# Temporary Labour Migration and the "Ceremony of Innocence" of Postwar Labour Law: Confronting "the South of the North"

**Adrian A. Smith**

**Abstract**

The article considers the temporary labour migration program in Canada, which catapults workers from the global South into work and wider relations in the global North, in the context of debates swirling around Anglo-American labour law. There is widespread consensus that labour law is experiencing a sustained moment of crisis in the face of neoliberal globalization. Not widely considered is how this crisis relates to temporary labour migration and the global South-North relationship and, in turn, how this relationship may impact emergent approaches tasked with transforming or transcending the field. Critical interventions seeking to confront the "southern question" within the socio-legal imaginary have gone largely unnoticed by labour law scholars. Transnational labour law may hold potential for an alternative account of the racialized production of unfree migrant labour. But only if its adherents can truly confront the dynamic unfolding through temporary labour migration—that of the "South of the North."

**Keywords:** Migrant labour, Anglo-American labour law, global south, transnational labour law, racialization, nation state system

**Résumé**

Cet article examine le programme de migration temporaire de la main-d'œuvre au Canada, qui catapulte les travailleurs du Sud global vers le travail et les relations accrus du Nord global à travers le contexte des débats entourant le droit du travail anglo-américain. Il existe un large consensus quant au fait que le droit du travail traverse, actuellement, une crise soutenue face à la mondialisation néolibérale. Or, peu de considération est accordée à la façon dont cette crise est liée à la migration temporaire de la main-d'œuvre et à la relation Sud-Nord et comment, à son tour, cette relation peut influer sur les approches émergentes chargées de transformer ou de transcender ce domaine. Les interventions critiques cherchant à confronter la « question du sud » au sein de l'imaginaire sociojuridique s'avèrent, d'ailleurs, un champ d'études peu considéré par les spécialistes du droit du travail. Le droit du travail transnational pourrait présenter le potentiel d'une explication alternative à l'égard de la production racialisée du travail migrant non libre, à condition que ceux qui y adhèrent puissent véritablement s'attaquer à la dynamique se déployant à travers la migration du travail temporaire - celle du «Sud du Nord».

**Mot clés :** travail, migrant, droit du travail anglo-américain, Sud global, droit transnational du travail, racialisation, système d'État-nation

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"Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity"[1]

## Introduction

Labour Law is in crisis. Caught within the widening gyre, a swirling vortex of outmoded practices, ideas, assumptions, and ways of knowing, labour law's centre can no longer hold. Once the object of scholarly affection, now labour law is the subject of debate and derision over its future. At the heart of the derisive debate is the prevailing disciplinary construction of labour laws—Labour Law—as it took hold in the "postwar moment" in the Canadian and wider Anglo-American tradition.[2] As "things fall apart," intervenors search for a new centre—or centres. Transnational labour law marks a particularly intriguing attempt to refashion that centre around a distinct set of assumptions and ways of knowing about neoliberal work-life subjectivities. This occurs through frameworks striving to re-situate, and for some even de-centre, national states in a globalizing economy.[3] But the extent to which transnational labour law can overcome the deficiencies of Labour Law remains an open question.

Drawing on temporary labour migration to Canada, this article explores Labour Law's deficiencies and broader crisis with a view to the challenges remaining for transnational labour law. I identify Labour Law's relative neglect of

[1] W. B. Yeats, "The Second Coming," in *The Collected Poems of W. B. Yeats*, ed. Richard J. Finneran (New York: Palgrave Macmillan, 1989). The cited passage has famously been transformed by Chinua Achebe into a formative intervention of post-independence African literature: "Things fall apart."

[2] In the first parts of the analysis I place emphasis on labour law as a body of rules *and* field of scholarship within the postwar North American context. I do so as a way of situating the ensuing critique, which rests on the normative belief that divergence between the rules-field understandings would have been far more desirable and productive than what otherwise occurred, especially had the field account embraced a wider and deeper perspective. In other words, there is nothing inherently problematic about scholarly constitution of a field in terms unique from its practitioners, particularly if it occurs as a way of contesting reactionary orthodoxy. I use the capitalized form, Labour Law, to connote the academic field and the pluralized form, labour laws, in reference to what are conventionally taken as the rules. But I concede that the distinction is not always self-evident, which one would expect in the messy production of knowledge, including academic knowledge, although there is much of importance in a positivist line of inquiry (e.g., What are these things they call "labour laws"? How do/did they come to pass?, etc.). The task herein is to problematize Labour Law as a field of study, not as a boundary-enforcing or canonical-setting exercise, but instead to show how scholarly adherents have come to define, know, and query "it" as an object of study.

[3] See, e.g., Adelle Blackett and Anne Trebilcock, eds., *Research Handbook on Transnational Labour Law* (Cheltenham, UK: Edward Elgar, 2015); Bob Hepple, *Labour Laws and Global Trade* (Oxford, UK; Portland, Oregon: Hart, 2005).

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temporary migration as the reproduction of marginalization and exclusion experienced by migrant workers, which follows from processes of Othering and belonging, and trace the neglect to a wider failure to meaningfully contemplate the global South-North relationship.[4] The emergence of transnational labour law may prove a helpful corrective. But to act as such, "it" would need to fully account for the role of South-North relations in the regulation or production of migrant labour. Whether as transnational labour law or any other approach, Labour Law's "second coming" must take hold as a transformative project and agenda by confronting—not sidestepping—the intricacies of the South-North hierarchical relationship. What is necessary is not just the understanding that the North needs the South—in Hegelian or, more aptly, Fanonian dialectical terms—or even that North and South are co-constituted. This is indeed true, but more is needed to capture the complexity of a world in which migrant workers of the South experience an enduring, constrained existence within the North. A more precise, if not nuanced, formulation seems imperative. Thus, as a way of signalling not attenuation but richness and complexity, I posit the idea of "the South of the North" as a dynamic of Othering with which transnational labour law—and wider scholarly understandings—must contend.[5]

The article is divided into two sections. The first section engages with the crisis thesis as viewed through an intervention by one of Labour Law's foremost interlocutors—Harry Arthurs. The discussion illustrates how key proponents not only did not readily contest Labour Law's valorization of a particularly narrow understanding of the legal regulation of "labour" and "worker" and forms of collective worker action, but in fact refrain from addressing their ongoing role in reproducing disciplinary marginalization and exclusion, most notably of those designated as migrant labour. It is this "ceremony of innocence" which helps to explain Labour Law's ongoing deficiencies and crisis. The second section explores migrant labour production through the South of the North formulation.

