MIGRANT LABOUR AND THE MAKING OF UNFREEDOM:

HOW THE LAW FACILITATES EXCLUSION AND EXPLOITATION UNDER CANADA'S TEMPORARY FOREIGN WORKER PROGRAMS

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ABSTRACT

This thesis explores the role of law in facilitating the exclusion and exploitation of migrant workers under Canada's Temporary Foreign Worker Programs [TFWPs]. The TFWPs have been widely criticized as contributing to systemic abuse and exploitation of migrant workers, and discursive connections between temporary migrant labour and the concept of human trafficking have increased in recent years. Despite this, little concrete action has been taken to ameliorate what are seen as fundamentally problematic aspects of the TFWPs' regulatory structure and operation. This thesis establishes that law plays a facilitative role in the exploitation of migrant workers by both excluding such experiences from dominant understandings of 'exploitation', located largely within the criminal law realm, and by creating a regulatory structure for the operation of the TFPWs which effectively excludes migrant workers from seeking law's protection.

This thesis develops a conceptual framework of unfreedom through which to explore the regulatory structure and operation of the TFWPs, having first established the limitations of existing legal definitions addressing severe forms of exploitation, and especially the concept of human trafficking in this regard. Using the conceptual framework of unfreedom, which emphasizes the existence of active, external constraints on the ability to exercise choice, this thesis examines the primary regulatory features under the TFWPs that create conditions of unfreedom, and explores how these regulatory features also impact upon individual experience and enable the occurrence of exploitation by private actors. This thesis concludes by offering insights into the ways in which the ideas of freedom, choice and rights, and their conceptualization within the state-subject relationship, might be reconceived in order to advance the existence of and meaningful access to rights for migrant workers, and enhance their substantive freedom under Canada's TFWPs.

RÉSUMÉ

Cette thèse explore le rôle du droit dans la facilitation de l'exclusion et l'exploitation des travailleurs migrants dans le cadre des Programmes canadiens des travailleurs étrangers temporaires (PTET). Les PTET ont été largement critiqués comme ayant contribué à l'abus et l'exploitation systématiques des travailleurs migrants, alors que les liens discursifs entre le travail migrant temporaire et le concept de traite des personnes ont augmenté dans les dernières années. Malgré cela, peu d'actions concrètes on été prises afin d'améliorer des aspects de la structure réglementaire et du mode opératoire des PTET qui apparaissent pourtant fondamentalement problématiques. Cette thèse établit que le droit opère un rôle de facilitateur en excluant ces expériences de la définition courante de « l'exploitation », que l'on retrouve principalement dans le domaine du droit criminel, et en créant une structure règlementaire permettant une mise en œuvre des PTET qui exclut à toutes fins pratiques les travailleurs migrants de leurs recours à la protection juridique.

Après avoir établi les limites des définitions juridiques existantes quant aux formes sévères d'exploitation et plus particulièrement le concept de traite des personnes, cette thèse développe un cadre conceptuel de non-liberté afin d'explorer la structure réglementaire et le mode opératoire des PTET. À travers le cadre conceptuel de non-liberté, qui met l'emphase sur l'existence de contraintes actives et externes sur l'habileté d'exercer le libre-arbitre, cette thèse examine les principales caractéristiques réglementaires des PTET qui établissent des conditions de non-liberté, et explore comment ces caractéristiques réglementaires affectent également les expériences individuelles et permettent la survenue d'exploitation par des entités privées. Cette thèse se conclut en offrant des perspectives quant aux moyens de reconcevoir les idées de liberté, de libre-arbitre et de droits ainsi que leur conceptualisation dans le cadre de la relation entre État et sujet, de manière à améliorer tant l'existence que l'accès significatif des droits des travailleurs migrants, tout en renforçant leur liberté substantive dans le cadre des PTET canadiens.

INTRODUCTION

"Temporary foreign workers have better work ethic, some employers believe"[1]

"McDonald's accused of favouring foreign workers"[2]

"Canadians think employers abuse temporary foreign worker program: survey"[3]

"John Williamson apologizes for 'offensive' comment on temporary workers program: MP reportedly said it makes no sense to pay 'whities' to stay home while 'brown people' work"[4]

"Exploited Workers' Canada's 'Slave Trade'"[5]

"McDonald's foreign workers call it 'slavery'"[6]

This brief sampling of news headlines concerning the Temporary Foreign Worker Programs [TFWPs] in Canada demonstrate clearly the debates and divisions – ideological and practical – surrounding the programs, a topic that has become increasingly sensationalized this past year

[1] Mark Gollom, "Temporary foreign workers have better work ethic, some employers believe" *CBC News* (8 April 2014) online: <www.cbc.ca/news>.
[2] Kathy Tomlinson, "McDonald's accused of favouring foreign workers", *CBC News* (14 April 2014) online: CBC News < www.cbc.ca/news> [Tomlinson].
[3] Don Butler, "Canadians think employers abuse temporary foreign worker program: survey", *Ottawa Citizen* (14 December 2014) online: Ottawa Citizen <http://ottawacitizen.com>.
[4] "John Williamson apologizes for 'offensive' comment on temporary workers program: MP reportedly said it makes no sense to pay 'whities' to stay home while 'brown people' work", *CBC News* (8 March 2015) online: CBC News <www.cbc.ca/news>.
[5] Dale Brazao, "Exploited Workers' Canada's 'Slave Trade'," *The Toronto Star* (30 August 2008) online: The Toronto Star <www.thestar.com>.
[6] Kathy Tomlinson, "McDonald's foreign workers call it 'slavery'", *CBC News* (17 April 2014) online: CBC News <www.cbc.ca/news>.

with a wave of 'scandals' over employer abuse of the program,[7] and a subsequent regulatory 'overhaul' by the federal government.[8] As the above headlines illustrate, migrant workers are laden with many competing identities: the idealized worker; the scapegoat for unemployment, or thief of local jobs; the 'slave'; the 'other'. This thesis takes up the challenge of exploring how these many identities work together, and against each other, in constructing a particular idea about migrant labour and workers in Canada, and the role of law in both constructing and reflecting these labels.

This thesis began with a question: why do we see increasing discursive connections made between migrant work and exploitation, especially in relation to 'human trafficking', and yet we do not see correlative action or policy reform to reduce susceptibility to abuse or prevent 'human trafficking'? The conclusions reached in response to this question, and which will be explored throughout this thesis, centre on the legal, social and political understandings brought to bear on both the concept of 'exploitation', particularly as it is couched in the modern legal language of 'human trafficking', and on the idea and experience of migrant work. As this thesis will argue, the dominant representations of human trafficking rely heavily on a relationship to ideas of sexual exploitation, and illegality. Migrant work is not well-placed within, or often associated with, these constructs. Relatedly, the perceptions of migrant work, as constructed in and reflected by, law, rest on racialized and paternalistic notions of who a migrant worker is, and on the idea

[7] See, i.e., Tomlinson, *supra* note 2; "Foreign worker permit pulled at Labrador City restaurants", *CBC News* (7 April 2014) online: CBC News <http://www.cbc.ca/news>; Susana Mas, "Temporary Foreign Worker Program sanctions Nova Scotia trucking company", *CBC News* (8 May 2014) online: CBC News <http://www.cbc.ca/news>; Susana Mas, "Temporary Foreign Worker Program sanctions target 3 employers", *CBC News* (8 April 2014) online: <http://www.cbc.ca/news>; "Weyburn restaurant defends staffing moves and use of foreign temps", *CBC News* (23 April 2014) online: CBC News <www.cbc.ca/news>.

[8] Government of Canada, *Overhauling the Temporary Foreign Worker Program: Putting Canadians First* (Ottawa: Government of Canada, 2014) online: Employment and Social Development Canada <http:// http://www.esdc.gc.ca> [Government of Canada 2014].

of an economic and labour market abstracted from its human dimension in relation to the place and purpose of migrant work within this landscape. The result of the bundle of forces at play in respect of these concepts is that the law facilitates the exclusion of migrant workers from its protection, and thus enables abuse and exploitation to occur. Before setting out these claims in greater detail, this Introduction will first lay the groundwork of the analysis to be undertaken in this thesis by examining the idea of 'stories' as a framing device from which to engage in an exploration of law's role, relationship and impact on concrete experience.

I. 'STORIES' AS A FRAMING DEVICE FOR EXPLORING LAW'S RELATIONSHIP TO LIVED REALITY

This thesis uses the idea of 'stories' from which to approach a richer understanding of law's relationship to, and impact upon, lived reality. The law is not often portrayed as a site of storytelling; yet, the law interacts daily with the stories and narratives of individual life. Traditional legal discourse and analysis has framed the law as largely acontextual and abstract, equating its internal logic with an accurate reflection of reason and understanding, while simultaneously leaving little room for other important aspects of experience, such as emotion and imagination.[9] This has created a foundational conflict between "individual, concrete human voices and abstract, general legal rules."[10]

[9] Toni M Massaro, "Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?" (1989) 87:8 Michigan Law Review 2099 at 2100 [Massaro].
[10] *Ibid* at 2101.

What we often see reflected in, and constructed by, law is a demand for stories that can be accommodated with its 'rationalist' framework. Stories of individual experience must be reduced to only those facts which correlate to the relevant legal definition or test. The result is similar to what author Chimamanda Adichie terms "the single story":[11] "show a people as one thing, as only one thing, over and over again, and that is what they become."[12] Adichie warns of the danger of this 'single story': by hearing only one perspective or perception, we forget the complexity and dynamicity of people, places and events, and ultimately reduce the richness and depth of human experience to a prescriptive form. The danger of a single story also lies in its consequences: "it robs people of dignity; it makes our recognition of our equal humanity difficult; it emphasizes how we are different rather than how we are similar."[13]

Law has often focused on a 'single story' of its own character, with destructive consequences for the individuals affected by it. In other words, law itself tells and directs a particular story of events and populations, with often hidden ideological assumptions and politics driving its own narrative. In this way, the impersonal and abstract appearance of law "may lead to a disregard for individuals, and may exalt logical consistency and predictability over compassion and substantive justice."[14] Similarly, law's propensity for binary approaches to defining identity abstracts both the commonality and complexity of human experience. Either/or distinctions like victim/agent or slave/free person reduce identity to formal status, neglecting to examine the real conditions individuals face and the depth of 'shades of grey' between full and free agency, and

[11] Chimamanda Adichie, "The Danger of a Single Story" presented at TEDGlobal conference, Oxford, UK, July 21-24 2009, online: <www.ted.com> [Adichie]. While I adopt Adichie's term, 'single story', this thesis is centrally concerned with the way in which a *dominant*, or 'definitive' story marginalizes other stories and narratives of similar experience, and thus acknowledges the presence of multiple stories bearing on an issue.
[12] Adichie, *ibid* at 9:32.
[13] *Ibid* at 13:58.
[14] Massaro, *supra* note 9 at 2101.

total evaluation of agency. This representation does significant harm at all points on the spectrum of experience, and this thesis will go on to explore.

The power of law and of stories is also deeply interconnected. As Adichie discusses, power defines stories: "how they are told, who tells them, when they are told, how many stories are told, are really dependent on power."[15] Power creates not just the ability to tell the story of another person, "but to make it the definitive story."[16] It is this idea of the creation of a 'definitive story', particularly, that will be taken up by this thesis. While many stories may exist, in several arenas to be explored in this thesis, a *dominant* story can be readily identified. Thus, this thesis seeks to expose and unsettle the assumptions we make *in* law and *about* law when we tell a 'single story'. In order to expose the problematic assumptions that attend to these dominant stories, this thesis will use the concept of "deconstructive practice" to unpack the ideology and claims underpinning these stories.

The concept of "deconstructive practice", derived from Derrida, seeks to expose and unsettle the assumptions made about a particular "privileged" subject, and to show, instead, the mutual dependency inherent between a "privileged" subject and its "other".[17] Through this process of "ungrounding" our assumptions and privileged concepts, we can begin to see that "[t]he law reflects social visions that involve privileging particular conceptions of human nature. As we deconstruct legal principles, we deconstruct the ideology or world view that informs them."[18]

[15] Adichie, *supra* note 11 at 10:06.
[16] *Ibid* at 10:15.
[17] See J M Balkin, "Deconstructive Practice and Legal Theory" (1987) 96 Yale LJ 743 at 747, 755 [Balkin].
[18] *Ibid* at 755.

The goal here is not to deny or critique a notion of an "objective truth", so much as to examine the way in which we interpret reality and "attempt to comprehend truth".[19]

As such, the goal of using stories as a framing device for this thesis is not to measure these stories against a "separate truth", but to ask how our understanding of 'truth' is constituted through, and influenced by, these stories and the beliefs that underpin them;[20] in other words, to examine how these stories, beliefs and actions, shape the legal order, and vice versa. Laws "both reflect and regulate social life" and the content and structure of legal orders thus "reflect views, whether obvious or obscure, about social relations."[21] The character and shape of the law thus both constructs, and is informed by the values and ideas of the community and people it governs. The law "tells a story about what a people are and should be."[22] The goal of examination, then, is to uncover the story law is telling about a society and its values. In other words, law paints a picture of society, and tells the story of its individual members, which begs the question: whose story, exactly, is law telling? Whose voice in society is heard by the law?

The question of voice, particularly, has become increasingly important in legal scholarship with the rise of critical legal studies. Recently, the concept of storytelling in law has been instrumentalized as a legal and political strategy for scholarship which focuses on marginalized groups in society, such as critical race theory and feminist studies. These "outside" scholars, as Kleinhans calls them,[23] have utilized "narrative storytelling projects" to "recuperate marginalized

[19] Balkin, *supra* note 17 at 761.
[20] Paul W Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago, IL: University of Chicago Press, 1999) at 35-6 [Kahn].
[21] Balkin, *supra* note 17 at 761-2.
[22] *Ibid.*
[23] Dr Martha-Marie Kleinhans, "Rewriting "Outsider" Narratives: A Renaissance of Revolutionary Subjectivities" (2007) 2 Charleston L Rev 185 at 187 [Kleinhans]. While using the "outsider" label can serve as a reification of this

people and groups as well as their experiences."[24] As identified by Kleinhans, the recurring themes in this mode of scholarship are:

> [T]he insistence on an empathetic point that has been lost or hidden by traditional legal scholarship, the use of storytelling as a political means through which legal scholars impart new (heretofore silenced) voices into the foray of law and its dominance, and an overwhelming, underlying drive for (and belief in) the transformation of both legal scholarship and political community[.][25]

Thus, the goal with this type of scholarship is often to give both voice and empathy in the legal and political arenas to populations historically ignored or silenced by the law.[26] In other words, such scholarship attempts to bring to the fore multiple stories, which may often speak counter to the dominant representation or 'single story' law portrays, in an effort to reshape the legal and political order in a way which is better capable of understanding and accounting for these multiple narratives and lived realities. The aims of this growing body of scholarship are shared by and shape the framework of this thesis.

With these attributes of the idea of 'stories' in mind, and their value as a framing device from which to explore a richer understanding of law's relationship to lived reality – it's influence on and reflection of individual experience and identity – the next sections will turn to set the context for the specific issues to be explored in this thesis: the conceptualization of 'human trafficking', and the current landscape of and issues attending migrant work under the TFWPs in Canada.

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binary approach to belonging, I do so to both acknowledge the continued presence of a distinction between those ostensibly "inside" dominant discourse of theory, practice and politics, and those placed "outside" it (see Kleinhans at 187), and to challenge it as discussed in this section, and the body of thesis will establish.

[24] Kleinhans, *supra* note 23 at 187.

[25] *Ibid* at 188.

[26] *Ibid.*

II. THE NARRATIVE OF HUMAN TRAFFICKING: A SINGLE, SENSATIONAL, AND PROBLEMATIC STORY

The label of 'human trafficking' has become increasingly predominant in social, political and legal arenas as a 'short-form' descriptor for many forms of exploitation. In some circles, it has become synonymous with prostitution, slavery, migrant smuggling, organized crime and a host of other controversial issues and terms. The rapid acceleration in both popularity and proliferation of the use of the 'human trafficking' label necessitates both an examination through this lens, and a direct challenge to it.[27]

The phrase 'human trafficking' evokes with it strong emotions and imagery of often poor and helpless women or girls "chained to a bed in a brothel".[28] Her trafficker, a brute, and often foreign, criminal affiliated with the mafia or some organized crime group. Today, the 'single story' – or, dominant representation – of human trafficking told in both political and social arenas unfolds along the lines of an innocent, and foreign, girl deceptively recruited to work in a prosperous country, playing on her vulnerabilities and feelings of duty to provide for her family or others in her care, or her desire to escape the desperate and limiting circumstances she experiences in her own country. Once there, she is, in fact, forced into some sort of sexual slavery at the hands of her trafficker, notably also a foreign national. Though she may attempt to escape, her efforts are futile. Eventually, she is rescued by police or immigration authorities; in this story, the state is her saviour. Version of this story are told and retold in numerous arenas.[29]

[27] These arguments will be explored in detail in Chapters 1 and 2 of this thesis.
[28] Dina Francesca Haynes, "(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act" (2006-7) 21 Geo Immigr LJ 337.
[29] This issue will be canvassed in-depth in Chapter 1.

Human trafficking as a modern phenomenon has attracted significant attention as a direct result this particular narrative. Both antecedent to, and following the development of the international *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*,[30] the dominant representation of human trafficking has substantially focused on the phenomenon as one connected to the conceptualization of sexual exploitation.[31] In other words, the conceptualization of human trafficking for sexual exploitation has been significantly privileged over other forms of human trafficking, such as forced labour for non-sexual purposes. The very language of trafficking in persons has a strong historical connection to prostitution and the sexual exploitation of women and girls.[32] It is thus unsurprising that this particular conceptualization has continued, after the advent of the *Protocol*, to dominate both discourse and policy in the political and legal arenas. This story of what human trafficking is and how it occurs has carried a powerful image, and powerful response. It has become both a political and moral cause taken up by, particularly, Global North nations. In the decade since the inception of the international *Protocol*, legal and other policy measures have proliferated at an enormous rate. A significant majority of these policies thus have focused on a crime- and border-control response

[30] 15 November 2000, 2237 UNTS 319.

[31] See, generally, Joe Doezema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (London: Zed Books, 2010); Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) [Gallagher]; Kamala Kempadoo, "Introduction: From Moral Panic to Global Justice: Changing Perspectives on Trafficking" at vii-xxxiii in Kamala Kempadoo, ed, *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (London: Paradigm Publishers, 2005); Joe Doezema, "Loose Women or Lost Women: the Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women" (2000) 1:1 *Gender Issues* 23-50. This theme will be further explored in Chapter 1.

[32] *International Convention for the Suppression of the White Slave Traffic*, 4 May 1910, 3 LNTS 278; *International Convention for the Suppression of Traffic in Women and Children*, 30 September 1921, 9 LNTS 415; *International Convention for the Suppression of the Traffic in Women of Full Age*, 11 October 1933, 150 LNTS 431; *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, 96 UNTS 271. See, also, Gallagher, *ibid* at 13-25. A specific analysis of the impact of political and social perceptions on the international legal definition of human trafficking, and its development and implementation, will be taken up in Chapter 2.

approach to prevent human trafficking from reaching our borders, and to punish the external 'bad actors' associated with the crime.[33]

With this story of human trafficking dominating political, social and even legal discourse and action, there is great danger to those it excludes, those whose stories are not being told. What does 'human trafficking' really mean, and what role do states really play in 'combating' it or contributing to it? Despite the political pomp and flare of states' declarations to 'eradicate' the 'evil of modern-day slavery' which is human trafficking,[34] one must critically examine the ways in which this concept is being constructed in the political and legal arenas. The pejorative imagery of the helpless, young, imprisoned foreign girl serves a distinct political purpose, as does the deliberate ignorance of other stories about human trafficking.

Significant variations in definitions, both legal and informal, as well as the 'clandestine' nature of 'human trafficking' result in unreliable statistics and quantification of the problem.[35] As such, relatively little is known in terms of concrete numbers and data in Canada. However, the limited existing research to date does establish the existence of human trafficking in Canada, both for sexual exploitation and forced labour, and concerning both international and domestic (Canadian) victims.[36] Canada is known to be a destination, transit and source country for human

[33] See Chapter 1 for an elaboration of this current approach and its consequent problems.
[34] Issues related to the rhetoric of 'modern day slavery' will be taken up in Chapter 2.
[35] See, i.e., Frank Laczko, "Data and Research on Human Trafficking" (2005) 43:1-2 International Migration 5; Guri Tyldum and Annette Brunovskis, "Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking" (2005) 43:1-2 International Migration 17; Liz Kelly, ""You Can Find Anything You Want": A Critical Reflection on Research on Trafficking in Persons within and into Europe" (2005) 43:1-2 International Migration 235.
[36] See, i.e., Royal Canadian Mounted Police. *Human Trafficking: A Threat Assessment* (Ottawa: RCMP, 2010) [RCMP]; Department of Justice. "An Overview of Trafficking in Persons and the Government of Canada's Efforts to respond to this Crime: 2010-2011", online: Department of Justice Canada <www.justice.gc.ca> [DOJ]; Benjamin Perrin, *Invisible Chains: Canada's Underground World of Human Trafficking* (Toronto: Penguin Canada, 2010).

trafficking, meaning victims come to, through or from Canada. Yet, despite this known plurality about the modes and purposes of human trafficking, a significant amount of discursive and actionable attention remains on the idea of human trafficking as the sexual exploitation of women and girls.[37]

By framing human trafficking in relation to a dominant, sensational and extremely narrow story, law itself is shaped and constructed to the exclusion of others in need of its protection. Further, by seeing only one part of a legal order as responsive to this single story – here, the criminal law – we fail to appreciate the negative impact other areas of law have in contributing to human trafficking and exploitation at the outset, as well as their potential in more effectively addressing the underlying situations which may give rise to an experience of exploitation.

Though human trafficking, as a legal and policy issue, has seen significant growth and attention in the past decade, the way in which this issue is being conceptualized and constructed in law and policy is largely problematic. The dominant narrative of human trafficking as gendered, foreign, and intrinsically connected to sexual exploitation, has left many other stories marginalized in discourse and action. Even within the dominant story of human trafficking as it is represented, the complexity and layered identity of affected individuals is ignored in order to fit within the prescribed parameters of the law.[38] By ignoring the voices of marginalized populations and also ignoring the complexity of the stories of those identified as trafficked

[37] For example, of the identified criminal cases where specific charges of human trafficking have been prosecuted under the *Criminal Code*, all but one (*R v Domotor*, [2012] OJ No 3630 (SC) (QL)) related to sexual exploitation: see Julie Kaye and Bethany Hastie, ""The *Criminal Code* Offence of Trafficking in Persons: Challenges From the Field and Within the Law" (2015) 3:1 Social Inclusion 88 [Kaye and Hastie]. See also, RCMP, *supra* note 36 at 1: "Recent convictions of human trafficking have mostly involved victims who are citizens and/or permanent residents of Canada trafficked for the purpose of sexual exploitation." See Chapter 1 for a deeper examination of the current state of Canada's response to human trafficking.

[38] This issue will be taken up in greater detail in Chapter 1.

persons, the law is shaped in a way which may be significantly detrimental to those it claims to protect.

III. EXPOSING AN-"OTHER" SIDE OF THE STORY: LAW AND THE CREATION OF UNFREEDOM FOR MIGRANT WORKERS

As set out at the beginning of this Introduction, migrant workers are laden with many identities in social and political arenas in Canada. They may be idealized as workers, vilified as contributors to negative economic and labour market trends, sensationalized as 'slaves'. These vastly different stories of who a migrant worker is, and what place migrant labour has in Canadian society, operate simultaneously to create an environment where migrant workers are effectively excluded from legal, political and social 'belonging' in Canada, and exist in conditions of 'unfreedom'.[39]

Against the backdrop of the dominant story associated with 'human trafficking', the correlation made between migrant workers and exploitation is largely marginalized in legal understandings of exploitation and associated terms. The legal understanding of exploitation, as couched in the modern language of 'human trafficking' especially, and as introduced in the previous section, thus operate largely to exclude migrant worker abuse from its experience and narrative. Coupled with their exclusion from legal understandings of 'exploitation', as this thesis will explore fully in Chapters 3 and 4, the regulatory regime governing the TFWPs in Canada operate to minimize,

[39] The term 'unfreedom' and attending framework for analysis will be explained in Chapter 2.

and in some cases, exclude migrant workers from belonging under law, which directly contributes to the occurrence of exploitative practices in reality.

While this thesis is focused on bringing a richer understanding of exploitation and abuse of migrant workers to the fore, it is important to recognize the heterogeneity of experiences that migrant workers in Canada do have. Indeed, many migrant workers will have positive experiences during their time in Canada, and this thesis does not seek to posit that all, or even most, migrant workers will be exploited or have negative experiences under the Temporary Foreign Workers Program. However, this thesis is concerned with those situations or experiences that can be described as exploitative or abusive, in line with the initial research question that guided this research, as set out earlier in this Introduction. Thus, while the experience of migrant labour is heterogeneous itself, this thesis will focus specifically on those situations or experienced that could, or should, fall within the ambit of legal understandings of exploitation, as will be further unpacked throughout the substantive chapters.

There is increasing concern in Canada about the use of the TFW programs as channels for human trafficking, and a small number of cases have surfaced which confirm this suspicion.[40] For example, 17 Thai workers brought to Canada through the use of legal work permits were later granted temporary resident permits as victims of human trafficking by Citizenship and Immigration Canada in 2010, despite no criminal charges being laid in the case.[41] Since the Temporary Resident Permit [TRP] program for trafficking victims was created in 2006, CIC has

[40] See RCMP, *supra* note 36; Lara Quarterman, Julie Kay and John Winterdyk, "Human Trafficking in Calgary: Informing a Localized Response", online: ACT Albera <www.actalberta.org> [Quarterman et al]; DOJ, *supra* note 36.
[41] Don LaJoie, "Exploited Farm Workers Win Reprieve" *The Windsor Star* (21 June 2011) online: The Windsor Star <www.windsorstar.com>.

issued temporary resident permits to over 89 foreign national victims of human trafficking,[42] establishing the presence of international human trafficking to Canada. In addition, statistics concerning the TRP indicates that, as concerns foreign national trafficked persons, human trafficking for labour exploitation represents a significant majority of overall cases at 72%.[43]

In its recent report on the status of human trafficking in Canada, the RCMP has noted increased awareness and concern about human trafficking occurring under the Temporary Foreign Worker Programs. The RCMP report noted heightened concern for exploitation with the significant influx of migrant workers into Canada in the last decade, and was particularly concerned with abuse by third-party recruiters.[44] The RCMP further noted that while some of its investigated complaints related to undocumented workers, "most had traveled to Canada as legitimate foreign workers under the Temporary Foreign Worker Program".[45] A recent study conducted by ACT Alberta and Mount Royal University in Calgary uncovered similar concerns about the use of TFWPs as a vehicle for human trafficking for forced labour.[46] This report also highlighted the prevalence of concerns surrounding labour exploitation and need for greater research into this issue in Canada. The National Action Plan to Combat Human Trafficking put forth by the federal government in June 2012 also notes the increased evidence and concerns surrounding human trafficking for forced labour in Canada, commenting particularly on the prevalence of the issue in Alberta and Ontario.[47]

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[42] See Public Safety Canada, *National Action Plan to Combat Human Trafficking 2012-2013 Annual Report on Progress* (Ottawa: Government of Canada, 2013) at 10 [Public Safety Canada].
[43] Public Safety Canada, *supra* note 42. The statistics available in this report are current up to December 31, 2012.
[44] RCMP 2010, *supra* note 36 at 32.
[45] Public Safety Canada, *supra* note 42 at 33.
[46] Quarterman et al, *supra* note 40.
[47] Public Safety Canada, *National Action Plan to Combat Human Trafficking* (Ottawa: Government of Canada, 2012) at 7.

Despite the breadth of concerns regarding abuse and exploitation under the TFWPs,[48] its use has increased substantially over the past decade. As of December 1st, 2012, approximately 108,000 temporary migrant workers were present in Canada under the TFWPs.[49] At its peak in the past decade, just over 97,000 works were brought in to Canada in a single year.[50] Over the past decade, entries per year under the TFWPs have nearly doubled, as can be seen from Table 1, on the following page.[51] Many of these workers are distributed into industries which typically provide jobs of low pay and low skill level, and require a large number of flexible, seasonal workers,[52] such as agriculture, domestic work, construction, hospitality and service work, and other low skill jobs commonly referred to as "3D jobs": dirty, dangerous, and difficult.[53] As set out in Table 1, streams of the TFWPs correlating with this kind of work: the Live-in Caregiver Program; the Seasonal Agricultural Worker Program; and, the Low Skill Pilot Program (now called the Stream for Lower-Skilled Occupations), have all experienced substantial increases in the past decade.

[48] In addition to those reports cited above, see also: Alberta Federation of Labour, "Temporary Foreign Workers: Alberta's Disposable Workforce" (Edmonton: The Alberta Federation of Labour, 2007); Alberta Federation of Labour, "Entrenching Exploitation" (Edmonton: The Alberta Federation of Labour, 2009); Canadian Labour Congress, "Canada's Temporary Foreign Worker Program (TFWP): Model Program – or Mistake?" (April 2011) online: <http://www.canadianlabour.ca>; Eugenie Depatie-Pelletier and Khan Radi, eds, "Mistreatment of Temporary Foreign Workers in Canada: Overcoming Regulatory Barriers and Realities on the Ground" Metropolis Quebec Working Paper CMQ-Im no.46, 2011; Fay Faraday, *Made in Canada How the Law Constructs Migrant Workers' Insecurity* (Metcalf Foundation: 2012); Anette Sikka, *Labour Trafficking in Canada: Indicators, Stakeholders, and Investigative Methods*, Report No.42 (Ottawa: Public Safety Canada, 2013); RCMP, *supra* note 36; Quebec Human Rights Commission, "Systemic Discrimination Towards Migrant Workers", summary of *La discrimination systémique à l'égard des travailleuses et travailleurs migrants*, adopted at the 574th meeting of the Commission, held on December 9, 2011, by Resolution COM-574-5.1.1; House of Commons. Standing Committee on Citizenship and Immigration, "Temporary Foreign Workers and Non-Status Workers" (May 2009) (Chair: David Tilson, MP); Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (Toronto: December 2012).
[49] Citizenship and Immigration Canada, "Facts and Figures 2012 – Immigration overview: Permanent and temporary residents" online: CIC <http://www.cic.gc.ca> [CIC 2012].
[50] *Ibid.*
[51] CIC 2012, *supra* note 49.
[52] Dowling et al, "Trafficking for the purposes of labour exploitation: a literature review" online: *Home Office Research Development Statistics* <http://www.homeoffice.gov.uk/rds> at 7.
[53] International Labour Conference, *Towards a Fair Deal for Migrant Workers in the Global Economy* (Report IV), ILO, 92nd sess. (2004), at 11.

Table 1: Citizenship and Immigration Canada, Summary of Entries under the Temporary Foreign Worker Programs, 2003-2012[54]

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	% Change
Information technology workers	1,052	1,298	1,762	2,131	2,977	3,194	2,688	2,871	606	210	-80
Live-in caregiver program	5,028	6,651	7,133	9,079	12,955	11,867	8,756	7,545	5,884	6,242	24
Seasonal Agricultural Worker Program	18,698	19,052	20,281	21,253	22,581	24,189	23,393	23,914	24,500	25,414	36
Low skill pilot program	2,327	2,785	3,769	6,529	15,310	25,664	19,014	14,143	15,167	20,636	886
Other workers with LMO	22,089	22,583	24,242	26,495	30,306	32,312	26,611	22,666	24,065	28,111	27
Workers with LMO ****	49,194	52,369	57,187	65,487	84,129	97,226	80,462	71,139	70,222	80,613	64

[54] CIC 2012, *supra* note 49. **** Labour Market Opinion

Coupled with the increasing use of the TFWPs, there have been numerous regulatory changes to the programs in recent years.[55] In addition to several piecemeal changes in the past five years, the TFWPs experienced a significant 'overhaul' in June 2014.[56] This reform, in particular, will change the structure of the TFWPs from a focus on 'skill-based' classification to 'wage-based' classification, while also introducing caps on the number and percentage of migrant workers that can be employed by specific employers and in specific industries and geographic regions, along with a number of other changes.[57] The change in occupation classification could result in some significant changes for migrant workers' status in certain jobs or industries, though many classified in 'lower-skilled' positions, such as food service and hospitality, will likely experience no improvement in their status under the new 'wage-based' classification system.

