benefit from legislative labor standards because they "are in no sense wards of the State" and "are . . . able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action."⁷¹ The idea is that duties of loving care toward oneself or the other, when they are not concerned with infringement on others' sphere of absolute freedom, are legally unenforceable and cannot be legislated.

⁶⁵ David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 1, 1 (2014).

⁶⁶ See generally DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* x–xi (2006).

⁶⁷ MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 11 (1992).

⁶⁸ Duncan Kennedy, *Legal Formalism*, in *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES* 8634, 8635 (2001).

⁶⁹ Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 26–28 (David Trubek & Alvaro Santos, eds., 2006).

⁷⁰ See, e.g., HORWITZ, *supra* note 67, at 29–30 (discussing *Lochner v. New York*, 198 U.S. 45 (1905)).

⁷¹ *Lochner*, 198 U.S. at 57.

By contrast, in neoliberalism, the goal of efficiency is clearly stated, and there is no discussion of duties of care towards the other being unenforceable as a matter of legal logic. Rather, the tone used by institutions like the IMF is more institutionalist, with talk of “changing the institutional framework” in order to increase “competition and price flexibility.”⁷² The famous legal implications of this economic outlook have been summed up by David Kennedy as follows: “the private law regimes necessary to support market transactions should be strengthened, while the public law regulations and bureaucratic procedures that impeded private exchange were dismantled.”⁷³ Often associated with this is the idea that labor market “regulation” creates unemployment and hurts workers by impeding growth and distorting labor markets.⁷⁴ This trope is central to neoliberalism as it is used in the debates I analyze. One of its underlying ideas is that “free market” private law is good because it prevents workers from “restricting supply” in the labor market in order to capture “rents” that decrease economic output.⁷⁵

Kerry Rittich, in her seminal mapping of the IMF and World Bank’s discourse on employment during the 1990s, proposed that there lies at the heart of neoliberal discourse an idea of “normal markets,” deviation from which is depicted as harmful, and that normality is alternatively defined as the *status quo* in (certain) developed countries, or as a model to which all states *should aspire*.⁷⁶ Additional costs imposed beyond bargains resulting from the normal free market are often modeled as leading to “deadweight loss” for society, i.e. to decreased economic activity due to higher costs than normal.⁷⁷

“Normality” is also defined as a legal regime (of employment at will and freedom of contract) that allows employers to “bid wages to whatever level enables them to get an amount of labor that can be put to profitable use.”⁷⁸ Other images used to describe this normal market include the idea that pure freedom of contract allows parties to maintain a “link between pay and performance,”⁷⁹ thereby providing incentives for superior performance. Another trope of the discourse is that free market law allows wages to reflect the productivity of workers and that wages will rise as

⁷² Kerry Rittich, *Rights, Risk and Reward: Governance Norms in the International Order and the Problem of Precarious Work*, in *PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 31, 33 (Judy Fudge & Rosemary Owens eds., 2006) (quoting INTERNATIONAL MONETARY FUND, *WORLD ECONOMIC OUTLOOK APRIL 2004: ADVANCING STRUCTURAL REFORMS* 104–05 (2004)).

⁷³ David Kennedy, *The ‘Rule of Law,’ Political Choices and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 69, at 95, 132.

⁷⁴ See, e.g., INTERNATIONAL MONETARY FUND, *WORLD ECONOMIC OUTLOOK MAY 1999: INTERNATIONAL FINANCIAL CONTAGION* 99–100 (1999); see generally JAMES ATLESON ET AL., *INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKER’S RIGHTS* 268 (2006), for a more general account of the implications of neoliberalism for labor markets.

⁷⁵ INTERNATIONAL MONETARY FUND, *WORLD ECONOMIC OUTLOOK APRIL 2003: GROWTH AND INSTITUTIONS* 144 (2003).

⁷⁶ KERRY RITTICH, *RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM* 93 (2002).

⁷⁷ See Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 *TEX. L. REV.* 1543, 1551 (2014), for further discussion.

⁷⁸ THE LABOUR LAW CASEBOOK GROUP, *LABOUR AND EMPLOYMENT LAW: CASES MATERIALS AND COMMENTARY* 24–25 (8th ed. 2011) (quoting ARMEN A. ALCHIAN & WILLIAM R. ALLEN, *UNIVERSITY ECONOMICS* 409 (3d ed. 1972)).

⁷⁹ RITTICH, *supra* note 76, at 82 (quoting WORLD BANK, *WORLD BANK DEVELOPMENT REPORT 1991: THE CHALLENGE OF DEVELOPMENT* 79 (1991)).

productivity itself rises.⁸⁰ “Flexibility” is another word often used to describe such a regime.⁸¹ Moreover, in the context of debates about trade law, it is asserted that any employment regulation that imposes costs beyond the “normal” market will lower the comparative advantage of the targeted country, thereby creating a global deadweight loss as well as a local loss of opportunities for growth and higher wages.⁸²

It is apparent that neoliberals often define the “normal” market as a regime of “absolute” property and contract rights,⁸³ notions that strongly evoke classical liberalism. Traces of this appear in the 1994–2008 labor standards debates, where some actors are unwilling to accept any labor standard promotion that goes beyond what the free market generates.⁸⁴ Yet, there is more than this to both the 1994–2008 discussions and neoliberalism more broadly.

First, neoliberalism is more often preoccupied with labor costs (and efficiency), and not with individual freedom understood as the overarching goal. Hence, many neoliberals are willing to compromise on certain labor standards, which they perceive to impose no additional costs on employers.⁸⁵ Moreover, proponents of neoliberalism are very much willing to discuss market failures, defined as “an outcome deriving from the self-interested behavior of individuals . . . in which economic efficiency does not result”⁸⁶ because of market “defects” like informational deficiencies or transaction costs. For neoliberalism the concern for market failures is often counterbalanced by fear of *government failure*, which may lead “regulation” to fail to correct market failures and even worsen the problem.⁸⁷ Nevertheless, in my own set of arguments from 1994–2008, market failures are often accepted as making *some* labor standards legitimate. In particular, prisoner’s dilemmas that create incentives that block the adoption of standards that are efficiency-enhancing in the long-term figure heavily in the arguments.⁸⁸ Thus, neoliberal modeling of “efficient” legal rules only indirectly depends on classical liberal views and does not hesitate to accept labor “regulation” and sacrifice individual freedom when it does not lead to efficiency.

I now turn to the way in which neoliberalism was used in the 1994–2008 debates. As with all three languages, an important part of my argument is that there is homology between neoliberal claims made across the three disputes. That is to say that, for instance, arguments made against trade/labor linkage are also used to limit labor standards promotion in the ILO context (by portraying non-core labor standards as efficiency-impairing or as hurting workers by reducing employment). Neoliberal discourse, however, seems somewhat politically indeterminate, less so than human rights but a lot more than social legal thought in the context of my three debates. That is to say that neoliberalism is very often right-wing, i.e. used to oppose any labor standard promotion to supplement or reverse the outcomes of the “free market,” but that it can also

⁸⁰ See *infra* notes 143–49 and accompanying text.

⁸¹ See, e.g., Richard B Freeman, *Labour Market Institutions Without Blinders: The Debate over Flexibility and Labour Market Performance*, 19 INT’L ECON. J. 129, 131–32 (2005); Guy Standing, *Globalization, Labour Flexibility and Insecurity: The Era of Market Regulation*, 3:1 EUR. J. OF INDUS. REL. 7 (1997).

⁸² See *infra* Part II.b. This sometimes leads to neoliberal claims that the resources for the “enjoyment of human rights” can be supplied most efficiently through “liberal trade promoting welfare.” See Petersmann, *supra* note 18, at 621–22.

⁸³ RITTICH, *supra* note 76, at 72.

⁸⁴ See *infra* Part II.b.

⁸⁵ See *infra* notes 184–85 and accompanying text.

⁸⁶ *Market failure*, THE PENGUIN DICTIONARY OF ECONOMICS (8th ed. 2011).

⁸⁷ See generally Anne O. Krueger, *Government Failures in Development*, 4:3 J. ECON. PERSP. 9 (1990), for the classic statement of this idea.

⁸⁸ See, e.g., *infra* notes 188–97 and accompanying text.

sometimes be moderately left-wing. Hence, we will see that the intellectual apparatus used to argue against linkage sometimes leads neoliberals to model certain labor standards as efficiency-enhancing and therefore to adopt the more left-wing position of accepting some international labor standards promotion. This analysis is the first step in my study of potential ideological convergence between neoliberalism and other discourses, including human rights.

B. *Neoliberal Arguments on Trade/Labor Linkage*

I start with neoliberal arguments on trade/labor linkage. It seems fair to say that the bulk of the arguments against linkage were articulated in the language of neoliberalism. One extremely common trope is that promoting labor standards through trade law mechanisms like sanctions will hurt targeted countries economically and make the workers concerned worse off. Robert Howse and Michael Trebilcock, in a widely-read book on international trade, put the point as follows:

Trade restrictions raise the prices of imports, thus imposing a welfare cost at home, while at the same time worsening the labor situation in the target country. Demand for labor services will fall, and plants will downsize or close. Trade sanctions are akin to a tax on employment of low-skilled workers. Using trade remedies to enforce labor standards would worsen the problems at which they are aimed (by forcing workers in targeted countries into informal or illegal activities). Unemployment will rise, and given the absence or weakness of social safety nets (unemployment insurance), can be expected to have a detrimental impact on poverty.⁸⁹

This argument is sometimes taken further and used to designate developed countries' labor standards as the problem. Indeed, for some, it is the fact that the North imposes "distortionary" labor standards to its import-competing sectors that creates the need for protectionist imposition of labor standards on the Global South, in order to "alleviat[e] the distortion caused by the industrial bloc's own labour standard[s]."⁹⁰

Another related claim of neoliberal opponents of linkage is that imposing labor standards on developing countries would rob them of their comparative trade advantage, and that "fair trade" or "social dumping"⁹¹ are intellectually incoherent bases on which to do so. Arvind Panagariya, Columbia economics professor and ex-Chief Economist at the Asian Development Bank, makes such an argument in an article in which he rejects any trade/labor linkage:

⁸⁹ MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 451 (3rd ed. 2005); see also Alan V. Deardorff & Robert M. Stern, *What You Should Know About Globalization and the World Trade Organization*, 10: 3 *REVIEW OF INTERNATIONAL ECONOMICS* 404, 416–17 (2002). On child labor, see also T.N. Srinivasan, *International Labor Standards Once Again!*, in *INTERNATIONAL LABOR STANDARDS AND GLOBAL ECONOMIC INTEGRATION: PROCEEDINGS OF A SYMPOSIUM* 34, 37 (United States Department of Labor ed., 1994) (stating that the "proscription of [child] labour, if strictly enforced without compensation, would lower family welfare of those who are already desperately poor"). The point is often made that it is because demand for low-skilled labor (the kind of labor employed in industries where labor standards are most often violated) is very price-elastic that higher labor standards directly translate into higher unemployment. See, e.g., Pietra Rivoli, *Labor Standards in the Global Economy: Issues for Investors*, 43:3 *J. OF BUS. ETHICS* 223, 230 (2003)). Others further distinguish between "industries where asset specificity is minimal and labor costs are an important component of production" and sectors who lack these characteristics, arguing that only in the former might labor standards be a serious concern. See Daniel Drezner, *Globalization and Policy Convergence*, 3:1 *INT'L STUD.* 53, 78 (2001).

⁹⁰ Murshed, S. Mansoob, *Perspectives on Two Phases of Globalisation*, in *GLOBALIZATION, MARGINALIZATION AND DEVELOPMENT* 1, 17 (2002); see also Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labour Rights*, 21 *J. INT'L ECON. L.* 43, 52 (2000) (suggesting that northern "domestic laws" relating to "labor rights" may "conflict with WTO rules" because they make it "more difficult for market penetration to take place").

⁹¹ See *infra* Part IV for an exploration of these arguments.

Virtually every textbook on international trade describes the pauper labor [“social dumping”] argument as a common fallacy. The simple point is that high wage countries are perfectly capable of competing against low wage countries due to their higher productivity. What they cannot do is to compete against the latter in goods in which they have a *comparative disadvantage* The very essence of the gains from trade is that due to differences in underlying fundamentals, countries differ in their abilities to produce different products. Developing countries have a comparative advantage in labor-intensive goods and developed countries in capital- and technology-intensive goods.⁹²

Accordingly, opponents of linkage have often argued that conceiving of trade comparative advantage as in any way conditioned by social or labor policies (and therefore as “fair” or “unfair”) is a “Pandora’s Box” that could lead any country to be considered an unfair trader.⁹³ The idea is that consideration of social policies is too “indeterminate”⁹⁴ to have any place in trade discourse. Existing social policies (or lack thereof) must be considered “part and parcel or comparative advantage.”⁹⁵ A related idea often used to oppose trade/labor linkage is that “wages reflect the supply of and demand for workers in a particular labor market, and the marginal revenue product of workers in that market,”⁹⁶ such that better working conditions in the Global South can only be achieved by “free market”-led development, leading to “higher value-added manufacturing and services, which are higher-wage industries.”⁹⁷

There is a direct link between that argument and the Kuznets curve theory, which posits that “income inequality initially worsens as per capita GNP rises, peaking at intermediate income levels and declining for industrial countries.”⁹⁸ This view that low labor standards grant labor-abundant countries a comparative advantage that helps them develop and climb along the Kuznets curve to ever-higher standards of living can be traced back to David Hume.⁹⁹ The implications drawn from

⁹² Arvind Panagariya, *Labor Standards and Trade Sanctions: Right End, Wrong Means*, in *THE IMPACT OF TRADE ON LABOR: ISSUES, PERSPECTIVES, AND EXPERIENCES FROM DEVELOPING ASIA* 141, 146–47 (Rana Hasan & Devashish Mitra eds., 2003).

⁹³ JAGDISH N. BHAGWATI, *THE WORLD TRADING SYSTEM AT RISK* 21 (1991).

⁹⁴ Michael Trebilcock, *Trade Policy and Labour Standards: Objectives, Instruments and Institutions*, in *HARD CHOICES, SOFT LAW* 170, 172 (John Kirton & Michael Trebilcock eds., 2004).

⁹⁵ Robert Howse & Michael Trebilcock, *The Fair Trade/Free Trade Debate: Trade, Labour, and the Environment*, 16 *INT’L REV. OF LAW AND ECON.* 61, 74 (1996) (asking, “[a]ssuming there is nothing wrong with another country’s environmental or labour policies[,] . . . then why should a cost advantage attributable to these divergent policies not be treated like any other cost advantage, i.e. as part and parcel or comparative advantage?”).

⁹⁶ Bhala, *supra* note 33, at 21 (citing PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 220–21 (15th ed. 1995)).

⁹⁷ Bhala, *supra* note 33, at 22.

⁹⁸ Bernhard G. Gunter & Rolph van der Hoeven, *The Social Dimension of Globalization: A Review of the Literature*, 143 *INT’L LABOUR REV.* 7, 21 (2004); *see also* Jeffrey A. Frankel, *Globalization of the Economy*, in *GOVERNANCE IN A GLOBALIZING WORLD* 45, 73 (Joseph S. Nye & John D. Donahue eds., 2000).

⁹⁹ As put by Hume:

When one nation has gotten the start of another in trade, it is very difficult for the latter to regain the ground it has lost because of the superior industry and skill of the former. . . . But these advantages are compensated in some measure, by the low price of labor in every nation which has not had an extensive commerce. . . . Manufacturers therefore gradually shift their places, leaving those countries and provinces which they have already enriched, and flying to others, whither they are allured by the cheapness of provisions and labor, till they have enriched those also, and are again banished by the same cause

DAVID HUME, *ESSAYS MORAL, POLITICAL AND LITERARY* 281 (Liberty Fund Inc. 2012); *see also* Panagariya, *supra* note 93, at 148 (“The changes in marginal benefits and costs of labor standards, for example, due to changes in income

this argument are that “tampering with free trade by imposing non-market wage rates will impede this process”¹⁰⁰ by robbing countries of the comparative advantage necessary for development.¹⁰¹ This is the background idea to the frequent claim that the level of appropriate or attainable labor standards protection depends on a country’s level of development.¹⁰²

Interestingly, ILO Director-General Michel Hansenne took up the same idea in his epochal report to the 1994 International Labour Conference (which is widely considered to have been a crucial intervention contributing to the acceptance of the idea of core labor rights in the ILO context).¹⁰³ Hansenne, exploring the question of how to “improve compliance with our basic standards by somehow changing the underlying philosophy of our supervisory system,”¹⁰⁴ rejects the idea that the ILO should “advocate either restrictions to trade or a compulsory equalization of social costs.”¹⁰⁵ Trade/labor linkage would be wrong, according to Hansenne, because “freer trade is to be sought for its potential to spur economic development, and thereby to improve the conditions of life and work and create jobs.”¹⁰⁶

Rather, according to Hansenne, the ILO must, through “cooperation rather than coercion,”¹⁰⁷ examine “whether the States concerned are taking sufficient measures to examine the possibility of ratifying ILO standards . . . to the extent their situation and means allow, and, in particular, to the extent made possible by the economic growth resulting from the relaxation or removal of trade barriers.”¹⁰⁸ “No one else, not even the Organization itself, can decide for each ILO Member” the

or productivity in ‘supplying’ labor standards, cause optimal labor standards to vary over time as well as across nations.”).

¹⁰⁰ Bhala, *supra* note 33, at 23.

¹⁰¹ *Id.* at 22. For similar arguments, see Alan O. Sykes, *International Trade and Human Rights: An Economic Perspective* 4 (University of Chicago Law Sch. John M. Olin Law & Economics Working Paper No. 188 (2nd Series), 2003), http://www.law.uchicago.edu/files/files/188.aos_.human-rights.pdf (“[R]ising real incomes and greater openness to trade tends to promote human rights”); Robert M. Stern & Katherine Terrell, *Labor Standards and the World Trade Organization* 7 & 9 (The University of Michigan, Gerald R. Ford Sch. of Public Policy, Discussion Paper No. 499, 2003, <http://fordschool.umich.edu/rsie/workingpapers/Papers476-500/r499.pdf> (since “workers may suffer negative consequences when their wages are raised above the market value of their productivity,” the only way to improve working conditions in poor countries is to “continue the many existing economic and social development efforts,” i.e. trade liberalization and conventional development policies). There is a strong analogy to claims famously made by Ernst-Ulrich Petersmann that the resources for the “enjoyment of human rights” can be supplied most efficiently through “liberal trade promoting welfare.” Petersmann, *supra* note 18, at 621–22.

¹⁰² See Drusilla K. Brown et al., *International Labor Standards and Trade: A Theoretical Analysis*, in FAIR TRADE AND HARMONIZATION 227, 230 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (“[T]he choice of labor standards may depend on a country’s stage of development and per capita income.”); BOB HEPPLER, LABOUR LAWS AND GLOBAL TRADE 66 (2005) (CLR must be interpreted “so as to take account of the level of socio-economic development in each country.”); HUGHES & HAWORTH, *supra* note 33, at 63 (“[T]he promotion and encouragements model at the heart of Hansenne’s strategic shift in ILO focus in the 1990s” [leading to the 1998 Declaration] “recognizes flexibility in the pace and scope of standard-setting, appropriate to different stages in development.”).