My intervention builds from a preoccupation with the stories "we" tell ourselves about "ourselves," as evident within overlapping and intersecting groups or communities—national as well as scholarly-epistemic, particularly within Labour

[4] While I have opted to use the terms "global South" and "global North" to align with the wider "South of the North" framing, this should not be read as a rejection of the concept of a "Third World" as a prescient way of framing inequality within the ongoing history of geopolitical analysis. For greater insight, see Radha D'Souza, "Imperial Agendas, Global Solidarities, and Third World Socio-legal Studies: Methodological Reflections," *Osgoode Hall Law Journal* 49 (2012); Vickey Randall, "Using and Abusing the Concept of the Third World: Geopolitics and the Comparative Study of Development and Underdevelopment," *Third World Quarterly* 4153, no. 25 (2004): 1.

[5] This particular formulation stands indebted to Amar Bhatia's incisive intervention, and he graciously read an earlier version of this article and provided thoughtful reflections. Bhatia, "The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World," *Oregon Review of International Law* 14 (2012): 131. See also Sujith Xavier et al., "Placing TWAIL Scholarship and Praxis," *Windsor Yearbook of Access to Justice* 33, no. 3 (2016): vii.

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Law and, in a more limited extent, socio-legal studies.[6] Here, concepts of Othering and belonging provide a "clarifying" analytic frame.[7] Othering, understood as a set of common processes or dynamics, captures how marginalization, exclusion, and inequality occur through the production and enforcement of group-based difference.[8] An attentiveness to Othering provides an opportunity for consideration of processes of belonging as something more than just innate. Othering helps to reveal not only who gets to belong to a given group or community and who does not, through the production of in-group and out-group identities and subjectivities. It also reveals the spatial and temporal bases upon and through which belonging is both enforced and contested—and perhaps reconstituted. Belonging incorporates (shifting) rights and obligations of national citizenship, but the construct is not utilized as a synonym of, nor is it reducible to, citizenship or identity.[9] As such, against its typically naturalized and nationalized popular treatment, processes of belonging constitute a "situated politics" across time and space.[10] The situated politics of belonging are territorialized and temporalized and extend beyond the global/local binary. Through the Othering and belonging frame, we find the opportunity to consider the ways in which these processes are called upon and deployed within the governing regime of migrant labour control and the production of the racialized, unfree, and migrant, labouring "Other," with a view to how they might be resisted.

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6 In a thorough if now dated review of social science scholarship on the idea of belonging, political and social geographer Marco Antonsich draws an analytical distinction between personal and intimate feelings of belonging in a place, "place-belongingness," and the surrounding social context, "politics of belonging," arguing that both dimensions are necessary for a full understanding of territorial belonging. Antonsich, "Searching for Belonging—An Analytical Framework," *Geography Compass* 4, no. 6 (2010): 644–59. See also Kathleen Mee and Sarah Wright, "Geographies of Belonging," *Environment and Planning A* 41 (2009): 772–79. I place great emphasis on the latter and concede that my analysis pays far less attention to the former, despite belonging's crucial emotional or psycho-affective dimensions. And while conceptions of belonging can take on personal or individual-centred focus, I attend to group-centred (or centric) conceptions and the interconnected concept of Othering. For a forceful, multidimensional account of belonging in settler capitalist Canada see Glen Sean Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014). For the formative anti-colonial engagement, see Frantz Fanon, *Black Skin, White Masks* (New York: Grove, 1967).

7 John A. Powell and Stephen Menendian, "The Problem of Othering: Towards Inclusiveness and Belonging," *Othering & Belonging* 1 (2016): 14–40, online: http://www.otheringandbelonging.org/the-problem-of-othering/.

8 In focusing on a particular articulation of Othering, racialization or the process through which perceived racial identities are ascribed to a group or situation, the aim is not to essentialize or elevate its significance above other forms. Racialization is enduring, and stubbornly so, but historically-situated/specific and thus far from fixed or even necessary. That said, the process has proven integral to the historical development of global capitalism, including through accordant understandings of superiority/inferiority, or racism. I have addressed this in the contemporary context of the regulation of labour: see Adrian A. Smith, "Racism and the Regulation of Migrant Labour," in *Research Handbook on Transnational Labour Law*, ed. Adelle Blackett and Anne Trebilcock (Cheltenham, UK: Edward Elgar, 2015), 138–149 ["Racism"].

9 See, e.g., William Kaplan, ed., *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal and Kingston: McGill-Queen's, 1993).

10 Nira Yuval-Davis, Kalpana Kannabiran, and Ulrike Vieten, "Situating Contemporary Politics of Belonging," in *The Situated Politics of Belonging*, ed. N. Yuval-Davis, K. Kannabiran, and U. Vieten (London, Thousand Oaks: SAGE, 2006), 7–8. See also Nira Yuval-Davis, "Belonging and the Politics of Belonging," *Patterns of Prejudice* 40, no. 3 (2006): 197–214. I borrow the important framing from Yuval-Davis and her collaborators, but I refrain from adopting their third identified way in which the politics of belonging is situated, that of intersectionality. See Yuval-Davis, *The Politics of Belonging—Intersectional Contestations* (London, Thousand Oaks, New Delhi, Singapore: SAGE, 2011).