Both the increasing use and regulatory changes are most often predicated on the need for migrant labour to fill short-term gaps in the labour market and the immediate needs of employers. In many ways, the design and evolution of the TFWPs has been based on a pure and abstracted economic and labour market analysis, devoid of the human dimension of migration and of workers who participate under the programs. The interests and rights of migrant workers are not part of the 'story'. As such, this landscape is unattuned to the experience and stories of migrant workers in relation to their participation under the TFWPs in Canada; their voices are not heard,

[55] See, i.e., Delphine Nakache and Paula J Kinoshita, "The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?" IRPP Study No.5 (May 2010) online: IRPP <http://www.irpp.org> at 4-5 for an overview of the evolution of the TFWPs; "Two-Tiered Wage System Allowed by Tories", *The Toronto Star* (28 April 2012) online: The Toronto Star <http://www.thestar.com>; Stephanie Levitz, "Harper government reverses course, halts '15% rule' on temporary foreign labour", *The National Post* (29 April 2013) online: The National Post < http://news.nationalpost.com>; Dominique Gross, "Temporary Foreign Workers in Canada: Are They Really Filling Labour Shortages?" Commentary No. 47, CD Howe Institute, April 2014, available online: <http://www.cdhowe.org/pdf/commentary_407.pdf>.

[56] Government of Canada 2014, *supra* note 8. Regarding the new wage-based classification system, see relatedly: Employment and Social Development Canada, "Stream for Low-wage Position" online: Employment and Social Development Canada <http://www.esdc.gc.ca/eng/jobs/foreign_workers/high_low_wage/low_wage/index.shtml>.

[57] *Ibid.*

and laws and regulations on the programs are not developed with their experience, interests or rights in mind. As a result, migrant workers are subjected to significant conditions of unfreedom under the regulations, and the laws attending the TFWPs thus facilitate the exploitation of abuse of migrant workers, despite the marginalization or minimization of their experience as such.[58]

Thus, despite the existing concerns and documented trends regarding migrant worker abuse, political and legal constructions about migrant labour, and of the TFWP regulations, continue to portray a different 'story' of this issue. There exists a significant disconnect between the law and the external reality it governs. It is this disconnect which this thesis seeks to explore more fully, and specifically in relation to, as described earlier in this Introduction, the ways in which migrant workers and their labour are represented and constructed – legally, politically and socially – so as to effectively exclude them both from law's protection both through recognizing their exploitation under existing legal definitions, and in effectively excluding them from seeking law's protection through the assertion of legal rights or accessing legal remedies in response to abusive practices.

Building from this preliminary exploration of the context for the substantive focus of this thesis, and the disconnect apparent in the treatment and regulation of migrant workers under the law, the next section will explore the theoretical basis for an examination of law's impact and influence on concrete experiences.

[58] These issues will be fully explored in Chapters 3 and 4.

IV. LAW IN CONTEXT: EXPLORING THE RELATIONSHIP BETWEEN 'LEGAL RULES' AND 'LIVED REALITY'

To observe and investigate the law, and its impact on society, this thesis begins from the proposition that law is not a "revealed truth" or "natural order" but a "way of organizing a society under a set of beliefs that are constitutive of the identity of the community[.]"[59] The law, its contents, and impacts, are inseparable from the broader contexts in which it operates; it does not exist in a vacuum, nor was it created or "discovered" in one. Rather, the law "is a constructed social world that could be constructed differently."[60] To accept this proposition enables a deeper exploration of law and its place in, and impact on, society, and facilitates a richer interrogation of the assumptions and values that shape law in society. In other words, it is only once we "bring the legal world to light, by raising to self-conscious examination the social and psychological meanings of a world understood as the rule of law"[61] that we can imagine other possibilities.

This idea of law does not purport to discover or create an objective truth, but seeks to uncover how perceptions of truth and reality inform, and are informed by, the laws and legal order governing society. In other words, as mentioned earlier, this approach seeks to bring to light what stories are being told in and through law, who is telling them, and how this impacts our understanding of the people, places and things included, and excluded, through this narrative.

The first step of examining law within the constructivist framework is, perhaps unsurprisingly, deconstructionist in nature. However, it is important to note that the goal of deconstruction here

[59] Kahn, *supra* note 20 at 6.
[60] *Ibid* at 30.
[61] *Ibid.*

is not presented as mere critique; deconstruction is necessary to fully understand the context in which the law exists, which is, in turn, necessary to full explore the impact of the law on the current landscape. In this regard, the content of a project of deconstruction has, at least, three important goals:

> First, deconstruction provides a method for critiquing existing legal doctrines; in particular, a deconstructive reading can show how arguments offered to support a particular rule undermine themselves, and instead, support an opposite rule. Second, deconstructive techniques can show how doctrinal arguments are informed by and disguise ideological thinking. … Third, deconstructive techniques offer both a new kind of interpretive strategy and a critique of conventional interpretations of legal texts.[62]

A central feature of deconstructive practice is to recognize and call into being those "aspects of human life that were pushed into the background by the necessities of the dominant legal conception we call into question."[63] By uncovering the power structures which shape the story law tells, we can gain a richer understanding into that which is ignored, and its impact. As alluded to earlier, power structures play a significant role in creating and structuring law: who is telling the story, what their beliefs are, and what authority they have ultimately shape, to a large extent, the resulting legal order. However, this is not to suggest that law is completely subject to, or overtaken by power.[64] In other words, what is advanced here is not a purely instrumental conception of law. Yet, at the same time, the ability and existence of the influence of power in shaping law and its dominant interpretations cannot be ignored.

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[62] Balkin, *supra* note 17 at 744. In this article, Balkin attempts to translate and adapt Derrida's conceptualization of deconstruction to the realm of legal scholarship.
[63] *Ibid* at 763.
[64] See, i.e., Ben Golder and Peter Fitzpatrick, *Foucault's Law* (New York: Routledge, 2009) at 2 [Golder & Fitzpatrick]. In this monograph, Golder and Fitzpatrick seek to offer an account of Foucault that acknowledges a theory of law within his work, contrary to some of the dominant interpretations of Foucault's understanding of law and power.

Rather than understanding law (in a quintessentially legal dichotomous fashion) as only an instrument of power, or as entirely devoid of power influences, the approach taken here seeks to advance the idea that these seemingly irreconcilable views of law in relation to power, in fact, represent "integrally related dimensions of the very same law[.]"[65] In other words, we can understand the law as both possessing a determined content or self, and yet, as influenced greatly by what is outside itself.[66] Fundamentally, then, the law exists in relation and inter-dependence with the institutions that create and administer it, and with the people, places and things it seeks to govern. The power structures that shape law, or 'tell' law what dominant social and other values exist which it should reflect in its rules and processes, are therefore very important to uncover and identify in order to understand whose stories law is hearing when it responds to its external context. This understanding of law allows us to both uncover the hidden or underlying assumptions, ideologies and power forces driving forward particular visions and interpretations of law in specific contexts or spaces, but also to preserve the capacity and potential for law to be envisioned and realized in multiple, and in new, ways.

In considering the influence of the 'external' on law, dominant or privileged conceptions often take precedence in both the site and content of legal rules. This, however, makes the fundamental mistake of "believ[ing] that we live in a single coherent world in which morality, politics, and knowledge coincide."[67] Under this approach, experiential understanding – the ability to tell a whole story, or multiple stories – is limited, as only certain facts are deemed 'relevant' and are often connected to serious misassumptions about human character and experience. In other

[65] Golder & Fitzpatrick, *supra* note 64 at 53.
[66] *Ibid* at 54, emphasis in original.
[67] Kahn, *supra* note 20 at 38.

words, a legal order is largely "characterized by its way of creating categories of the knowable and relating them to the ways in which facts are constructed in the culture at large."[68]

The development of law as dependent on 'facts' and 'truths',[69] which come largely from outside of itself and to which it responds, is, in part, a requisite performance in order to establish law's own necessity and 'natural order'.[70] A reliance on 'fact' in developing legal norms, particularly those concerning individual behaviour expectations, provides legitimacy and credibility to the identities and categories of knowledge constructed under the legal order. Indeed, as Kahn states, "the way in which we perceive our world, i.e., how its meanings appear to us, is determined by the categories of our own understanding."[71] Knowledge, and prescription of it, is thus an important legitimizing function of law. However, this is problematic not only because of the false assumptions made about the homogenous nature of society and people, but also because of the power and authority law has within its determined self. Particularly when we examine the concepts of rights and justice, now considered as foundational cornerstones of modern democratic societies, the power and authority to determine and direct the existence of and ability for individuals to exercise rights, or access justice, rests within the law. Thus, the stories law tells in relation to particular people, places, things and events significantly directs who is included, and excluded, from legal protection and redress. When those stories are built upon, and legitimized through, 'facts' and 'truths' which are left unquestioned, narratives that deviate from the constructed story and identity developed under law as treated as such – deviant, often with negative consequences, or at best, simple neglect under the law.

[68] Lawrence Rosen, *Law as Culture: An Invitation* (Princeton: Princeton University Press, 2006) at 70 [Rosen].
[69] See, i.e., *ibid* at 94.
[70] See, i.e., Golder & Fitzpatrick, *supra* note 64 at 66.
[71] Kahn, *supra* note 20 at 34.

The importance of the law as having an internal, or inherent, power in relation to the individuals it 'governs' is also located in the relationship itself. Law's own power is constituted not just in a 'top down' manner towards individuals, but also through individual self-subjection to law's power.[72] In other words, by subjecting ourselves to, and fitting ourselves within, the legal order and constructed categories within it, we engage in a referential cycle of producing and affirming law's authority and power. Thinking back, then, to the concept of 'outsider' narratives discussed in section I, the importance of bringing to the fore multiple and contrasting experiences under law is vital to its continued evolution in and response to society. In other words, because law's power is partly located outside of itself, as a responsive mechanism to social values and norms, and because the power and authority of law is in part constituted through individual subjection to it, this means that individual narratives, thoughts and ideas have the power to re-shape law differently. Ultimately, then, "law is dependent upon the powers outside it and […] these powers are themselves dependent upon the law."[73] This inter-relationship holds significant promise, and yet significant risk, for the "as-yet-unimagined and unimaginable future" of law and society.[74]

[72] Golder & Fitzpatrick, *supra* note 64 at 68-9. Relatedly, see Fox-Decent's fiduciary theory of the state, which will be explored in Chapter 5: Fox-Decent, Evan. *Sovereignty's Promise: The State as Fiduciary* (New York: Oxford University Press, 2011).
[73] Golder & Fitzpatrick, *supra* note 64 at 71.
[74] *Ibid* at 102.

V. UNDERSTANDING THE OPERATION AND OPERATIONALIZATION OF LAW: HARNESSING KNOWLEDGE 'ON THE GROUND'

As introduced in section I, storytelling and narrativity in legal scholarship seeks to infiltrate the traditional 'rational actor' model with a more complete understanding of experience by imbuing emotional elements into our understanding of the law, in part, to abut and expose the problematic, traditional reliance on 'fact' and 'truth' in law, as discussed in the previous section.

> If the traditional supposition of the law was that adjudication could proceed by "examining free-standing factual data selected on grounds of their logical pertinency," now "increasingly we are coming to recognize that both the questions and the answers in such matters of 'fact' depend largely upon one's choice (considered or unconsidered) of some overall narrative as best describing *what happened or how the world works*[.]"[75]

As this quote suggests, the idea of narrative seeks to bring more depth and context to the stories law hears, and to question the underlying assumptions and beliefs that the storyteller ultimately brings to bear on the story or narrative that is told.

Outside of the legal order, narrative has long been accepted as "one of the large categories in which we order and construct reality."[76] Yet, as mentioned earlier, law has remained reticent to accept narrative within its own order. However, despite the hesitation to officially recognize narrative, law is constantly involved in both hearing and shaping the stories of individuals; narrative has a "pervasive presence"[77] in law.

[75] Peter Brooks, "Narrativity of the Law" (2002) 14 Law & Literature 1 at 1 [Brooks], quoting Anthony G Amsterdam and Jerome Bruner, *Minding the Law* (Cambridge, MA: Harvard University Press, 2000) at 111.
[76] *Ibid.*
[77] *Ibid.*

Stories of individual experience are, of course, not a set of absolute 'facts', nor do they represent the 'whole story' or picture of an issue. However, the law, as an active and shaping force of individual experience, must be attuned to the myriad stories of individuals, and to each story's complexity. Yet, "[n]arrative is not wholly defined by the plane of its expression: stories can be translated, they can be transposed to other media, they can be summarized, they can be retold "in other words"[.]"[78] Stories can be instrumentalized, as can law, by the power structures and actors concerned with advancing a privileged conception of a particular people, place, thing or event.

This thesis thus seeks to engage in an exploration of the impact of the story law tells of human trafficking, and opposing it, of migrant workers, on the individual experiences for those seeking to fit within, or located outside, of law's dominant narrative in relation to these two concepts. To do so, the research undertaken for this project included a qualitative field study with *legal* actors, meaning actors and individuals who interact with the law – interpret it, apply it, analyze it, advocate with it – in relation to issues of human trafficking and migrant worker abuse. This field study thus seeks to harness the experiential knowledge of those engaged with these issues to better understand the operation, or operationalization,[79] of law and its impact in excluding and marginalizing certain groups or populations from its benefits and protections. Yet, this project did not itself include the voices of migrant workers, something which must be addressed before setting out the details of the empirical work.

[78] Brooks, *supra* note 75.
[79] I adopt the term 'operationalization' as opposed to 'operation' because I see the former as bearing a stronger, explicit connection to the individual and power that propels forward use. Conversely, the 'operation of law' maintains the more traditionally neutral and 'objective' perspective of law as abstract and wholly self-contained.

The introduction to this thesis has engaged in a significant exposition surrounding storytelling, narratives and law. Yet, this thesis does not itself engage in a project of bringing to the fore individual experiences and voices of migrant workers. This is so for two primary reasons: first, the focus on law and law's stories; and, second, the ethical issues surrounding an inclusion of migrant workers on this topic. First, this thesis focuses on the stories law tells and the way in which *legal* actors operationalize or are impacted by law. As such, the primary target group for the qualitative field study was those individuals who are responsible for operationalizing the law – law enforcement, government officials, legal representatives, and related actors. In addition, as this thesis focuses on legal definitions of certain conduct, it inherently requires an adjudicative function concerning the stories or narratives gathered; thus, it seemed inappropriate to gather stories from migrant workers as only 'certain kinds' of stories would be admittedly useful for my project. Thus, to interview migrant workers, I would be necessarily engaging in some of the problematic practices documented in this introduction, excluding some stories, co-opting narratives and reshaping them into the language necessary for this project. This is one of the ethical issues I grappled with in considering whether to interview migrant workers directly. The other primary ethical issue identified is that, because this project looks primarily to unlawful, or illegal, conduct, interviewing migrant workers directly could contribute to a possible state of precariousness or vulnerability, as they would be asked to divulge information which could put their work and status in Canada in jeopardy. As such, given the focus of my thesis, and the attending ethical issues contemplated in the course of preparing the empirical work, it became clear to me that this was not the appropriate forum, nor the right project, for telling (or re-telling) migrant workers' stories.

As stated above, this thesis draws on experiential knowledge of *legal* actors – those directly engaged with and responsible for operationalizing the law – involved in issues of human trafficking and migrant worker exploitation. As such, an important element of the research for this thesis was conducted through a qualitative interview study, undertaken with the approval of the Research and Ethics Board at McGill University.[80] The study consisted of semi-structured interviews with professionals from government departments, including law enforcement, and community organizations such as advocacy centres and legal aid providers. Interviews with 18 participants were conducted in British Columbia, Alberta and at the Federal level in Ottawa, between February and May 2014. In order to best protect the anonymity and confidentiality of participants in this study, participants are referred to only in terms of whether they are government officials or representatives of non-governmental organizations, without reference to their geographic or jurisdictional location.[81]

The goals of the interview study were two-fold: first, to identify and record how various organizations understood, interpreted and operationalized the concept of 'human trafficking' in their work; and, second, to identify and record trends concerning migrant worker exploitation that organizations have encountered, and particularly, the facets of the legal regulations which contributed to the identified trends. The study was carried out through a set of semi-structured interviews; sets of questions formulated under two streams in the interview guide (human trafficking, and migrant workers) were used as a 'jumping off' point for discussions with participants.[82] Participants were invited to comment on both topics (human trafficking, and

[80] REB certificate # 45-0172. See Appendix A for a copy of the Research and Ethics Board certificate obtained in connection with this study. See Appendix B for a copy of the research consent form used in this study.
[81] See Appendix C for a list of participants (by number) and correlating designation.
[82] See Appendix D for a copy of the interview guide used in this study.

migrant workers), though depending on the area of expertise, some participants chose to discuss only one of the topics. Interviews undertaken for this study were recorded with the permission of the interviewee;[83] audio-recordings were transcribed and analyzed to inform and identify trends bearing on the topics outlined above. Quotes and information from the interviews are used throughout this thesis to both inform and illustrate the points made therein.

Alberta and British Columbia were chosen as the focal case-study jurisdictions for this project for several compelling reasons. First, these provinces are amongst the top intake jurisdictions for migrant workers.[84] Second, both of these provinces have encountered cases related to forced labour of migrants.[85] Alberta is reported as having a higher number of suspected forced labour cases than other provinces in Canada.[86] Finally, both of these provinces have provincially-mandated, centralized coordination bodies for human trafficking efforts.[87] Despite the different structure of the bodies in Alberta and BC (with one located inside formal government structures, and the other external), they are the only two provinces in Canada with dedicated, centralized coordination bodies in this regard.

[83] See Appendix B for a copy of the research consent form and Research and Ethics Board certificate obtained in connection with this study.
[84] See, Citizenship and Immigration Canada "Temporary Foreign Worker Program work permit holders with a valid permit on December 31st by destination, 2004 to 2013", online: CIC <http://www.cic.gc.ca/english/resources/statistics/facts2013/temporary/1-8.asp>. In 2013, Alberta had 40,471 temporary foreign workers present in the province; BC had 22,522 workers, only slightly less than Ontario with 22,896. These three provinces recorded substantially higher numbers than all other provinces in Canada. By comparison, the province with the next largest intake, Quebec, had 8,789 temporary foreign workers present according to the CIC statistics.
[85] In BC, two cases were prosecuted under the *Immigration and Refugee Protection Act*, SC 2001, c27, s118: *R v Ladha*, 2013 BCSC 2437; and, *R v Orr*, 2013 BCSC 1883. A suspected case in Alberta ultimately dropped the charge of human trafficking under the *Immigration and Refugee Protection Act* and obtained a conviction, by guilty plea, for migrant smuggling (s117): see Kaye and Hastie, *supra* note 37 at 92.
[86] RCMP, *supra* note 36 at 32.
[87] In BC, the BC Office to Combat Trafficking in Persons, located under the Ministry of Justice; in Alberta, ACT Alberta which operates as a non-governmental organization.

The interview study and this thesis focus primarily on the Stream for Lower-Skilled Occupations [SLO] (formerly, Low-skill pilot program), and secondarily on the Seasonal Agricultural Workers Program [SAWP]. The focus on the SLO was chosen for several reasons: first, it has increased significantly over the past decade (see Table 1 above, identified as the 'Low-skill pilot program'); it is relatively new compared to the other programs, having begun in 2002; it is the least regulated stream of the TFWPs; and, it is being expanded to encompass work traditionally limited to the SAWP program, indicating that the SLO may become the dominant regulatory model for a significant proportion of 'lower-skilled' or 'low-wage' migrant labour in Canada in the future. Further, use of third-party recruiters under the SLO is substantial, and has been cited as a contributing issue to exploitation and trafficking identified by the RCMP.[88] The differences between the ways in the SAWP and SLO programs operate, including with respect to allocation of status, conditions of participation, and government involvement, as will be detailed in Chapter 3, also present, together, a more holistic picture of the various sub-models of migrant labour regulations existing in Canada. This allows, then, for a consideration of the variables existing under migrant labour regulation models, with the SAWP model representing perhaps a more 'traditional' model of migrant labour programs and SLO, perhaps, representing the current and future trends in this regard.

As the interview study for this thesis was conducted in February and March 2014, in advance of the regulatory reform which occurred in June 2014 and briefly set out earlier in this Introduction, the research, analysis and findings of this study and presented in the substantive chapters of this thesis are based primarily on the regulations, and terminology, as they existed prior to this regulatory reform. However, as mentioned earlier, the significant shift from 'skill-based' to

[88] RCMP, *supra* note 36.

'wage-based' classification of occupations under the TFWPs would likely have little impact on the industries and jobs forming the basis of this research. Where migrant workers would see an improvement in their status by virtue of the change in classification system, this may impact positively on their ability for long-term residence, a topic discussed in Chapter 3. In addition, the June 2014 promise greater oversight and inspections under the TFWP, an issue also canvassed in Chapter 3. However, the key regulatory features examined in this thesis, and in particular, the way in which employment and immigration status is allocated, have not changed under the June 2014 reforms, and these reforms, while potentially changing some details or individual situations, are not anticipated to have a significant impact on the overall findings and trends presented in the substantive chapters of this thesis.

The interview study, and broader analysis undertaken for this thesis, does not include a consideration of the Live-in Caregivers Program [LCP], the third primary 'lower-skilled' stream of the TFWPs. The LCP was ultimately excluded from this research for several reasons. First, while the SLO and SAWP streams have some difference in structure and procedure, the differences of the LCP are much more significant. Specifically, participants under the LCP have some opportunity for a direct pathway to permanent residency, an issue contemplated with respect to SLO and SAWP in Chapter 3. Further, until recently, the LCP had a 'live-in' requirement, meaning that participants lived and worked in the same place, a private residency. This feature of the LCP raises many unique issues, including with respect to privacy rights of the employer, and as concerns the types of experiences and influences bearing on precariousness, 'choice', and abuse. As such, it was determined that research on the LCP, of which there exists extensive work, would be best conducted independently of this thesis.

As mentioned above, this study was undertaken in order to bring to the fore a richer understanding of the legal issues at play in relation to the concept of human trafficking, and in relation to the experience of migrant labour in Canada, in order to both demonstrate the complexity of these issues, as well as to confirm and elaborate upon the common experiential trends existing in relation to these concepts, as contained currently in secondary literature on the subjects.[89] The results of this research study are used to illustrate and inform the critiques and investigation undertaken in the body of this thesis.

OUTLINE

The first chapter of this thesis seeks to engage in deconstructive practice to expose the problematic assumptions and "privileging" law relies on in constructing the single story of human trafficking, particularly as it related to ideas of sexual exploitation, and in its implicit connection with the border and migration. This chapter will explore the constructed political and social boundaries of human trafficking, and will engage with the underlying values and ideologies which are relied upon in the constructions of human trafficking at both the legal and political levels, exposing the broad problematic consequences that have resulted from these highly particular, privileged conceptions. This chapter will conclude by examining the current legal and political context in Canada, establishing the ways in which it largely replicates and reflects the issues exposed earlier in the chapter.

[89] As set out in Chapters 1-4.

Having deconstructed the ideology and hidden assumptions surrounding the concept of human trafficking, Chapter 2 undertakes a project of reconstruction, or re-imagination, of this concept within law. Beginning with the modern international legal definition of 'human trafficking', and broadening out to historical instruments related to slavery, practices similar to slavery, and forced labour, this chapter uncovers the theoretical and conceptual elements which are commonly present across these different legal concepts, to formulate a new framework for understanding contemporary forms of labour exploitation as 'unfreedom'. As such, this chapter ultimately rejects the label of human trafficking, as it does the prescription of the other labels explored, and focuses instead on understanding the core, or root, elements which each presents and which produce a related undercurrent in the conditions leading to constraints on freedom. Dislocating the conceptual framework from its existing legal labels, and their confines (as these almost exclusively operate as criminal law concepts), is demonstrated as important in gaining a richer understanding of the real issues underlying the current language.

Having exposed the problematic underpinnings of the dominant conceptualization of human trafficking in Chapter 1, and having articulated a broader, and yet more precise, theoretical reformation of 'unfreedom' in Chapter 2, Chapters 3 and 4 turn to an examination of the role of the law in contributing to and facilitating the exploitation of migrant workers in Canada, a phenomenon which is directly consequent of our current understanding of the two opposing, yet mutually reinforcing, stories concerning human trafficking, and migrant workers.

Chapter 3 will examine the "other[ed]" story of migrant workers and the unfreedom created by the legal and regulatory instruments governing their place and labour in Canada. Beginning with

the underlying assumptions brought to bear on the idea and purpose of migrant labour and the TFWPs, this chapter will explore the ways in which migrant labour is socially and politically constructed to create a landscape in which conditions of unfreedom are both accepted and ignored. This chapter will go on to examine three specific sites of unfreedom in the regulations: the employer specific work permit; limits on eligibility and residency; and a lack of monitoring and enforcement. This chapter will establish how the legal regulations independently produce conditions of unfreedom, and further act in a layered fashion to produce the underlying conditions that lead to exploitative and abusive practices.

Drawing out from the specific conclusions reached in Chapter 3, Chapter 4 will expand our consideration of the treatment of migrant workers beyond the confines of the legal regulations, and will specifically demonstrate how those regulations contribute to conditions of unfreedom by facilitating abusive and exploitative practices against migrant workers. Beginning with an exposition and critique of the racialized and stereotyped identity construction that migrant workers are made to bear, this chapter will focus on two primary issues: first, how the legal regulations and underlying context create a culture of impunity for employers under the TFWPs; and, second, how the legal regulations, underlying content, and power imbalance in the employment relationship effectively create an environment in which migrant workers are disabled from asserting their rights and accessing legal remedies.

Moving forward from the deconstruction and exposition of the problems identified in Chapters 1 through 4, the final chapter (5) is forward looking, and seeks to offer insights into the ways we can imagine the role and relationship of the state towards its subjects, and the place of rights

within this relationship, differently. Drawing on the fiduciary theory of the state developed by Fox-Decent, this chapter will examine how this theory provides firmer grounding for considering the interests and rights of migrant workers in Canada. Building from this theoretical reorientation, this chapter will go to provide examples of how both the existence of, and access to, rights for migrant workers can be improved in concrete terms.

Ultimately, this thesis seeks to expose and unsettle the problematic assumptions we make in law, and that arise when we confine and place boundaries on our legal understandings of individual experience. By stepping outside of our assumptions about the law and current social and political understandings of the multiple issues raised herein, this thesis seeks to illuminate and explore alternative narratives and understandings of law's relationship and impact on reality, and to encourage thinking differently about law, society, people and their place in relation to each other.

CHAPTER 1

DECONSTRUCTING THE 'STORY' OF HUMAN TRAFFICKING AND THE CORE OF ITS CONTEMPORARY CONCEPTUALIZATIONS

The story of human trafficking told in the political, social and legal arenas of the international community, and by many nation-states around the world today, centres on a particular privileged conception of the issue which is arguably unreflective of the reality of the *types* of human trafficking which exist, the *ways* in which it occurs, and of the experience of trafficked persons. This chapter sets out to unpack the assumptions and underlying ideologies which govern the dominant conceptualization and interpretation of human trafficking. The current conceptualization of human trafficking is not only bound and determined by the legal constructs in place, but also by the political and social boundaries which are constructed to fit and depict a particular image of human trafficking. As discussed in the Introduction to this thesis, such constructs are inextricable from the laws regulating, or in this case criminalizing, conduct; as such, the political and social construct of human trafficking shapes the creation, interpretation and application of legal texts, such as the *Protocol* and the resulting domestic law and policy enacted as an obligation under this instrument. The political and social constructs which shape the conceptualization of human trafficking, like with any construct, are dependent on particular ideologies, or, "privileged conceptions of social reality."[1] To engage in deconstructive legal practice thus requires engagement with political and social constructs – the deconstruction of the ideology surrounding the law and its interpretation, and application.[2]

[1] J M Balkin, "Deconstructive Practice and Legal Theory"(1987) 96:4 Yale LJ at 764.
[2] *Ibid.*

Despite the broad array of activities and conduct which may be subsumed under the modern banner of "human trafficking" by virtue of the *Protocol*, particular elements and images continue to dominate the narrative and conceptualization of this phenomenon, as connected to their histories. Section I will begin by exploring the historical and contemporary imagery of human trafficking and its strong association with sexual exploitation and morality. This will inform how the conceptualization of human trafficking rests on the representation of an 'iconic victim'[3] and also how it is deeply rooted in sexual and morality politics. Sitting alongside this dominant narrative, contemporary conceptualizations of human trafficking also rely heavily on its characterization as a 'migration crime'. The connection of human trafficking to transnational crime, and particularly to migration crimes, will be explored in more depth in section II for both its power as an attractive catalyst to state response, and for the inherent problems this focal point has as a primary response mechanism. In both the relationship to sexual exploitation, and to migration crime, the construction of human trafficking as a morality-driven phenomenon has been capitalized on for its discursive power in the political arena, and further problematizes the ability to fully understand and effectively respond to this phenomenon in all its forms. Finally, section III will explore how the dominant conceptualizations of human trafficking discussed in sections I and II have largely informed and influenced the current Canadian legal and political landscape concerning 'anti-trafficking' efforts, examining both the existing legal offences related to human trafficking, and the broader state-initiated activities aimed at addressing human trafficking within Canada.

[3] This chapter will employ the 'victim' label where necessary to demonstrate and deconstruct the dominant conceptualizations and narratives associated with human trafficking in the political, social and legal arenas, though this is not a label to which I subscribe in my own approach to these issues. The use of single quotes above is thus used to signal to the reader that these labels are subject to interrogation rather than accepting their characterization, and to alert the reader about the problematic assumptions embedded within these terms.

Ultimately, the conceptualization of human trafficking as deconstructed in this chapter establishes an understanding of what human trafficking is that is only one small piece of what human trafficking should, or could be. The particular and narrow focus of human trafficking, as concerns its dominant constructions, relegates many individuals and situations of exploitation outside the margins of belonging, without protection and without recognition, in all of the legal, political and social arenas. While Chapter 2 will go on to explore more broadly the idea of what human trafficking could, or should, be, this chapter sets the stage for understanding how law and policy construct the act, or crime, of human trafficking in a way which supports particular ideologies, and aligns with dominant narratives concerning, particularly, migration and sexual exploitation.

I. HUMAN TRAFFICKING AS SEX TRAFFICKING: CONSTRUCTING A 'PERFECT VICTIM PARADIGM'

This first section examines the strong historical and contemporary correlation between human trafficking and sexual exploitation, and as particularly dependent on a highly specific, gendered construction of 'victimhood'. As we will see in this section, because the label of 'human trafficking' was birthed directly as a product of moral panic surrounding women's sexuality and sexual purity, the connection to both sex and gender is deeply rooted and continues to bear significance in defining what human trafficking looks like today, and who is a 'victim'. This section begins by broadly outlining these primary ideological issues and imagery associated with human trafficking. This section then goes on to drill down on the specific contours of this

broader construction, examining in more detail both *what* human trafficking looks like through this ideological lens, and *who* a 'victim' is. As such, sub-section (b) will examine the role of sexual and physical violence as defining features contributing to the particular construction of what human trafficking is; sub-section (c) will explore the paradigmatic characteristics of the 'perfect victim' of human trafficking, birthed directly as a product of the associated imagery and ideology discussed throughout this section.

a. Imagery and Ideology in Sex Trafficking Discourse: Historical and Contemporary Perspectives

The particular language of "human trafficking", historically speaking, first came about in response to the perceived "trade in white women" forcibly procured for "immoral purposes" with the adoption of the *International Agreement for the Suppression of the White Slave Traffic* in 1904.[4] This concept of "white slavery" was used "to refer to forcible or fraudulent recruitment to prostitution"[5] and, in some cases, resulted in the development of domestic legislation, such as the Mann Act in the United States and Criminal Law Amendment Act 1885 in the UK.[6] Despite the fact that references to a "white slave trade" were abandoned in the latter 1920s as unreflective of

[4] *International Agreement for the Suppression of the White Slave Traffic*, 1 LNTS 83, 4 May 1904. This agreement was followed with an international convention: *International Convention for the Suppression of the White Slave Traffic*, 3 LNTS 278, 4 May 1910. See, Anne Gallagher, *The International Law of Human Trafficking* (Cambridge: Cambridge University Press, 2010) at 13-4.

[5] Gallagher, *ibid* at 13; see also, Jo Doezema, "Who Gets to Choose? Coercion, Consent, and the UN Trafficking Protocol" (2002) 10:1 Gender and Development 20 at 22 [Doezema 2002]; William F McDonald, "Traffic Counts, Symbols & Agendas: A Critique of the Campaign Against Trafficking of Human Beings" (2004) 11 International Review of Victimology 143 at 143-4 [McDonald]; Joel Quirk, *The Anti-Slavery Project: From the Slave Trade to Human Trafficking* (Philidelphia: University of Pennsylvania Press, 2011) at 217-224 [Quirk].