¹⁰³ HUGHES AND HAWORTH, *supra* note 33, at 46.

¹⁰⁴ ILO, International Labour Conference, 81st Session, at 7–24, *Defending Values, Promoting Change: Report of the Director-General* 51 (June 1994).

¹⁰⁵ *Id.* at 58.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 59–60. Hansenne reiterated that point in his 1997 report to the International Labour Conference:

Differences in conditions and levels of [labor standards] protection are linked to a certain extent to differences in levels of development. Denying developing countries the advantages (relative and transitory) which ensue from these differences would be tantamount to denying them a share in the profits of globalization and, by extension,

policies to be adopted, “subject only to two sets of minimal conditions:” respect for on the one hand freedom of association and “tripartism” and on the other hand “basic standards which, regardless of national priorities, seem inseparable from any pursuit of social progress.”¹⁰⁹ This second category of unassailable minimum standards, composed of “certain minimum provisions in the field of social security,” turns out to be mandatory only “in proportion to local costs, and to the extent that such protection can be financed out of the additional wealth generated by the growth of trade.”¹¹⁰ Having laid out a rule in favor of subordinating labor standards to growth through “free trade,” the Director-General establishes some exceptions, freedom of association and “basic social security,” only to reintroduce the sine qua non of growth through liberalization inside the exception.

The arguments explored so far all oppose the very idea of linking trade and labor standards. While the case in favor of trade/labor linkage has often been made, against the above arguments, in the languages of human rights and social legal thought, there have been counter-arguments in the language of neoliberalism, to which I now turn. The elaboration of the category of core labor rights (CLR) has been centrally important to the construction of these arguments. As I describe below, not only did ILO actors use neoliberal arguments to defend the project of CLR as an ILO legal mechanism, but scholars and institutions outside the ILO articulated neoliberal arguments to exempt the four CLR from the case against trade/labor linkage. This leads to a disaggregation of neoliberal anti-linkage arguments whereby the harmful characteristics typically attributed to all labor standards are projected only onto *non-core* labor standards. This is an instance of a move to the left, i.e. in the direction of more labor standards promotion.

The economic case in favor of CLR was to a large extent pioneered by the OECD in two studies from 1996 and 2000. These purported to show conceptually and empirically that a correlation can be established between economic performance and respect for core labor rights.¹¹¹ In fact, however, the 1996 OECD report presents a tricky argument, which deals as much with the causal link between trade and better labor standards as the reverse. It does state: “it is conceivable that the observance of core standards would strengthen the long-term economic performance of all countries.”¹¹² But the reverse is also true, according to the OECD. That is, “[t]he more successful

the possibility of subsequent social development;

ILO, International Labour Conference, 85th Session, *The Standard Setting and Globalization: Report of the Director-General* (June 1997), <http://www.ilo.org/public/english/standards/relm/ilc/ilc85/dg-rep.htm>.

¹⁰⁹ *Id.* at 60.

¹¹⁰ *Id.* at 60–61.

¹¹¹ See OECD, TRADE EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKER’S RIGHTS AND LABOUR STANDARDS (1996) [hereinafter OECD, TRADE EMPLOYMENT AND LABOUR STANDARDXS]; OECD, INTERNATIONAL TRADE AND CORE LABOUR STANDARDS (2000). For discussion, see ATLESON ET AL., *supra* note 74, at 252; KAUFMANN, *supra* note 26, at 152. Despite its influence, the OECD’s case for core labor rights is quite contested and unstable. Indeed, several analysts have criticized the evidence put forward in the 1996 and 2000 reports. See Steve Charnovitz, *Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labour Standards Debate*, 11 TEMPLE INT’L & COMP L.J. 131, (1997); Lance Compa, *Assessing Assessments: A Survey of Efforts to Measure Countries’ Compliance with Freedom of Association Standards*, 24 COM. LAB. L. & POL’Y J. 283 (2003).

¹¹² OECD, TRADE EMPLOYMENT AND LABOUR STANDARDS, *supra* note 111, at 105. It is interesting to note that this finding, in addition to being used to argue in favor of some linkage/promotion of CLR in ways I catalogue in this part, is also used to argue *against* labor standards promotion and linkage, as a refutation of “social dumping” arguments of unfair trade advantage. The argument is that if low labor standards do not raise comparative advantage, southern countries do not gain from their low labor standards and should not have a social clause imposed on them through

the trade reform in terms of the degree of trade liberalization achieved, the greater is the respect of association rights in the country.”¹¹³ There is thus a “mutually supportive relationship”¹¹⁴ between trade liberalization and core labor rights in general and collective bargaining rights in particular.

On the positive economic impact of core labor rights, the OECD argues that anti-discrimination rights “might raise economic efficiency by ensuring that the allocation of labour resources moves closer to a free market situation.”¹¹⁵ Eliminating forced labor “can also contribute to improving allocative efficiency.”¹¹⁶ Finally, “child labor exploitation” can be targeted by labor standards because it “is likely to undermine long-term economic prospects to the extent that it hampers children’s education possibilities and degrades their health and welfare.”¹¹⁷ As for freedom of association and the right to collective bargaining, their economic impact “depends on a variety of factors:”

On the one hand, these rights can help upgrade production processes, while also raising workers’ motivation and productivity. On the other hand, they can introduce a new distortion in the market if unionised workers succeed in raising their wages and working conditions above market levels. The net outcome on economic efficiency depends on the relative importance of these two effects.¹¹⁸

The OECD 1996 report established this normative unease with collective bargaining, which was to mark many subsequent economic arguments for labor standards.¹¹⁹ Nevertheless, it is often claimed that the additional empirical evidence provided by the follow-up 2000 OECD report dissipated these doubts, leading to a solidification of the economic case for all four CLR.¹²⁰

The OECD’s pioneering arguments, in addition to helping elaborate the CLR category in the first place, inspired some pro-linkage neoliberal arguments. Many of these arguments have been published after the 1998 Declaration, seemingly relying on the new consensus on the importance of promoting CLR. Rather than painting CLR as downright efficiency enhancing, these accounts often cautiously claim that *efficiency-neutrality* and mere *consistency* with trade law can be achieved. These arguments often appeal to notions of individual freedom said to drive or animate CLR. As put by Christopher McCrudden and Anne Davies:

Claims that there is a positive synergy between trade and rights are, at best, unproven. But this leaves the more modest argument that some fundamental workers’ rights *can be pursued without harming trade* There is a clear attempt [in the 1998 Declaration] to lessen the accusation of protectionism and the erosion of comparative advantage in the choice of these “core” rights [T]hese rights may be seen as rights to a process, not rights to a particular

trade sanctions; see K.D. Raju, *Social Clause in WTO and Core ILO Labour Standards: Concerns of India and Other Developing Countries*, in BEYOND THE TRANSITION PHASE OF WTO: AN INDIAN PERSPECTIVE ON EMERGING ISSUES 313, 318 (Dipankar Sengupta, Debashis Chakraborty & Pritam Banerjee eds., 2008).

¹¹³ *Id.* at 111.

¹¹⁴ *Id.* at 112.

¹¹⁵ OECD, TRADE EMPLOYMENT AND LABOUR STANDARDS, *supra* note 111, at 11.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 11–12.

¹¹⁹ See, e.g., David Charny, *Regulatory Competition and the Global Coordination of Labor Standards*, 3 J. INT’L ECON. L. 281, 290–92 (2000).

¹²⁰ KAUFMANN, *supra* note 26, at 152; HEPPLER, *supra* note 102, at 15.

outcome (however difficult that distinction is to draw in practice). They are linked, particularly, by an attempt to protect *freedom of choice*.¹²¹

Michael Trebilcock provides a strikingly similar take on the four core labor rights as “consistent” with free trade because based on “freedom of choice” and “individual well-being.”¹²² This leads in his case to a much stronger advocacy of a form of “hard” international enforcement, through the U.N. Security Council.¹²³ Both rationalizations present pro-linkage neoliberal arguments strongly rooted in classical liberal tropes of individual freedom.

Other actors purport to go beyond the ambiguous support for freedom of association displayed by the OECD by affirming its positive economic impact. According to Kimberly Ann Elliot, an academic who became in 2011 the chair of the Department of Labor’s National Advisory Committee on Labor Provisions of U.S. Free Trade, there is “relatively little controversy” over child labor, forced labor, and discrimination. In economic terms, “the real heat” comes from freedom of association and collective bargaining.¹²⁴ But, Elliot argues, freedom of association has a redeeming economic virtue, as it “can make economic reforms more acceptable and sustainable.”¹²⁵ It does so by “address[ing] concerns of the critics”¹²⁶ that “economic globalization today is unbalanced, disproportionately favoring capital over labor and other social groups.”¹²⁷ Also, collective bargaining laws “are a complement to reforms to increase labor market flexibility” because they “enable workers to negotiate to protect their own interests, without having to resort to detailed, interventionist government regulation.”¹²⁸

Hence, Elliott argues that, despite being possibly economically harmful, freedom of association and collective bargaining can enhance the legitimacy of other (neoliberal) economic reforms, thereby playing an instrumentally useful, if indirect economic role. It does so not only by making labor flexibility reforms seem more worker-friendly, but also by deflecting worker militancy from “interventionist government regulation.” Elliot also adds an argument sounding in institutionalist “rule of law” thinking by claiming that unions constitute a “cost-effective mechanism for responding to the pressures from civil society for more monitoring and verification of labor standards, particularly in developing countries where government capacity is limited.”¹²⁹ Unions can *make good governance cheaper* for developing countries.

The pattern I have uncovered so far is that neoliberal linkage arguments are generally right-wing, and occasionally moderately left-wing. I now turn to another debate, that related to the ILO 1998 Declaration’s “core labor rights,” to see whether neoliberal arguments follow the same

¹²¹ McCrudden & Davies, *supra* note 90, at 51–52 (emphasis added) (citations omitted).

¹²² Trebilcock, *supra* note 94, at 173–74.

¹²³ *Id.*

¹²⁴ Kimberly Ann Elliott, *Labor Standards and the Free Trade Area of the Americas*, (Institute for International Economics, Working Paper No. 03-7, 2003), at 3, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=444900&download=yes.

¹²⁵ *Id.*

¹²⁶ *Id.* at 4.

¹²⁷ *Id.*

¹²⁸ *Id.* at 4–5 (emphasis added) (citations omitted). To the same effect, see Duncan Campbell, *Labour Standards, Flexibility, and Economic Performance*, in *ADVANCING THEORY IN LABOUR LAW AND INDUSTRIAL RELATIONS IN A GLOBAL CONTEXT* 229, 237 (Ton Wilthagen ed., 1998); Howse & Trebilcock, *supra* note 95, at 62. Rittich argues that this is a characteristic trope of IMF/World Bank arguments on the advisability of otherwise bad-for-growth “regulation.” RITTICH, *supra* note 76, at 33.

¹²⁹ Elliott, *supra* note 124, at 5.

pattern there.

C. *Neoliberal Arguments on the 1998 Declaration and Core Labor Rights*

The legitimacy and desirability of the core labor rights contained in the 1998 Declaration has been mainly asserted from human rights and Social perspectives, with these two constantly vying for predominance, as I will outline below. Nevertheless, an important number of actors also sought to vindicate CLR on (moderately left-wing) economic, neoliberal grounds. On one level, the arguments presented are fairly concrete. Specific standards like equality rights are defended on the basis that “equal treatment and equal opportunities improve the efficient use of human resources” and “improv[e] workforce morale and motivation, leading to better labour relations with positive implications for overall productivity.”¹³⁰ Or, to take another example, it is claimed that “collective bargaining and tripartite dialogue are necessary elements for creating an environment that encourages high productivity, attracts foreign direct investments and enables the society and the economy to adjust to external factors such as financial crisis and natural disasters.”¹³¹

That being said, neoliberal arguments in favor of CLR are often made at a much higher level of generality, tapping into the “principles” that drive CLR and make them different from non-core standards. As in the case of the linkage arguments above, this is often done by assimilating CLR to neoliberal economic reforms. ILO Director-General Michel Hansenne, in a memorandum submitted to the 1996 G7 Conference on Employment, spoke of “*economic congruence*, since recognition of these fundamental rights [CLR] appears to be *based on the same principles* as those underlying the international trade system itself.”¹³² He concluded that “the prohibition of forced labour and recognition of freedom of association are the prerequisites for freedom and transparency in the labour market and may also be seen as the *natural extension of free trade in the world market*.”¹³³

Brian Langille has proposed a similar rationalization of the distinctiveness of core labor rights as based on “a ‘market friendly’ approach” which “liberates the discussion from familiar controversies couched in terms of economic efficiency,” because CLR are based on the “non-instrumental values” of “free, informed and uncoerced choice” which are “foundational to market theory.”¹³⁴ Christine Kaufmann provides a complementary rationale, taking up a distinction that will also be very important for human rights arguments, that between procedure and substance. Hence, the four CLR are “procedural labour rights” (as opposed to “substantive labour law”) which “aim to foster self-determination by essentially granting freedom of contract and thus freedom of choice,” with no need for “new regulations” to implement the rights.¹³⁵

¹³⁰ ILO, 91st session, *Time for Equality at Work: Report of the Director-General, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, at ix–x (2003), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_publ_9221128717_en.pdf.

¹³¹ ILO, 276th session, *Country Studies on the Social Impact of Globalization: Final Report*, ¶ 94, GB.276/WP/SDL/1, (Nov. 1999), <http://ilo.org/public/english/standards/relm/gb/docs/gb276/sdl-1.htm>.

¹³² ILO, *supra* note 18.

¹³³ *Id.* (emphasis added).

¹³⁴ Langille, *supra* note 18, at 242.

¹³⁵ KAUFMANN, *supra* note 26, at 70–71 (citations omitted). Kimberly Ann Elliott also praises the economic virtues of the procedural nature of freedom of association, which amounts to “principles that are universally applicable but that leave broad scope for national diversity in implementation” and “do not prescribe any particular set of industrial relations institutions.” Elliott, *supra* note 124, at 7; *see also* DAVID CHIN, A SOCIAL CLAUSE FOR LABOUR’S CAUSE:

Foregoing talk of “congruence” and “friendliness” does not express clearly the relationship between neoliberal reforms and CLR, however. It is probably safe to assume that Hansenne and Langille refer to the kind of “efficiency neutrality” McCrudden and Davies mentioned in the above-quoted excerpt.¹³⁶ Under this view, provided that core labor rights are grounded in the right individualist overarching concepts, their economic impact can be assumed to be at the very least neutral. And here, Kaufmann’s addition of the process/substance distinction may be seen to resonate with the idea that labor standards shouldn’t impose costs on employers (substance being equated with costs). The idea of cost-neutrality is an important part of the defense of CLR,¹³⁷ and it leads to the puzzling designation in certain circles of the non-core standards as “cash standards,” i.e. standards that cost something.¹³⁸ Nevertheless, as I will argue in the human rights part, the process/substance distinction is not always discussed in terms of its economic impact; sometimes, it is related to the question of the correct and principled interpretation of a human rights corpus based on things like human dignity and capabilities.

While there does seem to be a crystallized left-wing neoliberal discourse in favor of some promotion of the core labor rights, the neoliberal case sometimes collapses for some CLR, which are then marked as less legitimate than the others. This instability is incorporated in the very text of the ILO’s 1998 Declaration, article 5 of which

Stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up.¹³⁹

This is in effect an internal constraint on what concrete outcomes can be advocated for on the basis of the Declaration, any abstract statement of “congruence” between efficiency and CLR notwithstanding. And when it turns out that a given standard is judged economically harmful, the ILO’s promotional work of CLR might be “open to accusations that ‘rent-seeking’ minorities are seeking to enact international labour regulation in their favour”.¹⁴⁰

Alan Hyde provides a model for the kind of (right-wing) reasoning against certain CLR that might lead to such a conclusion, in a contribution to an important special issue of *Law and Ethics of Human Rights* devoted to labor standards and CLR. Hyde explicitly differentiates two groups of CLR based on their economic impact. Child labor is explained to be bad for comparative advantage because it “leads to low-productivity and poorly-compensated workers.”¹⁴¹ Instead,

GLOBAL TRADE AND LABOUR STANDARDS—A CHALLENGE FOR THE NEW MILLENNIUM 36–37 (1998).

¹³⁶ *Supra*, note 167.

¹³⁷ For example, the ILO’s principled stance against linkage was based on the idea it “should not advocate either restrictions on trade or a compulsory equalization of social costs.” ILO, *Defending Values, Promoting Change*, *supra* note 150; see also HEPPLER, *supra* note 102, at 59 (arguing that the 1998 Declaration “marks a significant shift from the priority given in earlier ILO conventions to matters which were believed to have a direct effect on economic competitiveness, such as hours of work, night work, unemployment and minimum age”).

¹³⁸ See KIMBERLEY ANN ELLIOTT & RICHARD FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 28–45 (2003); THOMAS OATLEY, INTERNATIONAL POLITICAL ECONOMY 355 (5th ed. 2012).

¹³⁹ 1998 Declaration, *supra* note 3, art. 5.

¹⁴⁰ Sean Cooney, *Testing Times for the ILO: Institutional Reform for the New International Political Economy*, 20 COMP. LAB. L. & POL’Y J. 365, 371 (1999).

¹⁴¹ Alan Hyde, *The International Labor Organization in the Stag Hunt for Global Labor Rights*, 3:2 L. & ETHICS OF HUM. RTS. 154, 163 (2009) [hereinafter Hyde, *Stag Hunt*]; see also Alan Hyde, *A Game Theory Account and Defense of Transnational Labour Standards—A Preliminary Look at the Problem*, in GLOBALIZATION AND THE FUTURE OF

[c]hildren should be in school, acquiring human capital that can be a part of better development strategies.”¹⁴² Hyde also states that “[d]iscrimination against women is not a source of comparative advantage” and that [e]conomies grow when women participate in the labor force”.¹⁴³ “However,” Hyde asserts, “it is a tougher problem to tackle than forced or child labor,” because discrimination “figure[s] deeply in some cultures’ value systems,” and “[i]t accomplishes nothing to assure a country that its trading rivals have greater rates of women’s labor force participation if the recipient of this assurance is motivated by its moral code, not economic rationality.”¹⁴⁴

On freedom of association, Hyde states that “a country or region may indeed realize comparative advantage by repressing unions and collective bargaining”.¹⁴⁵ It “may well figure in its pitches to foreign investors and may redirect gains from trade into investment, or rich people’s consumption, and away from working people.”¹⁴⁶ As a consequence, “it is simply pious to assert that enforcing this labor standard will not interfere with comparative advantage. It will, and the developing countries know it.”¹⁴⁷ On the basis of these analyses, Hyde applies to child labor the game theoretic approach of the “stag hunt” or “assurance game,” which indicates that a Pareto-efficient outcome can be achieved if countries cooperate to collectively eliminate child labor, but that inefficient “Nash equilibria” are reached because of the incentives to defect from cooperation by maintaining child labor, which gives defecting countries a short-term comparative advantage.¹⁴⁸ For those few standards that raise *long-term* comparative advantage (those against child labor and forced labor, it turns out, as well as occupational health and safety¹⁴⁹), Hyde proposes non-binding promotional work by the ILO to make countries realize where their “true” long-term comparative advantage lies.¹⁵⁰ Yet, the other two core labor rights, equality and freedom of association, are left severely criticized and delegitimized in this center-right take.