## 1. The Crisis in Labour Law Orthodoxy

The now well-entrenched understanding of contemporary scholars of Labour Law is that the field exists in crisis. This "crisis in Labour Law" thesis essentially emerged out of concerns about the diminution of national states' regulatory capacities within labour markets and the wider economic sphere wrought by neoliberalism.[11] The crisis is said to provide an opportunity to transform the borders of the field.[12] One place where this transformational project has been pursued is in the emergence of transnational labour law, an approach (or sets of approaches) concerned with, in the words of the late Bob Hepple, "[a] spider's web of hard and soft transnational regulation […] weaved around domestic labour laws and […] profoundly influencing them."[13] Extending across national boundaries, transnational "rules and procedures" apply unilaterally, bilaterally, regionally, or through multilateral arrangements.[14] Domestic labour laws are de-centred within transnational labour law accounts. That said, it is uncertain the extent to which proponents of these accounts remain indebted to the foundational assumptions of postwar Anglo-American Labour Law.

Temporary labour migration from the global South to the North offers a prescient example through which to explore Labour Law's prevailing understandings. The regulation of migrant labour incorporates such conventionally understood legal spheres as labour and employment, immigration, criminal, corporate, trade, environmental, land use planning, housing, social assistance, and public health, among others.[15] Yet, certain exceptions aside,[16] Labour Law scholarship largely has treated migrant labour and these myriad other legal-regulatory spheres or regimes as largely unimportant and beyond its domain and purview. Why has Labour Law scholarship not taken up the issue of migrant labour regulation in a more meaningful way? After all, the Canadian state has utilized "foreign labour" through temporary labour migration throughout the

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11 See Brian Langille, "Labour Law's Back Pages," in *Boundaries and Frontiers of Labour Law*, ed. Guy Davidov and Brian Langille (Oxford, Portland: Hart, 2006), 13–36.

12 Karl Klare, "The Horizons of Transformative Labour and Employment Law," in *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, ed. Joanne Conaghan, Richard Michael Fischl, and Karl Klare (New York: Oxford University Press, 2002), 29.

13 Hepple, 3.

14 Ibid.

15 A recent example of this occurred in the context of a municipality's attempt to employ loitering by-laws to restrict the local movement of migrant workers. See Mary Caton, "Leamington business owners ask council to curb uptown loitering," *The Windsor Star*, 20 July 2017, online: http://windsorstar.com/news/local-news/leamington-business-owners-ask-council-to-curb-uptown-loitering. For other examples see Adrian A. Smith, "The Bunk House Rules: A Materialist Approach to Legal Consciousness in the Context of Migrant Workers' Housing in Ontario," *Osgoode Hall Law Journal* 52, no. 3 (2015): 863; Adrian A. Smith, "Racialized in Justice: The Legal and Extra-Legal Struggles of Migrant Agricultural Workers in Canada," *Windsor Yearbook of Access to Justice* 31, no. 2 (2015): 15 ["Racialized"].

16 See, e.g., Judy Fudge, "Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers," *Comparative Labour Law and Policy Journal* 34, no. 1 (2012): 96; Cathryn Costello and Mark Freedland, eds., *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: Oxford University Press, 2014); Adelle Blackett, *Making Domestic Work Visible: The Case for Specific Regulation* (Geneva: International Labour Office, 1998); Joanna Howe and Rosemary Owens, eds., *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Oxford; Portland, Oregon: Hart, 2016).

so-called postwar period.[17] A reflection on certain core assumptions of Labour Law offers an explanation.

The origin story of postwar Anglo-American Labour Law, its "foundational framing and justificatory account of itself," is what Brian Langille terms its "constituting narrative."[18] This narrative is organized around the historical emergence and development of the three legal regimes governing employment: the individual contract of employment, statutorily-protected collective bargaining, and minimum employment standards.[19] The constituting narrative, following Langille, perceives "our current law as a reaction" to the "real life" limits of contract law.[20] On this account, labour laws, and in particular statutory collective bargaining, emerged with the aim of "constraining, or humanizing, or softening, or resisting contract in the name of justice, democracy, fairness, and equality."[21] Labour laws therefore were conceived as a way of attaining "justice against, or as resistance to, markets."[22]

Widening recognition of the deleterious effects of neoliberal globalization, including the mounting real life injustices stemming from the proliferation of precarious employment and life, has brought into question Labour Law's constituting narrative. It is my contention, however, that the questioning has not occurred deeply enough. While it has spurred something of a disciplinary respite, the crisis thesis rests on obfuscation of key shortcomings of the constituting narrative, which become apparent when we query recent interventions and proposals of prominent scholars. Take, for instance, Harry Arthurs's "counter-factual" proposal to re-envision the focus of orthodox Labour Law through the "law of economic subordination and resistance."[23] The proposal launches from the premise that there is no longer collective identity for workers as "the terms 'labour' and 'worker' are being emptied of meaning."[24] Arthurs characterizes the contemporary world as: "a world in which 'labour' as a sociological descriptor and political force has become anachronistic, in which 'workers' no longer answer to that name, and in which 'employment' has become so conceptually indeterminate and functionally attenuated that it no longer constitutes a stable platform for the protection of rights or the projection of entitlements."[25] And he adds, "if workers do not perceive that they have collective interests, if they are not committed to a collective identity and collective action, there is not much collective labour law can do to improve their lot."[26] Arthurs

17 See Vic Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada Since 1945* (New York: Routledge, 1991).

18 Langille, 22.

19 Ibid.

20 Ibid., 23, 22. On the historical development of the contract of employment in Ontario see Claire Mummé, "'That Indispensable Figment of the Legal Mind': The Contract of Employment at Common Law in Ontario, 1890–1979" (doctoral thesis, Osgoode Hall Law School, 2013).

21 Langille, 23.

22 Ibid.

23 Harry W. Arthurs, "Labour Law as the Law of Economic Subordination and Resistance: A Thought Experiment," *Comparative Labor Law and Policy Journal* 34, no. 3 (2013): 585–604 ["Economic Subordination"], see especially 592–596.

24 Ibid., at 589.

25 Harry W. Arthurs, "Labour Law after Labour," *Comparative Research in Law & Political Economy. Research Paper No. 15/2011*, 2011, http://digitalcommons.osgoode.yorku.ca/clpe/53 ["Labour Law"], 22.