[6] See, Jo Doezema, "Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women" (2000) 18:1 Gender Issues 23 at 30 [Doezema 2000].

the true "nature and scope of the problem",[7] new conventions solidified the synonymy of human trafficking and sexual exploitation, albeit encompassing a broader population of 'victims'.[8] While none of these instruments defined trafficking, all were concerned with the "coerced movement of women and girls abroad for the purposes of prostitution."[9] Finally, in 1949, the United Nations adopted the *Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others*.[10] This convention, too, left the concept of "trafficking" undefined, though it essentially criminalized all activities relating to prostitution, including the management or financing of brothels, supervision of prostitutes, and procuring of individuals into prostitution, regardless of consent.[11]

This "specter of innocent women and girls being taken abroad and forced against their will" into prostitution drove the international instruments developed under the banner of "human trafficking" in the earlier half of the 20th century.[12] Thus, the very idea of "human trafficking" was birthed as a label and framework to address the moral panic surrounding prostitution of women and girls, specifically. This inherent link between trafficking and prostitution continues to dominate the political discourse and measures today, despite the significant criticism levied

[7] Gallagher, *supra* note 4 at 14.
[8] *International Convention for the Suppression of Traffic in Women and Children*, 9 LNTS 415, 30 September 1921; *International Convention for the Suppression of the Traffic in Women of Full Age*, 150 LNTS 431, 11 October 1933.
[9] Gallagher, *supra* note 4 at 14.
[10] 96 UNTS 271, 2 December 1949. See also, McDonald, *supra* note 5 at 161-2, and Janie A Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy" (2010) 158 U Pa L Rev 1655 at 1663-8 [Chuang 2010], for a brief discussion of the historical instruments from 1904 to the 1949 *Convention*.
[11] 1949 Trafficking Convention, *ibid*, art.1,2,6. See also, Gallagher, *supra* note 4 at 14-15.
[12] Gallagher, *ibid* at 15. See also, Elizabeth Bernstein, "Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns" (2010) 36:1 Signs: Journal of Women in Culture and Society 45 at 49-50 [Bernstein], discussing this history in the American context; Ronald Weitzer, "The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade" (2007) 35 Politics & Society 447 at 467 [Weitzer] comparing the historical and modern 'mythical' dimensions; McDonald, *supra* note 5 at 144, and 161-2; Sophie Day, "The re-emergence of 'trafficking': sex work between slavery and freedom" (2010) 16 Journal of the Royal Anthropological Institute 816 at 820-2 [Day]; Doezema 2000, *supra* note 6 at 25-6; Quirk, *supra* note 5 at 217-224.

against this conceptualization,[13] and despite the richness of the other legal concepts which could be utilized to more accurately represent the phenomenon which the international *Protocol* seeks to address. "The narrow portrayal of trafficking as necessarily involving forced recruitment for the purposes of forced prostitution thus belies the complexity of the current trafficking problem."[14] This section will engage in an analysis of the historical and contemporary ideology associated with human trafficking, which has sustained a significant focus of the concept as one intrinsically connected to gender and sexual violence, which has, in turn, resulted in the construction of a highly specific and narrow identity of 'victimhood'.

The historical dimensions of the trafficking discourse and policy were directly and intentionally targeted towards eradicating forced prostitution and as the result of a moral panic over women's sexuality and purity.[15] In this historical context, the emergent theme which was at the centre of the issue was, as it is currently, that of consent.[16] Thus, the figure of the "innocent victim" sits directly opposite that of the "willing whore, complicit in her own downfall," with the "notion of

[13] See, i.e., Jo Doezema, *Sex Slaves and Discourse Masters: The Construction of Trafficking* (New York: Palgrave Macmillan, 2010) [Doezema 2010]; Kamala Kempadoo, Jyoti Sanghera, and Bandana Pattanaik, eds, *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (Boulder, Colorado: Paradigm Publishers, 2005) [Kempadoo et al]; J Berman, "(Un)popular Strangers and Crises (Un)Bounded: Discourses of Sex Trafficking, the European Political Community and the Panicked State of the Modern State" (2003) 9 European Journal of International Relations 37 [Berman]; Shelley Cavalieri, "The Eyes That Blind Us: The Overlooked Phenomenon of Trafficking into the Agricultural Sector" (2011) 31 N Ill U L Rev 501 [Cavalieri]; Chuang 2010, *supra* note 10; Weizter, *supra* note 12; Doezema 2002, *supra* note 5; Bridget Anderson and Rutvica Andrijasevic, "Sex, slaves and citizens: the politics of anti-trafficking" (2008) 40 Soundings 135 at 139-40 [Anderson and Andrijasevic].

[14] Janie Chuang, "Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts" (1998) 11 Harv Hum Rts J 65 at 66 [Chuang 1998].

[15] See Doezema 2010, *supra* note 13; Doezema 2000, *supra* note 6; Quirk, *supra* note 5 at 217-224.

[16] See, i.e., Doezema 2002, *supra* note 5; Quirk, *ibid*.

consent … marking the dividing line between those deserving of rescue and those deserving of condemnation."[17]

The language of "human trafficking" being so deeply rooted in concerns over prostitution took hold again in the 1990s as concern over prostitution and the sexual exploitation of women and girls resurfaced.[18] In this context, the absence of a precise legal definition became a focal point in the debate; however, this debate was not concerned broadly with modern forms of slavery, or the exploitation of others' labour. Given its historical roots, the language of "human trafficking" was deployed specifically to renew attention to the modern phenomenon of "cross-border exploitation of women and girls", particularly in Asia, and Central and Eastern Europe.[19] The resurgence of trafficking discourse in the 1990s replicated the myth of the helpless, innocent victim, threatened with violation of her sexual purity, and, from within some political groups, sought to equate 'human trafficking' and prostitution.[20] The modern proliferation of 'anti-trafficking' politics has been dubbed a "moral crusade,"[21] which "defines a particular condition as an unqualified evil" and sees its purpose as both symbolic, by "influencing normative boundaries and moral standards", and instrumental, by providing relief to victims and "punishing evildoers".[22] Despite its entanglement with the wider debate on prostitution and sex work, 'sex trafficking' has been successfully instrumentalized as a 'moral crusade', in large part due to its

[17] Doezema 2010, *supra* note 13 at 13; Doezema 2002, *ibid* at 22. See also, Chuang 1998, *supra* note 14 at 74, citing also Nora Demleitner, "Forced Prostitution: Naming an International Offense" (1994) 18 Fordham Intl L J 163 at 167.
[18] Gallagher, *supra* note 4 at 16. See also, Chuang 1998, *ibid* at 65, citing also Nora Demleitner, "Forced Prostitution: Naming an International Offense" (1994) 18 Fordham Intl L J 163 at 163-4; Amy Farrell and Stephanie Fahy, "The Problem of Human Trafficking in the U.S.: Public Frames and Policy Responses" (2009) 37 Journal of Criminal Justice 617 at 620 [Farrell and Fahy]; Chuang 2010, *supra* note 10 at 1663-71 for an overview of the dominant positions in the contemporary sex trafficking/prostitution debate.
[19] Gallagher, *supra* note 4 at 16. See also, Chuang 1998, *supra* note 14 at 65-6; Chuang 2010, *supra* note 10 at 1655-6 concerning the general conflation of human trafficking with 'sex trafficking', and by some groups, all prostitution.
[20] See, i.e., Doezema 2002, *supra* note 5; Weitzer, *supra* note 12.
[21] See, Weitzer, *ibid.*
[22] Weitzer, *ibid* at 448; see also, Anderson and Andrijasevic, *supra* note 13 at 139-40.

sustained focus on 'forcible' sexual exploitation, as well as its connection to the underlying, attendant gender violence and equality issue.[23] "[F]rom the beginning the problem has been constructed in a way which capitalized on the provocative image of the honest woman being forced into sexually exploitative situations by force or fraud."[24]

In order to garner public support and frame an issue as a universal evil, 'moral crusades' "typically rely on horror stories an "atrocity tales" about victims in which the most shocking exemplars of victimization are described and typified."[25] Narratives about human trafficking thus often present as sensational, harrowing accounts of significant trauma and violence,[26] and often "dramatize human suffering and are designed to cause alarm and outrage."[27] In addition to the imagery of suffering and extreme violence, the "eroticized" nature of the "victim-rescuer narrative" presented as representative accounts of sex trafficking holds "visceral appeal".[28] The construction of human trafficking as sex trafficking both is both the result of, and a catalyst for, the sensationalization of this particular 'angle' on the issue, attracting greater attention and calls for action than, for example, framing the issue as one "impacting exploited migrant laborers or as

[23] Which, notably, has served to bridge a gap between some groups of liberal feminists and conservative religious groups, both of whom have been very vocal against sex trafficking as well as some related issues such as pornography in the past, and, working together, have been attributed as propelling forward the anti-trafficking agenda significantly at both the international level, and domestically in, for example, the United States. See, i.e., Weitzer, *ibid*; Bernstein, *supra* note 12; Mojca Pajnik, "Media Framing of Trafficking" (2010) 12:1 International Feminist Journal of Politics 45 at 48-9 [Pajnik].

[24] McDonald, *supra* note 5 a 144; see also, Doezema 2000, *supra* note 6 at 24; regarding this imagery in the historical context, see also Quirk, *supra* note 5 at 217-224.

[25] Weitzer, *supra* note 12 at 448.

[26] See, i.e., Rutvica Andrijasevic, "beautiful dead bodies: gender, migration and representation in anti-trafficking campaigns" (2007) 86 feminist review 24 [Andrijasevic]; Dina Francesca Haynes, "The Celebritization of Human Trafficking" (2014) 653 The Annals of the American Academy of Political and Social Science 25 [Haynes 2014]; McDonald, *supra* note 5 at 154; Doezema 2000, *supra* note 6 at 31, 35; Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and the Law* (New York: Cambridge University Press, 2008) at 79-81 [Dauvergne], discussing the use of stories and photos in the United States TIP Reports.

[27] Weitzer, *supra* note 12 at 463.

[28] Haynes 2014, *supra* note 26 at 29-30. See also, Andrijasevic, *supra* note 26 at 39; Bernstein, *supra* note 12 at 48-9 outlining the dominant representations of the film *Call and Response*.

an outcome of globalization and weak labor protections[.]"[29] The "reductive narrative" of human trafficking as sex trafficking is favoured for its "simple narrative structure, with a bad guy (evil trafficker or deviant, sex-crazed male) doing bad things (sexual violence or enslavement) to an innocent, ignorant, impoverished victim (trafficked woman or child, sex slave, or prostitute)."[30] The often overly-simplified, reductionist narrative of human trafficking both relies on, and propagates the imagery of the 'ideal' or 'iconic' victim. This is evidenced in many ways, but perhaps most visibly and strikingly in media campaigns and posters developed for 'anti-trafficking' initiatives, which regularly deploy various "victimizing images of female bodies,"[31] presenting women as doll-like marionettes, as confined or shackled in various manners, and as hidden by obscuring faces and eye contact with the camera.[32] These sensationalized media campaigns reify and propel forward the narrow and problematic representation of human trafficking as sex trafficking, and of women as meak, passive objects of sexual commodification in need of rescue. 'Stories' of human trafficking put forth thus often rely on "narratives of female powerlessness and childlike sexual vulnerability."[33]

Within this sensationalized and moralized context, the dominant imagery of the modern-day "sex slave" rests heavily on the notion of vulnerability as a key factor in determining victimhood. Similar to the perceived need to combat impurity of women's sexuality in the previous era, the need to eradicate discrimination and inequality resulting from particular social and economic conditions, race, and gender, has provided a central ground from which to advance the anti-

[29] See, i.e., Haynes 2014, *supra* note 26 at 29
[30] Chuang 2010, *supra* note 10 at 1698. See also, Quirk, *supra* note 5 at 217-224, commenting on similar narratives and presentations in the historical context.
[31] Andrijasevic, *supra* note 26 at 26.
[32] See *ibid*.
[33] Farrell and Fahy, *supra* note 18 at 617, citing Wendy Chapkis, "Trafficking migration, and the law: Protecting the innocents, punishing immigrants" (2003) 17 Gender and Society 923 at 935; see also, Doezema 2000, *supra* note 6 at 34-5.

trafficking agenda of today.[34] Just as women of the late 1800s and early 1900s were constructed as "passive, meak sexual objects" in the war against white slavery, today's victims of human trafficking are constructed as meek and passive objects,[35] ripe for exploitation because of their inherently vulnerable status. Thus, although conceptualizations surrounding prostitution, in its modern-day context, present competing accounts of agency and consent,[36] the iconic, or perfect, victim of human trafficking is relegated to a space of near-complete non-volition in discourse and imagery, particularly for those groups who advance the position that "a woman's consent to undertake sex work is meaningless."[37] This conceptualization of victimhood in human trafficking advances the idea that women, particularly, experience such significant external constraints in their individual and community lives that they are rendered effectively incapacitated from exercising proper agency. In other words, this characterization portrays "women as perennial victims of false consciousness, incapable of making autonomous choices."[38] This "patronizing" portrayal, which "reduced women to the level of children in the name of 'protecting' women"[39]

[34] See Robert Uy, "Blinded by Red Lights: Why Trafficking Discourse Should Shift Away from Sex and the "Perfect Victim" Paradigm" (2011) 26 Berkeley J Gender L & Just 204 at 205 [Uy].
[35] See, i.e., Jayashri Srikantiah, "Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law" (2007) 87 BU L Rev 157 at 160-1 [Srikantiah].
[36] See, i.e., Chuang 1998, *supra* note 14 at 84-6; Lisa Carsen and Kathy Edwards, "Prostitution and Sex Trafficking: What are the Problems Represented to Be? A Discursive Analysis of Law and Policy in Sweden and Victoria, Australia" (2011) 34 Austl Feminist L J 63 at 63 [Carsen and Edwards]; Doezema 2002, *supra* note 5 at 20, discussing the division between two 'camps' of feminist lobbying at the negotiations for the international *Protocol*, as directly centering on the issue of consent in relation to prostitution / sex work, with one side supporting the proposition that all prostitution should be considered trafficking, while the other supporting the idea that some element of coercion is necessary for human trafficking in cases of sexual exploitation. Relatedly, see Chuang 2010, *supra* note 10 at 1663-71 discussing the primary, opposing positions on the contemporary sex trafficking/prostitution debate.
[37] Doezema 2002, *supra* note 5 at 21; see also, McDonald, *supra* note 5 at 160.
[38] Chuang 1998, *supra* note 14 at 85. See also, Carson and Edwards, *supra* note 36 at 63; Chuang 2010, *supra* note 10 at 1699-1700; Weitzer, *supra* note 12 at 452-3, critiquing the 'lack of agency', and implicitly to an extent, the false consciousness, claims; Dauvergne, *supra* note 26 at 73-4 discussing the 'discourse of victimization' in relation to women's agency.
[39] Doezema 2002, *supra* note 5 at 21, citing Human Rights Caucus, "Recommendations and Commentary on the Draft Protocol to Combat International Trafficking in Women and Children Supplementary to the Draft Convention on Transnational Organised Crime" (1999) at 5.

is critiqued by many groups and scholars, yet it remains a dominant political and social construction concerning sex trafficking.

Though not to diminish these stories, it is important to recognize that they may represent a small piece of a much larger and much more complex reality. This is, as discussed in the introduction of this thesis, the harm of a 'single story'. Overall, the historical and contemporary imagery and ideology associated with human trafficking relies, in broad strokes, on an inherent connection with sexual exploitation, and prostitution more generally, and on particular gender constructions of women and 'victims'. Drilling down from these broad contours, the next section will examine in more depth how the conceptualization of exploitation as sexual and physically violent in nature further supports these particular political and social constructions of what human trafficking is, and who is a 'victim'.

b. Exploitation as Sexual and Physical Violence

The concept of exploitation has been presented as the single most important factor in defining and interpreting human trafficking, both at the international and domestic levels. Unsurprisingly, given the context of trafficking discourse and history, outlined in the previous section, the concept of exploitation was largely constructed with the dominant imagery of sex trafficking in mind. In the decade leading up to the creation of the *Protocol*, a significant focus of debate and activism around what was being called 'human trafficking' focused on the issue of women and children subject to sexual exploitation.[40] In the decade since the ratification and entry into force

[40] See Gallagher, *supra* note 4 at 16; Srikantia, *supra* note 35 at 167; Chuang 1998, *supra* note 14 at 65, citing also Nora Demleitner, "Forced Prostitution: Naming an International Offense" (1994) 18 Fordham Intl L J 163 at 163-4;

of the *Protocol*, much attention continues to be paid to this form of human trafficking. The concept of exploitation as both sexual and physical in nature is heavily relied upon in political discourse, and has shaped, to a large extent, the resulting domestic laws and their application. Each of these criteria hold individual impact in constructing a particular understanding of exploitation as it relates to human trafficking, both international and domestic, and also work in concert to create an overarching conceptualization of human trafficking which reifies narrow stereotypes of this phenomenon.

The focus on sexual exploitation as the dominant concern of human trafficking carries with it particular symbolic power, as discussed in the previous section. Thus, "a focus on sexual violation, rather than the structural preconditions of exploited labor more generally, has been crucial to transforming [human trafficking] […] into a legal framework with powerful material and symbolic effects."[41] Particularly for abolitionist organizations associated with the anti-trafficking movement, "their account offers a narrow critique focused solely on the sexuality inherent in the labor, without acknowledging the other aspects of women's lives that shaped their choices to perform sexual labor."[42] The violation of dignity and bodily integrity inherent in sexual violence, coupled with the lengthy morality-driven history of this particular issue, facilitates the depoliticized image of human trafficking in political and social arenas. The direct and near singular focus on human trafficking as sexual exploitation thus sets a stage for broad political consensus, and simplifies the problem to the choices of particular 'bad actors', rather than looking at the more complex, underlying structural conditions in which this phenomenon

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Farrell and Fahy, *supra* note 18 at 620; Anderson and Andrijasevic, *supra* note 13 at 139 discussing the contested positions during the *Protocol* negotiations.

[41] Bernstein, *supra* note 12 at 49. See also, Chuang 2010, *supra* note 10 at 1694-9 discussing the powerful discursive, and resulting policy, privileging of sexual exploitation as synonymous with human trafficking.

[42] Cavalieri, *supra* note 13 at 1415; see also, Pajnik, *supra* note 23 at 48-9; Doezema 2002, *supra* note 5.

may occur. The constructed narrative of victimhood also fits most comfortably within a concept of sexual exploitation given the dominant representations and moral reprehensibility of sexual violence associated with both sex trafficking and, by some accounts, prostitution generally.[43] The depiction of human trafficking as an issue of gender violence carries a powerful, and seemingly apolitical, message; yet, in order to facilitate this construction, the women put forth as 'victims' are often, in fact, victimized by the narrative itself, objectified in media and awareness-raising campaigns, and revoked of her agency and dignity by both being on display and having her story told 'for her', as discussed in the previous section.

Hand in hand with the dominant imagery surrounding sexual exploitation, the emphasis placed on physical violence as the primary *means* by which human trafficking operates serves to further reify narrow imagery of exploitation.

> …the topic of violence points to the complexity of the production of the victimhood narrative: its plot lends itself for manipulation because it is already available within the mainstream discursive scenario on trafficking but, simultaneously, its appropriation feeds into and further sustains the dominant rendering of trafficking in terms of crime and violence.[44]

The use or threat of violence is particularly effective in affirming the moral reprehensibility associated with human trafficking, as it is an easily translatable and readily understood immoral or illegitimate way of procuring an individual's compliance. The presence or threat of physical violence serves to further entrench the construction of a 'perfect victim' identity, as the use of physical violence can be readily understood as vitiating any apparent consent or exercise of

[43] See, i.e., Weitzer, *supra* note 12 at 451-2 critiquing the claim that 'violence is omnipresent' in prostitution and sex trafficking.

[44] Rutvica Andrijasevic, "The Difference Borders Make: (Il)legality, Migration and Trafficking in Italy among Eastern European Women in Prostitution" in Sara Ahmed, Claudia Castaneda, Anne-Marie Fortier, and Mimi Sheller, eds, *Uprootings/ Regroundings: Questions of Home and Migration* (Oxford: Berg, 2003) at 264, cited in Nandita Sharma, "Travel Agency: A Critique of Anti-Trafficking Campaigns" (2003) 21:3 Refuge 53 at 59 [Sharma].

agency by 'victims', more so than other non-physical *means* and coercive tactics. "[T]he emphasis on violence serves to underscore the complete victimisation of the woman: the more violence, the more helpless and truly victim she is."[45] Thus, the idea of physical violence and its relationship to moral interpretations of consent bears significant connection in conceptualizing human trafficking.

The reliance on physical violence and sexual exploitation go hand-in-hand to support a particular construction of 'exploitation' in human trafficking. As concerns the conceptualization of sexual exploitation, the focus on physical violence as the means by which sexual services are procured confirms the moral reprehensibility of the crime, and provides a connection to the inherent violation of bodily dignity associated with such acts, and from some perspectives, of prostitution generally. Further, the physical violation inherent in sexual exploitation, as it is in sexual assault, is readily interpreted as physical violence, even if, for example, physical violence was not used to procure the activity. In other words, the act itself is physically violent. Thus, the relationship between physical violence and sexual exploitation is a natural one, and given the privileging of sexual exploitation over other forms of human trafficking, it is therefore perhaps unsurprising that the use or threat of physical violence has also received a privileged status in the current conceptualization of this issue.

[45] Doezema 2000, *supra* note 6 at 35; similarly, see Anderson and Andrijasevic, *supra* note 13 at 143, noting that "in order to 'pass the 'test' of trafficking, one must be a 'true' victim: injured, suffering and enslaved."

c. Producing the "Ideal Victim" of Human Trafficking: A One-Dimensional Narrative

Given the historical context in which the language of human trafficking developed, and the strong implicit connections made to exploitation as sexual and physical, a very specific production of victim identity has formed in relation to the conceptualization of human trafficking politically, socially and legally. The construction of victimhood, as mentioned earlier, attempts to provide a simplified, clean-cut answer to what is, in reality, a very complex issue. The perfect victim is a silent or silenced victim, too vulnerable to tell her story, or too vulnerable to understand the reality of the story she might describe. This section will consider what the 'perfect' or 'ideal victim' of human trafficking looks like, building on the imagery and ideology uncovered thus far. The narrative of 'victimhood' in human trafficking constructions can be broadly outlined as reliant on primarily on three criteria: knowledge; morality; and, opportunity. In order to facilitate an examination of these criteria, the prototypical features of a human trafficking narrative are first set out:

> A young woman meets her trafficker, who identifies her vulnerabilities – economic, emotional/psychological, or other – and makes a false promise, or deceives, the woman to do something based on the identified vulnerability. This may be a promise of a good job, of a romantic relationship, or something else. The young woman naively believes her trafficker, but later finds herself trapped and forced into prostitution. She may comply or stay in her situation, in part, because she feels compelled to pay back a debt now owing to her trafficker, wants to maintain her trafficker's 'love and affection', or for some other reason. However, the trafficker also employs physical violence or threatens her with physical violence to maintain control over her. At some point, she comes into contact with a third party, most likely law enforcement, who identifies her as a victim, and is rescued from her situation.[46]

[46] This scenario is a hypothetical and intentionally so. While it draws on the primary trends identified in existing stories of human trafficking, I did not want to republish or reproduce an actual story given the critiques I have made in this chapter.

Knowledge is an important factor in constructing victimhood in human trafficking because the international, and resulting domestic, legal definitions require exploitation to be procured by illicit means. This often assumes that the individual did not know the true nature of the work or services they would be performing and rests largely on assumptions of deceptive recruitment in victim narratives. Knowledge thus also bears a strong connection to consent: while a victim of trafficking cannot be said to consent to their situation because they did not have informed or accurate knowledge of it, an individual who did have knowledge of the conditions or type of work they would be engaging in could be seen as giving consent, and thus may not be understood as a trafficked person even where other conditions prevent them from exiting their situation or refusing to do certain work or services.[47] In this way, the simplified ideas about knowledge and consent serve to reinforce the narrative and identity of the trafficking 'victim' as an "innocent", drawing similarities between the victim-figure of the anti-white slavery movement at the turn of the 20th century and today's trafficking 'victim'.[48]

Also bearing relationship to the portrayal of the 'innocent victim', modern morality constructions in the anti-trafficking realm increasingly rely on compliance with the law to support notions of victimhood. Morality and compliance with or contravention of the law thus may be a weighty factor in assessing knowledge and credibility. Trafficked persons are expected to appear as victims "chained to a bed in a brothel", helpless and in need of "rescue";[49] deviation from this dominant imagery provides opportunity for the morality and legitimacy of the trafficked person

[47] See, i.e., Doezema 2000, *supra* note 6 at 43, discussing reduced penalties for crimes related to trafficking in some jurisdictions where a woman has knowledge that she will work as a prostitute.
[48] See, Doezema 2000, *ibid* at 34.
[49] For a critical commentary of this imagery and the persistent domination of imagery related specifically to sexual exploitation, see, i.e., Uy, *supra* note 34; Dina Francesca Haynes, "(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act" (2007) 21:3 Geo Immigr LJ 337 [Haynes 2007].

to be questioned. "Victims who are coerced into prostitution to pay off smuggling debts, for example, may not appear to law enforcement as victims but rather criminals, particularly if they are not physically restrained."[50] This connection with morality is particularly strong considering the dominant representation of human trafficking as sexual exploitation; a trafficked person who appears to have exercised agency to enter or remain in criminal activity – such as prostitution – may be undeserving of protection and may have her credibility questioned,[51] particularly where significant coercion or physical violence is not present. Thus, trafficked persons are relegated to a narrow space of understanding concerning victimhood, and the exercise of agency is looked upon suspiciously, particularly when moments of agency result in legal contravention or produce risky behaviour.

Opportunity, or more appropriately, lack of opportunity, is a critical factor in the construction of victimhood in relation to the trafficked person's ability to exercise agency during their exploitation, and also in relation to their ability to and mode of escape or rescue from their situation. During exploitation, opportunity and ability for a trafficked person to have some control and autonomy over their situation, such as by having some freedom of movement, can be regarded as highly suspicious because it may present opportunity for escape which the trafficked person did not capitalize upon. Thus, their credibility as a victim may come into question.[52] However, conversely, dominant imagery of trafficking victims focuses on "victims chained to a bed in a brothel"[53] who require *rescue* from their situation by an external actor – usually the state

[50] Farrell and Fahy, *supra* note 18 at 624.
[51] See, i.e., Doezema 2000, *supra* note 6 at 43
[52] See, i.e., Srikantiah, *supra* note 35 at 161 concerning the exercise of 'free will' as diminishing the credibility of the 'victim', and at 160 suggesting that identification of trafficking victims is problematic for those persons whose stories are not consistent with the dominant rhetoric.
[53] Haynes 2007, *supra* note 49 at 337. For a commentary and critique of the "rescue paradigm", see Chuang 2010, *supra* note 10 at 1715-18.

or a state authority – thus the criteria of opportunity in relation to exit is a double-edged sword for less-than-perfect victims of human trafficking.

Overall, the prescribed narrative of victimhood under the current conceptualization rests heavily on the privileged subject and ideology set out in this first section and presents a dominant narrative which is largely unreflective of the complex reality in which human trafficking may occur. Similar to the reductive narratives, neat binaries, and shallow understandings explored in this section in relation to 'sex trafficking', the next section will also explore how the contemporary understanding of human trafficking as intrinsically connected to migration replicates many of the identified issues within this separate, yet related, context.

II. Human Trafficking as Migration Crime: Territory, Sovereignty and Security of the State

Alongside the historical and contemporary ties to sexual exploitation, the link to transnational and migration crime, particularly, is a prevalent contemporary construction of the concept of human trafficking. In deconstructing the conceptualization of human trafficking as 'migration crime', two primary points of analysis arise: first, the problematic relationship between smuggling and trafficking; and, second, the broader 'threat' of migration and attending response of criminalization. Though migrant smuggling and human trafficking are represented as distinct phenomena, and rely on essentially opposite legal definitions, in practice and policy, these phenomena mutually reinforce each other, and also support the dominant crime-control approach

to irregular migration adopted by many states today. The smuggling/trafficking discourse further feeds into broader concerns, or panic, about the 'threat' of migration and anti-immigrant sentiments, which appear to be increasing in several Global North countries in recent years. The externalization of the threat of human trafficking maintains it as an 'outsider' problem, and enables the state to ignore its own responsibility and role in the creation and proliferation of human trafficking as a phenomenon within its borders. The general construction of human trafficking as migration crime, and the response taken by states, support the affirmation and centrality of the state as authority and sovereign over its territory, suggesting one reason why human trafficking has perhaps become such an attractive and powerful concept in both the political and legal arenas. This section will set out in more depth each of these issues.

a. Troubling the Smuggling/Trafficking Dichotomy

The conceptualization of human trafficking within the realm of migration is closely connected to – though always distinguished from – migrant smuggling,[54] the 'other' big criminal migration enterprise. The development of protocols dealing with both of these subjects simultaneously under the *UN Convention Against Transnational Organized Crime*[55] may have further brought to bear the notion of these concepts as mutually reinforcing, yet distinct, and also as both relating specifically to transnational and migration crime.

[54] See, i.e., Dauvergne, *supra* note 26 at 89; Jennifer M Chacon, "Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement" (2010) 158:6 U Pa L Rev 1609 at 1635 [Chacon].
[55] *United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2225 UNTS 209; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 15 November 2000, 2237 UNTS 319; *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 507.

At the core, migrant smuggling and human trafficking, though both conceptualized as involving irregular, or 'illegal', migration, are distinguished on the basis of consent. While smuggled migrants are seen as complicit criminals in their migration journey, and consented to the transaction, "trafficked persons are distinguished on the basis that they cannot be said to consent to their situation because of the presence of force, fraud or coercion."[56] This theoretical division also serves to preserve the identity of the 'iconic victim' of human trafficking outlined in section I(c). Knowledge, or consent, represents the dividing line between who is a 'victim' and who is not; similarly, moral judgment is implied because smuggled migrants are complicit criminals in their illicit activity, while trafficked persons – due to their lack of knowledge or ability to consent – are excused from criminal culpability. In other words, the line drawn between smuggling and trafficking rests on "assigning guilt. People who are smuggled are culpable; "they" have broken "our" laws. People who have been trafficked never had a choice."[57] In addition, 'opportunity' is implicated by affirming that trafficked persons do not have a choice in respect of their migration journey, nor the freedom to enter into or exit a situation of work or service, while smuggled migrants are free to end their transaction and exit their situation upon arrival to their destination.

Although this distinction may appear clear in the abstract, applying it to complex experience of migration is much less so.[58] Consider, for example, the following hypothetical:

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[56] Bethany Hastie, "To Protect and Control: Anti-Trafficking and the Duality of Disciplining Mobility" in Martin Geiger and Antoine Pécoud, eds. *Disciplining the Transnational Mobility of People* (New York: Palgrave Macmillan, 2013) 126 at 129 [Hastie], citing also Britta S Loftus, "Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims" (2011) 43 Colum Hum Rts L Rev 143at 145.
[57] Dauvergne, *supra* note 26 at 91.
[58] See Dauvergne, *supra* note 26 at 90; Dina Francesca Haynes, "Exploitation Nation: The Thin and Grey Legal Lines Between Traffiked Persons and Abused Migrant Laborers" (2009) 23 Notre Dame J L Ethics & Pub Pol'y 1; Chacon, *supra* note 54 at 1615.

> John makes arrangements with a smuggler to enter the United States and work in construction through a company arranged by the smuggler. He pays a sum of money in advance of the journey, and is told to hand over his passport for safekeeping. On arrival, John is told the construction company can't take him on yet, and is offered work in a restaurant as a dishwasher by the smuggler. His passport is not returned to him. He is charged a high amount for room and board, but sleeps in the basement of the restaurant. He is paid less than the minimum wage, and far less than he expected to make in the construction business. He works seven days a week, but is not paid overtime. When John inquires about his conditions and future prospects in the construction industry, he is told not to complain if he wants to stay in the US.[59]

Is John a migrant criminal, or a 'victim' of trafficking? This scenario presents facts which can support or counter evidence or indicia of either, or both, identities concerning the presence of consent, morality and opportunity. While John initially 'consented' to the smuggling operation, is there a clean-cut answer to whether he is 'consenting' to his current situation? Similarly, how easy would it be to understand or adjudicate John's subjective belief about his level of freedom to alter or exist his current situation (relating to the criteria of 'opportunity')? Finally, although John initially participated in criminalized activity by entering the United States without authorization, does he appear more as a criminal, or 'victim' of crime, in relation to his current situation?

In the vast grey area between the extreme polars of what counts as trafficking or smuggling, a "conundrum arises from an inability to isolate the jurisprudential, conceptual, and practical distinctions between victims of human trafficking (those forced to perform certain acts) and smuggled migrants (those who consent to being transported across international borders as means to engage in certain acts)."[60]

[59] Adapted from Dauvergne, *supra* note 26 at 90-1.
[60] Samuel Vincent Jones, "Human Trafficking Victim Identification: Should Consent Matter?" (2012) 45:2 Ind L Rev 483 at 485-6; see also, Chacon, *supra* note 54 at 1635 noting that, within this grey zone (in the US context),

The current conceptualization of, and association between, human trafficking and migrant smuggling has enabled increasingly restrictive migration and border control measures to be implemented in the name of fighting the 'universal evil' of human trafficking and protecting potential 'victims', while in fact, operating far more to 'combat' all irregular migration. In this way, both "anti-trafficking and anti-smuggling discourse and practice are anti-immigration sentiments expressed best in the idea that migrants are almost (if not) always better off at "home"."[61] This discourse locates the problems associated with both migrant criminality (smuggling), and migrant exploitation (trafficking) outside of and beyond the state, its citizens, and its markets.[62] This, in turn, normalizes some migrant exploitation, and 'illegality' that are embedded or engrained in local communities and domestic markets, while also preserving moral outrage and calls to action in other ways or for other groups.[63]

However, the relationship between these two phenomena suggest that human trafficking must also occur primarily, or even wholly, through irregular migration, thus overlooking a larger population of potential trafficked persons. By constructing human trafficking as an issue of irregular, or 'illegal', migration, the possibility of trafficked persons entering through legal channels and then being exploited in the destination country is largely ignored.