D. *Neoliberal Arguments on the Decent Work Agenda*

I have not found many neoliberal takes on the Decent Work Agenda. This may be evidence of a stronger consensus in favor of the DWA’s promotional strategy. It may also be evidence of the lesser notoriety of the DWA than of the 1998 Declaration. Nevertheless, I have two neoliberal critiques of the DWA to offer, as examples of how the neoliberal repertoire stays with us in more recent discussions. The first is significantly right-wing, in that it opposes any labor standard promotion. The second is a little more left-wing, though still very close to the center. These two arguments confirm that neoliberal arguments are generally tilted to the right but can occasionally be used for moderately left-wing purposes.

LABOUR LAW 143 (John D.R. Craig & S. Michael Lynk eds., 2006).

¹⁴² Hyde, *Stag Hunt*, *supra* note 141.

¹⁴³ *Id.* at 170.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* This approach seems open to a wealth of critiques, not least the one according to which it obscures the intra-state distributive impact of labor standards and spuriously assumes that “comparative advantage” unambiguously designates the best course to pursue for a polity, as argued by Guy Davidov in his response to Hyde. Guy Davidov, *Comment on Alan Hyde : The Perils of Economic Justifications for International Labor Standards*, 3:2 L. & ETHICS OF HUM. RTS. 180, 182 (2009).

¹⁴⁷ Hyde, *Stag Hunt*, *supra* note 141, at 170.

¹⁴⁸ *Id.* at 164–65.

¹⁴⁹ *Id.* at 175.

¹⁵⁰ *Id.* at 176–79.

The first set of arguments is from an editorial by Financial Times columnist Martin Wolf criticizing the ILO-commissioned World Commission on the Social Dimension of Globalization's final 2004 report.¹⁵¹ The report, which is articulated inter alia around "making decent work a global goal,"¹⁵² is attacked by Wolf for enunciating "platitudes" rather than confronting the "painful choices" required for "growth."¹⁵³ Wolf criticizes the report for advocating labor standards at all, because in developing economies "the formal sector's growth is stunted by regulation, generating a larger surplus of workers for an undercapitalised informal economy."¹⁵⁴ The "painful choice" that is required in these contexts is to "tolerate the operation of market forces, in rich and poor countries, uncomfortable though they may be."¹⁵⁵ The implication clearly is that no labor standard (or DWA-style social policy) is legitimate given the imperative of stimulating "growth." Notice the similarity with the neoliberal arguments against trade/labor linkage described above.

Brian Langille provides my second example of neoliberal takes on the DWA in a provocative recent article analogizing prevailing attitudes in the ILO to the Washington Consensus (the "Geneva Consensus")¹⁵⁶ and calling for a new approach to international labor law (a "Post Geneva Consensus"). The prevailing approach, in his view, is wrong because it assumes that there is a "big trade-off" between . . . fairness and decency (Geneva) and economic efficiency (Washington)," and according to Langille "[t]here is no trade-off."¹⁵⁷ Quoting Amartya Sen's *Development as Freedom* at length, Langille then explains why labor/employment law is harmonious with "economic growth," given that the ultimate end of both is "human freedom," which is itself furthered by growth.¹⁵⁸ Therefore, "[l]abor law is at its root no longer best conceived as law aimed at protecting employees against superior employer bargaining power in the negotiation of contracts of employment."¹⁵⁹ Rather, for Langille, labor law's *raison d'être* is the "regulation of human capital deployment" and the "instrumental and intermediate" goal of "productivity" as well as the "intrinsic and ultimate" goal of "maximizing human freedom."¹⁶⁰ This is already quite different from Langille's earlier invocation of Sen to defend the 1998 Declaration against its left-wing critics, which I analyze in the human rights part below, in that "productivity" is a goal here, however "intermediate."¹⁶¹

Expressing approbation for the 1998 Declaration, Langille states that the document "is best understood not simply in instrumental terms (including women doubles the size of the workforce), but intrinsically as securing the freedom to participate itself (not to be excluded by discrimination, included by force or as a child, and to participate meaningfully via collective voice)."¹⁶² So far so center-left. Langille then unexpectedly turns to "employment," a reference to the first prong of the

¹⁵¹ WORLD COMMISSION ON THE SOCIAL DIMENSION OF GLOBALIZATION, A FAIR GLOBALIZATION: CREATING OPPORTUNITY FOR ALL (2004).

¹⁵² *Id.* at 110.

¹⁵³ Martin Wolf, *Growth Requires Painful Choices, Not Platitudes*, FINANCIAL TIMES, Mar. 3, 2004, at 19.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Brian Langille, *Imagining Post Geneva Consensus Labour Law for Post Washington Consensus Development*, 31 COMP. LAB. L. & POL'Y J. 523, 532 (2010).

¹⁵⁷ *Id.* at 531 n.28.

¹⁵⁸ *Id.* at 549.

¹⁵⁹ *Id.* at 547.

¹⁶⁰ *Id.* at 549.

¹⁶¹ In contrast, see *infra* Part IV.b.3.

¹⁶² Langille, *supra* note 156, at 549.

Decent Work Agenda (“creating jobs”),¹⁶³ and expresses reservations as to the very idea of promoting it. The result is a discussion that seems very much indebted to neoliberalism:

Employment per se, on the other hand and on the view sketched here, is more problematic. Employment is not the natural category it once was. There are many ways in which productive activity can be carried on. We can address “disguised employment.” But *it seems unlikely that labor law can or should act as a barrier to new forms of production.* What it can do is be intelligent about how it deals with them primarily by considering whether tying aspects of social security—pensions for example, as well as other labor rights and standards—to individual employers makes sense in a world in which that might act as a significant barrier to the deployment of human capital with real intrinsic and instrumental costs. And at the same time we can remove the *perverse incentives* that are structured from insisting that we *tie benefits and rights to employment* thus encouraging its avoidance through disguised employment and other techniques.¹⁶⁴

The allusion to “disguised employment” is strange, because the paper up to then doesn’t mention the concept. This refers to situations where an employee is not treated as such, but rather as for instance an “independent contractor,” in order for the employer to avoid the legal obligations imposed by labor/employment law. Use of disguised employment is seen as a dangerous and illegal employer tactic in both domestic labor/employment law¹⁶⁵ and international labor law.¹⁶⁶ The suggestion that this is a “new form of production” which should not be barred by the imposition of labor standards is in line with the right-wing rationales discussed above. It is also exemplary of how neoliberal tropes articulated in previous debates might feed into discussions of the Decent Work Agenda.

I now want to comment briefly on how this relates to Langille’s quoting of Amartya Sen, whose “capabilities approach” I associate with the human rights paradigm, as I will explain below. Here Langille introduces the concepts of economic productivity and growth, thereby situating himself on neoliberal terrain, making his comment on disguised employment seem coherent with the language adopted. But, as I will illustrate below,¹⁶⁷ many others (including Langille elsewhere) have written about Amartya Sen’s capabilities approach from a pure human rights perspective, asking what labor standards are animated by the logic of human dignity and capabilities (or, as Langille himself puts it elsewhere, of the “equal right to concern for [individuals’] well-being and respect for their ability and need to exercise personal autonomy in leading fully-developed lives.”¹⁶⁸) As will be evident from my analysis in part IV, the human rights language and Sen’s conceptual apparatus do not logically entail any of the foregoing talk of productivity and growth, or for that matter classical liberal notions of individual freedom.

As a broader conclusion to this part, I will reiterate that the malleability of neoliberal discourse in my three polemics seems relatively high, though by no means absolute. So, market failures and

¹⁶³ See ILO, *supra* note, 58.

¹⁶⁴ *Id.* at 549–50 (emphasis added).

¹⁶⁵ See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 185 (2014); Judy Fudge, Eric Tucker & Leah Vosko, *Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada*, 10:2 CANADIAN LAB. AND EMP. L.J. 193 (2003). For the classic treatment of this problem by a labor lawyer, see Otto Kahn-Freund, *Servants and Independent Contractors*, 14 MOD. L. REV. 504 (1951).

¹⁶⁶ SERVAIS, *supra* note 62, at 232, para. 721.

¹⁶⁷ See *infra* Part IV.b.3.

¹⁶⁸ Langille, *supra* note 18, at 253.

prisoner's dilemmas impeding the adoption of long-term efficient standards can sometimes countervail the static equilibrium model portraying any labor standard as sub-optimal because it imposes costs beyond what "the market" dictates. This vocabulary can lead some actors to support some labor standards, though it seldom seems to lead to more than support for a few select "core" labor standards. We see that neoliberalism, while generally tilted to the right, can also be moderately left-wing. The idea of human rights converging with it to the right seems much less plausible. But to fully assess the potential for convergence, we need to analyze human rights approaches to labor law and add their ideological malleability to the picture.

III. HUMAN RIGHTS ARGUMENTS

In this part I present the human rights-based arguments made in favor of and against labor standards promotion across the series of debates I have been tracking: discussions of trade/labor linkage, the 1998 ILO Declaration on core labor rights (CLR) and the overall ILO legal corpus in light of the Decent Work Agenda.

My analysis in this part reveals considerable plasticity in what can be argued for with the human rights language. That is to say that human rights are more malleable than neoliberalism and are used to support any position from the far-right to the far-left of the spectrum. Anything seems possible, as human rights contain the idea of the irreducibly local nature of labor standards, such that no labor standard can ever be made binding without state consent (see below the arguments on trade/labor linkage), as well as maximalist claims on the indivisibility of all labor standards as equally binding human rights. Between these two extremes, concepts like human dignity, freedom-as-capabilities and procedural fairness allow for much fine-graining of which labor standards should be binding because they represent universal human rights. This extreme malleability refutes the idea that human rights converge or are complicit with neoliberalism, which is mostly right-wing and occasionally left-wing. Given these ideological differences, convergence seems as likely as divergence. Before delving into my analysis, I start with a definition of what I mean by human rights.

A. *A Definition of Human Rights*

I use the terms "human rights" to designate a language which emerged sometime in the 1970's and can be sharply distinguished from neoliberalism, classical liberalism and social legal thought. One important part of the discourse is the notion of protection of marginalized identities from injury. According to Duncan Kennedy, that is the core idea of the contemporary human rights language, where anti-discrimination rights are grammatically central to the repertoire (along with related commitments like the fight against genocide and apartheid).¹⁶⁹ It seems plausible that this trope was built by different constituencies imitating each other in the move to conceptualizing justice as preventing injuries to marginalized identities, as in Janet Halley's account of U.S. reconfiguration of feminist and gay advocacy along the lines of the claims developed by racial constituencies.¹⁷⁰ It may also be possible to understand the importance of anti-totalitarianism and

¹⁶⁹ Kennedy, *supra* note 69, at 65. For a broader critical account of the importance of injury and identity in contemporary American political discourse, see generally WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* (1995).

¹⁷⁰ See Janet Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW* 115, 115 (David Kairys ed., 1998). Duncan Kennedy has suggested that the business community has itself "imitated" identity rights by depicting supposedly inadequate patent and trademark laws in the Global South as legislative discrimination against *inventors* and businesses. Kennedy, *supra* note 69, at 67.

the figure of the political *dissident*, the documented 1970's focus of human rights activists,¹⁷¹ as an idea infused by the imagery of state discrimination and injury to a minority identity.

In addition, for Samuel Moyn, at least in context of the late 1970's historical breakthrough of human rights, their "moral" and anti-political character was a predominant feature of the discourse.¹⁷² But Moyn also points to another characteristic of the human rights language: "the image of another, better world of dignity and respect".¹⁷³ The importance of "human dignity" to the contemporary language of human rights is hard to understate, though it obviously has existed in many different forms.¹⁷⁴ It is central for many actors, including the famous international lawyer Antonio Cassese, who suggested that the "new doctrine of human rights" which in the period of 1974 to 1990 superseded previous understandings of rights¹⁷⁵ was based on "respect for human dignity".¹⁷⁶ While human dignity, as illustrated at length below often intervenes in labor standards debates through the incorporation of international human rights discourse, recent scholarly proposals seek to embed a normative theory of human dignity directly in domestic labor/employment law, without the mediating vehicle of international human rights.¹⁷⁷

One final concept is the "capabilities approach" pioneered by Amartya Sen¹⁷⁸ and Martha Nussbaum,¹⁷⁹ which incorporates notions like classical freedom and autonomy as well as social concerns for more substantive equality of opportunities and human/social welfare. The reason I associate this with human rights is that proponents of the capabilities approach often make the concept of human dignity central to their theories, as I will illustrate below.

Participants to my 1994–2008 debates draw on all parts of the human rights vocabulary, in what often seems like a disorderly set of concepts that can be used for multiple contradictory purposes. On the 1998 core labor rights polemic in particular, I found three distinct axes of conflict on which participants use the above-mentioned tropes to do battle: universal vs. local, technical vs. general and process vs. substance-based labor standards. That is, it is uncontested for some participants that the human rights language requires the application of these three dichotomies in order to determine which labor standards should be promoted and in what way (e.g. you might argue that only "universal," non-"technical" and "process"-based labor standards should be prioritized in the ILO as core labor rights). In exchanges over which labor standards fit in which

¹⁷¹ See SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 170 (2010).

¹⁷² *Id.* For critical takes on this historical thesis and an overview of some debates it sparked in the field of human rights history, see contributions to *HUMAN RIGHTS: MORAL OR POLITICAL?* (Adam Etinson ed., forthcoming in 2015, Oxford University Press); Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 *HARV. L. REV.* 2043 (2013).

¹⁷³ *Id.* at 4.

¹⁷⁴ For a history of human dignity tracing it back to what I would call Catholic (center-right) social legal thought in the 1930s, see Samuel Moyn, *The Secret History of Constitutional Dignity*, 17 *YALE HUM. RTS. AND DEV. L.J.* 39 (2014).

¹⁷⁵ ANTONIO CASSESE, *INTERNATIONAL LAW* 380 (2d ed. 2005).

¹⁷⁶ *Id.* at 397. An important contribution to the establishment of human dignity in international legal thought was Oscar Schachter, *Human Dignity as a Normative Concept*, 77 *AM. J. INT'L L.* 77, 848–54 (1983). For further legal historical research on human dignity, see contributions to *UNDERSTANDING HUMAN DIGNITY* (Christopher McCrudden ed., 2014); see also ERIN DALY, *DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON* (2012); Oliver Sensen, *Human Dignity in Historical Perspective: The Contemporary and Traditional Paradigms*, 10 *EUR. J. OF POL. THEORY* 71 (2006).

¹⁷⁷ Samuel Bagenstos, *Employment Law and Social Equality*, 112 *MICH. L. REV.* 225 (2013); Rogers, *supra* note 77.

¹⁷⁸ AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

¹⁷⁹ MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000).

category, participants use the concepts of dignity, capabilities, universality, etc. to justify their advocacy of a policy proposal involving a given set of labor standards (and not others).

The human rights repertoire also harbors specific legal arguments on how universally binding certain norms may be (either because they are *jus cogens*, customary international law or general principles applying to all U.N. Members) or, to the contrary, how non-binding the norms may be in the absence of state consent. This has repercussions both for the trade/labor linkage and the ILO debates.

Before I start my analysis of the uses of human rights in debates on international labor standards, I want to stress that human rights are categorically different from neoliberal reasoning. That is not to say that the two paradigms do not sometimes get combined, and I will mention when that happens. But when someone does make a combined argument, say, that “core labor standards, . . . when applied, simultaneously meet the requirements of the market and of human rights and dignity,”¹⁸⁰ we can analytically separate the two arguments because one does not entail the other. On a different but related point, we should definitionally exclude classical liberalism (based on absolute freedom of contract and property rights) from the human rights language. Whatever classical liberalism’s relationship to neoliberalism, an argument based on pure individual freedom as a power absolute within its sphere which cannot be displaced by legal enforcement of moral duties is not consonant with the newer vocabulary of dignity, injury, identity, capabilities, etc. I now turn to my analysis of the way in which human rights were used in the 1994–2008 labor standards debates.

B. *Human Rights Arguments on Trade/Labor Linkage*

Here I discuss the human rights-based arguments in favor of and against trade/labor linkage. Actors making these arguments tend to be very preoccupied with asserting (or denying) the very legal bindingness of labor standards, no doubt in order to counter (or preserve) the influential neoliberal arguments against linkage analyzed above. As a result, the ideological struggle opposes those who favor linkage (the left) and those who oppose it (the right). There is less discussion of the substantive characteristics of labor standards that might make linkage desirable and how these characteristics apply to different categories of standards. As we will see, the human rights takes on the ILO 1998 Declaration explored below are, for their part, overwhelmingly preoccupied with comparing and selecting specific standards for promotion.

The human rights case for linkage often starts with a claim to positive legal necessity: “Human rights law requires adjusting international law and international organisations so that they protect human rights more effectively.”¹⁸¹ It might be a claim that the WTO should be forced to obey the UN Charter, paragraph 1(3) of which binds states to “promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all”.¹⁸² Or it might be that states themselves have a legal obligation to “promote and protect” (and hence presumably to incorporate) human rights in their negotiation of trade treaties.¹⁸³ Adelle Blackett, a famous international labor law scholar, writes that “although *lex specialis* rules might be invoked as challenges to the applicability of other bodies

¹⁸⁰ HUGHES & HAWORTH, *supra* note 33, at 48.

¹⁸¹ Ernst-Ulrich Petersmann, *Human Rights, Cosmopolitan Democracy and the Law of the World Trade Organisation*, in FOUNDATIONS AND PERSPECTIVES OF INTERNATIONAL TRADE LAW 79, 81 (Ian Fletcher et al. eds., 2001).

¹⁸² See Williams, *supra* note 32, at 149–50.

¹⁸³ High Commissioner for Human Rights, *Globalization and its impact on the full enjoyment of Human Rights. Report of the High Commissioner for Human Rights*, para. 9 and 10, U.N. Doc. E/CN.4/2002/54 (Jan. 15, 2002).

of law to trade law, the argument is weakened to the extent that trade law is itself increasingly difficult to circumscribe.”¹⁸⁴ She then goes on to quote Article 31(3)(c) of the 1969 *Vienna Convention on the Law of Treaties*¹⁸⁵ for the proposition that, for the purposes of interpretation, “any relevant rules of international law applicable in the relations between the parties’ must be considered.”¹⁸⁶ For Blackett, this includes both customary international law¹⁸⁷ and treaty obligations, placing ILO conventions squarely within the ambit of the WTO.

Others are even less attached to state consent and anchor the legal obligation to respect labor standards in the “general principles of law recognized by civilized nations,” which represent consensus inasmuch as they reflect the internal laws of many/most states.¹⁸⁸ There is also the idea that some labor standards represent *jus cogens*, which according to Blackett includes several core labor rights such as the prohibition of forced labor,¹⁸⁹ as well as occupational health and safety as part of the overarching *right to life* (Blackett here makes an argument I will turn to below in the context of the 1998 ILO Declaration, according to which non-core, “technical” standards are required by more universal and non-technical fundamental rights).¹⁹⁰ In this repertoire, not only

¹⁸⁴ Adelle Blackett, *Mapping the Equilibrium Line: Fundamental Principles and Rights at Work and the Interpretive Universe of the World Trade Organization*, 65 SASK. L. REV. 369, 376 (2002).