26 Arthurs, Economic Subordination, 591. Employment law, which in principle offers the opportunity to "take up the slack," cannot in practice keep up with the demands, according to Arthurs.

levels additional blame on the reliance upon "special pleading" about "the unique character of employment relations" as "a semi-autonomous legal subsystem."[27] In this supposed "future without 'labour,'" the only observable commonality is economic subordination and resistance. That is, a counterfactual existence in which "labour law might have presented itself as part of a broad array of differentiated but related subsystems that collectively challenged some core conceptions of the law of industrial and post-industrial capitalism."[28]

Now my intervention is meant not as a quibble with, but in fact support for, an alternative presentation of labour laws as a subset of an interconnected whole. And, to be clear, I wholeheartedly agree with the need to take human resistance as a central heuristic—indeed, as I maintain elsewhere, resistance marks a pivotal device for conceptualizing social change.[29] That said, I am not certain the "future without labour" account confronts the full implications of its claims. A crucial shortcoming of the field stems from its tight mooring with the three governing legal regimes. Prevailing treatments of postwar labour laws have tended to operate within analytical frameworks artificially truncated and constrained by legal disciplinary distinctions. These accept—and even for some promote—the disciplining of labour laws within a discrete field insulated from overlaps with and intrusions from other fields. The academic acceptance and construction of postwar labour laws produced disciplinary "siloing" effects. Labour controls imposed through other regulatory frameworks (such as immigration) were not deemed worthy of consideration by scholars of the field. And to the point, the only sites from which most field scholars had conceived of "fight back" were linked directly (and more or less exclusively) with the aforementioned governing regimes. In fact, there was little if any space to consider collective acts of resistance beyond those which were expressly granted through the recognized institutional channels of statutory collective bargaining. At most, field scholars expressed modest concern for broader political struggles of unionized workers (and pointed to the limitations and weaknesses of organized labour's social democratic orientation). Outside of certain forceful interventions on welfare state capitalism, field analyses tended not to stray far from well-trodden paths. Beyond narrowly specific legal-institutional forms, human agency and resistance largely were not part of Labour Law orthodoxy. Collective worker action is not robustly accounted for in the constituting narrative. The absence of these features serves to illustrate the tight scholarly hold of postwar collective bargaining and its particularly narrow formation of collective worker rights and rights-based outcomes.

Further, questions surround the empirical foundation for this "future without labour" claim. The claim turns on the perception of contemporary worker action

[27] Ibid., 596.
[28] Ibid., 596.
[29] Adrian A. Smith, "Legal Consciousness and Resistance in Caribbean Seasonal Agricultural Workers," *Canadian Journal of Law & Society* 20, no. 2 (2005): 115 (citing Herbert Aptheker's dictum, "[r]esistance is the core of history, not acquiescence").

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as individualized, consumer-centric and de-collectivized, if not anti-collectivist.[30] But if this understanding conforms with certain Left critiques of neoliberalism which posit the deepening individualization of forms of social responsibility and subjectivity, it likewise misses how neoliberal subjectivity is introduced and imposed through the promotion of narrow, market-defined conceptions of "entrepreneurialism" and "competition." Neoliberal logic, to be sure, has been internalized into the self-identities of people who themselves work to condition each other. But the production of neoliberal subjectivity stems from neoliberalism as a political-economic project which, at its core, seeks to restore and deepen capital accumulation following the so-called postwar compromise.[31] In this we find a refashioning or "reconstitution" of individual *and* collective subjectivity[32]—and not, as too often simplistically stated or implied, the displacement of the latter at the expense of the former. These trends, evident within labour unionism among other areas, serve to deepen reformist forms of collective worker action. In other words, we are left with an interpretation that at once elevates individual identity and action and ignores the promotion of reformist collectivism, while also downplaying wider, rich histories of collective resistance struggles from below.[33]

## Reproducing Labour Law's "Others"

Leaving aside questions of empiricism, other concerns persist. Conceptual ambiguity surrounds the use of the term "labour law" in the "future without labour" contention. Discussions of "labour law" of course can become muddled in whether we are referring to the academic field, policy rules or discourse, professional practices,

30 This implies the existence of an individual-collective binary distinction. Arthurs is of course not alone in drawing so sharp a distinction, nor in identifying individualism as a defining feature of neoliberalism. But this sort of framing lacks the nuance necessary to account for the continuing, if shifting, role of collectivities in social life. While it is evident that neoliberalism produces certain crucial individualizing trends, collectivities remain an indispensable feature of our social world. The neoliberal production of national subjects is such an example of an individualizing trend which occurs within a pre-existent collectivist context, that of national states. While the point here is to cast doubt on the interpretative framing of the empirical data, and not to launch into a full articulation of the claim, we would do ourselves an analytical favour by more readily appreciating that social life is always-already collective and interconnected. In this respect, we might consider more carefully how neoliberalism impacts collective action, not simply by fostering individual allegiances and action but also by producing fragmented and reactionary forms of collectivity.

31 See David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005). While Harvey sees neoliberalism as a theory, it is apparent that its practical existence forms a pivotal aspect of critical understandings of contemporary social life. The theory–actually existing neoliberalism distinction proves disruptive to efforts to appreciate shifts and challenges of everyday life in the current moment.

32 See Robert Knox, "Law, Neoliberalism, and the Constitution of Political Subjectivity: The Case of Organized Labour," in *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project*, ed. Honor Brabazon (Abingdon, Oxforshire: Routledge, 2016).

33 Immanuel Ness, *Southern Insurgency: The Coming of the Global Working Class* (London: Pluto, 2016) (contending that "the expansion of neoliberal capitalism has radically reshaped the composition of the industrial working class on a global level" (46) and tracing contemporary militant struggles of the industrial working class of the global South); David Featherstone, *Solidarity: Hidden Histories and Geographies of Internationalism* (London: Zed Books, 2012) (discussing the global "hidden histories" of internationalism from below). For a discussion, see Smith, Racism, supra note 8; Smith, Racialized, supra note 15. For a forceful account of Canadian state efforts to undermine transnational community organizing, see David Austin, *Fear of a Black Nation: Race, Sex, and Security in Sixties Montreal* (Toronto: Between the Lines, 2013).