What, then, is the overarching goal or purpose of the close association between human trafficking and migrant smuggling, and relatedly, the attempts of a clean distinction between the

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"the government's approach has been to treat the gray-area case as one involving a voluntary migrant who is not eligible for the protections available to trafficking victims."

[61] Sharma, *supra* note 44 at 54

[62] See, i.e., Chacon, *supra* note 54 at 1635; Chuang 2010, *supra* note 10 at 1698; Sharma, *ibid* at 57.

[63] See Chuang 2010, *ibid* at 1698.

two? Both together, and independently, these concepts are engaged in the process of constituting the threat of migration, and the justification of criminalization as the appropriate primary response mechanism to this threat. While migrant smuggling directly engages with criminalization and is seen as a direct 'threat' to the nation-state, its social fabric, markets and systems, human trafficking serves to both reify this through distinction (by creating 'victims' and thus increasingly the moral reprehensibility of 'criminals'), and by creating a complementary humanitarian-based discourse to justify similar measures. In other words, the portrayal of 'victims' "garner[s] legitimacy for the state's criminalization of migrants who use smugglers and the scapegoating of the latter as the *cause* of people's migrations."[64] The next section will explore in more detail the construction of the migration threat and criminalization agenda, and the ways in which human trafficking supports its advance.

b. The Threat of Migration/Crime

In its relationship to migration, and migration governance, human trafficking is first and foremost put forth as a crime-control issue. Building on rising anti-immigrant sentiments, and supporting the increasingly restrictive migration management agendas of many Global North nations in the 21st century, human trafficking provides a centralized, sensationalized depiction of the 'evils' of migration,[65] much like it has been similarly used in relation to the issue of prostitution discussed in section I. Located within the issue of migration, trafficking is nearly always linked, both discursively, and in policy and practice, to irregular – or 'illegal' – migration, or to migrant smuggling, as discussed in the previous section. This connection allows

[64] Sharma, *supra* note 44 at 58.
[65] See, i.e., Anderson and Andrijasevic, *supra* note 13 at 137.

for additional support for the notion that "illegal migration of people opens the door to a host of other transnational crime, including organized crime."[66] Human trafficking is often presented as having strong links to organized crime, despite the fact that, in reality, human trafficking operations can range from "large-scale organized crime networks to "small scale information networks"."[67] The inclusion of human trafficking within broader discourses and debates on 'illegal' migration, then, serves to support a moral panic around the association of irregular migration and crime, leading to greater political support for restrictive immigration measures. The primary response, given this construction, is naturally one of criminalization. As a sweeping agenda, criminalization in relation to both human trafficking, and migration more generally, is presented as a necessary counter in many respects: in addition to fighting the direct 'evil' of the trafficker and organized crime, the crime-control approach to anti-trafficking migration policies and discourse also rests on the assumed need to protect both 'victims', as well as the communities and citizens of the destination country and state itself.[68]

The trafficker plays an important role in the construction of the criminalization agenda. Traffickers are portrayed as "dark, omnipotent criminals"[69] who must be stopped and punished, as criminal gang members or connected to organized crime,[70] and as "bear[ing] sole responsibility for the human misery of trafficking."[71] By identifying a specific external bad actor, political discourse and policy is able to create a tangible target for measures and laws aimed at addressing the crime, and "supports the assumption that adopting stricter legislation will hinder

[66] Farrell and Fahy, *supra* note 18 at 622; see also, Anderson and Andrijasevic, *supra* note 13 at 137; Sharma, *supra* note 44 at 57.
[67] Srikantiah, *supra* note 35 at 163.
[68] See, i.e., Pajnik, *supra* note 23 at 49, 54; Doezema 2000, *supra* note 6 at 44;
[69] Pajnik, *ibid* at 52.
[70] See, i.e., Doezema 2000, *supra* note 6 at 38; Anderson and Andrijasevic, *supra* note 13 at 137.
[71] Chacon, *supra* note 54 at 1616.

trafficking, imprison the perpetrators and save the victims."[72] Returning to the hypothetical scenario, then, John's "smuggler" provides a focal point for punitive action, whether John is seen as a smuggled migrant or trafficked person, and perhaps provides even greater cause for action if John is seen as the latter. The focus on 'traffickers', then, provides additional reinforcement to the need to criminalize the 'bad actors' associated with organizing irregular migration more broadly. The presence of an external bad actor also reinforces the externalization of the threat, as something outside or "other" to the state and its citizens. This is not only important in terms of gaining popular support, but diverts attention away from the role and responsibility of the state itself in contributing to the conditions which enable human trafficking to occur.[73]

As a broader border and migration issue, human trafficking provides an important opportunity for states to "claim power" and assert their sovereignty.[74] The intensification of border controls and restrictive immigration measures are seen as necessary to counteract the threat, and crime, of human trafficking in the name of protecting the state's citizens,[75] and the state itself. The perceived role of the state "in successfully eliminating threats, controlling crime and keeping borders under control" thus affirms its authority, and promotes its central position as "securer of the national community."[76] The constructed target of protecting citizens and communities from human trafficking also feeds into, and supports, broader anti-immigrant discourse which positions migration as a more general 'threat' to cultural and national identity, and economic and social prosperity in many Global North countries, such as the United Kingdom and United

[72] Pajnik, *supra* note 23 at 52. See also, Chuang 2010, *supra* note 10 at 1704-5; Sharma, *supra* note 44 at 60.
[73] See Hastie, *supra* note 56 at 131; Chacon, *supra* note 54 at 1616; Anderson and Andrijasevic, *supra* note 13 at 137.
[74] Pajnik, *supra* note 23 at 54.
[75] *Ibid* at 49; see also, Sharma, *supra* note 44 at 57, 59.
[76] Pajnik, *ibid* at 54.

States.[77] In relation to human trafficking, the construction of this 'threat' largely revolves around, and induces, panic concerning the infiltration of illicit criminal networks and organized crime, a central features of the external 'evil' of human trafficking, as discussed above. Thus, returning to the hypothetical scenario, where John is seen as a smuggled migrant, he himself is a threat to the local community by, for example, 'stealing jobs' from local citizens; even where he is seen as a 'victim', the infiltration of organized criminal networks through the border and in this community it itself a pervasive threat.

In addition, increasingly restrictive border measures and a crime-control approach to irregular migration in relation to human trafficking are represented as necessary and effective measures to protect 'victims' or potential 'victims' of human trafficking.[78] Thus, anti-trafficking responses within the migration management realm often rely heavily on a paternalistic approach, doing things 'in the name of', or 'in the best interest of' the vulnerable people – and women, particularly – who may become 'victims' of trafficking.[79] Particularly as concerns the crime-control approach to migration and 'victim' protection, the connection between human trafficking, sexual exploitation and gender dominates discourse and policy, echoing many of the representations explored in relation to the dominant imagery of sex trafficking in the previous section.[80] Yet, these measures in fact often operate punitively against individual migrants, by making legal migration more difficult and deportability easier to secure, thus enabling

[77] See, i.e., Doezema 2000, *supra* note 6 at 44; Anderson and Andrijasevic, *supra* note 13 at 137. Relatedly, see Chacon, *supra* note 54 at 1631-2 discussing how anti-trafficking framing contributes to exaggerated public perceptions of non-citizens as criminals and terrorists.
[78] See, i.e., Hastie, *supra* note 56 at 131-2; Sharma, *supra* note 44 at 60.
[79] See, i.e., Dauvergne, *supra* note 26 at 74 discussing this approach its impact on agency and a 'victim' identity. See also, Hastie, *ibid* at 131-2; Sharma, *ibid* at 58.
[80] In relation to the specific confluence of migration, sexual exploitation and gender in relation to human trafficking, see: Chuang 2010, *supra* note 10; Doezema 2000, *supra* note 6; Doezema 2010, *supra* note 13; Kempadoo et al, *supra* note 13; Berman, *supra* note 13.

"governments to restrict immigration under the guise of protecting trafficked persons."[81] In other words, the label of human trafficking enables humanitarian language and discourse to be used to act punitively, instrumentalizing the concept for ulterior purposes.[82] Returning again to John's scenario, if he is deemed to be a 'victim' of human trafficking, he will be removed from his current situation, but likely repatriated to his origin country. If John is able and willing to cooperate with investigative authorities in prosecuting his trafficker, he may be given temporary immigration relief; however, little concrete or long-term assistance exists and only for those willing to assist with the advancement of criminal proceedings. This places prosecutorial and criminal issues ahead of human rights for trafficked persons, and requiring 'victims' to reaffirm and prioritize their 'victim' status and subscribe to a narrative which attributes sole responsibility to the trafficker, rather than also acknowledging underlying structural conditions which contribute to the problems of both trafficking and smuggling.[83] By ignoring the broader context in which irregular migration occurs, this approach further ignores the fact that, like many migrants, John may simply 'try his luck' again, hoping for a better outcome next time, thus doing little to address the phenomenon of trafficking in a systemic manner or beyond immediate, individual occurrences.

Overall, the construction of human trafficking as a criminal issue, and as best solved through an approach of criminalization, maintains a strong focus on the particular 'bad actors' responsible for the crime, alleviating the state from considering or acknowledging the ways in which it

[81] Chuang 2010, *supra* note 10 at 1663; see also, Pajnik, *supra* note 23 at 52; Anderson and Andrijasevic, *supra* note 13 at 144.
[82] See, i.e., Doezema 2000, *supra* note 6 at 44; Anderson and Andrijasevic, *ibid* at 138 discussing the construction of human trafficking as 'anti-politics' in relation to a host of issues, including sex, labour and citizenship; Chacon, *supra* note 54 at 1619, citing James Hathaway, "The Human Rights Quagmire of "Human Trafficking"" (2008) 49 Va J Int'l L 1 at 6 [Hathaway].
[83] See Sharma, *supra* note 44 at 59.

contributes to this phenomenon, both in terms of contributing to an increasing underground migration economy through the imposition of restrictive measures,[84] as well as acknowledging its role in creating the broader socioeconomic conditions which "feed the trafficking phenomenon."[85] The sustained focus on a crime-control approach to human trafficking within the migration management paradigm, and dominant conceptualization of the issue as thus one of 'illegal' migration, particularly supports a narrow construction of human trafficking which is unreflective of the broader reality of the phenomenon.

Together, the dominant ideologies circulating the label and concept of 'human trafficking' form together to create a very narrow, and highly particular, image of *what* human trafficking is, and *who* is a 'victim'. The final section of this chapter will explore the claims made thus far within the specific Canadian context, establishing a troubling recurrence of the major themes identified thus far.

III. IDEOLOGICAL PARALLELS IN THE CANADIAN CONTEXT

Much like in the international arena, the concept of 'human trafficking' has received significant attention in Canada in the past decade, following ratification of the *Protocol* and development of domestic law and policy in line with that instrument. In line with the broader, common themes identified thus far in this chapter, the Canadian response to human trafficking has largely revolved around a criminal justice, or 'crime-control' model, and has further replicated the

[84] See, i.e., Chacon, *supra* note 54; Hathaway, *supra* note 82; Hastie, *supra* note 56.
[85] Chuang 2010, *supra* note 10 at 1705; see also, Pajnik, *supra* note 23 at 52; Farrell and Fahy, *supra* note 18 at 624; Sharma, *supra* note 44 at 59.

dominant ideology and imagery concerning the relationship of human trafficking to sexual exploitation, and as a migration issue. This section will examine in greater detail the ways in which the dominant ideology and imagery have influenced, and are present in, current political and social discourse, and the resulting impact and influence on domestic laws and concrete action within Canada. Drawing both on existing literature and studies, as well as the empirical research undertaken for this thesis,[86] this section will establish the problematic replication of the 'story' and representations of human trafficking exposed thus far in this chapter, and the attending political divisions and legal constraints that have resulted from conformance to these dominant conceptualizations.

a. Sensationalism and the Replication of Sex Trafficking Discourse

To a large degree, the conceptualization of and responses to human trafficking in Canada have relied on the imagery and equation of human trafficking with 'sex trafficking', and on the problematic identity production of 'victimhood' explored earlier in this chapter. The existence of contested positions on prostitution are also prevalent in Canada, and the conflation, by some groups, of all prostitution as trafficking and as inherently violent and exploitative further feeds the sensationalism associated with human trafficking in Canada.[87] In discourse, policy and action, the idea of human trafficking as primarily, if not wholly, about sexual exploitation of women and girls has been given significant privileging, despite existing evidence to the contrary. Many participants in the interview study acknowledge the heightened attention given to

[86] See the Introduction chapter for an explanation concerning this study and its methodology.
[87] See Lara Quarterman, Julie Kaye and John Winterdyk. "Human Trafficking in Calgary: Informing a Localized Response" (2012) available online: ACT Albera <www.actalberta.org>at 25-7 [Quarterman et al].

trafficking for sexual exploitation over other forms of exploitation.[88] As one participant notes, "we've definitely seen an equation made that human trafficking equals to sex trafficking."[89] Commenting on the reasons for this, another participant mentions: "I think one contextual challenge is that labour exploitation never captures the imagination of the public like sexual exploitation does."[90] Further, another study found that participants continued to describe "popular stereotypes of trafficked individuals as young, female, and Asian, trafficked for forced prostitution" despite direct experiences working with trafficked persons which deviated from stereotypes,[91] reinforcing the power of both the 'sex trafficking' imagery and migration connection.

The association between 'sex trafficking' and sensationalism, discussed in section I of this chapter, is often replicated in the Canadian context. Media and NGO awareness campaigns have been characterized as "reinforc[ing] the idea that human trafficking is little more than the sexual exploitation of women and girls who are forcibly confined in brothels", thus constraining a broader understanding and identification of trafficked persons outside of sex trade industries.[92] As one participant noted, "[…] labour trafficking is not as sexy as sex trafficking, if I can say that. When you see any PSAs out there or anything that's in the way of advertising about the offence or posters, it's often about sex trafficking."[93] Commenting on the negative impact of sensationalist awareness campaigns, another participant pointed out the disconnected nature of

[88] I.e., participants 05, 06, 12, 13, 18.
[89] Participant 12.
[90] Participant 06.
[91] Julie Kaye, John Winterdyk and Lara Quarterman, "Beyond Criminal Justice: A Case Study of Responding to Human Trafficking in Canada" (2014) 56:1 Canadian Journal of Criminology and Criminal Justice 23 at 30 [Kaye et al].
[92] Quarterman et al, *supra* note 87 at 24-5. See also, Royal Canadian Mounted Police, *Human Trafficking: A Threat Assessment* (Ottawa: RCMP, 2010) at 9 [RCMP], stating: "the widespread understanding of human trafficking is often clouded by stereotype, bias, and sensational media reports."
[93] Participant 18.

the message from the real experience and evidence on the ground: "They have this underlying idea that all awareness is good awareness, and the best way to raise awareness is to have shock ads, and to have this discourse on human trafficking, which is not reflective of reality."[94]

For individuals and groups who are aware or, or perceive, sensationalism around the issue of human trafficking, concerns often centre on the fact that this reinforces the narrow stereotyping of human trafficking as only encompassing the sexual exploitation of women and girls, which prevents identification of trafficked persons outside of the sex trade,[95] and may also hinder identification within the sex trade where the significant levels of violence and trauma associated with 'victimhood' are not readily apparent, or where an individual does not self-identify with the 'victim narrative'. For example, in discussing the negative impact of the sensationalism around human trafficking, and its equation with sex trafficking, one participant explains:

> I think it's detrimental because it ignores men. It's detrimental because it ignores labour. It is detrimental because it creates a dichotomy between the saviour and the victim. This takes away the agency of the individual who has been victimized: rather than feeling empowered to stand up and say "I can go to authorities because what's happening to me is wrong" they remain helpless victims in need of being saved. I think that's incredibly detrimental.[96]

As this quote demonstrates, the way in which human trafficking is conceptualized and portrayed does a disservice both to those whom it ignores, and to those whom it 'labels'. Concerns surrounding the narrow stereotyping associated with human trafficking as impacting identification of trafficked persons were also raised by many participants. In commenting on the resistance of individuals to self-identify, one participant states:

> If people don't see their experiences reflected in the terminology of human trafficking because they're not women bound and handcuffed and chained and

[94] Participant 13.
[95] Quarterman et al, *supra* note 87 at 24-5.
[96] Participant 13.

> stuffed into jars, if they don't fit that imagery, if they don't identify as trafficked even after learning about trafficking, where will that investigation go? What help is that to law enforcement in terms of evidence?[97]

Thus, as this quote demonstrates, the sensationalism around human trafficking has a far-reaching impact into understandings and concrete progress or action on the ground in response to potential cases of exploitation.

The privileging of sex trafficking is seen both in respect of broader policy initiatives, like the public awareness campaigns discussed earlier, as well as in relation to specific action and response on the ground. Discourse and action in response to human trafficking is increasingly appearing as a substitute for certain prostitution offences and cases,[98] giving credence to the identified concerns about stereotyping as constraining a broader understanding and identification of trafficking beyond the sex trade. In its report on human trafficking, the RCMP notes that "[p]olice investigations have shown that victims of human trafficking are primarily found in some avenue of the sex trade in Canada."[99] Similarly, one participant in the interview study reported, "most of the files that we have in Canada are actually in relation to domestic prostitution."[100] Of the known convictions for human trafficking under *Criminal Code* ss.279.01-279.04 (the 'specific' offence), only one is identifiable as not a case of 'domestic sex trafficking'.[101] Of the known cases where convictions for human trafficking under s.279.01

[97] Participant 12.
[98] See, i.e., Katrin Roots, "Trafficking or Pimping? An Analysis of Canada's Human Trafficking Legislation and its Implications" (2012) 28:1 Can J L & Soc 21 at 33-35 [Roots] discussing relevant cases, and at 37, noting "police emphasis on domestic trafficking increases the likelihood of procurement cases being dealt with under human trafficking provisions." See also, Julie Kaye and Bethany Hastie, "The *Criminal Code* Offence of Trafficking in Persons: Challenges From the Field and Within the Law" (2015) 3:1 Social Inclusion 88 at 88-9, 91 [Kaye and Hastie].
[99] RCMP, *supra* note 92 at 10.
[100] Participant 01.
[101] *Criminal Code of Canada*, RSC 1985, c-C46. The known conviction concerning non-sexual forms of trafficking and foreign national 'victims' is: *R v Domotor*, [2012] OJ No 3630 (SC) (QL) [*Domotor*]. The other known cases where convictions under s.279.01 were secured, and which involve domestic sex trafficking, include: *R v. Nakpangi*,

occurred in relation to sexual exploitation, the details of these cases further provide evidence of the stereotyping and sensational aspects of exploitation: the 'victims' were all young women, and the accused traffickers used significant levels of violence;[102] these trends were also identified in relation to other cases analyzed for the RCMP report.[103] Further, while discourse surrounding organized crime is prevalent, little concrete evidence exists to suggest a strong link in fact, and a majority of the cases identified and prosecuted as human trafficking had no explicit organized crime element.[104]

Yet, the conclusion about whether the sex trade represents accurately the primary site of human trafficking is questionable, given the strong association between human trafficking and the sex trade, as discussed, as well as definitional similarities between prostitution-related and trafficking offences under the *Criminal Code*,[105] thus perhaps allowing cases of sexual

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2008 CarswellOnt 9334 (WL Can) (Ont Ct J) (guilty plea); *R v. St Vil*, [2008] OJ No 6023 (QL) (guilty plea); *R v. Urizar*, 2010 Longueuil 505-01-084654-090 (CQ), upheld on appeal: 2013 QCCA 46; *R v. Estrella*, 2011 OJ No 6616 (QL) (verdict by jury); *R v. AA*, 2012 OJ No 6256 (QL) (verdict by jury), upheld on appeal: [2013] OJ No 3192 (QL); *R v. Byron*, 2013 ONSC 6427; Emerson (see RCMP, *supra* note 92 at 25, guilty plea); Vilutis (see RCMP, *supra* note 92 at 25, guilty plea); Lennox (see RCMP, *supra* note 92 at 26, guilty plea). See also: Kaye and Hastie, *supra* note 98 at 89, n4; RCMP, *supra* note 92 at 1, 23; Department of Justice, "An Overview of Trafficking in Persons and the Government of Canada's Efforts to respond to this Crime: 2010-2011", online: Department of Justice Canada <www.justice.gc.ca>; "Canada", United Nations Office on Drugs and Crime Human Trafficking Case Law Database, online: <http://www.unodc.org/cld>; Benjamin Perrin, *Invisible Chains: Canada's Underground World of Human Trafficking* (Toronto: Penguin Canada, 2010); Roots, *supra* note 98 at 33-34. It is worthy to note that the RCMP provides much larger statistics grouping together both specific human trafficking charges and 'related' charges / convictions: see, RCMP, "Human Trafficking National Coordination Centre" (homepage) online: <http://www.rcmp-grc.gc.ca/>, however, the RCMP also notes that cases "have mostly involved victims who are citizens and/or permanent residents of Canada trafficked for the purpose of sexual exploitation", see: RCMP, *supra* note 92.

[102] See *supra* note 101.

[103] See, RCMP, *supra* note 92 at 20-24.

[104] *Domotor*, *supra* note 101 being the exception. Regarding the unsubstantiated connection with organized crime, see: Roots, *supra* note 98 at 38-9.

[105] Prior to a successful constitutional challenge to Canada's prostitution offences (*Bedford v Canada*, 2013 SCC 72), the offences of procurement under s.212 of the *Criminal Code* (RSC 1985, c-C46), was primarily relied upon in this regard, particularly subsection (h) setting out the wording of "exercising control, direction or influence over movement", which has been interpreted in case law: *R v Perrault*, 1996 113 CCC (3d) 573, 1996 CarswellQue 1069, and which also appears under s.279.01 (trafficking in persons). See also, Roots, *supra* note 98, Kaye and Hastie, *supra* note 98 at 93. Following a successful constitutional challenge, the federal government introduced the *Protection of Communities and Exploited Persons Act*, SC 2014, c25. Under new *Criminal Code* legislation, the

exploitation to fit in more readily or easily with the definition requirements of 'human trafficking' under the *Code*. In addition, many police services will have an active mandate regarding prostitution and related criminal activity within, for example, a vice unit, providing a specific site and dedicated resources geared towards this issue; the same cannot be said for other forms of trafficking and the sites and spaces in which they may occur. The 'natural fit' between human trafficking and the sex trade also perhaps rests on the historical criminalization and stigmatization of this industry, as opposed to other industries in which labour exploitation might occur. As one participant noted, the connection between sexual exploitation and the sex trade has a natural connection because prostitution has been historically criminalized:

> Sex trafficking – the state of the prostitution laws in our country are certainly up in the air. However, it's always been identified as a crime. It's been sensationalized as an offence with prostitution and things like that. At least to some degree, it's been identified as some form of criminal activity before[.][106]

In elaborating on the criminal law connections, this participant further states,

> and also, prostitution and that type of crime is often associated with drugs and other crimes as well, so it's pulled in with that other identifiable criminal offences. Whereas, labour, maybe it's provincial labour laws, things like that come into play and stuff, but as far as the criminality of it, it's just completely hidden.[107]

Thus, the sensationalism and privileging of sex trafficking both propels forward a narrow and singular focus in terms of understanding what human trafficking 'is' or 'looks like' in Canada, and may also be the result of a natural fit or connection with historically criminalized and stigmatized activity in Canada, which, under the criminal justice model to responding to human trafficking, is thus more easily or readily translatable.

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prostitution-related offences mirrors the wording and structure of the trafficking in persons offences under s.279.01-279.04 in greater detail. See, i.e., s.268.1 (obtaining services), s.286.2 (receiving a material benefit), and s.286.3 (procurement). S.286.3 also retains the wording, "exercising control, direction or influence over movements" allowing for the continued use of this offence, and its interpretation under s.279.01 (trafficking in persons).

[106] Participant 18.

[107] Participant 18.

b. Human Trafficking and Migration Policy: A Conflicted Relationship

Human trafficking is often discussed in relation to immigration in Canada, though concrete action rarely reflects this discourse. With the general rise in crime-control models for immigration amongst Global North nations in the late 20th century,[108] Canada, too has followed suit, determining not only that a "crime and security" lens was appropriate for general immigration policy in the post 9/11 political context,[109] but directly connecting this with human trafficking. Spurred on by a denouncement of Canada's "lax immigration system" as facilitating human trafficking,[110] a number of laws and policies have been developed since the inception of the *Immigration and Refugee Protection Act* in an effort to 'combat' trafficking through a crime- and border-control approach. As a result, Canada's response to trafficking within the immigration system has largely centered on increasing "the policing of borders and to adopt legislation criminalization the acts of trafficking[.]"[111] In discussing the impact and problematic approach of a border-control model to address human trafficking, one participant states:

> The very immigration laws, the very immigration restrictions for people to come, that is what is turning people to get help from these recruiters, because you guys are making things impossible for people to come, and the other, the remedies for example reinforce the borders in order to protect the victim. That other rhetoric is so problematic. […] It's basically like deporting them in order to avoid to exploit them. It's a nonsense kind of response. So I feel it's evolving into these nonsense solutions that are only exacerbating the problem. The solutions are worse on the victim.[112]

[108] See, i.e., Bethany Hastie and François Crépeau, "Criminalising irregular migration: the failure of the deterrence model and the need for a human-rights-based framework" (2014) 28:3 Journal of Immigration, Asylum and Nationality Law 213.
[109] Jacqueline Oxman-Martinez, Jill Hanley and Fanny Gomez, "Canadian Policy on Human Trafficking: A Four-year Analysis" (2005) 43:4 International Migration 7 at 10.
[110] See *ibid* at 12, citing the United States Department of State, *Trafficking in Persons Report 2003*.
[111] Oxman-Martinez et al, *ibid* at 21-22.
[112] Participant 07.

As this quote demonstrates, the result of border and crime-control policies within the immigration system may much more often operate to the detriment of individual migrants than any legitimate claim of 'protecting' them.

Several recent efforts on the immigration front have utilized the paternalistic, 'victim centered' discourse, claiming to enact policies and measures which will protect individuals from becoming 'victims' of trafficking and exploitation, and particularly focusing on sexual exploitation, though typically maintaining a connection also to the criminal activities associated with trafficking and smuggling, more broadly. For example, in the wake of increasing controversy over the exotic dancer visa program, and specifically in relation to concerns about human trafficking under the program,[113] the federal government announced the termination of the program in 2012.[114] Not only would new applications under the program be denied, but all existing temporary work visas would also be cancelled, which led to concerns about the women already in Canada under the program at that time.[115] Quoting then Immigration Minister Jason Kenney in a news article, the purpose of the program's termination rested heavily on the paternalistic, or 'protectionary' discourse of human trafficking, as well as the emotive and sensational issue of 'sex trafficking' given the specific context and program in question: "Now we have the power […] to deny visas to people who we think … might have a high chance of trafficking or exploitation."[116] However, the denial and revocation of visas under this program does little to effectively protect or assist

[113] See, i.e., RCMP, *supra* note 92 at 19-20.
[114] See, Jessica Hume, "Strippers to be stripped of work visas: Kenney," *The Ottawa Sun* (11 June 2012) online: <http://www.ottawasun.com>; Laura Payton, "Exotic dancer no longer eligible job for foreign worker," *CBC News* (4 July 2012) online: <http://www.cbc.ca/news>.
[115] See Hume, *ibid*.
[116] Quoted in Hume, *ibid*.

individuals beyond removing them from Canada, or preventing their entry under this particular program at the outset.[117]

Similarly, amendments to the *Immigration and Refugee Protection Act*,[118] assented to in 2012, further enable immigration officers to refuse or deny entry to any foreign nationals to work in Canada if, in the opinion of the officer, the individual is "at risk of being subjected to humiliating or degrading treatment, including sexual exploitation."[119] Like the cancellation of the specific exotic dancer visa program, the changes here enable denial of entry or revocation of authorization to work in Canada on the basis of 'protecting' potential 'victims' of human trafficking, and also replicates the connection to sexual exploitation particularly. Also like the cancellation of the exotic dancer visa program, this new policy does little to effectively assist or protect a potentially trafficked person. The denial of entry or revocation of authorization for individuals who could be targeted by the new policy creates a disproportionately punitive outcome for individual migrants in Canada.[120] Thus, while the label and imagery of human trafficking – and sex trafficking, particularly – is used to propel forward changes to the immigration regime in the name of 'protecting' persons from human trafficking, in reality, the language is co-opted to justify restrictive, and in cases like the exotic dancer visa program, morally-driven policies and practices.

[117] See also, Hastie, *supra* note 56 at 135 for a critical commentary.
[118] SC 2001, c27.
[119] Bill C-10, *Safe Streets and Communities Act*, 1st Sess, 41st Parl, 2012, s.206(1.4) (assented to 13 March 2012).
[120] See, i.e., Hastie, *supra* note 56 at 136.

In addition to measures which target specific populations and programs, general awareness and information campaigns have been utilized in an attempt to deter 'risky' migration.[121] These campaigns often rest on an assumption concerning knowledge – the connecting back to the ideal characteristics of victimhood and attempting to prevent individuals from becoming 'victims'. Information and awareness campaigns, in this manner, attempt to 'inform' or 'warn' migrants about the possible dangers associated with their travel; in this way, they reinforce the assumptions that migrants don't know what might await them; and that, if they did know, they would not leave.[122] Along with reinforcement the assumed connection between knowledge and victimization, these campaigns further send the message that migrants are 'better off staying at home', thus also appearing paternalistic in nature.

While migrants are often highlighted in imagery and discourse concerning human trafficking, in reality, under the current criminal justice model, very few cases of human trafficking involving migrants have been pursued by law enforcement and Crown authorities. The first charge of human trafficking, under the *Immigration and Refugee Protection Act*,[123] was brought in relation to the sexual exploitation of two migrant women; however, the accused was acquitted at trial. Since then, one successful case under the *Criminal Code* was prosecuted,[124] resulting in a guilty

[121] The Federal Interdepartmental Working Group on Trafficking in Persons developed and distributes an information booklet in 14 languages to "warn potential trafficking victims": see, Tim Riordan Raaflaub, "Human Trafficking" PRB 04-25E (21 November 2006), Parliamentary Information and Research Service, Library of Parliament, Government of Canada, online: <http://www.parl.gc.ca/content/lop/researchpublications/prb0425-e.htm#cdnlaw>. See also, Hastie, *ibid* at 133.
[122] Antoine Pecoud and C Nieuwenhuys, "Human Trafficking, Information Campaigns, and Strategies of Migration Control" (2007) 50 American Behavioral Scientist 1674 at 1684. See also, Hastie, *ibid* at 133.
[123] SC 2001, c27, s.118; *R v Ng*, 2007 BCPC 204.
[124] *Domotor, supra* note 101.

plea, and two further cases under *IRPA* proceeded to trial in British Columbia,[125] with one resulting in a conviction, and the other resulting in an acquittal.

When cases involving migrants are identified by or presented to authorities, the biggest challenge in pursuing any response within the criminal justice framework appears largely to revolve around the cooperation of the individual, and their perceived credibility in court proceedings. Often, the interests and narrative of the individual do not align well with the dominant 'victimhood' narrative set out earlier in this chapter, limiting the ability for engagement within the criminal justice framework. As one participant discussed,

> We have a lot of files that come forward […]. The problem becomes that victims – former victims – generally use us as leverage to get their documents back, to leave the employment that they're in, which is not treating them well. They don't necessarily want to proceed with a police investigation and certainly not a human trafficking investigation, so they don't provide a statement. […] without their cooperation, without a statement from them, that file is not going anywhere.[126]

As this quote demonstrates, the interests and needs of migrants who may be trafficked or exploited do not necessarily align with the dominant response model, or approach, to human trafficking. In addition to this issue, several participants also commented on the fact that migrants may be very hesitant to talk to investigative or other authorities, particularly if they come from countries which have widespread corruption or distrust of official authorities. Finally, for those migrants who may be willing to cooperate with investigative authorities and participate in court proceedings, their credibility as witnesses is often a concern. As one participant noted, "I think the biggest hurdle is credibility for the victims when they testify."[127] Credibility issues

[125] *R v Orr*, 2013 BCSC 1883, resulting in a guilty verdict by jury against one accused; *R v Ladha*, 2013 BCSC 2437, resulting in acquittal by judge.
[126] Participant 01.
[127] Participant 03.

often centre around immigration status: either by virtue of the individual not having status, and thus, either implicitly being perceived as a criminal, and/or being perceived as having an ulterior motive for their claims of attempting to obtain status to remain in Canada, or as having contingent or temporary status, also giving rise to the suspicion of ulterior motives. Thus, the criminal justice system seems ill-suited to respond to cases of human trafficking involving migrants at all levels.