¹⁸⁵ Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980). Article 31, “General rule of interpretation,” reads as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

Id.

¹⁸⁶ *Id.* at 377.

¹⁸⁷ For arguments to the effect that CLR represent customary international law, see Virginia A. Leary, *The Paradox of Workers’ Rights as Human Rights*, in HUM. RTS., LAB. RTS. AND INT’L TRADE 22, 38 (Lance A. Compa & Stephen F. Diamond eds., 1996); Madeleine Bullard, *Child Labour Prohibitions are Universal, Binding, and Obligatory Law: The Evolving State of Customary International Law Concerning the Unempowered Child Labourer*, 24 HOU. J. OF INT’L L. 124 (2001); Leslie Deak, *Customary International Labour Laws and Their Application in Hungary, Poland, and the Czech Republic*, 2 TULSA J. COMP. AND INT’L L. 1 (1994); Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of Slavery and the Slave Trade Under International Customary Law*, 39 VA. J. INT’L L. 303 (1999).

¹⁸⁸ Philip Alston, *Labor Rights Provisions in U.S. Trade Law*, in HUM. RTS., LAB. RTS. AND INT’L TRADE, *supra* note 187, at 71, 79 (making this argument with respect to U.S. unilateral trade/labor linkage); *see also* Eddy Lee, *Globalization and Labour Standards: A Review of Issues*, 136: 2 INT’L LAB. REV. 173, 184 (1997) (“Membership of the ILO is near universal and membership of the ILO implies acceptance of the principles enshrined in the Constitution such as the freedom of association, the right to collective bargaining, and the rejection of the inhumane treatment of labour.”).

¹⁸⁹ Blackett, *supra* note 184, at 380. On child labor as *jus cogens*, see Janelle M. Diller & David A. Levy, Note, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT’L L. 663, 664 (1997).

¹⁹⁰ *Id.* at 386. *See infra* Part IV.b.1.

do economic objections tend to be excluded, but there is also an arsenal of claims that sovereignty cannot justify labor standards violations.¹⁹¹ As I will outline below, the repertoire otherwise provides arguments that sovereignty does retain normative force and can protect some behavior from scrutiny under human rights norms. But it also, ~~and that is what I want to briefly explore now,~~ creates a need for a delineation of the specific labor standards that can be rendered so unequivocally legally binding (and be linked to trade law).

Any determination of which labor standards are fit for linkage must disclose a set of selection criteria. These often revolve around the idea that one should distinguish “those labor standards that everyone would consider to be universal rights from other labor standards that will depend on given national circumstances.”¹⁹² Howse and Trebilcock, who were also prominent articulators of the neoliberal opposition to linkage, thus argued that “the most obvious and compelling normative basis for insisting on compliance with minimum standards” (note that only the minimum must be linked) lies in a “deontological conception of human freedom of equality.”¹⁹³ Other proposals for linkage, of which Dani Rodrik’s is exemplary, assert the “requirement that economic activities be based on processes that are generally viewed as fair and legitimate”.¹⁹⁴ For Rodrik, “discussion surrounding the ‘new’ issues in trade policy,” including “labour standards,” “can be cast in this light of procedural fairness.”¹⁹⁵ Other accounts relate a certain set of labor standards to the normative objective of “promot[ing] the spread of democracy”.¹⁹⁶ More concretely, according to one important proponent, only freedom of association and forced labor should be linked to trade, because other rights are not “basic human rights” and are not part of the “lowest common denominator”; rather, they are “technical labor standards” about which there is “less international agreement.”¹⁹⁷

Of course, state sovereignty is also an important principle of international law, no less of international human rights law. So, one can find (right-wing) arguments to the effect that ILO conventions are both too numerous and too detailed to evidence consensus in favor of universally binding labor standards, because states only ratify the details of these conventions in a context

¹⁹¹ Holly Cullen, *The Limits of International Trade Mechanisms in Enforcing Human Rights: The Case of Child Labour*, 7 INT’L J. OF CHILDREN’S RTS. 1, 21 (1999) (citing Dominic McGoldrick, *The Principle of Non-Intervention: Human Rights*, in THE UNITED NATIONS AND PRINCIPLES OF INTERNATIONAL LAW: ESSAYS IN MEMORY OF MICHAEL AKEHURST 85, 107 (Colin Warbrick & Vaughan Lowe eds., 1994)).

¹⁹² Robert Stem, *Labor Standards and Trade*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW; ESSAYS IN HONOR OF JOHN H. JACKSON 425, 426 (John Howard et al. eds., 2000).

¹⁹³ Howse & Trebilcock, *supra* note 95, at 65; *see also* Lee, *supra* note 188, at 196 (“[E]ven if the evidence on the link between labour standards and competitiveness is disputed there still remains the very strong moral case in favour of observing the core standards which are basic human rights.”); Frank J. Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle*, 25 BROOKLYN J. OF INT’L L. 51, 71 (1999).

¹⁹⁴ DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 11 (1997).

¹⁹⁵ *Id.* at 5.

¹⁹⁶ Marisa Anne Pagnattaro, *The ‘Helping Hand’ in Trade Agreements: An Analysis of and Proposal for Labor Provisions in U.S. Free Trade Agreements*, 16 FLA. J. OF INT’L L. 845, 847 (2004).

¹⁹⁷ Leary, *supra* note 187, at 38.

where their non-enforceable character is clear.¹⁹⁸ Arvind Panagariya, in an article quoted above,¹⁹⁹ voiced an argument against the idea that CLR represent general principles of international law susceptible to enforcement through trade sanctions (and that argument would probably hold against the 1998 ILO Declaration's making CLR binding by virtue of mere country membership).²⁰⁰ This is less an argument to scale down the number and detail of linkable labor standards than to deny the very possibility of universally binding standards. The claim is that CLR can have many different legal implications and interpretations. Therefore, "[t]here are perhaps shared values but precisely how these values are to be translated into action is quite contentious."²⁰¹ Moreover, the fact that for instance the United States has ratified only one of the CLR conventions "should alert the reader to the falsehood of any claims that there is general agreement among nations on a set of core labor standards."²⁰² As is evident, the foregoing arguments bleed into those related to the selection of a set of "core labor rights" from the broad corpus of ILO conventions, which led to the adoption of the 1998 Declaration. I turn to these arguments in the next part. Before I do, I note that the human rights arguments on linkage are evenly distributed across the ideological spectrum, such that they are as likely to be left-wing as they are to be right-wing.

C. *Human Rights Arguments on the 1998 Declaration and Core Labor Rights*

When one looks at the human rights rationalizations (and critiques) of the distinction between CLR and non-core labor standards, one finds, rather than an integrated position in favor of CLR, a hodgepodge of radically distinct arguments. I thus present not two coherent human rights-based positions in favor of and against the CLR paradigm but three axes of debate on which the human rights language provides tools to argue on the legitimacy of giving priority to a restricted set of standards. The three axes are (1) universal vs. local, (2) technical vs. general and (3) process vs. substance. Here the opposing camps are those who defend the appropriateness of the 1998 Declaration's four CLR (the right) and those who contest it and argue for a more expansive "core" (the left). The human rights case against any CLR promotion by the ILO, if it exists at all (this would be a third camp still further to the right), would probably be based on the human rights arguments and neoliberal against any linkage presented above. Like in the case of linkage, human rights arguments on the ILO 1998 Declaration are evenly distributed between the left and the right, along all three axes just mentioned.

1. The Universal vs. Local Axis

On the universal vs. local axis, proponents label CLR as universal and other standards as local. For example, Bob Hepple, the famous British labor lawyer, proposed such an analytic to

¹⁹⁸ Andrew T. Guzman, *The Design of International Agreements*, 16:4 EUR. J. OF INT'L L. 579, 608–09 (2005); see also MAUPAIN, *supra* note 18, at 137 ("Looking at the question from an ILO perspective, it might seem an obvious step to simply use international labour conventions as the benchmark of 'normality'. This would be a mistake. Indeed, these instruments are designed to define what is *desirable*. Their content was determined in light of the fact that they cannot be made mandatory.").

¹⁹⁹ *Supra* note 93..

²⁰⁰ See *supra* text accompanying note 5.

²⁰¹ Panagariya, *supra* note 93, at 143.

²⁰² *Id.*; see also Jagdish Bhagwati, *Policy Perspectives and Future Directions: A View from Academia*, in INTERNATIONAL LABOR STANDARDS AND GLOBAL ECONOMIC INTEGRATION: PROCEEDINGS OF A SYMPOSIUM, *supra* note 89, at 57, 59 ("The notion that labour standards can be universalized, like human rights such as liberty and *habeas corpus*, simply by calling them 'labour rights' ignores the fact that this easy equation between culture-specific labour standards and universal human rights cannot survive deeper scrutiny").

distinguish core from non-core labor standards based on the “principle of subsidiarity,” according to which jurisdiction over a given subject must be granted to the lowest (most “local”) entity *compatible with the subject matter in question*.²⁰³ For labor standards, this means that international regulation should only be concerned with “global,” “permanent” “fundamental rights” (and not “local,” “temporary” “short- or medium-term objectives of social policy”).²⁰⁴ For Hepple, it was already clear in 1994 that the “universal” standards were three of the four CLR (child labor, “equal pay between men and women” and freedom of association), as well as “the guiding principle that labour should not be regarded as a commodity or article of commerce.”²⁰⁵

In 2004, Janelle Diller, who would eventually become the Principal Legal Officer of the ILO, wrote in a very similar fashion that the 1998 Declaration represented the realization of the “universally shared values at the heart of [the] mandate” of achieving “universal respect for a minimum set of rules for labour in the global economy.”²⁰⁶ The question for Diller is to ascertain when it is that “the conviction is strongly shared that certain common values should guide the conduct and goals of people or institutions” to the point where these values may legitimately “be embodied in multilateral treaties”²⁰⁷ For Diller, the 1998 Declaration represents the answer to such an inquiry.

To this idea of the universality of CLR against the localness of non-core labor standards, other actors such as Nicolas Valticos, that mythical ILO figure, respond that the whole corpus of international labor standards is an indivisible instantiation of both the economic and social rights and the civil and political rights of the two UN Covenants.²⁰⁸ Consequently, it is wrong as a matter of human rights logic to segregate a class of labor standards and privilege them over others. In the words of Valticos, “international labour standards, as a body, constitute a special category of human rights, and . . . the structure now in jeopardy in fact represents a broad set of the rights that were painstakingly constructed and consolidated at the cost of two world wars.”²⁰⁹ In other words, all labor standards are universal. The (left-wing) idea of the indivisibility of labor standards (and the human rights they *all* embody) has considerable currency among both international labor law scholars²¹⁰ and ILO officials.²¹¹ We thus have a quite elaborate repertoire of opposing claims on

²⁰³ See Bob Hepple, *Equality: A Global Labour Standard*, in INTERNATIONAL LABOUR STANDARDS AND ECONOMIC INTERDEPENDENCE, *supra* note 54, at 123, 126.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 125.

²⁰⁶ Janelle M. Diller, *Globalization, Values and International Law in the World of Work*, in LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L’AVENIR: MÉLANGES EN L’HONNEUR DE NICOLAS VALTICOS 645, 646 (Jean-Claude Javillier & Bernard Gernigon ed., 2004) [hereinafter LES NORMES INTERNATIONALES].

²⁰⁷ *Id.* at 652.

²⁰⁸ Nicolas Valticos, *International Labour Standards and Human Rights: Approaching the Year 2000*, 137:2 INTERNATIONAL LABOUR REVIEW 135, 138 (1998). For a similar argument, see Alston & Heenan, *supra* note 10, at 254.

²⁰⁹ *Id.* at 136–37.

²¹⁰ For a similar argument, see Colin Feinwick, *The International Labour Organisation: An Integrated Approach to Economic and Social Rights*, in SOCIO-ECONOMIC RIGHTS JURISPRUDENCE: EMERGING IN COMPARATIVE AND INTERNATIONAL LAW 591, 612 (Malcolm Langford ed., 2008). Bob Hepple similarly claimed that in order to be “transformative” and fully realized, the CLR of equality needs to have a “strong link” with “social and economic rights.” Bob Hepple, *Equality at Work*, in THE TRANSFORMATION OF LABOUR LAW IN EUROPE—A COMPARATIVE STUDY OF 15 COUNTRIES 1945–2004 129, 155 (Bob Hepple & Bruno Veneziani ed., 2009).

²¹¹ Klaus Samson, the ILO’s first Human Rights Coordinator, once made a similar argument sounding in indivisibility that referred to the ILO conventions as “dealing with economic and social rights,” in addition to “matters considered

the universal vs. local axis, from right to left.

2. The Technical vs. General Axis

I now turn to the technical vs. general axis of conflict. Janice Bellace, long-time US member of the ILO Committee of Experts on the Application of Conventions and Recommendations, offered her own rationale for the selection of the CLR, arguing that the 1998 Declaration was based on the determination of “which conventions proclaimed core values and which laid down technical standards.”²¹² “Technicality” here is associated with detail (as opposed to broad wording) and analogized to what “might be found in a fair labor standards statute” (as opposed to “fundamental human rights”).²¹³ Clearly, this (relatively right-wing) argument has a theme of its own and asserts a certain logic of human rights which draws a line between broad rights and narrow “technical” standards as a matter of principle. This is an argument that many other actors have made,²¹⁴ sometimes with the surprising result that some of the four core labor rights are considered themselves more technical than others.²¹⁵

Other actors have a (left-wing) response to the idea that the distinction between fundamental rights and technical standards can guide ILO normative action. It is that the technical standards are required if the broad rights are to have any meaning at all. Deirdre McCann, a labor law professor and former official at the ILO, provides an account of “decent working hours as a human right” along those lines. She argues that the non-core conventions on working hours, far from being merely “technical” as suggested by some, “can be viewed as concrete expressions of the broader prescriptions of human rights documents, embodying the spirit of these instruments and advancing their goals by translating them into more specific instruments.”²¹⁶ She echoes the words of the ILO

to fall within the field of civil and political rights.” Klaus Samson, *The Protection of Economic and Social Rights Within the Framework of the International Labour Organization*, in IMPLEMENTATION OF ECONOMIC AND SOCIAL RIGHTS: NATIONAL, INTERNATIONAL AND COMPARATIVE ASPECTS 123, 125 (Franz Matscher ed., 1991). Samson criticized the segregation of economic/social and civil/political rights in the UN and regional human rights systems. These systems, he proposed, should draw inspiration from the fact that “[b]ecause of the unity of approach flowing from its Constitution, the ILO has used uniform methods both in formulating these various standards and in supervisory arrangements, without seeking to establish any distinction between different categories of rights.” *Id.* The important ILO Committee of Experts expressed the relationship between labor standards and the whole of the rights declared by the United Nations as follows:

[T]he ILO’s standards on human rights along with the instruments adopted in the UN and in other international organizations give practical application to the general expressions of human aspirations made in the Universal Declaration, and have translated into binding terms the principles of that noble document.

INT’L L. OFF., *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries* 16–17, para. 58 (1998).

²¹² Janice Bellace, *The ILO Declaration of Fundamental Principles and Rights at Work*, 17:3 INT’L J. COMP. LAB. L. & IND. REL. 269, 270 (2001).

²¹³ *Id.* at 272.

²¹⁴ For an account of the adoption of the 1998 Declaration as a process through which “the ILO tried to simplify its complex set of labor standards by identifying core rights out of the almost two hundred conventions that have been signed,” see RICHARD P. MCINTYRE, ARE LABOR RIGHTS HUMAN RIGHTS? 97 (2008). Andrew Potter claimed that the 1998 Declaration avoids “issues of legal detail” and is rather “an articulation of principles of policy common to the major legal systems.” Edward E. Potter, *A Pragmatic Assessment from the Employers’ Perspective*, in WORKERS’ RIGHTS AS HUMAN RIGHTS 118, 123 (James A Gross ed., 2003).

²¹⁵ As put by one British professor of international law, “[c]hild labour issues, involving as they do some of the most vulnerable persons in the world, have the power to capture the imagination in the way that sometimes technical battles over trade union recognition cannot.” Cullen, *supra* note 191, at 2.

²¹⁶ Deirdre McCann, *Decent Working Hours as a Human Right: Intersections in the Regulation of Working Time*, in

Committee of Experts on the Application of Conventions and Recommendations in claiming that the ILO conventions on working hours “have set forth principles which have been widely followed and have become part of the list of the fundamental rights of human beings and their dignity.”²¹⁷ As already noted, it has likewise been argued that occupational health and safety standards should be considered a fundamental human right (and CLR) because it is required by the broader *right to life*.²¹⁸ Here again we have a set of clashing arguments, which span the left-right spectrum.

3. The Process vs. Substance Axis

In a heated exchange published in a 2005 issue of the *European Journal of International Law*, two scholars affiliated with the ILO, Brian Langille and Francis Maupain, provide a response to the above-quoted article by Philip Alston criticizing the 1998 Declaration for being based on a regressive neoliberal agenda.²¹⁹ This particular exchange seems to be the most often cited set of articles on the 1998 Declaration and debates surrounding it. Here I dissect in some detail Brian Langille’s response to Alston in this epochal debate between a relatively left-wing position (Alston) and a relatively right-wing one (Langille), along a third axis: process vs. substance.

Langille, an independent scholar with long-lasting interest and implication in ILO academic and legal affairs,²²⁰ defends the idea of process-oriented core labor rights as fundamental and as having normative precedence over substantive legal guarantees.²²¹ He starts by preparing the reader for a “deeper and better account of international labour law”²²² rather than what he takes to be the dominant view of the ILO’s goals: that of enforcing labor standards to counter a “rational race to the bottom” by states “trading off lower labour standards in order to secure economic benefits.”²²³ For Langille, the goal is not to prevent “member states from pursuing their individual self-interest, but rather to help member states see where their self-interest actually lies.”²²⁴ As in the article quoted above in part II.d, Langille reaches this conclusion through a reasoning borrowed from Amartya Sen. Here, rather than analyzing Sen’s thought and ascertaining to what extent Langille’s conforms to it, I want to quote extensively from Langille in order to map what he gets out of Sen for the purpose of rationalizing the core labor rights.

Langille continues by stating that Sen’s thought emphasizes the “critical distinction between

HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW AND REGULATION, *supra* note 11, at 509, 514. For a similar argument on occupational health and safety and pension benefits, see Lance A. Compa, *Core Labour Rights: Promise and Peril*, 9 INT’L UNION RTS. 20, 20–21 (2002).

²¹⁷ INT’L L. OFF., HOURS OF WORK: FROM FIXED TO FLEXIBLE?: REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS 103 (2005) (cited in McCann, *supra* at 515).

²¹⁸ See Blackett, *supra* note 184, at 386; see also Emily A. Spieler, *Risks and Rights: The Case for Occupational Safety and Health as a Core Worker Right*, in WORKERS’ RIGHTS AS HUMAN RIGHTS 78, 94 (James A. Gross ed., 2003). Jeremy Waldron makes the same argument in LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991 12–13 (1993) (cited by Mundlak, *supra* note 12, at 259).

²¹⁹ Alston, *supra* note 10.