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or some or all of the above. Arthurs recognizes the muddling as a mere terminological or definitional issue and not as one with far deeper substantive implications. But the terminological shiftiness works to hide the question of the role and involvement of various constituents—especially scholarly adherents—in reinforcing or resisting the conditions created through labour laws. A similar shiftiness is apparent in how the account confines the geopolitical focus of analysis. Characterizations of labour law as "Anglo-American," "advanced," and "developed" are employed, again, without proper consideration of substantive implications—and, thus, without effort to truly test or broaden the field's geopolitical horizons. Here we find opportunity to consider the role and impact of the global South-North relationship in the construction and operation of so-called Anglo-American Labour Law, a point to which I return to below. For now, I wish only to bring to light the lack of sustained interrogation of geopolitical tradition which signals a particular kind of flaw in the mode of critique adopted.

Specifically, Arthurs's account regards "labour law" as a victim of its own special or even exceptional circumstances. But to portray "it" as an actor is to mount a critique without a subject.

And while subjectless critique may have a place within wider scholarly inquiry,[34] in this instance it has a tendency to cover up, exonerate, or re-inscribe. In failing to examine how adherents to orthodox Labour Law's constituting narrative contributed to the perceived crisis, we are relinquishing both intellectual responsibility and an opportunity for constructive reckoning. This produces a peculiar bit of analysis in which scholars expressly "point the finger" at workers, or at "labour law" as though it were some magical (semi)autonomous subject or actor, but stand unwilling to effectively engage in meaningful self-interrogation of the role of its academic adherents, past and present. It is, as Yeats suggests in the epigraph, a "ceremony of innocence" of sorts. Specifically, I argue that the ceremony of innocence performed by orthodox Labour Law's scholarly devotees amounts to actively not knowing their ongoing role in reproducing disciplinary marginalization and exclusion.

What becomes evident is the functioning of Othering and belonging as political forces within the postwar construction of Labour Law. And—as I put it elsewhere—here is the rub: "Postwar labour law orthodoxy was formulated in specific and limiting ways which reproduced a series of '[O]thers' who fell outside of its purview and who it cared little about engaging. There were large swaths of people, forms of human activities, approaches to law and regulation, and ways of organizing exchange relations and social life, which fell beyond its ambit."[35]

We are forced then to recognize the ongoing work of field scholars in reproducing marginalized and excluded "Others." The reproduction of Otherness occurs in key ways. In particular, as "critical" scholarship in the field has deftly shown, "labour" and "worker" are construed in narrow and stifling terms, organized

[34] See, e.g., Andrea Smith, "Queer Theory and Native Studies: The Heteronormativity of Settler Colonialism," *GLQ: A Journal of Gay and Lesbian Studies* 16 (2010): 41; Adelle Blackett, "Decolonizing Labour Law: A Few Comments," in *Labour Law and Social Progress: Holding the Line or Shifting the Boundaries?*, ed. Roger Blanpain, Frank Hendrickx, and D'Arcy du Toi (Alphen aan den Rijn, The Netherlands: Wolters Kluwer, 2016), 89.

[35] Smith, Racism, 144.

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around the dominant postwar mode of production: industrialized, Fordist mass-manufacturing. Fordism provided the paradigm through which the norm of standard employment emerged. It ultimately assumed a white, able-bodied male citizen worker who, as the primary breadwinner in a heterosexual relationship, received decent wages and benefits sufficient to support the family, while a dependent female caregiver performed the daily upkeep of the household. Through hard-fought struggle, the norm became entrenched within the legal regimes of statutory minimum protections and of industrial pluralism, which situated freedom of association in a procedurally-oriented, reformist form of labour union representation and collective bargaining. Labour Law scholarship troublingly accepted the core premises of the standard employment norm and industrial pluralism.

We could also note here evidence on the shifting spatial contours of the industrial working class, which not only counters prevailing empirical claims but also illustrates the analytical effects of these Othering processes. As the recent intervention of Immanuel Ness serves to illustrate, the "industrial working class has not disappeared but has been relocated and reconstituted in the South …."[36] The existence of resistance struggles from this reconstituted industrial proletariat, what Ness terms a "southern insurgency," undermines the "future without labour" premise by illustrating how collective identity and action have been reconstituted "beyond" the North through global capitalist neoliberalization.

Therefore, the point is that the "future without labour" claim, a subset of the wider crisis in Labour Law thesis, is constructed on a deeply flawed premise: that postwar orthodoxy fully or effectively grasped the richness and complexity of the categories of labour and worker and collective action—not to mention work and social life—in that period. It did not. No amount of gesturing toward a "new" analytical future can overcome the intrinsic reliance upon such a deficient understanding.[37] Following from

[36] Ness, 2. See also Beverly J. Silver, *Forces of Labour: Workers' Movements and Globalization Since 1870* (Cambridge, New York: Cambridge University Press, 2003).

[37] A more difficult matter to assess is the extent to which "critical" field scholarship reinforced the problematic construction of Labour Law. I cannot properly address the matter here, but it is worth raising some preliminary, if provisional, points. Over time, critical scholarly interventions helped to ground down certain of the foundational assumptions of Labour Law. Notwithstanding their salience, however, these interventions tended to be directed in ways that sought to reconfigure or stretch the constituting narrative while staying within its confines in notable ways. For instance, certain accounts viewed the narrow construction of "labour" and "worker" as troubling but not insurmountable. Other accounts failed to develop a robust enough analysis of the impact of racialization or other forms of marginalization and exclusion such as unemployment and social welfare. This might lead one to Langille's argument that Labour Law scholars, irrespective of ideological inclinations or "critical" commitments, tacitly accepted the constituting narrative, a claim with which I generally concur. But yet there is a part of that claim that proves more difficult to assess: whether certain critics of the constituting narrative worked "outside" of Labour Law, in other fields and through alternative frameworks, to pursue their interests in the regulation of capitalist labour and work—an assessment which is further complicated by whether critical interveners adopted different strategy and tactics when pursuing motives on expressly policy reform grounds than more expressly scholarly-epistemic ones (if such an analytical distinction can be drawn). The very idea of working "inside" or "outside" of the field, a distinction implied by Langille, is contested. What appears more certain is that amongst those who self-identified as field scholars or critical field scholars, the constituting narrative's outright rejection seldom appeared on offer. In maintaining a certain sympathy with or nostalgia for the three legal regimes of employment framing and wider Labour Law project, critical and orthodox interventions refrained from reconstituting the constituting narrative in expressly "radical" terms, that is as a marked departure from customary understanding and practice.