Of interest to note in the cases mentioned earlier, and in the Canadian context more generally, is the absence of a trend in traditional 'smuggling'. Individuals trafficked to, or in, Canada appear far more often, if not exclusively, to come through legal channels, meaning with authorization like a visa, even though use of those channels may be later found to be fraudulent. In, for example, the two recent *IRPA* cases from British Columbia,[128] both of the individuals were brought to Canada with a valid visa. Similarly, commenting on this issue, one participant stated, "[e]very file that I've dealt with has been through a legal channel. They've had work permits or they've come over as help for a family that's not going to be staying here more than six months, because there is that provision as well. So, they've come over legally."[129] As the conceptualization of human trafficking within migration policy and discourse often rests on irregular migration, and a focus on identification 'at the border', this trend points to both the ineffectiveness and impracticality of responding to human trafficking primarily through a border-control model.

[128] *R v Orr*, *supra* note 125; *R v Ladha*, *supra* note 125.
[129] Participant 01.

Overall, the ways in which human trafficking as a label and concept have been used in relation to immigration discourse and policy largely replicate the problematic representations explored in section II, and have largely served state interests in controlling migration and 'combating' crime, while also often operating to the detriment of individual migrants. 'Border-control' policies and measures enacted in the name of 'protecting' individuals from human trafficking are likely to be ineffective beyond minimizing the use of particular means or programs for immigration to Canada, and also because evidence establishes that many individual migrants who may be exploited or trafficked do not arrive to Canada through irregular means. Thus, these policies do little to effectively 'protect' or 'prevent' human trafficking. Further, for migrants who are exploited or trafficked within Canada, the criminal justice system is ill-suited to addressing their needs, or pursuing criminal cases in court. While the concept of human trafficking may thus often being associated with migration, or used to propel forward migration policy changes, both the discourse and resulting policy are largely unreflective of, and unattuned to, the real relationship between human trafficking and migration.

c. The Resulting Impact of the Dominant Conceptualization on Legal Understandings of Human Trafficking in Canada

As mentioned earlier in this section, Canada has enacted two specific offences of human trafficking: one under the *Immigration and Refugee Protection Act*,[130] and another under the *Criminal Code*.[131] Yet, it appears that these offences, and the legal definitions of human

[130] SC 2001, c27, s118.
[131] RSC 1985, c-C46, ss279.01-279.04.

trafficking which they create, are widely misunderstood.[132] In a study conducted in Calgary, Alberta, the authors report that a "lack of clarity surrounding the definition of human trafficking and clear misunderstanding of the definition were frequently stated […] as impediments[.]"[133] In addition to confusion over the correct interpretation, or requisite elements of, the legal definitions, in some ways, these definitions have also served to replicate the narrow political ideologies and conceptualizations of human trafficking exposed in this chapter. This section will explore the current issues associated with the offences of human trafficking under *IRPA* and the *Criminal Code*, suggesting that their current interpretation and confusion lead to a constrained understanding of human trafficking, and a restricted response to effectively addressing the issue.

The *Immigration and Refugee Protection Act* sets out the offence of human trafficking under s.118, which states: "No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion." Given the locus of this offence, it focuses, unsurprisingly, on the border transaction element of international human trafficking. While there is division about whether movement of some form is required to constitute human trafficking,[134] it is generally agreed that movement across an international border is not required. Yet, for the purposes of locating an offence under *IRPA*, this necessarily becomes the focal point.

The offence of human trafficking under *IRPA* is very similar to that of migrant smuggling, located under s.117: "No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is

[132] See Quarterman et al, *supra* note 87 at 17-8; Kaye and Hastie, *supra* note 98.
[133] Quarterman et al, *ibid* at 17. See also, Kaye and Hastie, *ibid.*
[134] See, i.e., Roots, *supra* note 98; Quarterman et al, *supra* note 87 at 20; Kaye and Hastie, *supra* note 98 at 93.

or would be in contravention of this Act." The similarities between the two offences support the trafficking/smuggling relationship discussed earlier in this chapter, as do the penalties for the offences, which are also very similar. The similar gravity of penalty, whether the organization of entry into Canada was 'consensual' or 'coerced' suggests that, as concerns migration, unlawful entry, *per se*, is the pertinent issue, "regardless of the circumstances or the motives upon entering."[135] This, again, supports the primary of the crime-control approach over any legitimate claim to act in individuals' "best interests".

However, despite the interrelations between smuggling and trafficking under *IRPA*, the offence under s.118 is found to be fairly clear and straight forward in both understanding and interpretation.[136] Many participants in the interview study commented on the clear and straightforward nature of the *IRPA* offence. Most of these participants also found that, compared to the *Criminal Code* offence of human trafficking, *IRPA* has a much lower threshold and is easier to establish in terms of the elements of the offence because it focuses on the border entry aspect, and not necessarily on what comes afterwards. As one participant noted, comparing *IRPA* to the *Criminal Code*, "[f]or IRPA, [….] I think the definition, it doesn't seem to be as problematic because there's such a lower threshold, you don't even have to prove that you're exploited once you get to Canada."[137] Thus, despite the restricted applicability of *IRPA*, the definition and wording of the offence itself appears quite clear and well understood by Canadian authorities.

[135] Constance MacIntosh, "Assessing Human Trafficking in Canada: Flawed Strategies and the Rhetoric of Human Rights" (2006) 1 Intercultural Hum Rts L Rev 407 at 417.
[136] See Kaye and Hastie, *supra* note 98 at 92, for an analysis of the *IRPA* offences under s.117 and 118, and their relationship to each other, and to the *Criminal Code* offence of trafficking in persons.
[137] Participant 05.

Unlike *IRPA*'s clear but limited scope, the *Criminal Code* offence of human trafficking may be widely applicable, yet suffers from significant ambiguity and confusion in understanding the elements of the offence. As mentioned earlier, designed perhaps with the prostitution offences in mind, the *Criminal Code* in many ways conforms better to the stereotypical ideology put forth in respect of sex trafficking, and particularly to the connection with physical and sexual violence in conceptualizing exploitation. The relatively untested and unused nature of the offence has also created greater hesitation by authorities to use it, particularly in cases of sexual exploitation where complementary offences are available.[138] Finally, confusion surrounding the issue of consent, and its relationship to the wording and elements of the *Criminal Code* offence, continue to present issues in application.

The offence of human trafficking is set out under s.279.01 and s279.04 of the *Criminal Code* as follows:

> 279.01 (1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence […]
>
> (2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.
>
> 279.04 (1) For the purposes of sections 279.01 to 279.03, a person exploits another person if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service;

[138] See, *supra* note 105 for an explanation of this relationship. Complementary offences under current prostitution legislation could include s.286.2 (material benefit) and s.286.3 (procurement), *Criminal* Code, RSC 1985, c-C46. See also, Quarterman et al, *supra* note 87 at 21; Roots, *supra* note 98; Kaye and Hastie, *supra* note 98 at 89, n7, and 95.

> (2) In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused
> used or threatened to use force or another form of coercion;
> used deception; or
> abused a position of trust, power or authority.[139]

Although the elements of the offence listed under s.279.01, relating to the acts of recruitment, transportation, transfer, receipt, holding, concealment, and the exercise of control, direction or influence over the movements of a person are subject to some confusion, notably whether movement is required,[140] this part of the offence is generally less contested than the definition of exploitation under section 279.04. The definition of exploitation requires that the accused engage in conduct which "could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened." It is this requirement, known as the 'fear for safety' standard, which has caused significant confusion both in terms of identifying its relationship to physical violence and/or other types of conduct, and in its relationship to consent, despite the caveat regarding consent under s.279.01(2).[141]

In the interview study conducted for this thesis, many participants commented on the nature and interpretation of the *Criminal Code*, and particularly, on the definition of exploitation found under s.279.04, which one participant aptly labeled "the crux of the human trafficking definition."[142] Most of the confusion and concerns arising with the definition centre on understanding and interpreting the 'fear for safety' requirement. Divergent opinions and

[139] Subsection (2) to s.279.04 added by amendment: SC 2012, c15.
[140] See, i.e., Quarterman et al, *supra* note 87 at 20; Roots, *supra* note 98; Kaye and Hastie, *supra* note 98 at 92.
[141] See Kaye and Hastie, *supra* note 98 at 92-5 for a detailed analysis of the elements of the offence under s.279.01 and s.279.04.
[142] Participant 01.

interpretations were offered by participants when asked about how they understand this element of the offence, however, there was a clear common thread of concern about whether the presence of *physical* violence particularly was necessary.

For example, when asked how the fear for safety standard is applied, one participant noted the prevalent interpretation towards the presence of physical violence:

> It's generally what is very obvious. If it's uttering threats, or assault, or fear of being assaulted because you have seen someone else being assaulted, then you meet that threshold. We have not necessarily seen a challenge in regard to emotional abuse, psychological abuse, taking away of people's documents, and that being enough to be reasonable fear for safety. So it's a very clear-cut reasonable fear of safety that currently meets the threshold.[143]

This understanding, in terms of how the offence is current being applied, was echoed by many participants, even where they recognized that the offence *could* apply in other ways, such as to psychological or emotional abuse.

In discussing the challenges associated with the *Criminal Code* offence, another participant comments on the uncertainty of the fear for safety standard:

> The biggest challenge is the […] requirement of fear in the definition of exploitation. There seems to be continuing concern and questions about what does that actually require. And one of the concerns is that it requires being afraid of physical violence to themselves or their family member, as opposed to a broader sense of fear, in the sense of psychological – kind of a psychological climate of fear that is more usually the technique that many traffickers use based on all of those things we've just talked about. It's still very unclear about how we define that concept of fear in the Criminal Code. We just don't have a lot of cases that really have been able to delve into that. So lack of judicial pronouncements add to the confusion. I think that really is a barrier. There is a sense that many cases have not come forward to the courts, because of the restrictive definition of exploitation in the Criminal Code.[144]

[143] Participant 01.
[144] Participant 05.

What this quote identifies is what has been referred to in another study as the "Catch-22"[145] of the human trafficking offence. Much of the uncertainty about the scope and applicability of the 'fear for safety' standard arises from a lack of judicial pronouncements, or case law, on it. However, because of the existing uncertainty, there may be significant hesitation for authorities to use the offence, or at least, to use it in anything less than the clearest cases, which ostensibly involve physical violence.

The preference for, or prevalence of, a connection to physical violence may also exist because of the problems associated with understanding consent in the context of human trafficking, as discussed earlier in this chapter. In the study described above, where the *Criminal Code* offence was referred to as a "catch-22", that participant elaborated on the problematic nature of the offence and the confusion surrounding consent, specifically: "[y]ou have to prove a fear, you have to prove that [victims of trafficking] were entirely unwilling or there was no real consent component at any point, or maybe if there was consent it's a clear delineation of when that consent stopped, and it's just unbelievably onerous[.]"[146] While the participants in this study did not specifically comment on the issue of consent, it clearly underlay the questions about whether psychological and emotional abuse or coercion were significant enough to 'count' as human trafficking, as determining what counts as 'fear for safety' is crucial to determining whether exploitation exists, and therefore whether the caveat concerning consent would apply. In other words, understanding what meets the threshold of a 'fear for safety' is significant in order to understand what conduct vitiates consent because the individual would be providing their work or services out of a 'fear for safety' rather than by choice. Thus, while the wording of the

[145] Quarterman et al, *supra* note 87 at 21.
[146] *Ibid.*

Criminal Code offence, and the 'fear for safety' standard specifically, may indeed be capable of including broader psychological and emotional harms,[147] the current misunderstandings and uncertainty around the offence are clearly inhibiting progress.

The current focus on the presence of physical violence may also lead the *Criminal Code* definition to be more easily applicable to cases of sexual exploitation than labour trafficking. As one participant explains,

> Well, in terms of sex trafficking, I would expect you'd probably have the physical abuse could be more present or the threats could be more present you know, the pimp and his prostitutes, whereas that just doesn't happen so much in labour trafficking. So the Criminal Code, it could work in sort of the pimp-prostitute situation, but may not work well in labour trafficking.[148]

The perceived reliance on, or connection to, physical violence thus not only inhibits a broader understanding of human trafficking generally, but may negatively impact cases of labour trafficking, in particular.

The confusion and diverging opinions about the 'fear for safety' standard specifically, and the requisite elements of the *Criminal Code* offence more broadly, also point to the much wider problem of definitions – be they criminal or civil, legal or colloquial – of human trafficking in general. As one participant commented, "[t]he definitions are problematic. The labeling is problematic. […] The lack of consensus on what constitutes human trafficking is single-handedly the biggest obstacle into doing any of this work."[149] This points more broadly to both the impact of the dominant conceptualizations and ideologies driving the label of human trafficking, as well as the constraints of locating this concept within the field of criminal law.

[147] See, i.e., Kaye and Hastie, *supra* note 98 at 94.
[148] Participant 04.
[149] Participant 12.

CONCLUSION

This chapter sought to investigate and expose the dominant conceptualizations, ideology and imagery associated with 'human trafficking' as currently understood in political, social and legal arenas, and the impact on the current Canadian context and response to human trafficking. Despite broad possibilities of what *could* constitute human trafficking, it is clearly very closely aligned with the idea of sexual exploitation, specifically, entailing a gendered perspective on the issue, and developing more recent manifestations of a connection to physical violence and organized crime. As an overlapping phenomenon, human trafficking has become increasingly entangled with the issue of irregular migration, having its roots in concerns over transnational movement of women and girls for sexual exploitation, but gradually becoming closely tied to irregular migration and terrorism as a 'security' and 'crime' issue within migration discourse and policy. These dominant conceptualizations depict a very particular 'story' of human trafficking that is intrinsically connected with criminality, and which thus focuses on external 'bad actors', looks away from the state as a contributory actor to the phenomenon, and reinforces its authority – moral and legal – in its territory.

While serving particular interests, the dominant ideology and sensationalism around human trafficking has done significant disservice to the development of an effective response that is reflective of the reality on the ground: "sensational media reports and awareness raising campaigns have created a stereotyped image of trafficked persons, which restricts law

enforcement, service providers, and the general public from accurately identify and understanding the lived experiences of trafficked persons."[150] The understandings and conceptualizations of human trafficking – though hotly debated – are significantly rooted in very narrow ideologies with very polarized politics. Thus, its effectiveness as a concept generally is in question, and the boundaries it prescribes appear to often do more harm than good. Simply broadening the scope of the concept of human trafficking may not be an effective remedy at this point, and similar divisions and issues are likely to arise where and when non-sexual forms of trafficking are treated more seriously. As one participant demonstrated,

> […] [T]hose different understandings, they're also fueled by high degrees of emotionality and passion, and maybe decades of frustration or desperation. I think we've seen that – […] – well now, we're talking about human trafficking and labour trafficking, so what about other elements of labour exploitation that somehow then get pushed off the table? Sometimes, human trafficking is seen to be […] in competition with other issues or other abuses. And that's another challenge.[151]

As this quote demonstrates, the emotional and conceptual underpinnings of individual understandings about human trafficking are deeply rooted, and the use of the concept, or 'label', of human trafficking will always require line-drawing, leaving some things, and some persons, beyond its boundaries and protection. This, too, is a consequence of the criminal law model, particularly (though all laws engage, to a degree, in line-drawing). The next chapter will go on to explore what might lie underneath the political ideologies and imagery of 'human trafficking', and how we might think of it differently by removing it from this context, and from the boundaries of criminal law.

[150] Quarterman et al, *supra* note 87 at 24; see also, Kaye et al, *supra* note 91 at 32.
[151] Participant 12.

CHAPTER 2

EXPLORING A BROADER FRAMEWORK FOR UNDERSTANDING SEVERE FORMS OF EXPLOITATION BEYOND THE 'HUMAN TRAFFICKING' LABEL

As the previous chapter demonstrated, the 'story' told of human trafficking in contemporary legal, political and social arenas is very narrow and ideologically driven. This chapter thus seeks to explore a broader understanding of what human trafficking *could*, or perhaps even *should*, be understood as by examining both the international legal definition of trafficking itself, as well as related legal concepts, drawing out the underlying key criteria which provides a common thread amongst these various concepts and which can be used to inform a broader framework for analysis unattached to the political and social 'baggage' of the trafficking label. As such, this chapter will examine what can be termed 'severe forms of exploitation', stepping away from the trafficking language in an effort to gain a richer understanding of the issues at hand beyond their political instrumentalization and social representation.

From within the purview of the law, the international *Protocol to Prevent, Suppress and Punish Trafficking in Persons*[1] is the authoritative legal instrument defining human trafficking. The *Protocol* thus has the power to bring to the fore a deeper understanding of *how* and *why* we view human trafficking as one thing today, but also to imagine things differently. The first section of this chapter will thus outline and analyse the *Protocol*; however, it will also demonstrate the complications associated with a continued use of the 'trafficking' label given its strong links with

[1] *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 15 November 2000, 2237 UNTS 319 [*Protocol*].

the problematic conceptualizations set out in Chapter 1. The second section of this chapter will examine historical concepts related to human trafficking, including slavery, slave-like practices, forced labour, and debt bondage. The ways in which each of these concepts have been historically developed, and are interpreted today, provides a more comprehensive approach and depth of understanding to what severe forms of exploitation encompass and are understood as in the international legal community. Drawing out the key factors which inform the concepts discussed in the first two sections, the third section of this chapter will thus argue for a richer understanding of and new language based on the concept of 'unfreedom'. This framework will bring together the commonalities present among the existing international legal definitions, while also widening the scope of inquiry beyond their limitations, and in a way which facilitates an examination of the multiple forces, and impact of law and legal institutions, on creating conditions of 'unfreedom' that enable exploitation to occur. This framework will then be used to investigate the state of the Temporary Foreign Worker Programs in Chapters 3 and 4.

I. THE INTERNATIONAL LEGAL FRAMEWORK ON HUMAN TRAFFICKING

Human trafficking as a contemporary legal concept receives its definition and framework from the international *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* [hereafter, the *Protocol*].[2] Although efforts were made to expand the concept of human trafficking beyond its historical instruments, and to "redefine trafficking as a broader phenomenon" addressing labour exploitation and other non-sexual forms of

[2] *Protocol*, *supra* note 1.

exploitation,[3] scholarship and research on the *Protocol* background documents and drafting processes suggests that it was very much concerned with the dominant political issues discussed in the previous chapter.[4] In addition to the strong connection to prostitution/sex work, the *Protocol*, as a supplement to the *UN Convention Against Transnational Organized Crime*,[5] and developed alongside a complementary protocol against migrant smuggling,[6] clearly bears a link to the issues of irregular migration and a crime-control approach.[7] To begin to understand the complexity surrounding the legal conceptualization of human trafficking, this section illustrates the ways in which it supports the current problematic understandings of the phenomenon, as discussed in Chapter 1, but also explores the international legal definition of human trafficking, as located under the *Protocol*, and how it provides a foundation from which to consider the concept of 'human trafficking' in a broader manner.

a. The Protocol as Reinforcing the Dominant Conceptualizations of Human Trafficking

The development of the *Convention* and attending *Protocols* was a very unique event in the modern international community. Not only did these instruments receive quick and high numbers

[3] See Janie A Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy" (2010) 158 U Pa L Rev 1655 at 1661-2 [Chuang 2010].
[4] See, i.e., Jo Doezema, "Who Gets to Choose? Coercion, Consent and the UN Trafficking Protocol" (2002) 10:1 Gender and Development 20 [Doezema 2002]; Chuang 2010, *ibid* at 1672-77; Anne Gallagher, "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis" (2001) 23:4 HR Quarterly 975 [Gallagher 2001]; Anne Gallagher, *The International Law of Human Trafficking* (Cambridge: Cambridge University Press, 2010) [Gallagher 2010].
[5] *United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2225 UNTS 209.
[6] *Protocol against the Smuggling of Migrants by Land, Sea and Air*, 15 November 2000, 2241 UNTS 507.
[7] See, i.e., James C Hathaway, "The Human Rights Quagmire of "Human Trafficking"" (2008) 49:1 Virginia Journal of International Law 1at 26-7 [Hathaway].

of ratification, entering into force a mere three years after its adoption,[8] thus demonstrating strong consensus and acceptance by individual states and the international community, but participation by both non-government and international organizations in the negotiations process was equally "unprecedented."[9] While the sustained involvement of an inter-agency working group of UN bodies sought to ensure the inclusion of human rights protections under all the instruments, a vast number of NGO organizations sought to be involved, specifically, in the negotiation of the trafficking *Protocol*.[10] Not only did the *Protocol* provide the first international legal definition of human trafficking, but it has also resulted in significant ratification and implementation of domestic criminalization of human trafficking.[11]

Developed as a supplement to the *UN Convention Against Transnational Organized Crime*, the *Protocol* was necessarily embroiled in the broader political concerns guiding international action in relation to the subject of its parent convention. While the issue of human trafficking was propelled forward, in part, by human rights groups concerned with that aspect of the phenomenon, it was the sovereignty and security issues which truly drove forward the negotiations of both the *Protocol* and the *Convention*.[12] States were concerned, particularly, with the interference of traffickers and smugglers in the order and channels of migration, and the ability to "facilitate the circumvention of national immigration restrictions."[13] In other words,

[8] There are 117 signatories and 159 parties to the *Protocol*. It was adopted on 15 November 2000, and entered into force on 25 December 2003. See *Protocol*, *supra* note 1.
[9] See Gallagher 2001, *supra* note 3 at 1001-2.
[10] *Ibid.*
[11] See United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons* (Vienna: UNODC, 2009) at 22. As of 2008, 125 of the 155 countries surveyed had specific anti-trafficking legislation, and 98 had criminalized trafficking for both forced labour and sexual exploitation. See also Gallagher 2010, *supra* note 3 at 42, n133.
[12] Gallagher 2001, *supra* note 3 at 976; see also, Hathaway, *supra* note 7 at 26-7, and 30-1.
[13] Gallagher 2001, *ibid.* See also, Bethany Hastie, "To Protect and Control: Anti-Trafficking and the Duality of Disciplining Mobility" in Martin Geiger and Antoine Pécoud, eds, *Disciplining the Transnational Mobility of*

"[b]order-security concerns and potential involvement of organized crime in trafficking had given countries the political will to address trafficking[.]"[14] As a result, the *Protocol*, like the other instruments developed during these negotiations, took on a significant crime-control focus.

The *Protocol* requires that states criminalize all forms of human trafficking as set out in the legal definition,[15] and this is the only mandatory obligation of states who are parties to the *Protocol*, affirming the primacy of criminal law in responding to human trafficking.[16] The *Protocol* further requires that related offences – attempt, accomplice, and organizing or directing – be criminalized.[17] To further support the prosecution branch of the framework, the *Protocol* outlines a number of recommendations regarding training, information exchange and cooperation as regards law enforcement and other investigative or related bodies. These recommendations include sharing information with respect to border traffic,[18] as well as information and knowledge gathered with respect to organized crime groups involved in human trafficking, such as recruitment tactics, routes of movement, known links or connections between groups or individuals, and investigative tactics.[19]

Similar to the emphasis on criminal law measures, the text of the *Protocol* also places importance on migration control mechanisms as a primary approach to addressing human

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People (New York: Palgrave Macmillan, 2013) for a commentary regarding states' use of anti-trafficking policies to reassert authority at the border and prevent co-optation of migration management practices by private actors.

[14] Chuang 2010, *supra* note 3 at 1662-3; see also, Hathaway, *supra* note 7 at 26-7, and 30-1.

[15] *Protocol*, *supra* note 1, art 5(1). See also, Gallagher 2001, *supra* note 3 at 984.

[16] See, i.e., Ryszard Piotrowicz, "The Legal Nature of Trafficking in Human Beings" (2009) 4 Intercultural Hum Rts L Rev 175; Nilanjana Ray, "Looking at Trafficking Through a New Lens" (2005-2006) 12 Cardozo J L & Gender 909 at 915 [Ray]; Alice Edwards, "Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labour" (2007-2008) 36 Denv J Int'l L & Pol'y 9 at 17 [Edwards]; Hathaway, *supra* note 7 at 2.

[17] *Protocol*, *supra* note 1, art 5(2).

[18] *Ibid*, art 10(1)(a), (b).

[19] *Ibid*, art 10(1)(c).

trafficking. Again, considering the parent *Convention* under which the *Protocol* was developed, it is clear that migration – and specifically, migration 'crimes' – were at the forefront of discussions leading to the drafting and adoption of the *Protocol*.[20] The final text of the *Protocol* makes numerous, concrete recommendations with respect to migration control mechanisms and to enhance border integrity in a variety of ways, including with respect to inter-departmental and state cooperation, travel document security, and use of air carrier sanctions and visa restrictions.[21]

Together, the specific, concrete measures in respect of criminalization and migration control make clear the emphasis on these approaches as the most effective, or best way, to 'combat' trafficking in persons at the domestic, regional and international level. The level of detail and space given to the crime-control approaches demonstrates their importance and primacy when contrasted with other approaches to addressing human trafficking which were also presented in the *Protocol*. Unlike with respect to the articles of the *Protocol* addressing prosecution and migration control issues, articles setting out recommendations with respect to prevention and protection are much more ambiguous and non-obligatory in nature.

Article 9 primarily addresses prevention activities, and makes recommendations for state parties to establish "comprehensive policies, programs and measures" to prevent human trafficking, and protect victims from revictimization.[22] Suggested prevention measures include research, information and media campaigns; social and economic initiatives; cooperation with non-

[20] See, i.e., Ray, *supra* note 16 at 915-7; Edwards, *supra* note 16 at 18.
[21] See *Protocol*, *supra* note 1, arts 11, 12, 13. See also Gallagher 2001, *supra* note 3 at 993-5 for an explanation of the border and law enforcement measures under the *Protocol*.
[22] *Protocol*, *ibid* art 9(1).

government and other civil society organizations; addressing "root causes" such as poverty and gender discrimination; and, discouraging demand.[23] These recommendations do not provide same kind of specific, concrete direction as those made for criminalization and migration control issues. In short, the measures set out to address prevention leave a significant amount of discretion to individual states, and provide little guidance for concrete implementation.

With respect to protection, the *Protocol* sets out recommendations which seek to ensure basic social services and human rights protections for trafficked persons. However, the most concrete recommendations set out under this section operate to ensure that trafficked persons are willing and able to participate in prosecutorial efforts, including privacy and protection of identity, and other considerations for victims involved in court proceedings,[24] as well as providing temporary immigration relief "in appropriate cases".[25] As such, the most concrete measures exist for "witness protection and not victim protection. Thus, there is a distinct hierarchy of victimhood."[26] In addition to these more concrete measures, the *Protocol* asks states to "consider implementing measures to provide for the physical, psychological and social recovery of victims",[27] including the provision of: appropriate housing; counseling; medical, psychological and material assistance; and, employment, educational and training opportunities.[28] Overall, the optional character of the protection provisions were criticized by human rights advocates, as was the absence of any protection against prosecution of trafficked individuals for related crimes.[29] However, it is likely that this absence was contemplated as a way to ensure the preservation of

[23] *Protocol*, *supra* note 1, art 9.
[24] *Ibid*, art 6(1),(2).
[25] *Ibid*, art 7.
[26] Ray, *supra* note 16 at 918.
[27] *Protocol*, *supra* note 1, art 6(3).
[28] *Ibid*.
[29] See Gallagher 2001, *supra* note 3 at 990-1; Hathaway, *supra* note 7 at 2-3.

"states' ability to control both prostitution and migration flows through the application of criminal sanctions",[30] again supporting the primacy of the crime-control approach to the issue.

In addition to the crime-control and migration focuses, the *Protocol* clearly replicates the dominant imagery of human trafficking as a gendered phenomenon, and one intrinsically connected with sexual exploitation. In its initial stages, the *Protocol* was intended to apply only to trafficking in women and children;[31] however, after consultation, it was determined that the instrument should address trafficking in 'persons', with a particular focus on, or attention given to, women and children.[32] The privileging of trafficking as a gendered issue has also been mirrored in the estimates of human trafficking which often represent women and sexual exploitation as representing the significant majority of the population and type of trafficking,[33] despite widely acknowledged issues pertaining to the use and value of statistical estimates of human trafficking.[34]

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[30] Gallagher 2001, *supra* note 3 at 991; see also, Hathaway, *supra* note 7 at 6.

[31] Gallagher 2001, *ibid* at 983; Gallagher 2010, *supra* note 3 at 26; Kara Abramson, "Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol" (2003) 44 Harv Int'l LJ 473 at 476 [Abramson]; Joel Quirk, *The Anti-Slavery Project: From the Slave Trade to Human Trafficking* (Philidelphia: University of Pennsylvania Press, 2011) at 235 [Quirk 2011].

[32] *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols*, UN Doc A/55/383/Add.1 UN, 3 November 2000 at 322 [*Travaux Préparatoires*]; Gallagher 2010, *ibid* at 26; Abramson, *ibid* at 478, commenting on the privileging of gender and age in protection and prevention measures under the *Protocol*.

[33] See, i.e., United Nations Office on Drugs and Crime, *Global Trafficking in Persons Report 2012* (United Nations: New York, 2012) at 7, noting that "[w]omen account for 55-60 per cent of all trafficking victims detected globally; women and girls together account for about 75 per cent" and as concerns the type of exploitation, finding that sexual exploitation represents 58% of reported cases and forced labour represents 36%, noting that the share of detected cases of forced labour has doubled in the past four years.

[34] See, i.e., Frank Laczko, "Data and Research on Human Trafficking" (2005) 43:1-2 International Migration 5; Guri Tyldum and Annette Brunovskis, "Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking" (2005) 43:1-2 International Migration 17; Liz Kelly, ""You Can Find Anything You Want": A Critical Reflection on Research on Trafficking in Persons within and into Europe" (2005) 43:1-2 International Migration 235; Quirk 2011, *supra* note 31 at 3-4, 228; Abramson, *supra* note 31 at 481, citing also John Salt, "Trafficking and Human Smuggling: A European Perspective" in International Organization for Migration, *Perspectives on Trafficking of Migrants* (Geneva: IOM, 2000) at 31, 33.

The drafting of the *Protocol* was seen by some parties as providing the opportunity for an international platform to revisit the issue of prostitution, which quickly overtook the negotiations.[35] This issue was highly debated and contested in several ways, and became an oversimplified division between 'camps' of 'neo-abolitionists' on the one side, and 'pro-sex work' organizations on the other side.[36] Concerns and debates surrounding the term 'sexual exploitation' and its relationship to prostitution escalated early in the drafting process. In considering Article 1 of the *Protocol*, the Special Rapporteur on Violence Against Women noted that the phrase "was subject to a wide range of divergent interpretations, according to whether all activities in the sex industry constituted "sexual exploitation" per se or whether only sex work under exploitative or slavery-like conditions could qualify[.]"[37] This essentially formed the crux of the debate, which manifested primarily in relation to the issue of interpreting consent in the legal definition.[38] On one side of this issue, some groups "argued that any distinction between forced and voluntary prostitution is morally unacceptable and that a coercion requirement in the definition would lend legitimacy to prostitution."[39] This, for these groups, no 'real' consent could ever be given to engaging in sex work, thus the *Protocol* was an opportunity to effectively criminalize all prostitution, and to carry forward the abolitionist undertones of the 1949 *Convention*. Opposing this position, other groups pointed out that the inclusion of voluntary sex work "would blur the distinction between trafficking and migrant smuggling" and create an

[35] See, i.e., Chuang 2010, *supra* note 3 at 1672; Gallagher 2001, *supra* note 3 at 984; Gallagher 2010, *supra* note 3 at 26-8.
[36] See Gallagher 2001, *ibid* at 1002; Joseph L Dunne, "Hijacked: How Efforts to Redefine the International Definition of Human Trafficking Threaten its Purpose" (2011-2012) 48 Williamette L Rev 403 at 410-4 [Dunne]; Quirk 2011, *supra* note 31 at 235-6.
[37] *Travaux Préparatoires*, *supra* note 32 at 334. See also at 339, n2 where the Netherlands contested use of this term and proposed an alternative definition of 'slavery' which included specific reference to forced prostitution.
[38] See Gallagher 2001, *supra* note 3 at 985; Gallagher 2010, *supra* note 3 at 26-8; Chuang 2010, *supra* note 3; Doezema 2002, *supra* note 3.
[39] Gallagher 2001, *ibid* at 984.

overbroad definition.[40] These groups sought to ensure that the legal definition only applied to coerced sexual exploitation, moving away from a definition of trafficking which could be used to obstruct or penalize sex work, and thus moving away from the 1949 *Convention*.[41]

In the end, the *Protocol* appears to have attempted to reach a compromise between the polarizing positions. The final text of the *Protocol* includes the terms "exploitation of the prostitution or others or other forms of sexual exploitation"[42] and sets out an interpretive note, stating that these terms should be interpreted and address "only in the context of trafficking in persons", thus attempting to reserve space for individual states to enact domestic legislation in accordance with their pre-existing laws on prostitution.[43] The *Protocol* also included a caveat regarding consent, stating that consent is irrelevant where one of the listed *means* (a required element to establish trafficking under the international legal definition) is employed. However, despite these efforts, the concept of human trafficking, as seen in the previous chapter, remains deeply embroiled in on-going debates about prostitution.