²²⁰ Alston reports that Langille was a “close observer in the process of drafting the Declaration.” Philip Alston, *Facing Up to the Complexities of the ILO’s Core Labour Standards Agenda*, 16:3 EUR. J. INT’L L. 467, 468 (2005). Moreover, Langille’s writings on the ILO are extremely influential, perhaps more than those of many official ILO representatives.

²²¹ See Brian Langille, *Core Labour Rights – The True Story (Reply to Alston)*, 16:3 EUR. J. INT’L L. 409, 430 (2005). Philip Alston agrees that this should be considered the main rationale behind the 1998 Declaration. Alston, *supra* note 10, at 487.

²²² Langille, *supra* note 221, at 419.

²²³ See *id.* at 419–20.

²²⁴ *Id.* at 420.

our true ends and the various means of obtaining them.”²²⁵ For Langille, the end is neither “to increase GDP per capita” nor to “construct an international labour code” “for their own sake.”²²⁶ Rather, for Langille:

The best conceptualization of our true ends is that offered by Sen – that the point of all our striving is *human freedom*. By this he means the real *capacity for human beings to lead lives which we have reason to value [H]uman freedoms of various kinds – social, economic, political – interact in complex mutually supportive ways.*²²⁷

So far, we have the goal of “human freedom,” which can come in social, economic and political forms and which allows human beings to “lead lives which we have reason to value.” Langille further fleshes out what this means to him:

[O]n a view of human freedom as the end and the key means, the core rights sound in what labour law theory has long known – that while there is much room for and need of other laws and institutions to make for a just workplace, *the most valuable legal technique (instrumentally and as an end in itself) has always been, and is, to unleash the power of individuals themselves to pursue their own freedom*. Removing barriers to self-help is a core concern. The *history of the labour movement* and its relationship with the creation and provision of the other elements we value (substantive statutory entitlements for example) is, as Sen predicts, one of human freedom advancing its own cause.²²⁸

We now have other elements to flesh out Langille’s “human freedom.” It is based on “self-help” and the possibility for individuals (and, importantly, social movements) to “pursue their own freedom.” This account, which Langille argues provides the “conceptual coherence” of CLR *contra* non-core standards, leads to the substance/process distinction, in that CLR do not entail “the creation of substantive entitlements, but rather by the way of procedural protection.”²²⁹

This leads to the following description of the substantive and procedural poles. The procedural nature of CLR is part of a “positive democratic, participatory story,”²³⁰ which resonates with such concepts as “industrial democracy, self-determination, workplace citizenship, the move from mere exit to voice, the power to contract, the idea of being an author, a subject creating workplace law rather than a mere object on the receiving end of a unilateral imposition of power.”²³¹ Here is Langille connecting “free participation” in the market to something like human dignity (being treated as “actors rather than objects”):

The ILO’s elevation of freedom of association to special constitutional status over fifty years ago is exactly in line with labour law’s conceptual map. But as it turns out there

²²⁵ Langille, *supra* note 221, at 432.

²²⁶ *Id.*

²²⁷ *Id.* (emphasis added).

²²⁸ *Id.* at 433–34 (emphasis added).

²²⁹ *Id.* at 429. Other similarly make this universal/process vs. contingent/outcome distinction:

In addition, there were signs of a developing conception of these core issues as labour *rights* and not as labour *standards*. This development is important for several reasons. First, it shifts the emphasis from economic efficiency to fundamental human rights. Second, a rights-based approach underlines the importance of fair contracting process and does not attempt to define universal common outcomes, which would be impossible. Therefore, the focus is on process, rather than on results.

KAUFMANN, *supra* note 26, at 70 (internal citations omitted).

²³⁰ Langille, *supra* note 221, at 431.

²³¹ *Id.*

are . . . other aspects of labour market *unfreedom*, other barriers to *free participation*, other barriers to a bargaining process in which both parties are *actors rather than objects*. Human beings can both be excluded from the market (by discrimination) or forced (literally) into it.²³²

Langille tells us that this account “sounds in the same deep deontological Kantian notions of equal humanity as does most of our constitutional and human rights theory.”²³³ But Langille adds other qualifiers to describe the dual poles of substance and procedure:

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.²³⁴

This quote contrasts to some extent with the previous one on human dignity but is more resonant with Langille’s reading of Sen as advocating “self-help.” Seemingly anticipating criticisms that this is a minimalist labor/employment law agenda, Langille states that “[a]s we all know this set of constraints is not a guarantee of justice,” because there are other ways that humans can arrive at the bargaining table in a condition of unfreedom (hunger, lack of bargaining expertise).²³⁵ But for Langille, these issues pose no problem, as “[n]o one maintains [sic] that the core is a guarantee of just outcomes.” The narrowness of his procedural rationalization of CLR “is not a conceptual problem – it is rather part of the grammar of procedural regulation of the bargaining relationship.”²³⁶

I have quoted Langille at such length the better to analyze other labor/employment law rationales based on Amartya Sen, some of which take explicit issue with Langille’s rationalizations of core labor rights. It is important to read carefully these competing interpretations, because Sen’s ideas have been very popular among labor/employment lawyers trying to inject new languages into the field,²³⁷ including on the issue of core labor rights in the ILO. Philip Alston, in a rejoinder to Langille’s reply to him, provides his own critique of Langille’s reading of Sen:

[I]t should be noted that Sen concludes his book by stressing that we must not lose sight of the fact that freedom involves ‘considerations of processes as well as substantive opportunities’. In marked contrast, Langille invokes Sen to justify the proposition – more worthy of Hayek than Sen – that the main challenge ‘has always been, and is, to unleash the power of individuals themselves to pursue their own freedom’.

In international human rights law, the interdependence of the two sets of rights – social and political, to use the shorthand terms – is axiomatic. Acceptance of the vital importance of individual liberty and empowerment does not, however, lead to the conclusion that the other half of the equation will be addressed automatically if freedom is secured.²³⁸

²³² Langille, *supra* note 221, at 430 (emphasis added).

²³³ *Id.* at 431.

²³⁴ *Id.* at 429 (emphasis added).

²³⁵ *Id.* at 430–31.

²³⁶ *Id.* at 431.

²³⁷ See Novitz & Fenwick, *supra* note 16, at 30 (describing Sen’s work as “influential in recent years in thinking about labour law”); Jude Browne, Simon Deakin & Frank Wilkinson, *Capabilities, Social Rights and European Market Integration*, in EUROPE AND THE POLITICS OF CAPABILITIES 205, 207 (Robert Salais & Rober De Villeneuve eds., 2004); see also ALAIN SUPIOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE 185, 191, 195–97 (2001) (referring to the capabilities approach).

²³⁸ Alston, *supra* note 220, at 477 (citing SEN, *supra* note 178, at 298).

This response mischaracterizes Langille's argument as individualist, whereas it is concerned with *both* individual and collective process rights as the priority category. That is, Langille likes unions and industrial democracy just as much as he does individual freedom. Nevertheless, Alston's is one possible (left-wing) response, which draws heavily on the doctrine of the indivisibility of human rights, a recurring theme in the human rights language.

Judy Fudge, a labor lawyer with occasional scholarly appearances at the ILO, provides a deeper critique of Langille's rationalization of core labor rights which digs into Amartya Sen's work to accuse Langille of providing a mistaken, "thin" reading of Sen. She proposes an alternative take which contests the adequacy of the CLR paradigm in light of Sen's theory, thereby sounding an unequivocally human rights tone:

[Langille] claims that Sen's conception of freedom "dissolves the old distinction between formal and substantive notions of freedom." While Sen's conception may do this, Langille's insistence on the fundamental grammar of labor law and its distinction between procedural labor rights and substantive labor standards tends to have the opposite effect.²³⁹

Fudge then argues that "procedural rights need to be backed up by substantive commitments since a purely procedural understanding of core labor rights runs the risk of abuse of power in unequal bargaining situations."²⁴⁰ She adds an often-made argument²⁴¹ that the CLR need the implementation of non-core standards in order to even be effectively protected, arguing that "[m]aternity leave and benefits, a shorter standard work week, pay equity, minimum wages, and positive obligations to accommodate women's domestic responsibilities are as important as prohibitions on discrimination if women are to achieve equality of capabilities."²⁴² Fudge then traces her disagreements to a mistake in Langille's use of Sen:

[T]he problem is not so much with Sen's concept of capability, but rather in assuming that the concept of capability provides a complete theory of social justice. Sen is very clear to acknowledge that:

Although the idea of capability has considerable merit in the assessment of the opportunity aspect of freedom, it cannot possibly deal adequately with the process aspect of freedom, since capabilities are characteristics of individual advantages, and they fall short of telling us about fairness or equity in the processes involved, or about the freedom of citizens to invoke and utilize procedures that are equitable.

A normative theory of social choice is needed to supplement Sen's theory of capabilities.²⁴³

Fudge then digs up that complement from Sen's own theory in the idea of "functionings," which should be understood as an expansive and substantive version of Sen's "human freedom" and capabilities:

²³⁹ Fudge, *supra* note 17, at 60.

²⁴⁰ *Id.* at 61.

²⁴¹ For a similar critique of Langille's article, see Adelle Blackett, *Situated Reflections on International Labour Law, Capabilities, and Decent Work: The Case of Centre Maraîcher Eugène Guinois*, in *REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL* 223, 230 (2007). See also *supra* note 251.

²⁴² Fudge, *supra* note 17, at 61.

²⁴³ *Id.* at 62 (citing SEN, *supra* note 178, at 336).

[O]n Sen's account it is not only the commodities that an individual has control over that are important for determining that individual's welfare, "the capability of that individual to achieve a range of functionings with the commodity also has to be considered." A capability is a type of freedom to achieve a number of different things a person may value being or doing. Central to this conception of capability is the idea of conversion factors, which are the characteristics of an individual's person, society, and environment.²⁴⁴

Fudge then claims that Sen's theory requires *both* substantive social rights claims to "resources" and "procedural" rights. The first category, the substantive social rights, are "claims to commodities that can be converted by individuals into functionings"²⁴⁵ and are as fundamental to capabilities theory as procedural rights. This "provides for a much more robust set of social rights, which include things like the right to a minimum wage and maternity pay, than Langille's core fundamental labor rights."²⁴⁶ For Fudge, Sen's theory leads to the conclusion that "social rights, even those that are directly redistributive, function in the same way as civil and political rights,"²⁴⁷ and should therefore not be distinguished from CLR. Here again we have a broad spectrum from right (Langille) to left (Alston and Fudge).

I have covered three axes of disagreement inside the human rights language as applied to CLR: universal vs. local, technical vs. general and process vs. substance. On each of these three axes the language provides several rhetorical tools to argue in favor of more or less labor standard promotion. Moreover, a position within one of these axes does not necessarily cohere with positions on others. "Technicality" might have nothing to do with substance vs. process, or universality. Moreover, many foundational concepts, including capabilities, autonomy, human dignity and universality, are used to quarrel along the three axes and to defend both left-wing and right-wing positions on the left-right spectrum. Human rights are, here again, not associated with one side of the spectrum, like neoliberalism was. I now turn to the Decent Work Agenda in order to explore how the human rights language plays out in that debate.

D. Human Rights Arguments on the Decent Work Agenda

As detailed in part I, the Decent Work Agenda is a programmatic concept that came to define the ILO's work, encompassing the four following prongs or objectives: "employment creation," "rights at work," "social dialogue" and "social protection."²⁴⁸ This normative structure potentially fits awkwardly with the core/non-core structure established by the 1998 Declaration. Indeed, the second prong, "rights at work," refers to the four CLR, begging the question of whether it has a "clear pre-eminence"²⁴⁹ within the DWA or whether, on the contrary, the four objectives are equally emphasized. For the fate of the non-core labor standards embodying social and economic rights, that question is crucial. I present here gain a broad range of arguments relating to the place of core labor rights in the Decent Work Agenda, starting with (relatively right-wing) positions that privilege CLR and going on to (relatively left-wing) positions that treat CLR as equally important as "employment creation," "social protection" and "social dialogue."

Jean-Michel Servais, then Research Coordinator at the ILO's International Institute for

²⁴⁴ Fudge, *supra* note 17, at 63 (citing Brown, Deakin & Wilkinson, *supra* note 237, at 207).

²⁴⁵ Fudge, *supra* note 17, at 64.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 65.

²⁴⁸ See *supra* Part I.

²⁴⁹ As suggested by Jean-Michel Servais. SERVAIS, *supra* note 62, at 350.

Labour Studies, articulates a position that distinctly privileges CLR over other DWA pillars. He claims that the ILO corpus can be separated into three categories of standards: (1) “public freedoms or social rights” (CLR, it turns out), (2) “more programmatic or promotional than directly compulsory” standards (concerning “employment, vocational training or the fight against discrimination”) and (3) a “third group whose technical content is more specific” (pertaining to “working conditions” and “social security”).²⁵⁰ Echoing the technical vs. general axis described above,²⁵¹ Servais clearly privileges CLR, the “essential nature” of which is recognized by “everyone,” over “technical” standards, which confront legislators with “contradictory objectives” and “choices [to] be made,”²⁵² *in the context of the Decent Work Agenda*.²⁵³ This is the most restrictive and right-wing take I could find on the Decent Work Agenda, short of opposing it altogether, as some neoliberals do.

Amartya Sen, in a landmark article published in the ILO’s own *International Labour Review* in 2000 and republished in 2013,²⁵⁴ provides a slightly more left-wing analysis of the Decent Work Agenda. Sen focuses the bulk of his comments on the prongs of CLR and “social dialogue” and says close to nothing about the other two pillars of the DWA, “creating jobs” and “extending social protection.”²⁵⁵ In light of what Sen does say about rights and social dialogue, his neglecting of the two potentially more Keynesian parts of the DWA seems coherent.

On the CLR component of the DWA, Sen opines that it is invaluable because “the invitation is not merely to produce fresh legislation,” because CLR can be promoted through the “creation of new institutions, better working of existing ones and, last but not the least, by a general societal commitment” to promote CLR.²⁵⁶ This non-interventionist rationale could be seen as part of the neoliberal language analyzed above, were it not for Sen’s insistence that CLR are distinctive because they are grounded in “ethical claims that transcend legal recognition” and are “part of a decent society.”²⁵⁷

Turning then to the relationship between CLR and the other prongs of the DWA agenda, Sen puzzlingly cites Ronald Dworkin and treats that issue through the jurisprudential question of whether “rights-based reasoning” and “goal-based programing” (or “social goals”) are necessarily in conflict.²⁵⁸ Sen concludes that it is possible to avoid conflicts “[i]f the formulation is carefully done to allow the trade-offs that have to be faced.”²⁵⁹ In that case, “[t]he rights at work can be broadly integrated within the same overall framework which also demands . . . decent and

²⁵⁰ Jean Michel Servais, *The Future of Work and Related Security: A Discussion of the Need to Place Matters in Perspective*, in *THE ILO AND THE SOCIAL CHALLENGES OF THE 21ST CENTURY: THE GENEVA LECTURES 11*, 18–20 (Roger Blanpain & Chris Engels eds., 2001).

²⁵¹ See *supra* Part IV.b.2.

²⁵² Servais, *supra* note 250, at 18, 20.

²⁵³ Servais’s distinction echoes that drawn by former ILO Director-General Wilfred Jenks between conventions dealing with “basic human rights,” “key instrumentalities of social policy,” and “basic labour standards.” WILFRED JENKS, *LAW, FREEDOM AND WELFARE* 103 (1963).

²⁵⁴ Amartya Sen, *Work and Rights*, 139:2 *INT’L LAB. REV.* 82 (2000), republished as a “special supplement” in vol. 152 (2013).

²⁵⁵ See *supra* Part I.

²⁵⁶ Sen, *supra* note 254, at 86.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 87.

productive work”.²⁶⁰ Hence, there is no conflict between the CLR and the rest of the DWA for Sen. But that does not tell us how he sees the relationship between them, apart from there being no conflict.

Sen then turns to the social dialogue pillar of the DWA and approvingly notes that it addresses “not merely the requirements of labour legislation and practice, but also the need for an open society” and the protection of the freedoms of “citizens with a voice who can influence policies and even institutional choices.”²⁶¹ In addition to the intrinsic value of democracy, Sen describes its “protective power” for workers.²⁶² The two examples of this given by Sen are the prevention of famines and the need to avoid financial crises and share the “burden of contraction” once these erupt (Sen refers to the then-recent example of the 1990s Asian financial crises). Social dialogue allows crisis-prone countries to avoid the “discipline of financial reform that the International Monetary Fund tried to impose on the economies in default [which] was, to a great extent, necessitated by the lack of openness and disclosure, and the involvement of unscrupulous business linkages.”²⁶³ Social dialogue does so by promoting “openness.”

It bears notice that in all of Sen’s discussion there is no mention of the role of CLR (or “social dialogue”) in contesting and altering the “market” distribution of riches and entitlements. Nevertheless, Sen does exhibit some (limited) sympathy for non-CLR elements of the Decent Work Agenda, based not on a neoliberal analysis but on a decidedly human rights-based argument about “transcendent ethical claims,” “voice,” and an “open” and “decent society.”

Bob Hepple provides an alternative rationalization of the Decent Work Agenda, in which “equality” is the overarching concept, along with “empowerment.”²⁶⁴ This rationale, which is applied to both the 1998 Declaration and the DWA, naturally encompasses “horizontal equality between workers,” “for disadvantaged groups, such as women, ethnic minorities and people with disabilities.”²⁶⁵ But it also includes, interestingly, “vertical equality,” “the aim of which is to compensate by social measures for the economic inequality between employers and workers.”²⁶⁶ It is hard to figure out what this might mean at such a level of generality, but it does seem to be quite different from Sen’s approach. In particular, it is plausible that “job-creation” and “social protection” would be more central to an agenda of alleviating employer/employee inequality than they were to Sen. In other words, Hepple’s position seems more left-wing.

Still further to the left side of that debate, we find Francis Maupain. In the famous above-quoted article responding to Philip Alston’s critiques of both the 1998 Declaration and the Decent Work Agenda (DWA), Maupain provides a rationale that depicts the pre-1998 ILO as fragmented and the DWA as a way to further the “interdependence” of *all* labor standards:

[B]y underlining the need to see workers’ protection as a whole, this concept [of Decent Work] can in fact help to bridge the gap inherent in the ‘self-service approach’ to standards by

²⁶⁰ Sen, *supra* note 254, at 88.

²⁶¹ *Id.*

²⁶² *Id.* at 90.

²⁶³ *Id.* at 89.

²⁶⁴ Bob Hepple, *Equality and Empowerment for Decent Work*, 140 INT’L LAB. REV. 5, 17 (2001).

²⁶⁵ *Id.* at 12.

²⁶⁶ *Id.*

recognizing and promoting their interdependence, which [sic] were recognized in Vienna to be ‘universal, indivisible, interdependent and interrelated’.²⁶⁷

This analysis rests on the critique of the “old [pre-1998] system” as a “pick-and-choose” model vulnerable to opportunistic and selective commitments by the member states.²⁶⁸ The idea is that the DWA represents a deeper fusion of all the international labor standards and makes them less vulnerable to selective ratification.