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this, I maintain the ceremony of innocence of field scholars reproduces processes of Othering and the attendant production of belonging found in labour laws, the constituting narrative, and wider social relations. But if Ness is correct about the southern insurgency, we also must appreciate the effects of other contemporary and ongoing South-North "insurgencies" on relations of work. Those deemed racialized and unfree, temporary migrant labour are emblematic. For postwar Labour Law, workers constructed as "the migrant Other"—among other "Others"—simply did not belong.[38] Meaningful engagement with the spheres of regulation of migrant labour was largely stifled within the wider academic portrayal of postwar labour laws as a discrete and insulated field tightly moored with the three regimes of employment. In this we find a further dilemma of Labour Law orthodoxy, identified elsewhere in social scientific and other academic thought as methodological nationalism, the seemingly pervasive treatment of the national state as the most appropriate, if not natural, unit of analysis.[39] The marginalization and exclusion of migrant labour within Labour Law orthodoxy is evidence of the constituting narrative's construction within the spatial and temporal parameters of methodological nationalism, framing the core constructs of "labour" and "worker" and "collective action," among others. But if methodological nationalism presents a real challenge for Labour Law scholars, the solution does not rest in claiming that the national state does not matter. Indeed, states assume crucial roles in contemporary migration management and the re/production of global capitalist relations.[40]

But there is more to the point. A clear relationship emerges between the constitution of, on one side, the scholarly-epistemic community of postwar, Anglo-American Labour Law and, on the other, the national migrant-receiving community of Canada and the communities of sending states. These are mutually constitutive sets of communities enforcing and reinforcing processes of Othering and belonging within and between each. Insofar as the community of Labour Law refrains from challenging "exclusionary impulses," it is part of the problem. In other words, there is a particular spatiotemporality to the Othering and belonging found within the epistemic community of Anglo-American Labour Law in the postwar moment which plays some role in the preservation of global inequality; or at the very least, that community has not expressly and forcefully devoted itself to confronting it.

Temporary labour migration develops within ongoing hierarchical relations of the global South and North, a geopolitical context excluded from the purview of "Anglo-American" Labour Law. The failure of Labour Law orthodoxy to consider the global South-North relationship in its constitution of labour and worker and beyond, undermines the field's ability to appreciate the production of migrant labour. I take up these points in the final section.

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38 Smith, Racialized.

39 Andreas Wimmer and Nina Glick Schiller, "Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences," *Global Networks* 2 (2002): 301–34; Andreas Wimmer and Nina Glick Schiller, "Methodological Nationalism, the Social Sciences, and the Study of Migration: An Essay in Historical Epistemology," *International Migration Review* 37, no. 3 (2003): 576–610. But see Daniel Chernilo, "The Critique of Methodological Nationalism: Theory and History," *Thesis Eleven* 106 (2011): 98.

40 Adrian A. Smith, "Migration, Development and Security within Racialized Global Capitalism: Refusing the Balance Game," *Third World Quarterly* 37, no. 11 (2016): 219.

## Confronting "the South of the North"

Anglo-American Labour Law scholarship has not fully confronted the role and impact of the global South in the construction and operation of the field. While there are strong interventions committed to these sorts of explorations,[41] certain prominent accounts appear quite resistant. I argue that the global South-North relationship marks a foundational spatial and temporal dimension of the production of labour. But rather than focusing analysis, the argument invites a further set of questions: Is the widespread adoption of concepts of "the North" and "the South" all that is missing from Labour Law? Is reconstituting the constituting narrative with a view to the global South possible given underlying or entrenched assumptions and commitments? And, if so, is it a useful or even worthwhile endeavour? What is the contribution of key markers like "Anglo-American" and "postwar" analytically? Are these distinctions productive in anything but the most general terms? Or, do they serve merely to hide alternative approaches and assumptions, histories and geographies—flown as analytical flags of convenience to avoid answering questions about scholars' geopolitical affiliations, sensibilities, and commitments? And a further set of questions emerges in the specific context of this analysis: What if concern rested not primarily with the limits of Labour Law, nor with saving the field as it were, but with confronting the *problématique* that temporary labour migration presents? What should we make of temporary labour migration's capacity to situate people in work and life relations spanning differentiated societies of the South and the North? Where do national states, racialization, labour unfreedom, colonialism, settler colonialism, capitalist imperialism, among other critical constructs, fit into understandings of the making of migrant labour?

To see Labour Law as a largely regressive and problematic affair is also to acknowledge that these shortcomings mirror much—but not all—of socio-legal studies in the global North. In contrast, intervenors such as Boaventura de Sousa Santos, Jean and John Comaroff, Eve Darian-Smith and scholars of Third World Approaches to International Law, widely known as TWAIL, have sought to confront the "southern question" within the socio-legal imaginary.[42] Third World Socio-Legal Studies, as it is collectively termed by Radha D'Souza, adopts a particular set of methodological lenses and commitments to appreciate the relationship between socio-legal thinking and the global South-North interaction. While I cannot engage with all of these perspectives, there is a collective sense that knowledge about law cannot escape global geopolitical hierarchies. Like wider socio-legal studies, postwar Labour Law's disciplinary silo represents a "geopolitical

41 See, for example, the works of scholars like Adelle Blackett and Alvaro Santos. Blackett, Decolonizing, supra note 34.