Overall, the *Protocol*, despite its possibilities, reinforces the dominant conceptualizations and imagery of the 'human trafficking' label, discussed in the previous chapter, and thus minimizes the value it might have in advancing substantive responses beyond providing support for anti-prostitution and anti-migration political agendas. The negotiations and drafting of the *Protocol* presented an opportunity for states and NGO groups to revisit divisive debates around prostitution and irregular migration, and to reaffirm particular positions and ideologies in respect

[40] Gallagher 2001, *supra* note 3 at 985.
[41] See *ibid* at 1002.
[42] See *Protocol*, *supra* note 1, art 3(a).
[43] *Travaux Préparatoires*, *supra* note 32 at 347.

of these issues. As a result, the final text of the *Protocol* bears an intrinsic connection to these political and ideological underpinnings that cannot be undone.[44] As such, the 'label' and framework of human trafficking, despite genuine efforts to expand the concept beyond its historical boundaries, is of limited value in addressing contemporary forms of exploitation beyond these boundaries. However, despite this, it is worth examining the underlying possibilities arising out of the legal definition formulated under the *Protocol* in order to identify key conceptual elements informing the definition and its interpretive possibilities. This can provide a starting point for articulating a broader, or better, framework from which to understand contemporary forms of exploitation.

b. Understanding the International Legal Definition of Human Trafficking

In its final form, the *Protocol* defines human trafficking as:

> […] the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;[45]

Despite the existence of historical trafficking-related instruments, as discussed in the previous chapter, the *Protocol* provided the first international legal definition of 'human trafficking'. In addition, the definition provides states with a template from which to create domestic legislation

[44] See, i.e., Ray, *supra* note 16 at 912, outlining domestic anti-trafficking laws in some states which only relate to sexual exploitation; Edwards, *supra* note 16 at 45, commenting on the continued emphasis of trafficking for sexual exploitation since the development of the *Protocol*; Doezema 2002, *supra* note 3 at 45.
[45] *Protocol*, *supra* note 1, art 3(a).

criminalizing human trafficking – the only mandatory obligation under the *Protocol*. The definition set out in the *Protocol*, then, is significant in shaping legal understandings of human trafficking. Yet, there exists remarkably little scholarship analyzing or interpreting the elements of the *Protocol* definition.[46]

It is clear from the background of and negotiations leading up to the final text of the *Protocol* that the definition proved to be one of the most difficult and controversial issues of the drafting process, and is a result of a series of compromises.[47] It is unsurprising, then, that the language is somewhat broad and inexact, thus allowing space for individual states to criminalize human trafficking in a way which aligns with their existing legal structure. Further, the significant ratification of the *Protocol* and, thus, introduction of criminal legislation at the domestic level, may provide one account for the lack of analytical attention to the *Protocol* definition, with scholarship focusing on domestic anti-trafficking laws in various jurisdictions. The *travaux préparatoires* to the *Protocol*, along with international materials developed with the specific aim of interpreting the definition, are useful in delineating what the international community, and the UN body responsible for the *Protocol*, understands the legal definition to be and encompass. As such, and given the limited scholarship on the subject, this section will look primarily to these materials in analyzing the critical components of the legal definition and their possible interpretation.

[46] As regards the few identified texts which do discuss the elements of the definition directly, see: Dunne, *supra* note 36; Edwards, *supra* note 16; Kalen Fredette, "Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation" (2009) 17 Cardozo J Int'l & Comp L 101 [Fredette]; Gallagher 2001, *supra* note 3; Gallagher 2010, *supra* note 3; Hathaway, *supra* note 7 at 9-11.
[47] See, i.e., Gallagher 2010, *supra* note 3 at 25; *Travaux Préparatoires*, *supra* note 32 at 339-348.

In interpreting the *Protocol* definition, what is clear and unchallenged is that all three elements must be present for a situation to constitute human trafficking, except where children are concerned, in which case the *means* element is not required.[48] Beyond this, however, there exists little consensus. With respect to the *acts* element of the definition, relatively little controversy exists, with debate focusing primarily on whether movement is required to constitute human trafficking.[49] Under the scope of the *Protocol*, there appears to be some agreement that movement was inherently contemplated given the transnational focus of the instrument and its parent convention. In addition, in drafting both the trafficking and smuggling *Protocols*, some importance was placed on distinguishing between coerced and voluntary movement as a key factor in separating these two phenomena.[50] Yet, certain constitutive elements, particularly those of harbouring and receipt, do not, in their plain meaning, imply movement but rather maintenance in a situation.[51] In any event, having established the limitations of the context in which the *Protocol* was developed, and with the purpose of this analysis being to establish the underlying critical components to advance a broader conception of contemporary forms of severe exploitation, a focus on the issue of movement serves only as a distraction to this goal. While the distinguishing feature of 'coerced' or involuntary, versus voluntary, movement bears relevance to understanding the underlying conceptual elements of the definition, beyond this, the debate

[48] *Protocol*, *supra* note 1, art 3(c); see also, Gallagher 2010, *supra* note 3 at 29.
[49] See, i.e., Dunne, *supra* note 36 at 407, characterizing human trafficking as a "series of stages" and as often involving the movement of people; Gallagher 2010, *supra* note 3 at 30, commenting on the listed acts as including both process-oriented (movement) elements as well as those relating to maintenance in an 'end situation' of exploitation; Hathaway, *supra* note 7 at 10, describing the act element as a 'process-oriented' element which criminalizes prohibited forms dealing or trading in individuals which leads to exploitation and not exploitation itself; Edwards, *supra* note 16 at 15, commenting that the *Protocol* "omits internal trafficking from its remit, explicable by its international focus under the umbrella of transnational organized crime."; Fredette, *supra* note 46 at 117; Ray, *supra* note 16 at 918; Abramson, *supra* note 31 at 480.
[50] See Gallagher 2010, *supra* note 3 at 25; Hathaway, *supra* note 7 at 5, and at 25-31 concerning a discussion of the relationship between trafficking and smuggling during the negotiations and drafting process for the protocols.
[51] See Gallagher 2010, *ibid* at 30.

surrounding the requirement of movement in and of itself does, or should, not bear on the critical components of the definition, as will be seen below.

The *means* and *purpose* elements of the definition work together to shed much more light on the underlying considerations of what human trafficking could be understood as encompassing, yet also suffer greatly from ambiguity and contestation. The *purpose* element makes clear that human trafficking is centrally about exploitation; yet, it is widely acknowledged that not all exploitation rises to the level of human trafficking. Thus, something about the specified *means* and *purpose* elements must shed additional light on what kind, or type, of exploitation does meet the threshold of the definition in constituting human trafficking.

Rather than defining what is meant by 'exploitation', the *purpose* element of the *Protocol* prescribes a non-exhaustive list of outcomes or targets of exploitation, including sexual exploitation, forced labour, slavery, servitude, and other purposes. The listed purposes of human trafficking thus seek to identify and label the primary objectives for which human trafficking serves as a vehicle for exploitation. However, this is of limited value, as exploitation at the level of human trafficking could arise in any form of work or service, and in any industry. What value do the listed purposes have, then, in understanding what could be meant as constituting human trafficking? First, the listed purposes indicate an attempt to broaden the concept of human trafficking beyond its historical connection to sexual exploitation and prostitution.[52] Second, the list signals the possibility that the *Protocol* sought to bridge various historical concepts related to exploitation through the inclusion of forced labour, slavery and slave-like practices, and

[52] See, i.e., Chuang 2010, *supra* note 3 at 1661-2 commenting on this as an objective of some human rights groups during the initial negotiations process. See also Edwards, *supra* note 16 at 14; Fredette, *supra* note 46 at 114.

servitude.[53] Although the *Protocol* does not define or add additional detail on these purposes, the *travaux préparatoires* indicates a preference for broad interpretations in accordance with existing domestic and international law.[54] These related concepts thus add value in interpreting and understanding both the underlying critical components of human trafficking, and common thematic elements for a broader framework for analysis, which will be taken up in greater detail in section II of this chapter.

However, the lumping together of various historical and contemporary concepts, or purposes, has also attracted criticism in terms of the appropriateness of responding to myriad forms of exploitation with a 'one size fits all' style approach. The inclusion of various forms of exploitation under the definition of human trafficking, and the use of an "all-inclusive framework provokes the question of whether all forms of trafficking are of a similar nature and are therefore well-suited to conjoined regulation."[55] Indeed, while the sites and causes of certain forms of exploitation and their attendant pre-existing legal structures or relationships may be quite different, for example between sexual exploitation in countries where prostitution is criminalized and forced labour which occurs in the formal economy regulated by employment and labour laws, what is common as concerns the various purposes of exploitation is "the form of coercion or deception employed, rather than the type of exploitation or the causes of that trafficking[.]"[56] Thus, while the criticism concerning the overarching approach is valid in terms of a developing a broad or holistic response model, when examining the definition for its key identifying factors in delineating what we mean by 'exploitation', this critique in fact supports the idea that the critical

[53] See Gallagher 2010, *supra* note 3 at 35.
[54] See, generally, *Travaux Préparatoires*, *supra* note 32 at 339-349. See also, Gallagher 2001, *supra* note 3 at 987; Gallagher 2010, *supra* note 3 at 35.
[55] Edwards, *supra* note 16 at 15. See also, Gallagher 2010, *ibid* at 49.
[56] Edwards, *ibid* at 15.

common element or thread in defining human trafficking appears to be the *means* component of the definition.

The *means* element of the international legal definition seeks to identify conduct, or methods, of inducing or maintaining exploitation in the context of human trafficking. Given the well-accepted fact that not all exploitation rises to the level of human trafficking,[57] it is logical that the *means* element plays an important role. Thus, is not the merely existence of a purpose to exploit, but also *how* exploitation is procured, which is integral to the international legal definition of human trafficking. This is supported by the *travaux preparatoires* to the *Protocol*, which sets out that during negotiations regarding the caveat of consent, many delegations acknowledged that the "means listed, by their nature, precluded the consent of the victim".[58] This acknowledges that it is the *means* used to induce an individual into human trafficking which differentiates the crime from other forms of exploitation.

This differentiation is significant for two reasons which will be further explored throughout this thesis: first, a focus on the *way* exploitation is procured, and not *what* it is procured for, supports the argument against the continued privileging and distinction given to the primacy of sexual exploitation over other forms of exploitation as constitutive of human trafficking; and, second, a focus on the *means* element of the definition aligns more substantially with related concepts of slavery, debt-bondage, and forced labour, as will be demonstrated in this chapter. A focus on the *means* by which exploitation is procured is arguably more reflective of what our legal conceptualization of human trafficking should rest on, and may also be more effective in

[57] See, i.e., Gallagher 2010, *supra* note 3 at 49.
[58] *Travaux Préparatoires*, *supra* note 32 at 344, n26.

developing legal boundaries which accurately reflect the reality of this phenomenon and the way in which human trafficking occurs. Thus, a focus on the *means* element may assist in addressing the problematic gaps which have resulted from the current construction of human trafficking.

The *means* element seeks to identify the *ways* in which exploitation may occur which are sufficiently serious to constitute human trafficking. As such, it is unsurprising that this element of the definition was the subject of significant debate during the drafting of the *Protocol*. The final listed *means* included in the *Protocol* definition represent a wide array of tactics which may be used to induce a victim into human trafficking, and can be broadly situated within three overarching categories: force, fraud and coercion. Most of the listed *means* were ultimately left undefined, and while some are "self-evident,"[59] or may already be defined in domestic legislation, such as the use of force or threats thereof, fraud, and deception, others are much more ambiguous in their possible interpretation, notably coercion, abuse of power, and abuse of a position of vulnerability.[60]

Coercion is often seen as "central to the *idea* of trafficking"[61] though it was not defined in the *Protocol* or its background documents. The grouping of coercion with, but separately identified from, threats and use of force in the *Protocol* definition, suggests that coercion may be a non-physical form of force, though the seriousness of what constitutes coercion for the purposes of

[59] See Gallagher 2010, *supra* note 3 at 31.
[60] *Ibid.*
[61] *Ibid* at 31, n76.

human trafficking has been left undetermined.[62] In the Model Law against Trafficking in Persons, developed by the UNODC, a sample definition of coercion is set out:

> (e) "Coercion" shall mean use of force or threat thereof, and some forms of non‑violent or psychological use of force or threat thereof, including but not limited to:
> (i) Threats of harm or physical restraint of any person;
> (ii) Any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person;
> (iii) Abuse or any threat linked to the legal status of a person;
> (iv) Psychological pressure;[63]

As this definition illustrates, coercion is a broad concept capable of encompassing many different specific acts; however, common to all of the above listed is an objective to exert control over another person.

While abuse of power was discussed in the drafting and negotiations processes, its meaning was disputed and it was ultimately left undefined.[64] An earlier articulation of abuse power as 'abuse of authority' referred to "the power that male family members might have over female family members in some legal systems and the power that parents might have over their children."[65] Though limited in scope, this term also demonstrates a link to situations where one individual is in a position to, or seeks to, exert control over another. Abuse of a position of vulnerability was outlined with greater detail in the *travaux préparatoires* as: "any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved"[66] and has been determined to include situation of pregnancy, mental or physical infirmity, and immigration

[62] United Nations Office on Drugs and Crime, *Abuse of a Position of Vulnerability and Other "Means" within the Definition of Trafficking in Persons* (Vienna: United Nations, 2012) at 17 [UNODC 2012].
[63] UNODC, *Model Law against Trafficking in Persons* (Vienna: United Nations, 2009) at 12 [*Model Law*], citing the US State Department, Model Law to Combat Trafficking in Persons, 2003.
[64] *Travaux Préparatoires*, *supra* note 32 at 343, n20; see also Gallagher 2010, *supra* note 3 at 32.
[65] *Travaux Préparatoires*, *ibid* at 343, n20; see also, UNODC 2012, *supra* note 62 at 17.
[66] *Travaux Préparatoires*, *ibid* at 347; see also UNODC 2012, *ibid* at 17.

status, among others.[67] Unlike the possible interpretations of coercion and abuse of power, the concept of abuse of a position of vulnerability looks more directly to the targeted individual and the specific, or contextual factors, that may be unique targets for control mechanisms. Thus, while the inclusion of abuse of a position of vulnerability does seem to imply, again, a situation where one person attempts to exert control over another, rather than focusing on the specific conduct of that control, this term focuses on the unique, or uniquely vulnerable, targets of control in certain situations.

Despite the additional details provided on some of the identified *means* under the *Protocol*, in general, "[u]ncertainties around the limits of the "means" element of the definition are another potential source of confusion."[68] Yet, despite the lack of clarity surrounding the interpretation of individual listed *means*, it is clear that this element of the definition defines conduct which is necessary to understanding the concept of exploitation, and a richer understanding of the underlying meaning and importance of the *means* as a whole can be provided by examining their relationship to the article concerning consent.

The *Protocol* states that where one of the listed *means* is employed to exploit an individual, this vitiates any apparent consent made by the exploited individual.[69] The article concerning consent has generated significant confusion in its interpretation and relationship to the elements of the international legal definition,[70] likely due, at least in part, to the underlying debates about consent in relationship to sex work which were highly contested during the negotiations for the

[67] *Model Law*, *supra* note 63 at 9; see also, Gallagher 2010, *supra* note 3 at 32-3.
[68] Gallagher 2010, *ibid* at 49.
[69] *Protocol*, *supra* note 1, art 3(b).
[70] See Gallagher 2010, *supra* note 3 at 28; Fredette, *supra* note 46 at 115-6. Abramson, *supra* note 31 at 477; Hathaway, *supra* note 7 at 11.

Protocol, as discussed in the previous section. However, removed from this context, it can be argued that the consent provision merely seeks to restate existing international human rights norms, which state that "[t]he intrinsic inalienability of personal freedom renders consent irrelevant to a situation in which that personal freedom is taken away."[71] This idea concerning the inalienability of personal freedom, and an inability to consent to situations of servitude or bondage, previously arose in the context of drafting the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* and the *International Covenant on Civil and Political Rights*.[72]

The consent provision in the *Protocol* recognizes the fact that the *means* used to exploit an individual under the definition operate by their very nature to undermine the process of choice and consent. "It is logically and legally impossible to "consent" when one of the means listed in the definition is used. Genuine consent is only possible and legally recognized when all the relevant facts are known and a person exercises free will."[73] In other words, this provision seeks to confirm that the *means* element of the definition "operates to annual meaningful, informed consent."[74] Thus, the consent provision is predicated upon the presupposition that genuine consent is not possible because of the actions of the trafficker in employing one of the listed *means*.[75] It does not seek to imply that trafficked persons are unable to exercise consent or agency because of inherent vulnerability or lack of capacity; rather, it seeks to underscore the meaning ascribed to the chosen *means* of the international legal definition as constituting an

[71] Gallagher 2010, *supra* note 3 at 28.
[72] *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 30 April 1956, ESC 608(XXI), OHCHR; *International Covenant on Civil and Political Rights*, GA Res 2200A(XXI), OHCHR, 1966. See Gallagher, *ibid* at 28, n66.
[73] *Model Law, supra* note 63 at 34.
[74] Gallagher 2010, *supra* note 3 at 28.
[75] *Model Law, supra* note 63 at 34. See also, Dunne, *supra* note 36 at 408, 410.

active, external interference with the process or choice or decision-making of the individual, either by asserting additional negative consequences for a particular choice outcome (relating to *means* of force or coercion, broadly), or by withholding information that would be relevant to the choice process (relating to *means* of deception, broadly).[76]

Overall, the international legal definition of human trafficking provides greater guidance on understanding the possible interpretation and key elements concerning contemporary forms of exploitation than at first appears. The central underlying, and theoretical core of this definition appears to rest largely on the identified *means* or methods of exploitation. While defining each listed *means* under the *Protocol* has proven problematic and difficult in practice, taken as a whole, and in relationship to the provision concerning consent, it becomes clear that the core element of the idea of human trafficking, taken out of its political and ideological context, centres on attempts to gain or effect control over another, through conduct which actively interferes with or impedes the ability to freely engage in autonomous decision-making, or the process of choice to do, or not do, something. This is, of course, quite broad when examining the concept of human trafficking through a criminal law lens, yet is very informative when taken out of this particular context, as will be further explored later in this chapter.

This section sought to understand both the limitations and possibilities of the concept of human trafficking as formulated in international law. Despite its importance in concretely defining 'human trafficking', the *Protocol* has failed to become disentangled with the underlying political ideologies driving the 'trafficking' label. Further, though the achievement of international

[76] See also, Bethany Hastie, *By Any Means Necessary: Towards a Comprehensive Definition of Coercion to Address Forced Labour in Human Trafficking Legislation* (LLM Thesis, McGill University Institute of Comparative Law, 2012) [unpublished].

consensus on the definition of human trafficking can certainly be seen as a milestone, the breadth and ambiguity of the definition, coupled with the underlying ideological drivers, has resulted in significant debate and contestation over meaning. Yet, with the development of the *Protocol* and its inclusion of related concepts, notably slavery, slave-like practices, and forced labour, 'trafficking' has become the language and label often employed when discussing these other phenomena in contemporary forms. In other words, there appears a "pervasive belief that the modern fight against slavery is by and large appropriately fought under the antitrafficking rubric,"[77] which is equally applicable other noted forms of contemporary exploitation such as slave-like practices, servitude, and forced labour. Given the strong connection now made between trafficking and related phenomena, coupled with the inescapable issues of a continued reliance on the 'trafficking' label, the next section will explore the related concepts independently, in order to further identify common elements and conceptual threads which can assist in understanding contemporary forms of exploitation beyond the contested and charged language of human trafficking.

II. Historical and Contemporary Concepts Related to Human Trafficking: Slavery and Slave-Like Practices, Debt-Bondage, and Forced labour

This section seeks to explore more deeply what the conceptualization of human trafficking *could be*, or perhaps even *should be*, in terms of advancing a richer understanding of contemporary forms of severe exploitation, by exploring the related concepts identified under the *Protocol* definition. Many of the concepts attaching to the modern-day legal definition of human

[77] Hathaway, *supra* note 7 at 15.

trafficking have strong and well-defined histories, and continue to be studied, both in scholarship and in the international community, today. In addition, like the *Protocol*, the international treaties on slavery, slave-like practices and forced labour are widely ratified and thus have potential force and weight as international legal instruments. These concepts provide a much broader picture from which to understand human trafficking in all its forms. Placing the idea of human trafficking within this broader spectrum will assist in bringing to light the key elements or criteria which constitute the types of exploitative situations sought to be criminalized under the contemporary banner of 'human trafficking', and which can thus be used in developing a new framework for analysis later in this chapter. This section will set out the historical representations of slavery, slave-like practices, and forced labour, as well as their contemporary interpretations at both the international and domestic levels, which will provide a more comprehensive picture of the critical elements or features of contemporary forms of exploitation which are commonly present between these concepts, and also as found under the *Protocol* in section I.

a. The Abolition of Slavery and Slave-Like Practices: Historical Roots for Modern-Day Prohibition against Exploitation

The historical foundations of the international movement against the exploitation of persons can arguably be traced back to the abolition against slavery. This momentous legal development recognized an inherent right to be free from legal ownership and thus an inherent and inalienable right to basic freedom of the person. The *Convention to Suppress the Slave Trade and Slavery*[78]

[78] 25 September 1926, 60 LNTS 253 [*Slavery Convention*].

defines slavery as "the status or condition of a person over whom any of all of the powers attaching the right of ownership are exercised" and includes

> all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.[79]

However, despite the legal prohibition on chattel slavery arising from the 1926 *Convention*, the social reality of slavery continued to exist in many forms.[80]

Building from the original *Convention to Suppress the Slave Trade and Slavery*, a supplementary convention was subsequently developed which sought to tackle 'slave-like' practices which continued to exist despite the abolition of 'legal ownership' or chattel slavery. The *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*[81] specifically references the need to elaborate upon the original *Convention* in light of awareness that "slavery, the slave trade and institutions and practices similar to slavery have not yet been eliminated in all parts of the world"[82] and that this supplementary convention would thus "intensify national and international efforts towards the abolition of slavery, the slave trade and institutions and practice similar to slavery".[83]

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[79] *Slavery Convention*, *supra* note 78, art 1.
[80] See, i.e., Kevin Bales, *Disposable People: New Slavery in the Global Economy* (Berkeley, CA: University of California Press, 1999) [Bales]; Gallagher 2010, *supra* note 4 at 48; Hathaway, *supra* note 7 at 16; A Yasmine Rassam, "Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law" (1999) 39 Va J Int'l L 303 at 322 [Rassam 1999]; A Yasmine Rassam, "International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach" (2005) 23:4 Penn State International Law Review 809 [Rassam 2005].
[81] 30 April 1956, ESC 608(XXI), OHCHR [*Supplemental Convention*].
[82] *Ibid*, preamble. See also, Rassarm 2005, *supra* note 80 at 829.
[83] *Ibid.*

A central feature of the *Supplementary Convention on the Abolition of Slavery and Slave-Like Practices*, for our purposes, is the development of the prohibition against debt bondage. The *Supplementary Convention* defines debt bondage as:

> [T]he status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.[84]

Essentially, debt bondage was recognized as a predominant form of continued slavery without legal ownership over the person, *per se*. Rather, the 'creditor' is able to exact control by virtue of a legal entitlement to a debt owed by the debtor, and to exploit the circumstances of the debtor by continuously drawing out the debt. This development continues to have direct relevance today as debt bondage continues to be a predominant form of enslavement and exploitation of persons around the world.[85] The concept of debt bondage is also significant in examining today's legal conceptualization of human trafficking, as it represents a paradigmatic case of *de facto* ownership or slavery absent the use of physical force or violence, or threats thereof. The use of violence, as discussed in Chapter 1, has come to be relied upon heavily in establishing what human trafficking 'looks like', and the case of debt bondage, being internationally recognized as a slave-like practice, thus provides a strong case against the heavily reliance on, and narrow criteria of violence as a primary element of human trafficking.

[84] *Supplemental Convention*, *supra* note 81, art 1(a).
[85] See, i.e., Hathaway, *supra* note 7 at 16, citing also Bales, *supra* note 80; Rassam 2005, *supra* note 80 at 822.

Today, the *Slavery Convention* has received renewed attention. Although the concept of legal ownership of persons can be considered as successfully abolished,[86] the social condition and lived reality of slavery has persisted, and the concept of de-facto slavery continues to have relevance in the international arena. In addition, there appears "strong evidence that the legal understanding of what constitutes slavery has evolved to *potentially* include contemporary forms of exploitation such as debt bondage and trafficking."[87] This renewed attention, and interest in reinterpretation or 'evolving' the definition of slavery found in the 1926 *Convention* to account for modern conditions, has resulted in debate about both the content of the definition under the *Convention*, as well as the relationship between contemporary slavery and other forms of exploitation, such as servitude, debt bondage and forced labour.

The definition of slavery itself, as found under the 1926 *Convention*, has been subjected to contemporary interpretations in an effort to both carry forward and expand upon the traditional notion of chattel slavery. The Bellagio-Harvard group, for example, defines the modern-day legal parameters of slavery as primarily centred on possession and control:

> In cases of slavery, the exercise of 'the powers attaching to the right of ownership' should be understood as constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty, with the intent of exploitation […][.]
>
> Possession is foundational to an understanding of the legal definition of slavery, even when the State does not support a property right in respect of persons.
>
> While the exact form of possession might vary, in essence it supposes control over a person by another such as a person might control a thing. Such control may be physical, but physical constraints will not always be necessary to the

[86] Though some forms of chattel slavery appear to continue to exist in extremely limited forms: see, i.e., Bales, *supra* note 80; Rassam 1999, *supra* note 80 at 321; Gallagher 2010, *supra* note 4 at 48; Hathaway, *supra* note 7 at 16; Rassam 2005, *supra* note 80 at 818-9.
[87] Gallagher 2010, *supra* note 4 at 190.

> maintenance of effective control over a person. More abstract manifestations of control of a person may be evident in attempts to withhold identity documents; or to otherwise restrict free movement or access to state authorities or legal processes; or equally in attempts to forge a new identity through compelling a new religion, language, place of residence, or forcing marriage.[88]

While the historical roots of the legal concept of 'slavery' focused on *legal entitlement*,[89] this contemporary interpretation attempts to account for situations which present the primary features of ownership absent only legal entitlement to do so. Thus, under this interpretation, a level of control which is tantamount to 'possession' is fundamental to contemporary forms of slavery, and that possession must operate to significantly deprive a person of their individual liberty.[90]

The contemporary concept of slavery has also received some judicial consideration in the context of international criminal law. Within this context, it has been found that the historical definition under the 1926 *Convention* "has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership[.]"[91] In determining whether enslavement exists, a number of factors or indicia may be identified, including "control of someone's movement, control of physical environment,

[88] "Bellagio-Harvard Guidelines on the Legal Parameters of Slavery", online: Queen's University Belfast < http://www.qub.ac.uk/schools/SchoolofLaw/Research/HumanRightsCentre/Resources/Bellagio-HarvardGuidelinesontheLegalParametersofSlavery/> [Bellagio-Harvard Guidelines].

[89] However, even in historical context, careful attention to the power dynamics inherent in ownership has been argued by some historians. See Rassam 2005, *supra* note 80 at 814-5.

[90] Bellagio-Harvard Guidelines, *supra* note 88; see also, Rassam 2005, *ibid* at 822; Joel Quirk, "Defining Slavery in All its Forms: History Inquiry as Contemporary Instruction" in Jean Allain, ed, *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford: Oxford University Press, 2012) 253 generally, and at 256 [Quirk 2012]; Robin Hickey, "Seeking to Understand the Definition of Slavery" in Jean Allain, ed, *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford: Oxford University Press, 2012) 220 [Hickey].

[91] *Prosecutor v. Kunarac, Kovac, & Vukovic*, Case No. IT-96-23-T & I-96- 23/1-A, Judgment, 118 (June 12, 2002) at para 117 [*Kunarac*], cited also in *Rantsev v. Cyprus and Russia*, App. No. *25965/04*, Eur. Ct. H.R. (2010) at paras 142-3 [*Rantsev*]. See Holly Cullen, "Contemporary International Legal Norms on Slavery" in Jean Allain, ed, *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford: Oxford University Press, 2012) 304 for a consideration of *Kunarac* and contemporary judicial interpretations of slavery. See also, Quirk 2012, *ibid* at 258-9 discussing different interpretations of the criteria of 'powers attaching to the right of ownership'; Hickey, *ibid* for a detailed analysis of the 1926 definition and importance of the criteria of 'powers attaching to the right of ownership'.

psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour[.]"[92] Thus, the 'powers attaching to the right of ownership' remain a central defining feature of contemporary forms of slavery,[93] and the kind of conduct contemplated by this criterion appears to rest largely on an idea of effecting control over another person.

Efforts to update the definition and legal understanding of slavery have also resulted in debate concerning the relationship between this concept and other slave-like practices. Some groups and scholars seek to distinguish slavery from other forms of exploitation and from related concepts such as forced labour, slave-like practices and servitude,[94] raising concerns about the conflation between slavery, a *jus cogens* norm and *erga omnes* legal obligation, and other forms of exploitation as thus diluting the importance and universal character of slavery in international law.[95] Relatedly, some scholars raise concerns about the conflation of slavery and human trafficking, particularly, and see the concepts as distinct and potentially mutually damaging when represented as relational. For these scholars, "[c]onflation risks diluting the force of "slavery"", and "[c]onversely, equating trafficking with slavery risks inadvertently raising the legal threshold

[92] *Kunarac*, *supra* note 91 at para 119, cited also in *Rantsev*, *supra* note 91.
[93] See, Gallagher 2010, *supra* note 4 at 179, commenting on the ambiguous wording of this definition as the key leverage for activists and scholars proposing expansion or reinterpretation of the definition. See also, Rassam 2005, *supra* note 80 at 814-17, concluding at 817: ""…when viewed outside the narrow framework of legal ownership, the institution of slavery is defined as the total dominion over another […]."
[94] See, i.e., Bellagio-Harvard Guidelines, *supra* note 88; Chuang 2010, *supra* note 3 at 1709; Rassam 2005, *supra* note 80 at 817. See also Gallagher 2010, *supra* note 4 at 178-81 for commentary on this approach; Quirk 2012, *supra* note 90.
[95] Gallagher 2010, *ibid* at 178; Chuang 2010, *ibid* at 1709; Rassam 2005, *ibid* at 842, raising concerns about the breadth of practices attaching to the term 'slavery' but not necessarily condemning any or all practices that might be termed contemporary forms of slavery.

for trafficking[.]"[96] The desire to keep the language and concept of slavery as distinct from human trafficking is understandable in light of the sensationalist approach in equating trafficking with 'modern-day slavery' in public awareness and media campaigns. The use of slavery to label trafficking co-opts the moral weight of the former for an agenda which, as seen in Chapter 1, is often highly political and contested in respect of the latter. Therefore, it is perhaps unsurprising that this approach has garnered strong criticism.

On the other hand, the continued division between slavery and other forms of exploitation is seen by some scholars as problematic and, to an extent, impossible.[97] The point at which some other form of severe exploitation ends, and modern slavery (or human trafficking) begins, is seen as a "slippery notion" as any attempt to demark a 'bright line' distinction will necessarily depend on several contextual factors, including political ideology, personal circumstances and alternatives, and the socio-economic and cultural landscape of a particular place, to name a few.[98] Though apparently depoliticized, as "[t]he fight against slavery is one of the very few human rights imperatives that attracts no principled dissent,"[99] the specific contours of what constitutes modern-day slavery are highly political and contested, as discussed above. Thus, some scholars advocate away from the continued use of traditional categories to attempt to define and understand what are, in fact, highly interrelated, and integrated, concepts.

[96] Chuang 2010, *supra* note 2 at 1709.
[97] See Julia O'Connell Davidson, "New slavery, old binaries: human trafficking and the borders of 'freedom'" (2010) 10:2 Global Networks 244 at 250 [O'Connell Davidson]. Relatedly, see also Bales, *supra* note 80; Hathaway, *supra* note 7; Rassam 2005, *supra* note 80.
[98] See O'Connell Davidson, *ibid* at 249.
[99] Hathaway, *supra* note 7 at 7-8; cited also in, O'Connell Davidson, *ibid* at 257.