Such an “indivisibility” approach was adopted by then Director-General Juan Somavia in the preface to a 2004 *mélange* offered to Nicolas Valticos. Somavia addresses the past and future of “the standards,” which “are the history of the ILO.”²⁶⁹ Here, “the standards” are addressed as an integrated whole and understood to “make decent work a reality.”²⁷⁰ The 2008 Declaration, which I address in more detail in part IV on social legal thought, incorporates this doctrine of indivisibility by referring to the four prongs of the DWA as “four equally important strategic objectives of the ILO.”²⁷¹ It has been claimed that the 2008 Declaration, “while reaffirming the principles set out in the 1998 Declaration[,] goes beyond these by placing them within the context of ‘Decent Work’,” with no hierarchical relationship between them.²⁷² Finally, at the far left of the ideological spectrum, there is the somewhat marginal argument that Decent Work *itself* is a right, encompassing a whole panoply of standards beyond the core labor rights.²⁷³

I have covered a quite large spectrum of views, from Servais and Sen’s privileging of certain pillars of the DWA (and specifically of core labor rights) to those who view the ILO’s policy objectives as, like human rights, indivisible. We find here the same extreme malleability from left to right.

As a broader conclusion to this part on human rights, I want to reiterate my central points. The homology between the three debates is quite clear, though the arguments themselves seem slightly more eclectic than they were in the case of neoliberalism. So, for instance, arguments on trade/labor linkage deal with the legal bindingness of human rights regardless of state consent and with criteria to distinguish which rights are properly universal so as to be fit for linkage (this is where tropes like dignity, fairness and preventing “harm” intervene). On the CLR issue, many of the same arguments are used to navigate the three axes of universal vs. local, technical vs. general and process vs. substance. In the context of the Decent Work Agenda, this same human rights vocabulary is used to argue for different systematizations of the Agenda, some of which distinctly privilege some prongs (e.g. CLR) and some of which treat the four pillars as “indivisible” and equally important from the point of view of human rights.

I have also emphasized throughout that there is a loose grammar to human rights arguments

²⁶⁷ Francis Maupain, *Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 439, 461–62 (2005). For a similar take on the DWA by a senior ILO staff member, see Steven Oates, *International Labour Standards: The Challenges of the 21st Century*, in THE ILO AND THE SOCIAL CHALLENGES OF THE 21ST CENTURY: THE GENEVA LECTURES, *supra* note 250, at 93, 95.

²⁶⁸ Maupain, *supra* note 267, at 444.

²⁶⁹ Juan Somavia, *Préface to LES NORMES INTERNATIONALES DU TRAVAIL : UN PATRIMOINE POUR L’AVENIR: MÉLANGES EN L’HONNEUR DE NICOLAS VALTICOS* xiii, xiv (Juan Somavia trans., Jean-Claude Javillier & Bernard Gernigon eds., 2004) (translation from French by the author).

²⁷⁰ *Id.*

²⁷¹ 2008 Declaration, *supra* note 64, at 9.

²⁷² Novitz & Fenwick, *supra* note 16, at 29.

²⁷³ MacNaughton & Frey, *supra* note 27, at 444.

that is distinct from both neoliberalism and classical individualist liberalism. “Freedom” understood in a classical way is seldom invoked. Even Brian Langille’s take on the 1998 Declaration, which has been (mistakenly) denounced by Alston as “worthy of Hayek,”²⁷⁴ deals with both individual and collective labor standards (freedom of association and collective bargaining) and rests on the idea of dignity attained through procedural empowerment, not individualism (or for that matter economic efficiency). I suspect that if someone were to make an actual Hayekian claim about the primacy of property and contract rights over labor standards, interlocutors would not engage with it on human rights terms as some have done with Langille’s claims, but would rather dismiss it as illegitimate and possibly anachronistic. In order to be considered as making a genuine human rights argument, one must go beyond classical liberalism, hence my insistence that the two registers must be understood as analytically distinct and separable.

Finally, in all three debates, I found considerable malleability, in the sense that the human rights repertoire contains arguments to argue for anything from no labor standards at all to a maximalist view of all labor standards as universally binding human rights. This contrasts with neoliberalism, which was not so malleable and more consistently identified with the right. We see that positing systematic convergence between human rights and neoliberalism is wrong, as human rights can be and are more often identified with the left than neoliberalism. Thus, for example, left-wing human rights arguments are likely to conflict with right-wing neoliberalism, and right-wing human rights arguments are likely to conflict with center-left neoliberal defenses of labor standards promotion.

IV. SOCIAL LEGAL THOUGHT ARGUMENTS

By now, I have provided a complete refutation of the thesis that human rights and neoliberalism converge by outlining their different ideological leanings and their potential for considerable divergence. Yet this does not describe the whole of the intellectual landscape, as I have not yet addressed what I call social legal thought, i.e. discourses based on social welfare and stability. While accounts of labor standards debates often neglect to discuss social legal thought, it merits a separate place in the analysis. Indeed, this discourse distinguishes itself from human rights, in that it emphasizes not individual dignity or human capabilities but the good of society. In fact, there is much evidence that human rights (like neoliberalism) was born as a discourse opposing social legal thought.²⁷⁵ Only once we have incorporated social legal thought into the picture can we have a thorough analysis of the intellectual and ideological structures that will stay with us in future policy discussions. This part explores the arguments based on social legal thought in the context of the three debates on trade/labor linkage, the adoption of the ILO 1998 Declaration and the struggle over the meaning of the ILO’s Decent Work Agenda. But first, I offer a more thorough definition of what I mean by social legal thought.

A. *Definition of Social Legal Thought*

“Social legal thought” (or “the Social”)²⁷⁶ was born in the second half of the 19th century as a

²⁷⁴ Alston, *supra* note 253, at 477.

²⁷⁵ See generally Moyn, *supra* note 19.

²⁷⁶ I acknowledge tremendous debt to Duncan Kennedy, who introduced me to the idea of there being a set of discourses understandable as all connected to social legal thought. This part is in large part inspired by Kennedy, *supra* note 69, by the “Globalization of Law in Historical Perspective” course taught at Harvard Law School in the Fall of

critique of classical individualist law and laissez-faire; the critique was that classical law was internally incoherent both substantively²⁷⁷ and methodologically,²⁷⁸ in that it entailed an “abuse of deduction” from incoherent individualist premises that led to sub-optimal results from a social standpoint. Moreover, individualism and laissez-faire led to crises and bred instability, because they allowed strong actors to unduly externalize many costs on society²⁷⁹ and thereby led law to be out of touch with social life and the new economic interdependence brought about by industrialization.²⁸⁰

The key goal of the Social was to prevent crises and stabilize the social order, and its ethos was organicism understood as a rejection of individualism.²⁸¹ This led to an embrace of teleology and instrumentalism at the level of legal reasoning, i.e. to seeing law as a “means” to the good of society, an organism composed of social classes, national minorities and “institutions” which should be coordinated with a view to curbing conflict and instability.²⁸² One classic slogan of social legal thought was Karl Polanyi’s call for a protection of society against “the market” by “re-embedding” the latter in the former.²⁸³

The legal-institutional consequences of this approach were the creation of a new form of “social citizenship”²⁸⁴ based on “decommodification” and the carving out of various domains from 19th century private law to constitute new quasi-public law fields (labor/employment law, housing law, youth protection regimes and so on indefinitely).²⁸⁵ The welfare state is therefore a central Social development, though it bears emphasis that in the North and the Global South both left-wing welfare states (the U.S. New Deal, post-revolutionary Mexico in the 1930s, Post-War Britain, Arab socialist post-independence regimes, etc.) and right-wing organicist and/or developmentalist regimes (European and Japanese fascism, Peron and Vargas in Argentina and Brazil, etc.) all bear the marks of social legal thought, such that at least historically, the Social was as much heralded by the right as it was by the left.²⁸⁶

Keynesianism is also characteristic of social legal thought, insofar as it posits a socially destructive “logic” of laissez-faire business cycles and purports to stabilize it by counter-cyclical macro-economic policy and public spending on the decommodifying social programs of the

2014, as well as numerous conversations with Professor Kennedy on how to understand social legal thought and its characteristics.

²⁷⁷ RUDOLF VON JHERING, *LAW AS A MEANS TO AN END* 380–99 (Isaac Husik trans., 4th ed. 1913).

²⁷⁸ See generally FRANÇOIS GÉNY, *MÉTHODE D’INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF: ESSAI CRITIQUE* (La. State Law Inst. trans., 2d ed. 1899).

²⁷⁹ ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* 174 (1920).

²⁸⁰ Justin Desautels-Stein, *Pragmatic Liberalism: The Outlook of the Dead*, 55 B.C. L. REV. 1041, 1069 (2014).

²⁸¹ See Anna Di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499, 527–45 (2006).

²⁸² Kennedy, *supra* note 69, at 41.

²⁸³ KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 75–76 (2d ed. 2001).

²⁸⁴ See T.H. Marshall’s classic analysis of the “social element” of citizenship, including “the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in society.” T.H. MARSHALL, *CLASS CITIZENSHIP AND SOCIAL DEVELOPMENT: ESSAYS BY T.H. MARSHALL* 78 (University of Chicago Press 1964).

²⁸⁵ FRANZ WIEACKER, *THE HISTORY OF PRIVATE LAW IN EUROPE WITH SPECIAL REFERENCE TO GERMANY* 432–36 (Tony Weir trans., Oxford University Press 1995); Alvaro Santos, *The Trouble with Identity and Progressive Origins in Defending Labour Law*, in *CRITICAL LEGAL PERSPECTIVES*, *supra* note 41, at 207, 209–10.

²⁸⁶ Kennedy, *supra* note 69, at 46–50, 58.

welfare state.²⁸⁷ Just like the Social involved new domestic legal institutions to replace laissez-faire law, the international order was also “juridified”²⁸⁸ through the creation of the League of Nations, the ILO and the Post-War Bretton Woods Institutions, with the goal of avoiding “individualist” behavior by states which threatens global stability and peace.²⁸⁹

Before turning to the specific consequences for labor/employment law below, it bears mention that the preoccupation of proponents of the Social with global and domestic stability (i.e. avoiding wars and economic disruption) informed their attempts to eliminate tariffs through the GATT in the Post-War period (with no maximalist attempt to rule out non-tariff barriers or domestic welfare states)²⁹⁰ and their attempts to regulate labor conditions through the ILO. In the case of the ILO, the idea was both that poor working conditions might breed domestic social unrest and geopolitical instability²⁹¹ and, according to Polanyi’s famous account,²⁹² that international trade might lead to a “race to the bottom” in labor conditions and social protection, with the same resulting instability.

In labor/employment law, the Social often places heavy emphasis on unions and collective bargaining, based on something like father of the NLRA Robert Wagner’s insistence that unionized workers are “organic groups unified by solidarity interests and norms.”²⁹³ This, combined with unions’ capacity to “equalize bargaining power” between employers and workers²⁹⁴ and foster “industrial peace,” not least through the maintenance of order and discipline in the workforce,²⁹⁵ meant that they should be privileged vehicles for regulating society through labor law.

In the ILO, the obvious analog to this is the importance placed on tripartism, an ILO form of corporatist decision-making involving worker organizations, employer organizations and states,²⁹⁶ as well as a general emphasis on ILO conventions on freedom of association and collective bargaining above all else, a recurring trope I identify with social legal thought in my debates. But there is more to the Social in the ILO context. Guy Standing usefully identifies traits which I consider to be paradigmatic of the Social as applied to the ILO, based on a general “commitment to a model of labourism legitimizing variants of industrial citizenship, in which social entitlements (‘social rights’, so-called) have been tied mainly to the performance of labour.”²⁹⁷ Standing

²⁸⁷ Kennedy, *supra* note 69, at 57.

²⁸⁸ See generally Kennedy, *supra* note 21.

²⁸⁹ See generally David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841 (1987).

²⁹⁰ LANG, *supra* note 32, at 29–30. For more on this point and its relationship to the fear of protectionism and war, see JEFFRY FRIEDEN, *GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY* 287–90, 300 (2006).

²⁹¹ See Santos, *supra* note 285, at 210 n.6.

²⁹² According to Polanyi, “[t]he League of Nations itself had been supplemented by the International Labour Office partly in order to equalize conditions of competition among the nations so that trade might be liberated without danger to standards of living” POLANYI, *supra* note 283, at 27–28. Indeed, the Preamble to the ILO’s 1919 constitution warned that “the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries” (ILO CONST. pmb1.).

²⁹³ Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1452 (1993).

²⁹⁴ For the classic statement of this theme, see OTTO KAHN-FREUND, *LABOUR AND THE LAW* 8 (Paul Davies & Mark Freedland eds., 3rd ed. 1972). For critical takes on it, see the contributions in *THE IDEA OF LABOUR LAW* (Guy Davidov & Brian Langille eds., 2011).

²⁹⁵ For the famous critique and description of this trope, see Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978).

²⁹⁶ See HUGHES & HAWORTH, *supra* note 33, at 21–22.

²⁹⁷ Standing, *supra* note 9, at 356.

identifies two conventions which, along with those on freedom of association and collective bargaining, epitomize the ILO's historical ethos: the Convention on Social Security No 102 of 1952 and the Employment Policy Convention No 122 of 1964.²⁹⁸ The latter aimed to ensure “full, productive and freely chosen employment” and was one of the clearest examples of the Keynesianism of the times, while the former “call[ed] on governments to introduce benefits for nine ‘contingencies’, all linked to employment — medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivor’s benefits.”²⁹⁹ Such was the historical approach of the ILO, based on its constitutional slogan that “labour is not a commodity.”³⁰⁰ As mentioned above, these traits were supplemented by the notion that unrestrained global *laissez-faire* would provoke a “race to the bottom” in labor conditions and have disastrous social results. Together, these ideas are what I mean by social legal thought in the context of my 1994–2008 debates.

I now turn to my analysis of the way in which social legal thought was used in the 1994–2008 debates. The arguments here seem more varied than they were for the other two languages. I will describe arguments based on “social dumping,” the idea of a “race to the bottom,” Keynesianism, the privileging of freedom of association, social security, and decommodification as ways to curb instability and, finally, the “right to work.” It is remarkable that, despite this wider variation in the themes covered, I found the same homology across topics than in the case of neoliberalism and human rights. So, for instance, arguments based on avoiding a race to the bottom in labor standards figure in all three settings, even though they were initially articulated in the trade/labor linkage context.

However, and unlike neoliberalism and human rights, social legal thought always seems to point in the same direction of more labor standards promotion, i.e. it always seems left-wing. It is a lot less malleable and normatively indeterminate than my other two languages. Hence, we can foresee many divergences not only between human rights and neoliberalism but also between social legal thought and both these discourses. Finally, the Social has been significantly present at every step of my series of disputes, such that it doesn't seem right to portray any one of the debates as dominated by a single language (be it neoliberalism for trade/labor linkage or human rights for the 1998 Declaration controversy). The Social has also been there all along, and it could very well have a bright future ahead of it.

B. Social Legal Thought Arguments on Trade/Labor Linkage

1. Social Dumping Arguments

The first set of Social Legal Thought arguments I explore, that relating to “social dumping,” originates in the trade/labor linkage debate. Claims of “social dumping,” often made in the contexts of the European Union market and American federalism,³⁰¹ are based on the idea that “exploiting

²⁹⁸ Standing, *supra* note 9, at 358–59.

²⁹⁹ *Id.* at 358.

³⁰⁰ This famous slogan was codified in the ILO's epochal 1944 Declaration of Philadelphia. ILO, *Declaration concerning the Aims and Purposes of the International Labour Organization*, (May 10, 1944), http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#declaration.

³⁰¹ See Diamond Ashiagbor, *Collective Labor Rights and the European Social Model*, 3:2 L. & ETHICS OF HUM. RTS. 222 (2009); Mark Barenberg, *Federalism and American Labor Law: Toward a Critical Mapping of the “Social Dumping” Question*, in HARMONIZATION OF LEGISLATION IN FEDERAL SYSTEMS 93–118 (Ingolf Pernice ed., 1996).

workers' lack of bargaining power is not legitimate competition."³⁰² The analogy is of course to actual dumping, whereby a seller unfairly underprices its goods to drive out competitors and secure a more advantageous market position.³⁰³ The argument rests on the idea that poor working conditions provide a competitive advantage that is illegitimate and unduly harmful to competitors, who must scale down their own labor standards in order to compete.³⁰⁴ It requires that the main or only reason why a good is cheaper be the abnormally low labor standards.³⁰⁵ Making a "social dumping" argument also requires the proponent to put forward criteria for the identification of the level at which labor standards become unfairly low.³⁰⁶ Specifically, as put by Francis Maupain, this argument "runs up against the challenge of delineating what rights are relevant in the determination of 'fairness'."³⁰⁷ One such argument rests on the idea that when states "grossly misrepresent the views or violate the interests of their citizens,"³⁰⁸ the resulting transactions of "products produced under repressive conditions" are illegitimate from the point of view of international trade.³⁰⁹ Another possible take is that social dumping "undermines internationally agreed norms of fairness" because it involves "practices that prevent workers from using their economic power to improve their compensation and conditions of employment" and has the effect of "depressing global economic demand and fostering social instability" (note the Keynesian twist).³¹⁰

While it is often claimed that social dumping arguments are discredited and incoherent (what is a *fair* or *normal* level of labor standards?),³¹¹ some high profile actors have made such arguments in favor of trade/labor linkage, as well as in the context of mere ILO promotional work. The 2008

³⁰² Pagnattaro, *supra* note 196, at 847.

³⁰³ I do not explore the legal definition of dumping, except to note that article VI of the GATT defines it as a situation where "products of one country are introduced into the commerce of another country at less than the normal value of the products." GATT, *supra* note 323, article VI.

³⁰⁴ As put by Adelle Blackett:

The concept of "social dumping" is built on the premise that countries with low labor standards (or that do not enforce those standards) have artificially low labor costs. Capital, which is mobile, shops for low cost labor, which enables it to produce, if not more efficiently, at a lower overall cost per unit. Labor is not similarly mobile. To compete with low labor cost countries of the South, where the labor supply is plentiful, states must decrease their labor costs by decreasing labor standards, or harmonizing "down."

Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31:1 COLUM. HUM. RTS. L. REV. 48, 48–49 (1999).

³⁰⁵ Halina Ward, *Common But Differentiated Debates: Environment, Labour and the WTO*, 45 INT'L & COMP. L.Q. 592, 610 (1996).

³⁰⁶ As put by Grossman & Koopmann:

Unlike conventional dumping which means selling abroad below cost or at lower prices than charged in the home market, 'social dumping' refers to costs that are for their part depressed below a 'natural' level by means of 'social oppression' facilitating unfair pricing strategies against foreign competitors.

Harald Grossman & Georg Koopmann, *Social Standards in International Trade: A New Protectionist Wave?*, in *WORLD TRADE AFTER THE URUGUAY ROUND: PROSPECTS AND POLICY OPTIONS FOR THE TWENTY-FIRST CENTURY* 115, 116 (Harald Sander & Andràs Inotai eds., 1996).

³⁰⁷ MAUPAIN, *supra* note 18, at 135.

³⁰⁸ ROBERT LAWRENCE, ALBERT BRESSAND, & TAKATOSHI ITO, *A VISION FOR THE WORLD ECONOMY: OPENNESS, DIVERSITY AND COHESION* 52, 54 (1996).

³⁰⁹ *Id.*

³¹⁰ Hiatt & Greenfield, *supra* note 311, at 48.

³¹¹ Langille, *supra* note 32, at 38; MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 719–20 (4th ed. 2013).