42 Boaventura de Sousa Santos, *Another Knowledge Is Possible: Beyond Northern Epistemologies* (London, New York: Verso, 2007); Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge, New York: Cambridge University Press, 2013). On TWAIL see, e.g., B. S. Chimni, "Third World Approaches to International Law: Manifesto," *International Community Law Review* 8 (2006): 3–27; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2005); Obiora Chinedu Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?," *International Community Law Review* 10 (2008): 371–78; Xavier et al., supra note 5.

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silo"[43] as knowledge production about the labour-law interaction develops parochially. The normative question then becomes from what spatiotemporal location(s) should we seek to make sense of the production of labour and migrant labour specifically? And, to borrow the words of Jean and John Comaroff, further complexity awaits the account, for: "[e]mpirically speaking, however it may be imagined, the line between north and south is endemically unstable, porous, broken, often illegible. It is not difficult to show that there is much south in the North, much north in the South, and more of both to come in the future. All of which is underscored by the deep structural articulation—indeed, by the mutual entailment—of hemispheric economies […] which defy any attempt to unravel them along geopolitical axes."[44]

It is this particular dynamic, what we might term "the South of the North," that presents a qualitatively distinct set of challenges which the mere introduction and widespread adoption of conceptions of the South and the North cannot address.

D'Souza's formidable intervention offers helpful support for thinking through the issue of normative spatiotemporal location. Deftly interrogating the philosophical foundations of Third World Socio-Legal Studies, D'Souza identifies two dominant understandings of law in the global South—imperial agendas and global solidarities—which exist in binary opposition, and yet, tensions notwithstanding, both adhere to liberal philosophy's undermined concept of society. Referring to these binary oppositions—which play out in socio-legal studies as comparative law versus TWAIL approaches, modern versus traditional law, state centralism versus legal pluralism—, D'Souza points to an over-reliance on conceptions of "society" derived from liberal social philosophy in the western or "Greco-Roman-Christian intellectual traditions."[45] As such, "society" receives a binary treatment as opposed to, as D'Souza invites, a differentiated understanding following from a "non-dualist" philosophical commitment to allowing analytical tensions to exist. In this respect, in the context of "law and society" analysis of the global South, the task is to attend not only to law, but also to the "different modes of constitution of societies," primarily an internally-derived or capitalist mode and an externally-imposed or imperialist mode.[46]

From D'Souza we might begin to identify ways forward for reconstituting Labour Law—and for directing the general production of transnational labour law—aimed at "bringing in" the global South by rendering more robust and nuanced conceptions of "its" legal-societal constitutions.

## Temporary Labour Migration to Canada in Space and Time

Temporary labour migration to the global North produces a set of processes, situated relations, and experiences, a dynamic, that functions through and across national state borders of the South and the North. South and North bleed together

[43] Darian-Smith, 5.
[44] Jean Comaroff and John Comaroff, "Theory from the South: A Rejoinder," *Cultural Anthropology*, 2012, https://culanth.org/fieldsights/273-theory-from-the-south-a-rejoinder. One need not support the wider argument to appreciate the insight that South and North "bleed" into each other.
[45] D'Souza, supra note 4.
[46] Ibid., 441.

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through Canada's temporary labour migration regime. But it is not a process or space of transcendence of national state territoriality. As a structure of living together and belonging, the regime is constituted through an amalgam of legal spheres deriving from the respective participating states and the wider global system of national states. The hierarchical state system, functioning on the premise of universal sovereignty and the preservation of territorial integrity, sets up a complex interplay of sending states and the receiving state in migrant labour production. Sending states assume a pivotal role by virtue of the fact that migrant workers, as respective citizens, are "tethered" to them. These states discipline the national populace in a myriad of ways that not only make labour into a productive force, understood in capitalist terms, but also prepare workers (and their kin) for the circular migratory experience. People are pre-sorted into categories of desirability based on "human capital" criteria such as formal educational attainment, health, and demographic profile. The Canadian receiving state, reliant upon projections of immigration humanitarianism and multicultural acceptance and tolerance, carry out migration selection in ways that marginalize, exclude, and render certain people more or less desirable but unequal. Taken together, it is through the interaction of national states that peoples of the global South are rendered racialized, unfree, and migrant, productive labour. And it is through this hyper-exploitation that these peoples are devalued and differentially treated or incorporated into the work and social life of the North.

Canada's approach to temporary labour migration can be further situated in colonialism, marking a continuation of resource extraction from the global South which followed European contact and the colonization of vast peoples and territories. These southern territories, plentiful in fertile land, and water, minerals, and other raw materials that run with it, as well as existing indigenous and introduced populations, provided the site and source of labour power for a colonial-capitalist agenda of natural resource extraction. Canada's approach to migration extends the hyper-exploitative arrangement through the extraction of human resources from the global South. This harnessing of so-called foreign labour from the global South facilitates the pursuit of capital accumulation, especially within Canada's political economy. Temporary labour migration is therefore deployed as a counter to the political and economic gains secured through struggles for independence and ensuing claims for global solidarity, serving to shift the global North's "post-colonial" burden of responsibility back onto inhabitants of the global South.

Just as Canada's migration approach functions in ways consistent with colonialism, it too performs the work of settler colonial hyper-exploitation, displacement and dispossession.[47] The production of migrant labour occurs as a basis for preserving if not deepening the colonial settlement project in Canada. The work and very existence of migrant labour is called upon to bolster the underlying claim of territorial authority of the Canadian settler state. This work is further complicated

[47] On this, see Adrian A. Smith, "A Political Economy of Sociolegality in Settler Colonial Canada," in *Change and Continuity: Canadian Political Economy in the New Millennium*, ed. Mark Thomas, Leah F. Vosko, Carlo Fanelli, and Olena Lyubchenko (Montreal and Kingston: McGill-Queen's University Press, forthcoming).