This approach towards a disintegration of the distinction between severe forms of exploitation, including slavery, slave-like practices or servitude, forced labour, and human trafficking, may be gaining momentum at the regional level. In the European Union, a recent case considering Article 4 of the European Convention on Human Rights, which prohibits slavery, servitude and forced labour, determined that "trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership"[100] and, contrary to previous case law, found it "unnecessary to identify whether the treatment about which the applicant complaints constitutes "slavery", "servitude" or "forced and compulsory labour".[101]

Regardless of whether or where any 'bright line' distinction between severe exploitation ends, and modern slavery begins, what is common to the various categories on this continuum is the existence of conduct which seeks to exert and effect control over another person. While the phrasing of the 1926 *Convention*, "exercise of any or all of the powers attaching to the right of ownership" continues to bear relevance today, substantive inquiries and analysis focuses on those powers which exert control absent a legal entitlement to do so, as there is no longer any right of ownership over a person. The exertion of control and exploitation of another person are strongly linked to the inherent violation of dignity and personal freedom. Finally, indicia or factors of a condition of slavery, or of control, may include control over movement or the physical environment, control over the type and condition of work engaged in, psychological control, confinement, threats of force or coercion, and assertions of exclusivity, amongst others. Like the broad interpretation of the definition of human trafficking in the previous section, then,

[100] *Rantsev*, *supra* note 91 at para 281.
[101] *Ibid* at para 282.

contemporary interpretations concerning the legal definition of slavery bear a strong connection to understanding and articulating conduct which actively interferes with personal freedom, and with the autonomy of the decision-making process of an individual.

b. The Parallel Development of the Concept of Forced Labour

The concept of forced labour was first developed in international law under the *Convention Concerning Forced or Compulsory Labour* in 1930.[102] Although this *Convention* does not abolish all labour which can be considered forced or compulsory, it aims to prohibit all unauthorized forced labour, leaving only limited exceptions for state-controlled compulsory labour, such as military service or prison work.[103] Forced labour, as a generally prohibited practice under the *Convention*, is defined as: "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".[104] The development of the legal definition of "forced labour" continues to have "heightened relevance today," particularly in light of the recognition of "human trafficking, and especially trafficking for labour exploitation,"[105] and thus remains a significant focal area of the agenda of the International Labour Organization, the *Forced Labour Convention*'s governing body.

The ILO makes broad use of the concept of forced labour, including trafficking, slavery, slave-like practices and debt bondage as possible forms of forced labour, and also including

[102] 1 May 1932, 39 UNTS 612.
[103] *Ibid*, art 2(2).
[104] *Ibid*, art 2(1).
[105] International Labour Organization, *Forced Labour and Human Trafficking Casebook of Court Decisions* (Geneva: ILO, 2009) at 3 [ILO 2009].

prostitution as one site where forced labour can occur.[106] The links between forced labour and the related concepts are also demonstrated through explicit links and references made in international treaties and instruments. For example, a subsequent convention on the abolition of forced labour, created in 1957, specifically cites the *Slavery Convention* and *Supplementary Convention* in its preamble, indicating an awareness of the connection between these two forms of prohibited practices.[107] Further, like the definition of slavery, the concept of forced labour has also been discussed in international criminal law, under the broader banner of 'enslavement'.[108] As outlined in section I, forced labour is also specifically included as an end purpose in the international legal definition of human trafficking under the *Protocol*, and the background documents make clear that the definition under the *Forced Labour Convention* was contemplated as the governing instrument in defining that term.[109] The inclusion of forced labour within the listed purposes of exploitation has been seen as an important addition, as "extending the end purposes of trafficking to include the most serious exploitative work practices."[110] The breadth of the forced labour definition, and its interpretation by the ILO, is thus seen as important to advancing a broader understanding of exploitation, and human trafficking.[111] The concept of

[106] See, "Forced Labour, Human Trafficking, and Slavery" online: International Labour Organization <http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>.
[107] *Convention Concerning the Abolition of Forced Labour* (No 105), 25 June 1957, 320 UNTS 4648.
[108] See *Kunarac, supra* note 91; *Prosecutor v Krnojelac*, Case No. IT-97-25 (15 March 2002), Case No. IT-97-25-A (17 September 2003) (Appeals Chamber).
[109] See, *Travaux Préparatoires*, *supra* note 32 at 340; UNODC, *Legislative guide for the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime* (Vienna: UNODC, 2004) at n14; ILO 2009, *supra* note 105 at 16. See also Gallagher 2010, *supra* note 4 at 35, n95 commenting on the link between the trafficking *Protocol* and *Forced Labour Convention* explicitly stated by the UNODC Secretariat; Edwards, *supra* note 16 at 41.
[110] Gallagher 2010, *ibid* at 35.
[111] The ILO itself notes the expansive possibility its broader definition, stating that "[f]orced labour, contemporary forms of slavery, debt bondage and human trafficking are closely related terms though not identical in a legal sense. Most situations of slavery or human trafficking are however covered by ILO's definition of forced labour." "The meanings of Forced Labour" online: ILO < http://www.ilo.org/global/topics/forced-labour/news/WCMS_237569/lang--en/index.htm>.

forced labour is thus, and as will be further established in this section, perhaps the broadest of all the concepts related to severe forms of exploitation canvassed in this chapter.

The ILO makes effective use of the broad definition of "forced labour" and has sought to ensure this concept remains up-to-date in its interpretation and application. For example, the ILO has provided interpretive guidance to the definition such as by affirming that a "menace of penalty" can include not only penal sanctions but also a "loss of rights and privileges",[112] and through the release of an extensive list of indicators of forced labour, including: restriction of movement; debt bondage; wage violations; retention of identity documents; threats of denunciation to authorities; and, physical or sexual violence or threats.[113] The "menace of penalty" element of the definition has been the subject of considerable attention, both within and beyond the ILO. Specifically, questions around whether, and to what extent, psychological coercion and economic compulsion fall within the meaning of the definition have arisen.[114] While general, external constraints, or underlying conditions, such as economic status have not commonly been held to be within the scope of the definition,[115] they may become relevant dependent on other factors present in a specific situation. This suggests, then, that some active exertion of control or threat must be present to constitute a 'menace of penalty', but leaves room for a consideration of the unique vulnerabilities which may impinge upon an understanding of the impact and influence of control mechanisms, similar to the 'abuse of a position of vulnerability' term under the trafficking *Protocol*. Overall, these interpretations, and the work done to advance the definition

[112] ILO, *Human Trafficking and Forced Labour Exploitation, Guidance for Legislation and Law Enforcers* (Geneva: ILO, 2005) at 20 [ILO 2005]; ILO 2009, *supra* note 105 at 12.
[113] ILO 2005, *ibid* at 20.
[114] See ILO 2009, *supra* note 1045 at 12.
[115] *Ibid.*

of forced labour, shed greater light on the types of conduct which can be used to exploit individuals, and how 'control' is effected or attempted in more subtle ways.

Like the trafficking *Protocol*, the ILO definition of forced labour also includes a caveat concerning consent, by stating that an individual must not have offered him or herself voluntarily to perform the work or service. In interpreting this component of the definition, a similar relationship between the means of control or exploitation and consent is enunciated: "work accepted under the menace of any penalty is not work accepted voluntarily. In other words, there is no 'voluntary offer' under threat."[116] In addition, the ILO has concluded that "where deceit and fraud are involved in the original work offer, the worker's acceptance cannot be considered knowing and voluntary."[117] Thus, like the trafficking *Protocol*, where there exists the use of force, threats, coercion, deception or fraud, the ability to engage with autonomous decision-making or free choice is undermined, and thus consent is deemed irrelevant.

Although the definitional ambiguities around what constitutes 'forced labour' appear to be far less contested than the other concepts discussed, it continues to be under-represented in domestic human trafficking cases and laws. This is due, perhaps in large part, to the relative political 'attractiveness' of the sensationalism of the concept of human trafficking, and the ease with which it aligns with dominant political narratives concerning, for example, prostitution, as well as irregular migration, as was seen in Chapter 1. Similar to the way that discourse around slavery is often couched in terms of trafficking, the same discursive trend exists with respect to the idea of forced labour, despite the fact that domestic law and policy is clearly not targeted towards this

[116] ILO 2009, *supra* note 105 at 12-3.
[117] *Ibid* at 13; see also Gallagher 2010, *supra* note 4 at 36.

form of exploitation, thus providing one possible account for the gap between discourse and practice.

Recognizing the current gaps in implementation of the *Forced Labour Convention*, coupled with increasing connections to human trafficking, and the changed nature of forced labour since the original *Convention*, a new *Protocol to the Forced Labour Convention, 1930* [hereafter, the *Forced Labour Protocol*] was adopted in June 2014 by the ILO.[118] In addition to affirming the definition of forced labour set out in the 1930 *Convention*,[119] the *Forced Labour Protocol* expands upon state obligations and recommendations to effectively address the phenomenon through a "3 P" approach of prevention, protection/remedies, and prosecution/punishment of offenders,[120] similar to that found under the trafficking *Protocol*. Thus, the *Forced Labour Protocol*, in terms of overall response obligations and approaches, is significantly in line with, and adds depth to, those found under the trafficking *Protocol*.

As a further possible response to the identified issues surrounding use of the concept of forced labour, trends at both the regional and state levels appear to increasingly favour locating legislation pertaining to forced labour outside of the human trafficking label. At the European Court of Human Rights, the Court has contemplated the meaning of forced labour under Article 4 of the Convention on a few occasions and has interpreted the definition in a manner largely consistent with the ILO's approach,[121] though trafficking is now also subsumed under that

[118] 103rd Sess, 11 June 2014. Re the purposes concerning development of the *Forced Labour Protocol*, see the Preamble.
[119] *Ibid*, art 1(3).
[120] *Ibid*, art1(1), 2, 3, 4.
[121] See *Van der Mussele v Belgium*, Application No. 8919-90 (23 November 1983); *Siliadin v France*, Application No. 73316/01 (26 July 2005).

Article and, as mentioned earlier, the Court appears to have signaled a move away from distinguishing between the concepts included therein.[122] The United States has a significant body of case law related to forced labour, litigated under domestic statutes prohibiting conduct such as involuntary servitude, debt peonage and forced labour,[123] as well as criminalizing forced labour under the *Trafficking Victims Protection Act*.[124] Similar to the United States, Australia has specific offences for slavery, related practices and forced labour under their criminal law,[125] and recently passed new legislation updating these offences.[126] Finally, the United Kingdom passed legislation criminalizing forced labour as a distinct offence.[127] The offence was developed with the intention of having "clear, enforceable offences of servitude and forced labour in order to give further and specific protection to those who may be the victims of forced labour"[128] and is intended to be complementary to the existing trafficking offences, being used where the trafficking element "cannot be proved to the criminal standard" or where there is no trafficking element.[129]

These developments, like the ILO's work at the international level, clearly seek to define and understand a broader range of conduct which gives rise to situations of forced labour, consistent with the international legal definition under the *Forced Labour Convention*, and beyond the confines of the concept of human trafficking. Like the definitions of slavery and debt bondage, definitions of forced labour seek to account, overall, for prohibited conduct used in the

[122] See *Rantsek, supra* note 91.
[123] See ILO 2009, *supra* note 105 at 99-107.
[124] *Victims of Trafficking and Violence Protection Act of 2000*, 22 USC 7101.
[125] *Criminal Code Act 1995*, s 271.
[126] *Crimes Legislation Amendment (Slavery, Slave-like Conditions and People Trafficking) Bill 2013*, No.6, 2013 (assented to 7 March 2013).
[127] *Coroners Justice Act 2009*, s.71.
[128] "Slavery, Servitude and Forced or Compulsory Labour", online: UK Crown Prosecution Service <http://www.cps.gov.uk/>.
[129] *Ibid.*

exploitation of another which attempts to effect control over that person by removing or inhibiting the ability to freely engage with the process of choice, or autonomous decision-making.

Having identified both the interpretive possibilities, but also significant problems associated with a continued reliance on the human trafficking label, this section sought to explore additional, and related, legal concepts which could inform a more comprehensive picture of the legal possibilities in defining severe forms of exploitation, and which could illuminate key conceptual threads from which to develop a broader, and yet more precise, framework for analysis. What is clear from the analysis of the legal concepts of slavery, slave-like practices, and forced labour is that, while each of these concepts also face challenges and contestation in their interpretation and/or implementation, all of these, as well as the international legal definition of human trafficking, present a core element of conduct or methods by which exploitation is procured, and which focus significantly on conduct which attempts to effect control and that operates to undermine, inhibit or remove the autonomy of the affected individual to freely engage in the process of choice or decision-making. Taken together, the trafficking definition, as informed by the related and historical concepts, does, therefore, enable the identification of key conceptual threads which provide a starting point for a conceptual framework aimed at understanding and articulating the core, or critical, elements underlying a broader understanding of severe forms of exploitation unattached to the political weight of the 'human trafficking' label, yet informed by its legal definitional possibilities. The final section of this chapter will take up the challenge of articulating, in greater detail, that framework.

III. Articulating a Broader Conceptual Framework for Analysis: Unfreedom

The foregoing sections of this chapter examined both the specific legal definition of human trafficking and the many related concepts capable of attaching to, and supplementing, this definition. What is evident from this analysis is both the potential for the conceptualization of 'human trafficking' to encompass an understanding of the phenomenon beyond its current representations, and the breadth and depth of the related concepts of slavery, slave-like practices, and forced labour, in advancing an understanding of contemporary forms of severe exploitation beyond human trafficking. This final section will thus outline and analyze the key conceptual threads which exist between these various concepts and will argue for a framework of analysis which rests more clearly on these underlying themes, as well as their connection to the broader concept of freedom, or perhaps more accurately, 'unfreedom'. The first section will bring together the analysis of the previous section to determine the key common criterion, or threads, which form the critical elements of each concept. The next section will go on to explore this in relation to the concept of 'unfreedom' and to build a framework for analysis of the next chapters of this thesis.

a. Distilling the Essence of Human Trafficking and Related Concepts: Effective Control and Interference with Choice

The categories of criminalized, or prohibited, exploitation discussed in this chapter (slavery, slave-like practices, forced labour, and human trafficking), rely, to varying extents, on a 'bright

line' distinction about where 'mere exploitation' ends and criminal exploitation falling within one of the prescribed categories begins. This is difficult and risky to operationalize in practice, as was also discussed in relation to the Canadian context in Chapter 1. However, while exploitation may exist on a continuum which is not cleanly or clearly divided and distributed into legal categories in practice, understanding the core, or critical, elements of these legal concepts is an important first step to re-imagining or re-constructing a conceptual framework which more appropriately reflects and responds to the continuum of exploitative experiences individuals may face.[130] What is apparent from the legal concepts discussed in this chapter is that these concepts all rely, in varying degrees of clarity, on the existence of certain forms of prohibited conduct which is used to exploit an individual. With regard to slavery, for example, this conduct is the exercise of powers attaching to the right of ownership; with respect to debt bondage, it is the deceptive or false inflation of debt, and abuse of power of the creditor in that relationship; under the definition of forced labour, it is the use of a 'menace of penalty'; and, for human trafficking, it is the delineated conduct listed under the *means* element of the definition. It is the *way* a person exploits another person, or the method of control used to induce or maintain exploitation, which is commonly present amongst these various legal concepts, and which arguably represents the critical element of each concept independently.

Building then from the existence of prohibited conduct, commonalities also exist with respect to the substantive content of that conduct. As outlined in the definitions of the legal concepts explored within this chapter, prohibited conduct under each of these concepts centres on acts which attempt to effect control. Further, the prohibited conduct and control mechanisms discussed thus far set out a common underlying objective of altering, or interfering with, the

[130] O'Connell Davidson, *supra* note 97 at 250

process of choice or autonomous decision-making of the affected individual. This cannot be disconnected from the underlying context and specific circumstances of those who are targeted by mechanisms of control, and these issues bear significantly on the use and effectiveness of such mechanisms. Group, or individual, vulnerabilities such as gender, race, age, socio-economic circumstances, and immigration status,[131] for example, play an important role in the ability to effect control where methods of that control can be targeted to the specific vulnerabilities of that individual. This correlation was seen specifically in relation to the definitions, and interpretations, of forced labour, and abuse of a position of vulnerability under the trafficking *Protocol*. However, this is not to suggest that such pre-existing vulnerabilities render an individual less capable of engaging with the process of choice. Rather, similar to the analysis presented concerning the issue of 'consent' in the discussion of the legal concepts of human trafficking and forced labour in the previous sections, it is the methods or *means* used by a person to effect control which actively interfere with that ability to engage in the process of choice; pre-existing vulnerabilities come into play in terms of understanding how and why particular methods may be used effectively in that regard.

In an effort to add clarity to definitions which suffer from ambiguity and a lack of precision, and possibly also to add clarity to the relationship with, and importance of, underlying contextual factors or pre-existing vulnerabilities, lists of 'indicators' are often presented as examples of the kind of conduct contemplated by the definitions. As was discussed in the previous section, both the concepts of slavery and forced labour have seen specific consideration and enunciation of 'indicators' by relevant bodies. Indicators of human trafficking are also often presented in

[131] See, i.e., Kendra Strauss, "Coerced, Forced and Unfree Labour: Geographies of Exploitation in Contemporary Labour Markets" (2012) 6:3 Geography Compass 137at 141 [Strauss].

training and education materials.[132] Lists of indicators between the various concepts further demonstrate significant overlap, commonly including, for example, threats or use of violence, control over physical movement, confinement, retention of identity documents, threats of deportation or denunciation to authorities, non-payment for work, and control over social relations.[133] As is self-evident from this cursory list, indicators of exploitation common to all of the identified legal concepts clearly identify methods of effecting control, as well as the primary 'targets' of control mechanisms, such as physical safety, psychological and economic security, and, security of administrative or legal status.

When asked about common indicators of human trafficking and exploitation, or about the conduct seen in cases of exploitation, several participants in the research study also produced lists closely related to the above, suggesting an understanding or awareness of the breadth of severe forms of exploitation even where this may not clearly fit within prescribed legal definitions, such as under the Canadian *Criminal Code*.

The most commonly cited indicators of exploitation or control related to: threats (of both physical violence and more general, or unnamed, threats); specific threats of deportation or denunciation to authorities; restrictions over movement and social restrictions; the use of deception or false promises in respect of recruitment, work arrangements, etc.; withholding or taking possession of passports, work permits, and other identity documents; and, unlawful or

[132] See, i.e., "Indicators of Human Trafficking" online: United Nations Office on Drugs and Crime <http://www.unodc.org>; "Indicators of Human Trafficking" online: US Department of Homeland Security <http://www.dhs.gov>; "Operational indicators of trafficking in human beings" online: International Labour Organization <http://www.ilo.org>.
[133] See *ibid*; ILO 2005, *supra* note 112; *Kunarac*, *supra* note 91.

improper living and working conditions, particularly hours of work and issues concerning pay and wages. In addition, some participants also cited the use of physical violence or abuse.

In relation to the indicators, most participants made explicit that the overarching concern or 'one big indicator' is to look at whether control is being exerted over another person. As one participant states, "[…] We really look at whether someone is controlled for the purposes of exploitation."[134] The understanding of what that control looks like, as demonstrated by the commonly quoted indicators above, is promising as participants in the study recognized the various, and especially non-physical ways that control may be effected. In fact, many participants appeared keenly aware of use and impact of psychological control or coercion specifically. As one participant noted, "the manipulation and the psychological control of this crime is really what makes the crime. A lot of the times, people aren't physically injured. It's all psychological control."[135] This depth of awareness is also a product of what is being seen in practice; as one participant comments, "I would say we see more coercion than we've seen direct physical control. We've seen much more psychological manipulation."[136]

Many participants also made explicit the connection of how control mechanisms operate to interfere with choice as the central feature of what trafficking or exploitation 'means'. For example, as one participant states,

> Ultimately, this is about causing somebody to do something ultimately for the benefit of another person, although that isn't required in our legal paths, but

[134] Participant 05.
[135] Participant 18.
[136] Participant 12.

> causing somebody to do something through means that essentially take away that person's ability to meaningfully choose that labour or services.[137]

In addition to recognizing the myriad control mechanisms that can, and are, used to induce exploitation, several participants appeared to acutely understand the connection between underlying contextual factors, or pre-existing vulnerabilities, and the control mechanisms used, and their impact, in specific situations. In discussing the spectrum of indicators, or types of cases, which might be present, one participant noted both the difficulty of establishing the 'less than obvious' cases and also demonstrates an acute awareness of how various factors may act as a bundle of forces to create vulnerability to exploitation:

> [It's] easy to say somebody is exploited when they provide their labour as a result of threat of violence, but how do you get at the, "okay, well there were no threats." But there was nothing overt, it was the most discrete, subtle behaviour that conveys to that victim, a person that they really don't have a choice here for whatever reason that might be. It might be because the accused is abusing their immigration status, abusing the fact that they have no choice because if they don't work for two dollars an hour they're not going to be able to send any money home, to feed their kids. […] There are any infinite number of circumstances that make a person vulnerable to the conduct of an accused person […]."[138]

Thus, despite the significant problems associated with the language and label of 'human trafficking', an awareness of the common themes that can be termed the critical conceptual factors relating to severe forms of exploitation, as discussed earlier in this section, are clearly present in practice as well, as demonstrated by the results of the interview study. Overall then, it is clear from both the secondary and primary analyses, that the essence of severe forms of exploitation can be distilled as relying on three relational factors: (1) attempts to gain or effect

[137] Participant 17.
[138] Participant 17.

control over another person (2) through the use of mechanisms which target vulnerable contextual factors or characteristics, and which may act as a 'bundle of forces' or layered experience, and (3) in a way which operates to interfere or impede with their ability to meaningful choose between alternatives or engage in autonomous decision-making.

Within the context of criminal law, the locus of the concepts discussed in this chapter, the focus of definitional interpretation and operationalization, however, remains on specific individual actors who purposefully engage in conduct which seeks to exact 'effective control' over other individuals and which actively interferes with their process of choice. This ignores the important power-relations and institutional factors of governance which create structural conditions leading to such circumstances. "[I]nstitutions that define and project the operation of legal, social and economic power"[139] play an important role – both contributory and causal – in the creation of circumstances of forced labour, human trafficking and related phenomena. As such, while the concept of effective control and interference with the process of choice provides an important starting point for, and piece of, understanding and delineating a conceptual framework, it must be complemented and couched within broader framework which is capable of examining these issues beyond individual actors, and in a way which more richly accounts for the structural and underlying conditions in which such phenomena occur. The next section will take up this work, through an examination of a theory of 'unfreedom' as a guiding conceptual framework for analysis.

[139] Strauss, *supra* note 131 at 141.

b. *Towards a Richer Understanding of Severe Forms of Exploitation as Conditions of Unfreedom*

What is clear from the above analysis, as a starting point from which to build a broader and richer conceptual framework from which to understand severe forms of exploitation, is the common thread of effective control and its underlying purpose of interfering with the process, or freedom, of choice for targeted individuals. While there is some consensus concerning the connection between exploitation and [a lack of] freedom of choice, this is complicated by a definite lack of consensus on "what constitutes freedom of choice and great difficulty in determining the reality of consent."[140] Thus, these concepts must be explored in greater depth in order to understand and articulate a clear framework for analysis.

The idea of freedom is often presented as an absolute binary: "human beings are either free, in which case they are assumed to exercise self-sovereignty, or enslaved, in which case they are imagined as evacuated of agency and reduced to an object-like condition."[141] This binary ignores the spectrum or continuum upon which individuals might exercise, or be deprived of, some freedom, or agency, and also ignores the structural and underlying factors which contribute to varying states of freedom and particularly in this regard, the role of the state and substantive access to rights and legal venues for asserting those rights or freedoms. This is so because, where individuals are presumed 'free', they are presumed to have full substantive access to their freedom and to asserting their freedom; yet, the presumption of freedom rests only on a formal

[140] Strauss, *supra* note 131 at 140. See also, generally, Martha Minow, "Choices and Constraints: For Justice Thurgood Marshall" (1992) 80 Geo LJ 2093 [Minow].
[141] Julia O'Connell Davidson, "Troubling freedom: migration, debt, and modern slavery" (2013) 1:2 Migration Studies 176 at 177 [O'Connell Davidson 2013]. See also, Minow, *ibid* at 2093-4.

distinction under law, not a substantive one. In reality, beyond formal legal status, numerous legal and social forces may operate in concert to create a very different experience.

One need only consider the experience and condition of 'freed slaves' following the Emancipation Proclamation in the United States to see clearly the fallacy of this position. Despite formal recognition as free persons, and of slavery as unconstitutional, many legal and social forces continued negatively impinge upon former slaves' abilities to assert and carry out free choice. In the absence of chattel slavery, particularly in the American South, new forms of forced labour, primarily those of convict leasing and systems of debt peonage, sprung up as a response to fill the gap. Under convict leasing schemes, free black men, particularly, were targets for arrest on charges such as vagrancy,[142] and then, once convicted and levied with fines they could not pay, "leased" out to companies engaged in industries such as coal mining.[143] Despite the legal abolition of chattel slavery, this system represented just another kind of slavery, "a system in which armies of free men, guilty of no crimes and entitled by law to freedom, were compelled to labor without compensation, were repeatedly bought and sold, and were forced to do the bidding of white masters through the regular application of extraordinary physical coercion."[144] The cotton industry, particularly, also relied heavily on the need to fill the gap of labour after the end of chattel slavery. Under new contractual arrangements, many former slaves entered into yearly contracts with white plantation owners "that obligated black workers to remain throughout a planting and harvest season to receive their full pay, and under which they agreed to extraordinarily onerous limitations on personal freedom that echoed slave laws in

[142] Being defined, in that context, as an offence in which a person is unable to establish that he or she is employed: see Douglas A Blackmon, *Slavery by Another Name: The Re-Enslavement of Black People in America from the Civil War to World War II* (New York: Doubleday, 2008) at 1 [Blackmon].
[143] See, i.e., *ibid* at 1-4.
[144] *Ibid* at 4.

effect before emancipation."[145] While the consensual arrangements of such contracts cannot be ignored, neither can the social and economic conditions facing former slaves who were without land or property, and needed to earn a living. While this has only been a very brief survey of some of the issues arising in the United States in the post-emancipation era, they aptly demonstrate the legal recognition of freedom as a formal status does little to advance substantive experiences of freedom on its own. Rather, both social and economic forces, and legal instrumentalization, can easily be used to continue to marginalize and subjugate populations and individuals who are ostensibly 'free'.

If we view freedom as a substantive state of being, rather than merely a formal recognition under, or discursive assertion of, the law, we can begin to see that the idea of freedom is complex, fluid and contextual; like exploitation, it exists on a continuum, and is contingent on numerous factors which may be variously relevant in different circumstances or contexts. A substantive view of freedom focuses on creating conditions that enable individuals to lead the kind of lives they value, and have reason to value.[146] In this vein, freedom can be understood as including at least two valuable, and fundamental, aspects: opportunity and process.[147] The idea of freedom includes an internal capacity, or "actual capability to achieve" (opportunity), and the existence of autonomous choice (process).[148] The opportunity aspect of freedom "relates to the real opportunities we have of achieving things that we can and do value."[149] Thus, social forces, such as underlying contextual and circumstantial factors such as gender, race, age, ethnicity,

[145] Blackmon, *supra* note 142 at 27, citing also Edward Royce, *The Origins of Southern Sharecropping* (Philadelphia: Temple University Press, 1993) at 101.
[146] See Amartya Sen, *Development as Freedom* (Toronto: Random House, 1999) at 18 [Sen 1999].
[147] Amartya Sen, *Rationality and Freedom* (Cambridge, MA: Harvard University Press, 2002) at 506 [Sen 2002]. See also, Sen 1999, *ibid* at 17.
[148] Sen 2002, *ibid* at 506.
[149] *Ibid.*

socio-economic circumstances, can play an important role in defining an individual's opportunity for freedom. The process aspect of freedom involves having "the levers of control in one's own hands",[150] and therefore entails an "immunity of interference by others".[151] While here the emphasis appears more closely related to the concept of 'effective control', this process aspect of freedom can also be impacted by the factors delineated above in relation to opportunity, particularly where, for example, laws related to one or more of the characteristics identified above prescribe choice or create barriers to exercising choice.

It is important to see the relationship between process and opportunity, as well as their distinct roles in developing freedom.[152] Similarly, social, legal and other forces can act independently, or in concert, to constrain the substantive reality or experience of freedom for individuals in relation to either or both of opportunity and process. This approach thus requires looking beyond only procedural aspects of freedom, which the law has more traditionally focused on, to both the substantive content of and consequences flowing from those procedures.[153] This approach then also entails an examination of the various normative forces shaping individual experience – legal, social, relational, et cetera – their interrelationship, and interconnections. The result is to provide a richer, more contextual, and more individualized account of the experience of freedom, and equally of the experience of deprivation of freedom, or 'unfreedom'.

If the substantive condition of freedom exists on a spectrum contingent on a bundle of normative forces, their interrelationship and their collective impact on individual experience, the spectrum

[150] Sen 2002, *supra* note 147 at 506.
[151] Tore Sager, "Freedom as Mobility: Implications of the Distinction between Actual and Potential Travelling" (2006) 1:3 Mobilities 465 at 467.
[152] See Sen 1999, *supra* note 146 at 17.
[153] See *ibid* at 19.

upon which freedom can be assessed thus also includes an inquiry into opposite or negative conditions which identify conditions of depraved freedom, or 'unfreedom'.[154] In contrast to inquiries concerning the core tenets of freedom, various strands of thought have examined concepts of 'not freedom' and 'unfreedom', with divergent opinions on the distinction – if any – between the two. While a full canvassing of this debate is beyond the scope of this inquiry, it can be very briefly summarized as a debate on whether 'unfreedom' focuses only on a lack of power due to external impediments (i.e., process) or can also imply a lack of internal capacity (i.e., opportunity).[155] However, as canvassed above, the process aspect of freedom can be deeply connected with the opportunity aspect, particularly where external forces operate to inhibit the quality and quantity of the available set of choices of an individual (opportunity) and not just the ability to choose between existing alternatives (process). Put differently, constraints on the ability to exercise or carry out choice (process), are inextricable from the normative and underlying forces impacting on individual experience (opportunity).

Returning to the example of post-emancipation reality for former slaves in the United States, legal schemes were created to re-introduce slavery-like labour and conditions in a way which both interfered with the process of free choice, and which capitalized on the existing limited opportunity or availability of choice for former slaves. The "convict leasing" schemes actively interfered with choice by criminalizing and arresting former slaves on charges specifically conjured up to target them; the "vagrancy" offence used to commonly arrest and convict former slaves, "most tellingly in a time of massive unemployment among all southern men, was

[154] See Sen 1999, *supra* note 146 at 15-17.
[155] See, Matthew H Kramer, "Freedom, Unfreedom and Skinner's Hobbes" (2001) 9:2 The Journal of Political Philosophy 204.

reserved almost exclusively for black men."[156] Thus, while the convict leasing scheme was an external impediment or influence on [un]freedom, it cannot be disconnected or separated from the underlying context which made it so successful – the targeting of black men, particularly, the knowledge that most would be without the means to pay the fines, thus allowing the state to 'lease' them out, and the general popular sentiments and beliefs about African Americans at the time which made the scheme not only successful, but desired and desirable.

Concerns and debates surrounding agency and choice are particularly prevalent in respect of issues in which these are seen as constrained[157] – in other words, where the site of examination is implicitly one where a condition of unfreedom may exist, at least to a degree. However, the often polarizing nature of such debates, as was seen in relation to the prostitution/sex work divide in Chapter 1, frequently runs the risk of oversimplifying reality by either focusing too little on external factors and conditions which constrain options and choice, or by ignoring or dismissing the existence and ability to exercise choice even in constrained conditions.[158] As a result, individuals represented within such debates are often reduced to the problematic dichotomy introduced earlier, as either having full and free agency, or as being evacuated entirely of agency; "either as rational, responsible agents or as coerced, innocent victims."[159] The product of such debates entail a sustained focus on the individual factor out of social and legal context, and in a vacuum from the relational influences that may impact choice in a more nuanced manner.

[156] Blackmon, *supra* note 142 at 1. See also Tom Brass, "Capitalist Unfree Labour – A Contradiction?" (2009) 35:6 Critical Sociology 743 [Brass 2009] at 753 commenting on the convict leasing scheme and that, "the number of offences carrying a prison sentence was extended by the state, precisely in order to increase the number of unfree workers made available to capital through the convict lease system."
[157] See, i.e., Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Burlington, VT: Ashgate, 2013) at 11-48 for a detailed discussion of this in feminist contexts [Campbell].
[158] See Campbell, *ibid* at 12; Minow, *supra* note 140 at 2094.
[159] Campbell, *ibid* at 32.

However, agency, like freedom and other concepts discussed thus far in this thesis, is rather more complex and can be best seen as existing on a spectrum or continuum rather than as a binary.

Agency, understood as autonomy "plus options" in relation to viable choice,[160] is very closely related to freedom as process (autonomy) and opportunity (options). If freedom is a substantive state of being, then, we can characterize agency as the tool by which we are able to realize individual freedom. Therefore, the bundle of normative social and legal forces operating to constrain freedom do so through a deprivation of individual agency. In other words, such a theory of agency "helps to make sense of the socially determined subject's ability to act in the world because it emphasizes the social embeddedness of the individual choice maker and the way in which she is understood through salient, politically produced group identities, while also collecting within it the individually specific modes of taking up these external forces."[161]

However, this is not to say, particularly when considering underlying contextual factors such as gender, race and socio-economic status, that these characteristics inherently diminish the agency, or internal capacity, of an individual; it is rather how these characteristics interplay with other forces, are represented in social contexts, are impacted by or exist in relation to law, et cetera, which thus result in external norms and forces depriving or constraining agency. In other words, inherent characteristics do not equate with less internal capacity, but the way in which inherent or internal characteristics are represented by and relate to external structures and environments impact on the ability to exercise agency, by constructing particular legal and social identities which interact and operate in particular ways within the external environment.