ILO Declaration on Social Justice, which I analyze in more detail below, notes at its article IA(iv) that “the violation of fundamental principles and rights at work [CLR] cannot be invoked or otherwise used as a legitimate comparative advantage”.³¹² This is a straightforward social dumping argument which purports to pronounce on the “legitimacy” of the comparative advantage enjoyed by a country found in violation of the ILO core rights. It directly clashes with the statement made in the 1998 Declaration, in which, as noted above, “The International Labour Conference . . . [s]tresses that . . . the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up.”³¹³

In his report to the International Labour Conference in 1997, Director-General Hansenne voiced a similar claim, combining in a single statement what would end up being the two contradictory articles from the 1998 and 2008 Declarations:

[A] comparative advantage linked to a certain level of wages or social protection is legitimate, particularly if it is a factor of economic growth[—]and thus, by extension, of social progress. I believe, however, that this principle should have as its corollary that any such comparative advantage would, if it were *artificially maintained to the detriment of social progress as a mere means of winning markets*, lose all legitimacy.³¹⁴

Hansenne did not overtly advocate trade/labor linkage in that report issued one year after the dismal failure of attempts to steer WTO member states in that direction.³¹⁵ He was addressing ILO promotion of labor standards. This goes to show that while originally elaborated as a peculiarly trade-related analogy, “social dumping” arguments were used subsequently in debates about the 1998 Declaration, the 2008 Declaration and the Decent Work Agenda.

2. Race to the Bottom Arguments

The next set of arguments I address relates to the idea of a “race to the bottom” and the need to prevent it. In a nutshell, the idea is that capital mobility and trade liberalization create downward pressure on labor standards, making it impossible for states to maintain these standards and leading to undesirable social results.³¹⁶ This argument contradicts the idea that the productivity of workers or “economic fundamentals” is the main explanation for differences in labor standards between countries.

Global *laissez-faire* is said to create downward pressure on labor/employment laws in two ways. The first, and the most common, is “regulatory arbitrage,”³¹⁷ whereby competition for

³¹² 2008 Declaration, *supra* note 64, art. IA(iv). The provision also states, in a potentially contradictory way, that “labour standards should not be used for protectionist trade purposes.” *Id.*

³¹³ 1998 Declaration, *supra* note 3.

³¹⁴ ILO, *supra* note 154 [emphasis added].

³¹⁵ Francis Maupain, writing in his own name, did relate core labor rights to the idea of the illegitimacy of comparative advantage gained by violating them. MAUPAIN, *supra* note 18, at 138. He argued, by reference to the GATT concept of “normal price,” quoted *supra* note 315, that “judging ‘normality by reference to rules preventing ‘social oppression’ [meaning CLR] seems more promising: in many ways this reasoning corresponds well with the identification of fundamental rights [CLR] as ‘enabling rights.’” *Id.*

³¹⁶ As noted by Robert Howse, race to the bottom arguments are often quite distinct from claims of social dumping, as unlike the latter they do not rest on the idea of restoring the proper level of labor-cost competitiveness but rather postulate a downward spiral that is harmful regardless of the trading partners’ starting point. Robert Howse, *The World Trade Organization and the Protection of Workers’ Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 165 (1999).

³¹⁷ See Drezner, *supra* note 89; Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties 1960–2000*, 60:4 INT’L ORG. 811 (2006). For a critical take, see Richard B.

capital and trade traps states into a prisoner's dilemma in which the only rational course of action for all participants is to lower labor standards to get a competitive edge.³¹⁸ However, this makes everyone worse off because once all states lower their labor/employment laws, no one gets a trading advantage, and labor/employment laws are just less protective than before.³¹⁹ The second way in which *laissez-faire* is said to create downward pressure on labor laws is through "a decline in revenues resulting from lower tariffs and lower profit taxes [which] forced many governments to cut expenditure, including in the social sector."³²⁰ Hence, falling state revenues caused by trade liberalization drive the "lowering" of some labor standards and social programs.

Notice that all the Social arguments reviewed in this part take the very left-wing position of advocating linkage of many labor standards with the trade regime. It also bears mention that the race to the bottom idea is invoked in subsequent discussions in the ILO as a justification for more labor standards promotion. Guy Standing, in a critique of both the Decent Work Agenda and various institutional developments such as the shifting of resources away from standard-setting activities, gives the ILO an overarching goal steeped in a race to the bottom rationale. Since "in the globalization era labour costs are part of trade competition", the ILO must seek to find ways of "limiting labour cost differences between countries" and embrace a much more ambitious version of the Decent Work Agenda.³²¹ Other actors have argued that the core labor rights ILO strategy should be modified and expanded to counter the socially destructive effects of a race to the bottom on non-core labor standards.³²²

C. *Social Legal Thought Arguments on the 1998 Declaration and Core Labor Rights*

Despite the omnipresence of human rights rationalizations of the 1998 Declaration, as well as of critiques that existing human rights rationales represent a dilution of the ILO's Social agenda, it is interesting to note that as a matter of historical fact there were, even at the very time of the adoption of the 1998 Declaration, wholly Social rationales for that document. Importantly, these rationales are all identified with the left of the ideological spectrum.

In 1998, shortly after the adoption of the 1998 Declaration, the International Labour Review, the academic journal of the ILO, published a special issue entitled "Labour Rights, Human Rights," which seems to be an important part of the discourse around the shift to core labor rights. The anonymous introduction by the editors to the special issue provides an interesting example of how social legal thought can be used to "speak" labor standards. The editors start by indicating that the special issue celebrates the 50th anniversary of both the Universal Declaration of Human Rights and the ILO Freedom of Association and Protection of the Right to Organise Convention (No. 87),

Freeman, *Are Your Wages Set In Beijing?*, 9:3 J. OF ECON. PERSP. 15 (1995). For an invocation of the race to the bottom rationale in the context of "linkage" at the level of NAFTA, see Nicholas Keresztesi, *Mexican Labour Laws and Practices Come to Canada: A Comment on the First Case. Brought to Canada Under the North American Agreement on Labour Cooperation*, 8 CANADIAN LAB. & EMP. L.J. 411, 413 (2000).

³¹⁸ Langille, *supra* note 32, at 42. It seems like quite an important point that what matters in the race to the bottom dynamic is the threat of, and not merely actual divestment. *Id.*; Mundlak, *supra* note 12, at 242.

³¹⁹ See Brian Langille, *Labour Standards in the Globalized Economy and The Free Trade/Fair Trade Debate*, in INTERNATIONAL LABOUR STANDARDS AND ECONOMIC INTERDEPENDENCE, *supra* note 54, at 229, 335–36.

³²⁰ Gunter & van der Hoeven, *supra* note 98, at 17–18.

³²¹ Standing, *supra* note 9, at 375.

³²² Bob Hepple, *New Approaches to International Labour Regulation*, 26 IND. L. J. 353, 359 (1997); Guy Mundlak, *DeTerritorializing Labor Law*, 3:2 L. & ETHICS OF HUM. RTS 189, 200–01 (2009); Hani Ofek-Ghendler, *Globalization and Social Justice: The Right to Minimum Wage*, 3 L. & ETHICS OF HUM. RTS 266, 283 (2009).

both adopted in 1948. They then reveal their goal of demonstrating that these two documents “can be strong tools for those who seek to pursue the vision of a world where the humanity and dignity of each person are fully respected.”³²³ So far so human rights-sounding. The editors then say that they will explain “what these important instruments *and especially Convention No. 87* [—] have accomplished and of what they are still capable.”³²⁴ Freedom of association is given predominance in the editors’ analysis. The reasons for this become clear a few lines later. Indeed, “[t]he central focus of this special issue is on the instrumental right of freedom of association”,³²⁵ because “[w]ithout the right to associate, whether exercised or not, the prospects for achieving social justice are poor.”³²⁶ Contrary to many advocates of the human rights rationales for core labor rights, for whom as already noted the 1998 Declaration is a historic breakthrough and “the first pronouncement expressly proclaiming a ‘human rights’ orientation for the ILO,”³²⁷ the editors describe the 1998 Declaration as just “another historic milestone in the promotion of social justice.”³²⁸

This shows that a few months after the 1998 Declaration was adopted, there already existed in the heart of the intellectual community of the ILO³²⁹ an alternative approach to the more conventional human rights CLR rationale, one rooted in social legal thought, and specifically in the prioritization of freedom of association as the one right necessary to achieve broader “social justice.” This approach of course resonates with Social theorizing about the importance of freedom of association over other ILO standards because of its role in “social dialogue,” “deliberative democracy,” and “collective interest formation” (by contrast with individual-based conceptions of autonomy).³³⁰ The contributors to the 1998 special issue were not engaged yet in subsequent debates on the link between the Declaration and the broader Decent Work Agenda (DWA). Yet, it is plausible that their arguments would support and pave the way for the (partial and contested) consolidation of the DWA under a left-wing Social agenda in the 2008 Declaration, which is described below.

We can also trace a different kind of Social rationale for core labor rights, one based on Keynesianism. Speaking at a conference chaired by the IMF First Deputy Managing Director alongside World Bank and ILO officials, David Smith, then director of the AFL-CIO’s Office of Public Policy, offered a classic Keynesian justification for core labor rights. After noting that core labor rights are “not quantitative,” but “expressly qualitative,” and that they are “procedural rights,” Smith argued that international financial institutions should promote CLR not only for human rights reasons, but also because they are “necessary [for] . . . sustainable economic

³²³ ILO, *Introduction: Labour Rights, Human Rights*, 137:2 INT’L LAB. REV. 127, 127 (1998).

³²⁴ *Id.* at 127 (emphasis added).

³²⁵ *Id.*

³²⁶ *Id.* at 128.

³²⁷ Bellace, *supra* note 15, at 5.

³²⁸ *Id.* at 129.

³²⁹ Contributors to the special issue include such leading ILO employees and scholars as Nicolas Valticos (former deputy Director-General), Lee Swepston (former chief of the ILO Equality Branch), Harold Dunning (formerly of the ILO Bureau for Workers’ Activities) Kelly Hellerson (former deputy Legal Adviser) and Geraldo von Potobsky (former chief of the ILO’s Freedom of Association Branch).

³³⁰ Faina Milman-Sivan, *Freedom of Association as a Core Labor Right and the ILO: Toward a Normative Framework*, 3 L. & ETHICS OF HUM. RTS. 1–2 (2009). For a prior articulation of “collective interest formation” as a Social good promoted by unions, see Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 796 (1994).

development”.³³¹ That is because the historical enactment of labor standards in developed countries “contributed to the development of a broad middle class . . . precisely because it created a domestic consumption base, where domestic demand led the process of development. [It also] created more sustainable [economic situations that were] less prone to crisis [and] less prone to disruption”.³³²

All these examples show that it is possible to rationalize the 1998 Declaration and CLR in a Social way and that such rationalizations did exist. They are all left-wing in that they propose broad promotion of labor standards to enact wealth redistribution and collective associative activity in the name of the good of society. Moreover, it is plausible that there is some resonance between these approaches and subsequent Social arguments on the Decent Work Agenda, to which I now turn.

D. *Social Legal Thought Arguments on the Decent Work Agenda*

Stephen Pursey, then Senior Economic Policy Adviser at the ILO, wrote in 2002 that the first pillar of the DWA, that of CLR, “influences the development of the legal framework for the realization of the goal of decent work for all”³³³ Moreover, it “has been the core of the institution’s mandate since it was created with the objective of promoting *social justice* and dignity at work.”³³⁴ This is, I note in passing, an interesting retrospective projection of “social justice” as the foundation of the 1998 Declaration, one with which many human rights proponents quoted above might disagree.

Discussing the second DWA pillar, the “creation of more and better jobs,” Pursey explains that “[e]mployment is the first step in escaping poverty and social exclusion.”³³⁵ As for the third pillar, “social protection,” “[t]he goal is to insure people against the major risks to their earning power, and prevent accidents and work-related illnesses.”³³⁶ Finally, the pillar of “social dialogue” “aims to better the processes by which differences of interest are resolved and common aims identified and pursued”.³³⁷ Pursey’s take is more left-wing than others such as Amartya Sen’s, analyzed above, in that it stresses the importance of every pillar of the DWA, providing Social rationales for each.³³⁸

Janelle Diller, then Principal Legal Officer of the ILO, presented a very similar analysis of the Decent Work Agenda in a 2007 panel on international labor law at the annual meeting of the American Society of International Law (ASIL) (the first panel of its kind at the ASIL since 1999).

³³¹ International Monetary Fund (IMF), Transcript of Seminar and Panel Discussion on “A Role for Labour Standards in the New International Economy?”, (Sept. 29, 1999), www.imf.org/external/np/tr/1999/tr990929.htm.

³³² *Id.*

³³³ Stephen Pursey, *The Decent Work Agenda: Modernizing the ILO’s Mission*, 2 GLOBAL SOCIAL POLICY 6, 7 (2002).

³³⁴ *Id.* For a quasi-identical claim, see TONIA NOVITZ, INTERNATIONAL AND EUROPEAN PROTECTION OF THE RIGHT TO STRIKE: A COMPARATIVE STUDY OF STANDARDS SET BY THE INTERNATIONAL LABOUR ORGANIZATION, THE COUNCIL OF EUROPE AND THE EUROPEAN UNION 105–06 (2003).

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.* at 8.

³³⁸ For a similar discussion of the DWA, see Juan Somavia, *The ILO Decent Work Agenda as the Aspiration of People: The Insertion of Values and Ethics in the Global Economy*, in PHILOSOPHICAL AND SPIRITUAL PERSPECTIVES ON DECENT WORK 3, 7–8 (Dominique Peccoud ed., 2004); Guy Mundlak, *The Right To Work – The Value of Work*, in EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 341, 349 (Daphne Barak-Erez & Aeyal Gross eds., 2007).

Diller indicates that “international labor law is rooted in the constitutional mandate of the ILO, and the concept of ‘decent work’ is essentially a formula for the convergence of four primary constitutional objectives.”³³⁹ Having equated the Decent Work Agenda with the goals of international labor law itself, Diller goes on to elaborate the following analysis, based on a trade-related argument and what looks like a race to the bottom idea, as well as a clear concern for instability and social insecurity:

The *Wall Street Journal* yesterday reported the “misgivings” of free trade advocates about the social impact of globalization; concerns that the *downsides of trade are deeper than once realized focus especially on job insecurity* [I]t is these concerns that are at the heart of the aims of international labor law: *job insecurity, protection of workers’ income, decent working conditions, and avoiding abuse* [T]he usefulness of law as a means for giving voice and effect to these widely shared values can be pursued through the application of normative principles (e.g., rights) that are necessary to realizing the ultimate goals³⁴⁰

The reference to the instrumental use of “rights” to achieve the broader goals of the DWA, identified as inter alia job security and protection of workers’ income, is a clear attempt to provide a Social rationale for the DWA. In Diller and Pursey’s analyses, the four pillars of the DWA seem equally valued, in accordance with the idea that decent work is “a cross-cutting, holistic concept which should have an impact greater than the sum of its four constituent parts”.³⁴¹

So far I have presented arguments on which DWA prong to prioritize. The arguments are all left-wing, i.e. they give equal importance to the four prongs of the DWA as part of a broad Polanyian agenda for re-embedding the market in society and promoting redistribution. I now want to explore how some Social takes give content to individual prongs of the DWA besides CLR. Doing this reveals another axis of ideological conflict: that of less and more expansive definitions of each DWA prong.

Francis Maupain has claimed that “fundamental rights aside, there is no goal to which the ILO has accorded a higher priority” than employment creation and stimulation, the first objective of the DWA.³⁴² But, as Kerry Rittich points out, everyone agrees that more employment is a good thing; the question is whether to get there by anti-inflationary macro-economic policies, low exchange rates and the “free market” or through stimulative Keynesian macro-economics and “regulation.”³⁴³ What makes an employment-related proposal Social cannot just be favoring employment in the abstract; it has to privilege the stimulative, interventionist route over the “free market.” And that is what many actors and organs have done.

For instance, the ILO Committee of Experts, in its 2010 report on the application of conventions related to the first pillar of the DWA (“creating jobs”), provides a Social rationale in support of Employment Policy Convention No 122 of 1964, a document strongly identified with the ILO’s Social and Keynesian past and which binds states to promote “full employment” through macro-economic policy-making.³⁴⁴ The ILO uses the following definition of “full employment”:

³³⁹ Janelle M. Diller, *Three Challenges Facing International Labor Law*, 101 AM. SOC’Y INT’L L. PROC. ANN. MEETING 398, 399 (2007).

³⁴⁰ *Id.* (emphasis added) (citation omitted).

³⁴¹ Graeme Buckley, *Decent Work in a Least Developed Economy: A Critical Assessment of the Ethiopia PRSP 24* (ILO Pol’y Integration Dep’t Nat’l Pol’y Group, Working Paper No. 42, 2004).

³⁴² MAUPAIN, *supra* note 18, at 88.

³⁴³ See RITTICH, *supra* note 76, at 42.

³⁴⁴ International Labour Conference, *Report III (Part IB): General Survey Concerning Instruments in Light of the*

it is a “situation where all persons seeking employment have been provided with paid positions.”³⁴⁵ This does not tell us exactly how the goal is to be reached, yet the affinities with an ambitious Keynesian vision seem clear.³⁴⁶ Indeed, it ignores concepts like the “Non-Accelerating Inflation Rate of Unemployment” and the “Natural Rate of Unemployment,” which were used to criticize Keynesianism and drastically reduce the level of employment that could be stimulated through macro-economic policy without purported disastrous consequences for inflation.³⁴⁷ These concepts were important tools in the historical triumph of neoliberalism over Keynesianism, leading to the “rejection of a role for demand-management policies to limit unemployment to its frictional component”.³⁴⁸ Ignoring these concepts is a left-wing approach that favors more stimulative government interventions to empower workers economically.

Moreover, in its 2010 report, the Committee of Experts digs up some 1984 amendment to the Employment Policy Convention (corresponding to the DWA prong of “job-creation”) which specifies that it should be considered as an instrument in the service of the “realization of the right to work as a human right”.³⁴⁹ While it is famously unclear what “the right to work” means, that concept has been a rallying cry for socialists and left liberals at least since the French revolution of 1848 (as a response to calls for “property rights”).³⁵⁰ It has also, like other social and economic rights, been considered non-justiciable for a long part of its history.³⁵¹ However, as a programmatic concept (or somewhat justiciable right), it can involve various obligations to provide and create employment as well as obligations pertaining to the quality of working conditions.³⁵² The very idea of a right to work suggests something between a little and a lot more than merely benefiting from employment created through “free market” means; in other words, it seems to require the kind of state intervention that is central to a left-wing project of wealth redistribution.

In an important 2004 *mélange* volume dedicated to Nicolas Valticos, Anne Trebilcock, senior official and former Legal Adviser to the ILO, proposed a “sketch of provisions from a range of Conventions and Recommendations relevant to decent work and the informal economy”,³⁵³ the

2008 *Declaration on Social Justice for a Fair Globalization*, ¶ 27, ILC99-III(1B)-2010-01-0010-1-En.doc (June 2010),

http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_123390.pdf.

³⁴⁵ ILO, *Thesaurus: Full Employment*, <http://www.ilo.org/thesaurus/> (last visited Nov. 6, 2016); MacNaughton & Frey, *supra* note 27, at 305 n.6.