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by the fact that some of those deemed desirable migrants belong to indigenous communities which were, themselves, shaken from traditional territories of the South. The South of the North dynamic therefore clarifies the ongoing and conjoined development of colonialism and settler colonialism as a continuation of the racialized devaluation of migrant labouring *and* Indigenous bodies. It is, as such, a pattern of relations and processes deeply rooted in the historical development of racialized global capitalism, which is utilized to justify, enforce and reproduce the existing skewed relationship between peoples and states on a global scale. Thus, the dynamic clarifies transnational labour migration's spatiotemporal logic of power, which, while extending beyond any given national territorial context, spans local and global scales, as a continuation of national settler state authority and, through it, the dominance of capitalist classes.

All of this notwithstanding, the South of the North dynamic also represents a spatial and temporal location through which ordinary working people struggle for survival. The dynamic encapsulates a transnational regime of global production and social reproduction. It is contingent on the gendered production–social reproduction divide, but in it we also find evidence of collective solidarities and resistance struggles from below aiming to contest the divide and prevailing social relations. Through a more serious focus on this "geography of survival" of migrant workers, and its affinities and tensions with longstanding geographies of survival of Indigenous communities, enslaved and indentured peoples, and other Others, we might find generative opportunities in which the structures of living together and belonging can be understood and ultimately remade. If, as a mode of inquiry, transnational labour law is to provide sustained analytical support to these efforts, it must expressly confront the narrowness and insularity of postwar Labour Law and avoid at all costs the repackaging of the field's well-worn deficiencies. And this may require a scholarly commitment to shedding its affiliations with field orthodoxy altogether.

## Conclusion

In the face of neoliberal globalization and precarious employment, there is widespread consensus that the scholarly field of postwar Anglo-American labour law is experiencing a sustained moment of crisis—or worse. In this article I insert into the tortuous discussion the phenomenon of temporary labour migration from the global South to the North, and in particular to Canada, understood within the register of Othering and belonging. Temporary labour migration presents great difficulty for the field's foundational assumptions or narrative, dominant approaches and ways of knowing. When it comes to appreciating "labour" and "worker," collective action beyond statutorily-enacted collective bargaining, and even "law" or regulation in societal context, labour law orthodoxy has tended to marginalize and exclude a range of Others. In this marginalization and exclusion, prominent scholars of the field disregard the active production of racialized and unfree, temporary, migrant labour through hierarchical global South-North relations of states and peoples. As such, labour law scholarship can be understood as continuing—i.e. reproducing—processes of Othering and the attendant construction of who gets to belong or not belong, found within existing regulatory regimes and wider social relations.

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Yet as things fall apart within labour law, as its prevailing orthodoxy loses its grasp and appeal, there is a dearth of meaningful self-reflection and interrogation. If the field's crisis scholarship is tantamount to its day of reckoning, it falls perilously short in both sustained judgment and retribution. Far from drowned, what we in fact find is a thriving ceremony of innocence performed by prominent scholarly adherents who engage in actively not knowing the processes and relations of making migrant labour—akin to what philosopher Charles Mills terms an epistemology of ignorance.[48] The epistemological innocence prevails in the absence of serious consideration of the global South-North relationship as a foundational spatial and temporal dimension of labour—and especially migrant labour—production. As the scholarly-epistemic community of labour law largely reinforces deeply exclusionary politics of belonging, it appears to share with the global community of national states what John Crowley once described as "the dirty work of boundary maintenance."[49] There is a real concern, then, that if this crisis talk continues undeterred, it will function as nothing more than a thinly disguised excursion into epistemic gatekeeping, animating an inward force of disciplinary minutemen who patrol the borders of knowledge production searching out outliers in the form of theories, approaches or peoples; and, demonstrating an outward indifference to (or worse, neglect of) the deployment of national-territorial borders to devalue and dehumanize ordinary working people. This amounts to an abdication of intellectual responsibility, if not a betrayal of the aspirations of working classes of all variants and incarnations.

The seriousness of this concern not only calls into question the continuing value of labour law as a field of study, but also presents crucially important challenges for the "transnational turn." For transnational labour law to extend beyond mere critique to offer something of real or sustained importance, a "second coming" of sorts, thorough interrogation of the ongoing role of the global South-North relationship in the making of labour, worker, collective resistance and law and society must occur. In this we must come to appreciate more than just the enduring existence of the global South vis-à-vis the global North, but how South and North bleed together through regimes like the one erected to facilitate temporary labour migration to Canada, and how a range of other insurgencies, southern *and* northern, occur within and across the South-North spatial and temporal divide to justify and enforce material injustice and misery. Here, therefore, the challenge is one of confronting the South of the North, the unfolding dynamic deeply rooted in the centuries-long expansion of racialized global capitalist relations. The South of the North dynamic joins past, present, and future of colonial and settler colonial configurations—it is an extension of labour unfreedom into the afterlives of new world enslavement, and of displacement and dispossession in the unfolding desecration of Indigenous livelihoods.[50] And yet, the dynamic also marks the lived

[48] See Charles Mills, *The Racial Contract* (New York: Cornell University, 1997), 18.
[49] John Crowley, "The Politics of Belonging: Some Theoretical Considerations," in *The Politics of Belonging: Migrants and Minorities in Contemporary Europe*, ed. Andrew Geddes and Adrian Favell (Aldershot: Ashgate, 1999), 30.
[50] See, e.g., Smith, Sociolegality, supra note 47; Todd Gordon, *Imperialist Canada* (Winnipeg: Arbeiter Ring, 2010).

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existence(s) of ordinary people as they struggle, across space and time, against pressing adversity. It is evidence that the creative and stubborn, collective defiance of oppressed peoples contests the imposition of spatial and temporal bounds; their "geographies of survival" are far from outmoded. In this respect, South of the North serves as a reminder to scholars in what remains of the field of labour law, in the burgeoning study of transnational labour law, and beyond: Even if the "best" amongst us refrain from fully confronting the South of the North, the lack of intellectual conviction will not dampen the passionate intensity of those deemed the earth's "worst."

Adrian A. Smith
Associate Professor
Osgoode Hall Law School
formerly Associate Professor
Department of Law & Legal Studies
Institute of Political Economy, Institute of African Studies, Carleton University
adriansmith@osgoode.yorku.ca

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