³⁴⁶ MacNaughton & Frey, *supra* note 27, at 304 n.6.

³⁴⁷ WILLIAM MITCHELL & JOAN MUYSKEN, *FULL EMPLOYMENT ABANDONED: SHIFTING SANDS AND POLICY FAILURES* 49–50 (2008).

³⁴⁸ *Id.*

³⁴⁹ ILO, *supra* note 344, at xi. The ILO is hardly alone in connecting “full employment” to the right to work. This is also an established move in the jurisprudence of the Committee on Economic, Social and Cultural Rights. See Sarah Joseph, *UN Covenants and Labour Rights*, in *HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW AND REGULATION*, *supra* note 11, at 331, 337.

³⁵⁰ See Georges Bourgin, *Le “droit au travail” et la revolution de 1848 en France*, 5:7–8 *SYNTHÈSE* 309 (1946). For a range of analyses of the right to work, its history and possible meanings, see the contributions in *THE RIGHT TO WORK: LEGAL AND PHILOSOPHICAL PERSPECTIVES* (Virginia Mantouvalou, ed., 2014).

³⁵¹ It is, however, enshrined in Article 23.1 of the Universal Declaration of Human Rights, Article 6 of Part III of The International Covenant on Economic, Social and Cultural Rights, among many other Conventions, not to mention many domestic constitutions.

³⁵² See Guy Mundlak, *The Right to Work: Linking Human Rights and Employment Policy*, 146 *INT’L LAB. REV.* 189, 193 (2007).

³⁵³ Anne Trebilcock, *International Labour Standards and the Informal Economy*, in *LES NORMES INTERNATIONALES*,

normative goal being to “mak[e] decent work a reality for all workers and employers.”³⁵⁴ While Trebilcock does discuss the four CLR and the 1998 Declaration under the heading “Human Capabilities and Empowerment,”³⁵⁵ she also discusses the Social Security (Minimum Standards) Convention, corresponding to the “social protection” prong of the DWA, in strikingly Social terms:

The basic ILO instrument in this field is the Social Security (Minimum Standards) Convention, 1952 (No. 102). Certainly, its gender-biased language would suggest contemporary irrelevance; however, the underlying approach of the Convention is fully up to date for addressing the informal economy. It is based on notions of solidarity and progressive extension of coverage. This approach is at odds with more recent trends in social protection that shift the burden of risk to the individual, and link delivery to profit-making institutions. These are trends that are of little use to the poor or indeed to those who risk falling into poverty because of a catastrophic event.³⁵⁶

We find there again a left-wing kind of social legal thought, with a combative edge denouncing the privatization of social services and advocating for “solidarity” and poverty alleviation.

The final event worth analyzing is the adoption of the 2008 Declaration on Social Justice for a Fair Globalization by the International Labour Conference. Its main legal import is said to have been the constitutionalization of the Decent Work Agenda, which had never been formally included in a treaty but was rather a programmatic initiative launched unilaterally by the Director-General in 1999.³⁵⁷ The 2008 Declaration’s other important move was to re-introduces freedom of association/collective bargaining as the most important CLR in its article IA(iv), describing the CLR prong of the DWA as follows:

[R]especting, promoting and realizing the fundamental principles and rights at work, which are of particular significance, as both rights and enabling conditions that are necessary for the full realization of all of the strategic objectives, noting: – that freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives.³⁵⁸

As mentioned above, the idea that unions and collective bargaining should be the privileged regulatory mechanism is an organicist and collectivist trope that was historically central to social legal thought. Its reaffirmation builds on the Social takes on the 1998 Declaration mentioned above, which prioritized freedom of association and collective bargaining. This is a left-wing idea, as it favors a very expansive agenda of wealth redistribution and uses collective bargaining as a tool to further that social goal.

In addition, Maupain mentions the International Labour Conference employer group’s “stubborn resistance” to the inclusion of the words “decent work” in the 2008 Declaration’s title (in order to avoid a more expansive definition of the ILO’s role in promoting labor standards).³⁵⁹ According to Maupain, this is one of the factors that paradoxically facilitated the “revisit[ation] of

supra note 206, at 585, 613.

³⁵⁴ *Id.* at 613.

³⁵⁵ *Id.* at 603.

³⁵⁶ *Id.* at 609–10.

³⁵⁷ See MAUPAIN, *supra* note 18, at 58 n.29.

³⁵⁸ 2008 Declaration, *supra* note 64, at 11 (emphasis added).

³⁵⁹ MAUPAIN, *supra* note 18, at 55, 58.

‘social justice,’ the leitmotif of official rhetoric during the Cold War, which had (due perhaps to its ‘collectivist’ connotations) fallen into relative disfavour almost immediately after the fall of the Berlin Wall.”³⁶⁰

Maupain is not alone in interpreting the adoption of the words “social justice” as a turn to a more expansive Social agenda. Hughes and Haworth report that “[t]he 2008 Declaration . . . signals the moving-on of the ILO from the politics of the 1998 declaration,”³⁶¹ insofar as it proclaims a “broader mandate for social justice.”³⁶²

Keeping this semantic quarrel in mind allows us to better understand the political stakes of historical and normative claims about the relationship between the 1998 Declaration, the Decent Work Agenda and the 2008 Declaration. Hence, when left-leaning ILO actors like long-time ILO Committee of Experts member Janice Bellace conflate Decent Work and “social justice,” treating them as evidently one and the same, we should see this as a political maneuver:

The exact title spotlights the fact that the 2008 Declaration expresses the contemporary vision of the ILO’s mandate, one of social justice, in an era of globalization. Moreover, because only months before at the ILO Forum in Lisbon, “Decent Work” had been linked expressly to “fair globalization,” there was a definite implication that social justice was at the heart of Decent Work.³⁶³

Of course, the specific legal implications of “social justice” in a statement like this are up for grabs. The point is that as long as these abstract concepts are understood by some to have divergent normative consequences (in this case, social justice being more expansive than decent work, and decent work being more expansive than core labor rights), the programmatic place of a concept like “social justice” will remain an important legal-political issue for actors involved in ILO debates.

This part has illustrated that Social arguments are present in every one of the three debates covered in this article. Despite there being more variety in the types of claims made under the Social banner than in the human rights and neoliberal languages, I found the same homology across the debates, suggesting here again that users of the language cumulatively produce a repertoire that survives a given debate and influences future ones. However, unlike in the case of human rights (and to a lesser extent neoliberalism), Social arguments are not very politically malleable, in the sense that, in my localized debates, they seem to always advocate *more* labor standards promotion, a left-wing orientation. Of course, one could conceive of arguments based on things like preventing instability and fostering solidarity that would exclude a number of labor standards as not relevant to these goals, thereby resulting in a more restrictive and right-wing labor law agenda. But the fact that I could not find any suggests that this is not how the language is used, experienced and constituted. This fact has a lot to tell us about the role social legal thought is likely to play in future debates.

CONCLUSION

This article has undertaken to taxonomize claims made in three debates about international labor standards: (1) polemics in the 1990s about trade/labor “linkage” in the WTO, (2) discussion of the selection of “core labor rights” to be included in the ILO’s 1998 Declaration and (3) the

³⁶⁰ *Id.* at 58.

³⁶¹ HUGHES & HAWORTH, *supra* note 33, at 80.

³⁶² *Id.*

³⁶³ Bellace, *supra* note 15, at 23.

1999–2008 exchanges on the shape of the ILO corpus under the Decent Work Agenda. My goal has been to criticize the idea that institutional developments like the adoption of the ILO’s 1998 Declaration can be seen as the triumph of one language, in this case that of human rights, and that the adoption of a human rights language somehow is complicit or resonates with either neoliberalism or classical liberal individualism.

I have claimed that a given legal institution can often be rationalized according to different legal languages, with varying political consequences as to the expansiveness of the labor standards promotion agenda that is advocated. Moreover, I have argued that the human rights discourse can and should be distinguished from classical individualism. It contains new concepts of dignity and harm that seldom seem to be reducible to a set of classical individual property and contract rights even through legal work by neo or classical liberals. In my debates, there are very few influential attempts to restrict labor standards to classical liberal rights, and those that exist do not tap into the human rights discourse but rather use the instrumentalist efficiency analyses of neoliberalism. Social legal thought is another omnipresent discourse that is not reducible to either human rights or neoliberalism. I have suggested that these three discourses were used throughout my three 1994–2008 debates and that there is considerable homology between their uses across the topics (for example, many arguments on trade/labor linkage oddly resemble arguments on the 1998 ILO Declaration). Finally, I have demonstrated that the three discourses vary in their degree of political malleability, such that the human rights language is extremely flexible in the range of positions it can accommodate (from many labor standards to be promoted to none at all), while neoliberalism is less flexible and social legal thought even less. From this I have concluded that, given the empirical fact of the extreme malleability of human rights, there is no reason to think that they will converge more often than not with neoliberalism, or with social legal thought for that matter.

I now want to take a step back from my perhaps excruciatingly detailed analysis and propose speculative thoughts (no more than that) on broader ideological trends that might help explain the peculiar configuration described in this article. The configuration, remember, is one whereby human rights can be equally right and left-wing, neoliberalism mostly right-wing though quite malleable and social legal thought consistently left-wing, with the left understood as more and the right as less inclined towards labor standards promotion. What follows does not pertain to the material and ideational factors that *caused* this configuration. Rather, they are hints at some intellectual tendencies that track my findings here.

The right-wing orientation of neoliberalism may be commonsensical to many readers. However, it is the product of a historically significant shift, the abandonment of classical liberalism by the left. It used to be the case that many labor unions and socialist parties advocated for the right to strike on the basis of absolute property in one’s labor,³⁶⁴ for collective bargaining as *actual* freedom of contract³⁶⁵ and for statutory employment standards as *fair* return to one’s contractual performance of work under freedom of contract.³⁶⁶ These were all tropes that embraced classical liberalism. The left abandoned this tradition and turned massively to the organicism of social legal thought (e.g. “industrial democracy”) over the course of the 20th century.³⁶⁷ The post-1968 leftist

³⁶⁴ WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 135–40 (1991).

³⁶⁵ *Id.* at 128–35.

³⁶⁶ See generally KARL MARX, *CRITIQUE OF THE GOTH A PROGRAMME* Part I (Peking, Foreign Languages Press 1972) (1875).

³⁶⁷ On American unions’ shift to “industrial democracy” during the twentieth century, see Joseph A. McCartin, *Industrial Democracy*, in 2 *ENCYCLOPEDIA OF U.S. LABOR AND WORKING-CLASS HISTORY* 643 (Eric Arnesen ed.,

critiques of the governance program of the Social, after an initial flirt with anti-authoritarian radicalism,³⁶⁸ led to the triumph of human rights as the dominant program of the left,³⁶⁹ with a pride of place for identity politics in various forms (the fight against discrimination, genocide, apartheid, homophobia and sexual violence as injuries to *identities*).³⁷⁰

The late 1960's also mark the moment where the right decidedly embraced liberalism as its political project. When we look beyond the narrow realm of global policy debates on labor standards, the distinction between revivals of classical liberalism and instrumentalist efficiency-based neoliberalism loses some of its relevance. The contemporary right embraces both of these things, with the work of Reagan judicial appointments³⁷¹ and Friedrich Hayek³⁷² representing examples of classical liberal revivals and Coasian law and economics³⁷³ and the analyses of the IMF and the World Bank³⁷⁴ representing instrumentalist views based on the goal of efficiency. This distinction loses its importance because the crucial point is that the right has to a large extent abandoned social legal thought in favor of liberalism writ large, both classical and economic efficiency-oriented. This seems to explain why I found so few right-wing arguments under social legal thought.

However, it used to be the case that fascism, right-wing Christian democracy and some forms of southern developmentalism (e.g. Peron and Vargas in Argentina and Brazil) produced right-wing social legal thought.³⁷⁵ Factors that might have led to the disappearance of this ideology include the discredit of right-wing corporatism and fascism after World War II,³⁷⁶ the influence of the right's fight against the southern developmental state³⁷⁷ and the widespread idea on the right that the northern welfare state (even in its right-wing Christian democratic form) carried the seeds of fascism and communism³⁷⁸ (the Social as "The Road to Serfdom"³⁷⁹). These trends may have led many on the right to durably abandon Social organicism in favor of (neo)liberalism. It bears emphasis that the foregoing probably applies only to debates on "market" issues, as opposed to the family and civil society (encompassing e.g. criminal law, the rights of children in the family and in school, abortion and gay rights, gender equality, etc.).³⁸⁰ In the domain of family and civil society, the right may remain organicist (and Social) in the sense of being opposed to individual rights and favoring individual sacrifice for the purported good of society (think of "social conservatives").³⁸¹ But in the market, including on labor standards, the right's shift to (neo)liberalism and atomistic individualism seems close to universal.

2007).

³⁶⁸ Moyn, *supra* note 98, at 114–16.

³⁶⁹ DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 8–9 (2004).

³⁷⁰ See Halley, *supra* note 170; Kennedy, *supra* note 69, at 65–66.

³⁷¹ Feinman, *supra* note 93.

³⁷² For a discussion of Hayek's work as a complex revival of classical liberalism, see RITTICH, *supra* note 76, at 102–08.

³⁷³ See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

³⁷⁴ See generally RITTICH, *supra* note 76.

³⁷⁵ Kennedy, *supra* note 69, at 46–50, 58.

³⁷⁶ *Id.* at 41–42.

³⁷⁷ See HAROLD JAMES, INTERNATIONAL MONETARY COOPERATION SINCE BRETTON WOODS 120–47 (1996).

³⁷⁸ See Kennedy, *supra* note 69, at 60.

³⁷⁹ FRIEDRICH HAYEK, THE ROAD TO SERFDOM (1944).

³⁸⁰ This is Duncan Kennedy's distinction. See Kennedy, *supra* note 21, at 115–16.

³⁸¹ See *id.*

The foregoing might explain why neoliberalism is predominantly right-wing and social legal thought left-wing on the market question of labor standards promotion. But more would be required to explain why neoliberalism is nevertheless more malleable than social legal thought. It may be that neoliberalism, now more ubiquitous and central than the social legal thought it displaced, is subject to heavier critiques and forced to please a broader array of audiences. The critiques of neoliberalism in the IMF and the World Bank are legion,³⁸² and their role in bringing about a “chastening” of neoliberalism and its opening up to some social goals is well documented.³⁸³ This pressure on neoliberalism may have been heightened by a shift of the gravitational center of international economic law away from the IMF/World Bank towards UN institutions under the leadership of UN Secretary General Kofi Annan.³⁸⁴ These phenomena, combined with the energetic campaign in favor of linkage of trade and social issues in the 1990s,³⁸⁵ might have pressured neoliberals into compromising on their anti-regulatory program so as to allow for *some* human rights, labor standards and environmental regulation. It is plausible that social legal thought, being more marginal, was not exposed to as much pressure from a broader audience.

This brings us to human rights, the most malleable of all three discourses in the WTO and ILO 1994–2008 labor standards debates. We could see this malleability as symptomatic of the centrality of human rights in the contemporary era. Indeed, its malleability may attest to the fact that there was a critical mass of people willing to engage with the discourse to articulate anything from right-wing arguments on the impossibility of imposing any international labor standard absent state consent³⁸⁶ to left-wing arguments depicting *all* labor standards as indivisible human rights.³⁸⁷ Even if we exclude classical liberal emphasis on property and contract rights from the definition of contemporary human rights, as I have argued we should, the malleability remains considerable.

It is not clear how this political configuration will evolve in the future. I have decided to end my analysis in 2008 precisely because there seem to be significant changes after that. It appears that in the wake of the Great Recession social legal thought was further strengthened vis-à-vis human rights in the ILO, as a reaction to “imbalances” in the global economy that led to destructive social results.³⁸⁸ Moreover, it seems that neoliberalism was rolled back among some international organizations because of a return to Keynesian approaches,³⁸⁹ though some scholars document

³⁸² For reviews and assessments of these, *see, e.g.*, UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 262252 (2006); JAMES M. CYPHER AND JAMES L. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* 589–90 (2009); Pahuja, *supra* note 14, at 235; BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* 160–61 (2003); JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002); David Schneiderman, *Habermas, Market-Friendly Human Rights, and the Revisibility of Economic Globalization*, 8 *CITIZENSHIP STUD.* 419 (2004).

³⁸³ *See, e.g.*, Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 69, at 203, 206.

³⁸⁴ MARK MAZOWER, *GOVERNING THE WORLD: THE HISTORY OF AN IDEA* ch. 11–12 (2012).

³⁸⁵ *See supra* Part I.

³⁸⁶ *See supra* notes 231–35 and accompanying text.

³⁸⁷ *See supra* notes 241–44 and accompanying text.

³⁸⁸ *See* ILO, *Decent Work: Some Strategic Challenges Ahead, Report of the Director-General*, International Labour Conference, 97th Session, Report I(C), (2008), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_092642.pdf. *See also* MAUPAIN, *supra* note 18, at 55–58.

³⁸⁹ *See* Olivier Blanchard, Giovanni Dell’Ariccia & Paolo Mauro, *Introduction, Rethinking Macro Policy II – Getting Granular*, in *WHAT HAVE WE LEARNED? MACROECONOMICS AFTER THE CRISIS* 1, 16 (George Akerlof ed., 2014).

another comeback of global neoliberalism since then.³⁹⁰ Whatever future research into the post-2008 might reveal, it is crucial to map the period of 1994 to 2008 in great detail, as I have done here, as it is a particularly dense nodal point of intellectual developments fateful for the future of debates about labor standards.

To me, the malleability of the three discourses is the key programmatic question for those who want to intervene in debates on labor standards. It is also the question that intensely preoccupies the scholars quoted in the introduction as to the relationship between human rights and neoliberalism. I have meant to suggest a methodology to get better answers to that question than a simple-minded assertion of systematic complicity or mutual reinforcement, based on careful structural analysis of the way discourses are articulated and given form by a set of historically situated actors. Given the fatefulness of the 1994–2008 debates on labor standards, it is more than worthwhile to ponder over which languages important intellectual actors use and what argumentative structures and historical sediments they end up producing. The payoffs of such a study are both descriptive, in that they allow us to understand what work languages like human rights and neoliberalism are doing in the world, and strategic, as the labor standards debates of tomorrow will take place among the partial ruins of today’s argumentative cathedral, of which I have presented “one view.”³⁹¹ The past will likely remain with us in a recognizable form, and knowing it well may be an indispensable first step towards thoroughly changing it in whatever direction seems right to us, in light of our own choices among the complex arguments that make up this ever-expanding yet astonishingly stable cathedral.

³⁹⁰ Kerry Rittich, *Fragmented Work and Multi-Level Labour Market Governance: Informality, Crisis Policy and an Expanded ‘Law of Work’*, in CRITICAL LEGAL PERSPECTIVES, *supra* note 41, at 185, 192.

³⁹¹ This is an allusion to Guido Calabresi and A. Douglas Melamed’s famous reference to Monet’s paintings of the Cathedral at Rouen in *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). For a critical discussion that nevertheless informs my use of the metaphor here, see Jeanne L. Schroeder, *Three’s a Crowd: A Feminist Critique of Calabresi and Melamed’s One View of the Cathedral*, 84 CORNELL L. REV. 394, 396–98 (1999).