[160] Campbell, *supra* note 157 at 11, citing also Carisa R Showden, *Choices Women Make: Agency in Domestic Violence, Assisted Reproduction, and Sex Work* (Minneapolis, MN: University of Minnesota Press, 2011) at 1.
[161] Showden, *ibid*.

This approach to understanding agency seeks to avoid the oft-repeated problematic dichotomy of either infantilizing or paternalizing individuals by ignoring or dismissing completely the exercise of agency even in extremely constrained conditions, or condemning and morally judging individual choices with no reference to, or appreciation of, context.[162] Rather, this approach seeks to recognize agency and preserve the dignity of persons who must navigate choice within extremely constrained conditions, and account for an individual's own values and objectives in the decision-making process,[163] while also commanding greater attention to the multiple forces shaping those external conditions and the problematic ways in which they may interact and collectively impact upon individual experience and agency, a factor which law is often reticent to acknowledge.

Consider the issue of contract labour in the cotton industry in post-chattel slavery America. As mentioned earlier, labour provided by former slaves on farms and plantations was made through contractual arrangements, of which consent between parties is a cornerstone legal feature. Indeed, while former slaves who entered into such agreements consented and exercised their agency, navigating options and choosing for reasons which they likely attached good value to, such as economic necessity, that process of choice and the content of labour contracts cannot be abstracted from the broader social context of the time. Particularly in the Deep South, the widespread and deep-seeded belief about the inferiority of African Americans, coupled with near complete economic reliance on slave (or slave-like) labour for the existence and prosperity of the

[162] See, i.e., Campbell, *supra* note 157 at 12; Abramson, *supra* note 31 at 492.
[163] See Sen 1999, *supra* note 146 at 19.

cotton industry[164] are factors that cannot simply be ignored in considering the level of freedom and agency within which former slaves had to operate, or the breadth of 'viable options' available in this regard. Conversely, as some historians have also pointed out, during the period of legal chattel slavery in America, too often slaves are relegated as objects in discourse and scholarship, with no attention paid to the multiple ways in which they navigated and exercised choice within the extreme constraints presented by their situation.[165] A more meaningful approach to understanding agency and choice is thus able to locate and understand the tensions and balance existing between choice or agency and external constraints, giving voice and recognition to each independently, as well as to the dynamic interplay between them. In other words, "[d]iscerning the choices people make under massive restraints can accord them dignity and respect while highlighting the sources and shapes of their constraints."[166]

As the foregoing discussion and examples have illustrated, agency and freedom exist in relation, and are best seen as a spectral arrangement or process. External influences or impediments which constrain the exercise of both agency and freedom can be identified in relation to two important features: the set of available options or choices (opportunity), and the ability to exercise a particular choice in an autonomous manner (process). Further, external impediments or obstacles which constrain or inhibit the ability to exercise choice are, in many cases, inseparable from the underlying context (opportunity) in which an individual is situated. Thus, while the focus here remains on external impediments and influences, they must be seen in connection with the bundle of normative forces – social, legal, economic, and others – which operate to produce a specific context and state of unfreedom.

[164] See Blackmon, *supra* note 142 at 120-1.
[165] See, i.e., Minow, *supra* note 140 at 2094-5.
[166] Minow, *ibid* at 2096.

Unfreedom as a conceptual core for this analysis thus seeks to examine the active, external constraints which impact upon an individual's ability to exercise choice. This characterization is not limited to individual actors, as institutions and structures, such as the legal regime, can significantly impact on the level of freedom and agency which an individual can exercise. However, the concept of 'unfreedom' advanced here does rely on an active/passive distinction in this regard. While all law, for example, impacts upon an individual's decision-making process or ability to act or choose, some laws actively, rather than passively, constrain choice, and do so directly, as opposed to indirectly, as illustrated in the examples used in this section.

The concept of unfreedom in relation to migration issues, and of 'unfree labour' as a specific characterization of certain types of work, is not new. Indeed, as illustrated in this chapter, slavery, forced labour and other forms of servitude clearly fall within the ambit of 'unfreedom' as defined above. Historically, the transition from bonded and forced labour, as well as slavery, towards free contract labour was seen as a significant development in realizing individual freedom due to the power and mobility of labourers to negotiate employment and freely exchange in the market economy.[167] Yet, just as the formal legal abolition of slavery did not, in fact, abolish the social condition of slavery, as illustrated in this section, other forms of unfree labour have also not been eradicated, despite progress towards this goal. Reaching back to Marxist traditions, and beginning within an agrarian context and focused on areas in the Global South,[168] the concept of unfree labour has been rekindled and advanced in modern scholarship,[169]

[167] See, i.e., Sen 1999, *supra* note 146 at 28-30; Tom Brass, *Towards a Comparative Political Economy of Unfree Labour* (London: Frank Cass Publishers, 1999) at 9 [Brass 1999].
[168] See Brass, *ibid*; Sen 1999, *ibid* at 28-30.

with an increasing focus on inquiry in the context of labour migration and temporary work.[170] Broadly, modern scholarship concerning unfree labour has shifted towards focusing on the ways in which it is sustained in capitalist (as opposed to pre-capitalist) economies and societies, and the way in which various forces exert control over workers in a way which inhibits their mobility and power in the employment and broader market economy.[171] For example, as one author argues, "it is precisely when rural workers begin to exercise their freedom of movement or bargaining power […] that capital attempts to shift the balance of work-place power in its own direction once again by restricting labour mobility."[172] This body of scholarship has sought to advance a deeper understanding of unfreedom beyond chattel slavery, one which rejects the legal binary between total enslavement and total freedom,[173] and which does not assume formal recognition of freedom, or abolition of certain practices, under law equates to actual freedom,[174] but looks also the underlying bundle of normative forces impacting on individual experiences of unfreedom, as well as broader, external structures which facilitate exploitation.[175]

This thesis, then, takes up the work of further advancing the concept of unfreedom and unfree labour, and contributing to the resurgence in dialogue by connecting and developing the existing ideas and discussion in two important regards: first, as a new way of thinking about modern

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[169] See, i.e., Brass 1999, *supra* note 167; Robert Miles, *Capitalism and Unfree Labour* (London: Tavisock Publications, 1987); Sen 1999, *ibid* at 28-30; Brass 2009, *supra* note 156; Jim Hagan and Andrew Wells, "Brassed Off: The Question of Labour Unfreedom Revisited" (2000) 45 International Review of Social History 475; Stephanie Barrientos, Uma Kothari and Nicola Phillips, "Dynamics of Unfree Labour in the Contemporary Global Economy" (2013) 49:8 The Journal of Development Studies 1037 [Barrientos et al].

[170] See, i.e., Strauss, *supra* note 131; Judy Fudge and Kendra Strauss, eds, *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (New York: Routledge, 2014); Aziz Choudry and Adrian A Smith, eds, *Unfree Labour? Struggles of Migrant and Immigrant Workers in Canada* (Fernwood Publishing, 2014 *forthcoming*); Barrientos et al, *ibid* at 1037.

[171] See, i.e., Brass 1999, *supra* note 167 at 9-13; Barrientos et al, *ibid* at 1038.

[172] Brass 1999, *ibid* at 9.

[173] See, i.e., Brass 1999, *ibid* at 11; Barrientos et al, *supra* note 169 at 1038-9.

[174] See, i.e., Brass 1999, *ibid* at 19-20.

[175] See, i.e., Barrientos et al, *supra* note 169.

forms of exploitation, or human trafficking, beyond current narrow constructions of those concepts and un-rooted from their ideological underpinnings; and, second, by examining specifically how the *law* constructs and creates unfreedom and unfree labour, focusing on Global North contexts which are often presumed to embody and protect a significant greater number and extent of basic rights and freedoms for individuals. As we will see in the next chapter, contemporary migrant labour programs can be seen, in many regards, as recreating forced and bonded labour due to the constraints placed on both power and mobility of individual workers through existing regulations and governance features typical of these programs.

Unfreedom as a core conceptual framework for understanding 'human trafficking' in a new way brings together the key common thread of 'effective control' developed under the international legal definitions discussed within this chapter, as the conduct exerted by individual actors seeking to effect control over another person is a form of active, external constraints or impediments to exercising choice. However, the concept of unfreedom also enables an examination of the way in which the law, and regulatory regimes, governing specific contexts or populations further creates independent forms of unfreedom through the active constraint on choice, as well as how it contributes to the ability for individuals to exert effective control. The concept of unfreedom as related to law, then, enables both an examination of law's own creations of unfreedom, as well as how it facilitates unfree labour in private, individual interactions, such as in the employer-worker relationship. As discussed earlier in this thesis, migrant workers and issues of forced labour are often relegated to the background of discussions surrounding human trafficking, given the political ideologies and privileged conceptions associated with that label. Unfreedom as an alternative conceptual framework, then, also enables

a broader examination of the status and state of migrant work and its relationship to forced, or unfree, labour, while maintaining a connection to the key elements informing the former concept, as presented earlier in this chapter. Thus, overall, the concept of 'unfreedom' facilitates a much richer examination of the primary issues sought to be analyzed in this thesis. Using the framework of unfreedom, the next chapters will examine the state and status of migrant work in Canada, arguing that the Temporary Foreign Worker Programs and legal regulations surrounding its governance create many layers of unfreedom for migrant workers in Canada, and facilitate the existence of a significantly exploitative environment.

CHAPTER 3

THE REGULATORY STRUCTURE OF CANADA'S TEMPORARY FOREIGN WORKER PROGRAMS: CONDITIONS FOR AND OF UNFREEDOM

The recognition of systemic exploitative practices under the TFWPs in Canada, as well as increasing concerns regarding the existence of human trafficking under these programs,[1] has prompted little legislative change, and continues to be ignored as a site of labour exploitation. As Chapters 1 and 2 demonstrated, this may, in part, be the result of narrow understandings and interpretations of the dominant concepts associated with exploitation, and especially in relation to the idea of 'human trafficking'. As such, the conceptual framework of 'unfreedom' developed in Chapter 2 provide a much richer lens through which to investigate and understand the ways in which law, legal and public institutions, and individual actors contribute to migrant workers' experiences of abuse and exploitation. While Chapter 4 will explore the impact of conditions of unfreedom in facilitating abuse and exploitation on the ground, this chapter will explore how the regulatory structure of the Temporary Foreign Worker Programs creates underlying conditions of unfreedom that enable those problematic practices to happen.

[1] See, i.e., Fay Faraday, "Made in Canada How the Law Constructs Migrant Workers' Insecurity" (Metcalf Foundation: 2012) [Faraday 2012]; Eugenie Depatie-Pelletier and Khan Radi, eds, "Mistreatment of Temporary Foreign Workers in Canada: Overcoming Regulatory Barriers and Realities on the Ground" Metropolis Quebec Working Paper CMQ-Im no.46, 2011; Alberta Federation of Labour, "Entrenching Exploitation" (Edmonton: The Alberta Federation of Labour, 2009) [AFL 2009]; Alberta Federation of Labour, "Temporary Foreign Workers: Alberta's Disposable Workforce" (Edmonton: The Alberta Federation of Labour, 2007) [AFL 2007]; RCMP, "Human Trafficking in Canada" (Ottawa: Royal Canadian Mounted Police, 2010) [RCMP]; Lara Quarterman, Julie Kay and John Winterdyk, "Human Trafficking in Calgary: Informing a Localized Response", online: ACT Albera <www.actalberta.org>.

Temporary migration for low-skilled work is a rapidly expanding sector of immigration in many Global North countries, including Canada, the United States, and several European Union countries, as well as in Global South countries with booming economic growth like Qatar and the United Arab Emirates.[2] Migrants who participate in such programs are employed in industries which typically provide jobs of low pay and low skill level, and require a large number of flexible, seasonal workers,[3] such as agriculture, domestic work, construction, hospitality and service work, and other low-skilled jobs commonly characterized to as "3D" work: dirty, dangerous, and difficult.[4] These workers are thus relegated to some of the most precarious sectors of employment and industry, commonly fraught with issues regarding employment and safety standards.

Canada began introducing migrant workers to the economic landscape in the mid-1960s through the Seasonal Agricultural Workers Program [SAWP]. While the mid-1960s saw an explicit turn away from racially discriminatory immigration policy in Canada generally, the simultaneous

[2] See generally, International Labour Organization, *International Labour Migration: A Rights-Based Approach* (Geneva: ILO, 2010) at 1-2, 17 [ILO 2010], commenting on the general increases and trends in international migration around the globe; Catherine Dauvergne and Sarah Marsden, "The ideology of temporary labour migration in the post-global era" (2014) 18:2 Citizenship Studies 224 at 227-231 [Dauvergne and Marsden, "Ideology"] and Catherine Dauvergne and Sarah Marsden, "Beyond Numbers Versus Rights: Shifting the Parameters of Debate on Temporary Labour Migration" (2014) 15 Journal of International Migration & Integration 525 at 529-538 [Dauvergne and Marsden, "Beyond"], providing data on the trends in temporary labour migration in the United States, Canada, Australia and the United Kingdom; Martin Ruhs and Philip Martin, "Numbers vs. Rights: Trade-Offs and Guest Worker Programs" (2008) 42:1 International Migration Review 249 [Ruhs and Martin]; Delphine Nakache and Paula J. Kinoshita. "The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?" IRPP Study No.5 (May 2010) online: IRPP <http://www.irpp.org> at 3-4, providing an overview of the increase in the Canadian context [Nakache and Kinoshita].

[3] Dowling et al, "Trafficking for the purposes of labour exploitation: a literature review" online: *Home Office Research Development Statistics* <http://www.homeoffice.gov.uk/rds> at 7 [Dowling et al]; see also Bethany Hastie, "Doing Canada's dirty work: a critical analysis of law and policy to address labour exploitation trafficking" in Ato Quayson and Antonela Arhin, eds, *Labour Migration, Human Trafficking and Multinational Corporations: The commodification of illicit flows* (New York: Routledge, 2012), 121 at 121 [Hastie].

[4] International Labour Conference, *Towards a Fair Deal for Migrant Workers in the Global Economy* (Report IV), ILO, 92nd sess. (2004), at 11 [ILO 2004]; Hastie, *ibid* at 121.

introduction of this program implicitly maintained a racialized dimension towards migrants.[5] The SAWP program invited migrants from Caribbean countries, and later Mexico,[6] to labour in Canada's agricultural sectors for eight-month periods. The program was, as it still is, conducted through bilateral agreements between the Canadian government and sending country governments. In its first year of operation (1966), the SAWP program brought in 264 workers from Jamaica.[7] Today, over 20,000 migrants participate in the SAWP program on a yearly basis.[8] The general 'Temporary Foreign Worker Program' was formally introduced in Canada in the 1970s, though the early 2000s saw a significant shift in this program with the introduction of low-skill occupations under the "Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C and D))" in 2002, now termed the "Stream for Lower-Skilled Occupations [SLO].[9] Since that time, the number of migrant workers entering Canada has grown exponentially: in 2003, 2,327 migrants entered Canada under the SLO; in 2012, that number

[5] See Patti Tamara Lenard and Christine Straehle, "Introduction" in Patti Tamara Lenard and Christine Straehle, eds, *Legislated Inequality: Temporary Labour Migration in Canada* (Montreal: McGill-Queen's University Press, 2012) at 5-6, 12 [Lenard and Straehle]; Sarah Marsden, "The New Precariousness: Temporary Migrants and the Law in Canada" (2012) 27:2 Canadian Journal of Law and Society 209 at 212 [Marsden 2012]. Re the continued racialization of migration policy and towards migrant in Canada, see also, Nandita Sharma, "The "Difference" that Borders Make: "Temporary Foreign Workers" and the Social Organization of Unfreedom in Canada" in Patti Tamara Lenard and Christine Straehle, eds, *Legislated Inequality: Temporary Labour Migration in Canada* (Montreal: McGill-Queen's University Press, 2012) 26 [Sharma 2012]; Nandita Sharma, *Home Economics: Nationalism and the Making of 'Migrant Workers' in Canada* (Toronto: University of Toronto Press, 2006) [Sharma 2006]; Vic Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada since 1945* (London: Routledge, 1991) [Satzewich].

[6] In 1974. Lenard and Straehle, *ibid* at 8.

[7] Lenard and Straehle, *ibid* at 8; for a brief history concerning the TFWPs in Canada, see also Canadian Labour Congress, "Canada's Temporary Foreign Worker Program (TFWP): Model Program – or Mistake?" (April 2011) online: <http://www.canadianlabour.ca.> at 2-3 [CLC].

[8] Lenard and Straehle, *ibid* at 9.

[9] See, i.e., Dominique Gross, "Temporary Foreign Workers in Canada: Are They Really Filling Labour Shortages?" Commentary No. 47, CD Howe Institute, April 2014, available online: <http://www.cdhowe.org/pdf/commentary_407.pdf> [Gross]. See also, Employment and Social Development Canada, online: <http://www.esdc.gc.ca/eng/jobs/foreign_workers/lower_skilled/index.shtml>. Occupations under NOC C and D typically require a secondary school education and/or job-specific training (NOC C) or on-the-job training (NOC D). See Statistics Canada, "National Occupation Classification 2011" (Ottawa: Ministry of Industry, 2012) online: <http://www.statcan.gc.ca/pub/12-583-x/12-583-x2011001-eng.pdf>. See also, Nakache and Kinoshita, *supra* note 2 at 4-5 for an overview of the evolution of the TFWPs.

grew to 20,636.[10] Together, migrants coming in under the SLO and SAWP made up a combined 21.6% of overall 'foreign worker' entry into Canada in 2012.[11] In addition to the increasing use of the programs in the past decade, the TFWPs have seen significant flux and change in its regulatory structure, such as the expansion and constriction of qualifying occupations under particularly the NOC C and D ("low skill") classifications, the introduction and removal of an accelerated Labour Market Opinion [LMO] process, and the brief allowance of differential pay structures for migrant workers.[12]

This chapter will explore broadly the issue of low-skilled labour migration, and use of temporary migrant worker programs, in the globalized economy, as a way to contextualize and outline specific issues that bear directly on this population's vulnerability to exploitation and which create conditions for and of 'unfreedom'. To begin, section I will discuss broadly the issue of low-skilled labour migration in the globalized world, examining both the underlying motivations which have given rise to a substantial increase of this form of migration in recent decades, and the political construction of the low-skilled labour migrant as an "othered" figure. This underlying context, dependent on the creation and sustenance of a migrant economy in which differential rights are normalized and migrants are systematically excluded from social, political and legal belonging, exposes a landscape which produces conditions *for* unfreedom. Sections II-

[10] Citizenship and Immigration Canada, "Facts and Figures 2012 – Immigration overview: Permanent and temporary residents" available online: <http://www.cic.gc.ca/english/resources/statistics/facts2012/temporary/05.asp>.
[11] *Ibid.* As set out in the Introduction to this thesis, the analysis of the TFWPs will be limited to the SLO and SAWP streams; the Live-In Caregivers Program, a third 'lower-skilled' stream, is excluded from this thesis because of the many unique features bearing on that program, as discussed in the Introduction.
[12] With respect to the pay differential structures, a regulatory measure introduced allowed employers to pay migrant workers 15% less than Canadian counterparts for highly skilled workers, and 5% less for low-skill workers; this measure was quickly revoked. See: "Two-Tiered Wage System Allowed by Tories", *The Toronto Star* (28 April 2012) online: The Toronto Star <http://www.thestar.com >; Nicholas Keung, "Wage cuts for foreign workers in Canada discriminatory, critics say", *The Toronto Star* (24 May 2012) online: The Toronto Star < http://www.thestar.com >; Stephanie Levitz, "Harper government reverses course, halts '15% rule' on temporary foreign labour", *The National Post* (29 April 2013) online: The National Post < http://news.nationalpost.com>.

IV will then turn to interrogate the regulatory structure of the TFWPs, and specific measures under the programs which produce conditions *of* unfreedom for migrant workers, including: the employer-specific work permit; limits on participation and time in Canada and the lack of access to permanent residency; and, jurisdictional limitations with respect to the regulation of employers and third-party recruiters. The regulatory regime, and the specific measures discussed, establish that the law operates largely not as a "means of protecting migrants' employment rights" but as mechanisms which "produce uncertainty and dependence,"[13] constructing and reifying the 'othered' and precarious status of migrant workers to the benefit of the state. Just as the underlying context creating conditions *for* unfreedom and its interaction with regulatory measures which create conditions *of* unfreedom can be viewed as 'layers' bearing, cumulatively, on the experience of migrant workers, we will also see that the regulatory measures themselves act similarly as a 'layered' landscape of unfreedom, and as a foundational layer from which further unfreedom is experienced by migrant workers subjected to abusive and exploitative practices, which will be explored in Chapter 4.

Before engaging in this analysis, however, a note on the labelling and language used to describe the migrant worker is necessary. Formal legal institutions and structures in Canada refer to this population as "temporary foreign workers", which contributes to a label that propels forward the underlying notion of "otherness" for this population – they are othered both in relation to their status in Canada (being temporary), as well as their status in relation to 'Canadians' (being foreign).[14] Thus, at the outset, any analysis exposing the construction of the migrant worker as 'other' must give recognition to this labelling and its implications. This chapter will thus use the

[13] Bridget Anderson, "Migration, immigration controls and the fashioning of precarious workers" (2010) 24 *Work Employment Society* 300 at 313 [Anderson].
[14] See Faraday 2012, *supra* note 1 at 16.

term ‘migrant workers’, as has been used throughout this thesis so far, in an attempt to create distance between an objective reality and the political construction of this group. In addition, while the label of ‘low-skilled’ work is contested, and rightly so, this chapter will adopt this label to ensure clarity regarding the immigration streams and type of industries being discussed.

I. Understanding Low-skilled Labour Migration in the Globalized World: Conditions *for* Unfreedom

Low-skilled labour migration, and the use of temporary labour migration programs specifically, have seen rapid expansion across the globe in the past decades, concomitant with the rise of globalization and increased ease with which goods, capital and people can move across territorial boundaries: “[G]lobal capitalism creates immigrant workers.”[15] The growth of temporary migrant labour programs, specifically, is a noted trend with respect to how labour markets and mobility are being negotiated transnationally in both Global North and South nations. Though labour migration and mobility may, at first, be seen as a promising feature of the globalized world, it has operated in some ways to reinforce the divide between wealth and poverty, and between ‘us’ (being citizens) and ‘them’ (being migrants). In this way, labour mobility agreements, as with the concept of globalization more generally, serves an important role in reinforcing the idea of territorial sovereignty and the concept of the nation-state:

> Despite its rhetoric, global capital does not aim at the elimination of national borders; rather, the border regime legalises ‘foreign and temporary’ worker programmes for the benefit of capital interests. The role of the nation state

[15] Harsha Walia, “Transient servitude: migrant labour in Canada and the apartheid of citizenship” (2010) 52 *Race Class* 71 at 72 [Walia].

> remains pivotal in a globalised economy, providing the principal means for disciplining the workforce.[16]

Unpacking the underlying claims and motivations, from the state or 'demand' perspective, of temporary labour migration is often pushed to the background of discussions about low-skilled labour migration, particularly, which often focus on the reasons individual migrants migrate for work and the 'root causes', or poor socio-economic conditions, in their origin countries which create the motivation to migrate for work. Understanding both the "pull" [demand] and "push" [supply] factors associated with low-skilled labour migration is necessary to gain a deeper and more complete understanding of the underlying context in which many temporary foreign workers operate when navigating choices related to their employment and conditions abroad. This section with thus explore the broader context of low-skilled labour migration in order to expose the multiple normative forces often at play where migrant work is concerned, the ways in which migrant work and workers are constructed by and in receiving states, and the problematic underpinnings and assumptions that have given rise to, and accompany the continued existence of, temporary low-skill labour migration programs in their current form.

Although labour migrants may come from many places in the world, "in practice they hail from poor nations whose populations are often racially and ethnically distinct"[17] from the destination country in which migrant labourers work. Low-skilled labour migrants generally migrate from countries and regions characterized by economic instability and high unemployment, and where

[16] Walia, *supra* note 15 at 73. See also, Dauvergne and Marsden, "Ideology", *supra* note 2 at 226-232, discussing the ideology of 'temporariness'; Sharma 2012, *supra* note 5; Anderson, *supra* note 13at 303.
[17] Lenard and Straehle, *supra* note 5 at 12; see also, Judy Fudge, "The Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers" (Metropolis British Columbia Working Paper Series No. 11–15, 2011) at 30; Sharma 2012, *supra* note 5 at 35-40, discussing representations of "difference" that are often associated with temporary migrant workers.

other social and cultural conditions may impact their economic power, such as gender, education and class.[18] Temporary labour migration programs are thus sustained by, and depend upon, "the existence of structural inequalities (underdevelopment, unemployment, underemployment) and income inequalities between developed and developing economies."[19] Indeed, at the heart of any discussion about migration, particularly for work, is the economic motivation which most often lies at the core of the decision-making process for individual migrants. This characterization of the economic dynamics of labour migration thus centres on the individual migrant, and not the demand of receiving states, and does so in a way which also allocates full responsibility for and free agency in decision-making process of the migrant, thus obscuring the broader context in which economic inequality is a desirable and necessary trait to propel forward, particularly, low-skilled temporary labour migration.

The significant growth of temporary labour migration programs can be primarily attributed to two important claims: first, the need for states to access a pool of labour for industries which are often seen as either new 'booming' economic sectors, or which are characterized by chronic labour shortages; and, second, the unwillingness of citizens to take on certain types of work. These claims, in fact, often operate as 'myths' which simplify the complex reality in which migrant labour often occurs, and which must be unpacked in order to better understand the underlying features of the labour landscape which operate to create precarious work conditions for migrants. Lying beneath these claims is, in fact, a reality which structurally embeds the need for migrant labour within the economic landscape, and which operates to create an extreme form

[18] Faraday 2012, *supra* note 1. See also CLC, *supra* note 7 at 13. See also, Leigh Binford, "From Fields of Power to Fields of Sweat: the dual process of constructing temporary migrant labour in Mexico and Canada" (2009) 30:3 Third World Quarterly 503 at 504 [Binford].
[19] Faraday 2012, *ibid*. See also, Dauvergne and Marsden, "Beyond", *supra* note 2; Ruhs and Martin, *supra* note 2; Dauvergne and Marsden, "Ideology", *supra* note 2; Sharma 2012, *supra* note 5.

of commodification of individual migrants involved in temporary labour programs. In other words, temporary migrant worker programs create a disposable workforce which, ultimately, plays a significant and critical role in the continued economic growth and industrial prosperity of states competing in the global marketplace.

The rise of low-skilled (as opposed to highly skilled) migration is often explained as the result of "a labour market need for migrant workers to fill jobs that indigenous workers reject[.]"[20] Common to the various industries dependent on migrant labour is the need for a highly flexible, seasonal, and low-skilled workforce willing to accept jobs of low pay.[21] Notably absent from the commonalities of migrant-reliant industries is the presence and influence of unions and other labour rights groups.[22] These industries are often characterized by the nature of the work as "dirty, dangerous and difficult",[23] and include, predominantly, agriculture, hospitality services, construction, and caregiving,[24] among other employment sectors. It is thus the nature of the work which is often put forth in support of the claim that citizens, or 'indigenous' workers, reject certain jobs in certain economic sectors. However, this explanation ignores the role of employers

[20] Robert MacKenzie and Chris Forde, "The rhetoric of the 'good worker' versus the realities of employers' use and the experiences of migrant workers" (2009) 23 Work Employment Society 142 at 144 [MacKenzie and Forde]. See also, Dauvergne and Marsden, "Ideology", *supra* note 2 at 231-5, discussing the function of ideology in constructing labour markets in relation to temporary migrant work. See also, Harald Bauder, "Foreign farm workers in Ontario (Canada): Exclusionary discourse in the newsprint media" (2008) 35:1 The Journal of Peasant Studies 100 at 107-8 [Bauder], discussing representations of migrant workers as an 'economic necessity', in part, attributable to the gap created by Canadian workers leaving to work in 'more lucrative industries'. Bauder's analysis of newsprint media representations related to the depiction of migrant workers as an 'economic necessity' also identifies some presentations of the structural nature of and reliance on migrant work programs. Relatedly, see Sharma 2012, *supra* note 5 at 38, discussing the racialized narrative that migrant workers are more "naturally inclined" to the types of work and conditions seen as undesirable (and therefore, often rejected) by Canadians.
[21] Dowling et al, *supra* note 3 at 7. See also, Sharma 2012, *ibid*.
[22] See MacKenzie and Forde, *supra* note 20 at 144.
[23] ILO 2004, *supra* note 4 at 11; see also, Cindy Hahamovitch, "Creating Perfect Immigrants: Guestworkers of the Word in Historical Perspective" (2003) 44:1 Labor History 69 at 94 [Hahamovitch].
[24] See, i.e., Binford, *supra* note 18 at 504; Fudge, *supra* note 17 at 28-29; Sharma 2012, *supra* note 5.

and the state in creating a migrant economy.[25] The industries in which migrant labour has become reliant require workers who are willing to accept low pay and poor working conditions; these factors are seen as necessary to the survival of the industry. However, this underlying factor which creates the need for a migrant economy is not often discussed.

In Canada, despite rhetoric which positions migrant workers as 'stealing' jobs from Canadians and undercutting workplace and pay standards, use of the TFWPs increased significantly in the past decade.[26] However, newly announced changes to the TFWPs seek to limit the participation of migrant workers in some industries by tying the use of migrant workers to the unemployment rate of a given region, and creating a cap on the number of "low-wage" migrant workers an employer may hire based on a percentage of that employer's total workforce at a given worksite.[27] These changes have been introduced, in part, to ostensibly promote the employment of Canadian workers, as also suggested by the title of the ESDC webpage: "Overhauling the Temporary Foreign Worker Program: Putting Canadians First."[28] For example, as a part of the changes to the LMO (now to be called the Labour Market Impact Assessment (LMIA)) process, employers will be required to provide information on the number of Canadians that applied for the available job, the number of Canadians interviewed, and an explanation of why those individuals were not hired.[29] In addition, employers applying for an LMIA will now be required to attest to the rule that Canadians cannot be laid-off or have their hours reduced at a worksite

[25] MacKenzie and Forde, *supra* note 20 at 144; see also, Dauvergne and Marsden, "Ideology", *supra* note 2 at 231-5; Dauvergne and Marsden, "Beyond", *supra* note 2 at 538.
[26] From 2002 to 2013, the total number of low-skilled migrant workers entering Canada more than doubled from 25,555 to 55,651: Government of Canada, *Overhauling the Temporary Foreign Worker Program: Putting Canadians First* (Ottawa: Government of Canada, 2014) online: Employment and Social Development Canada <http:// http://www.esdc.gc.ca> [Canada 2014]. See, also, Sharma 2012, *supra* note 5 at 31.
[27] See, Canada 2014, *ibid.*
[28] *Ibid.*
[29] *Ibid* at 9.

where migrant workers are or will be employed.[30] The government report outlining the changes states that "[…]the TFWP is no longer being used as it was intended to be used – as a last and limited resort to allow employers to bring foreign workers to Canada on a temporary basis to fill jobs for which qualified Canadians are not available." Yet, this is a vastly oversimplified description of the reality in which the use of the TFWPs has expanded so rapidly, and thus, the announced changes fail to meaningfully engage with the deeper, structural issues existing with respect to a reliance on low-skilled migrant work.

Along with the often ignored reality that the claim of job-rejection by citizen workers is underpinned by the constructed need for a migrant economy, the permanent nature of that need is also often ignored in discourse surrounding migrant labour. For many industries, such as agriculture, the reliance on temporary migrant labour is historically embedded in the economic model that underpins the continued existence of these sectors. For example, the use of temporary migrant workers under the Canadian Seasonal Agricultural Program (SAWP) – dates back to the 1960s,[31] with ever-increasing numbers of migrant workers admitted to the program each year. It appears a trite conclusion to draw, 50 years later, that the need for migrant labour in this industry is permanent, not temporary, in nature. Demand for migrant labour has "remained constant through periods of unemployment and through periods of high and low permanent migration quotas" in Canada.[32] Thus, it is not a wholly external or 'natural' labour market force which has

[30] Canada 2014, *supra* note 26.
[31] See, Lenard and Straehle, *supra* note 5; Satzewich, *supra* note 5; Kerry Preibisch and Jenna L Hennebry, "Buy Local, Hire Global: Temporary Migration in Canadian Agriculture" in Patti Tama Lenard and Christine Straehle, eds, *Legislated Inequality: Temporary Labour Migration in Canada* (Montreal: McGill-Queen's University Press, 2012) 48 at 51-2 [Preibisch and Hennebry].
[32] Sarah Marsden, "Assessing the Regulation of Temporary Foreign Workers in Canada" (2011) 49 Osgoode Hall LJ 39 at 46 [Marsden 2011], citing Sharma 2006, *supra* note 5; see also, Jenna L Hennebry and Kerry Preibisch, "A Model for Managed Migration? Re-Examining Best Practices in Canada's Seasonal Agricultural Worker Program" (2010) 50 International Migration 19 at 22 [Hennebry and Preibisch]; Delphine Nakache and Sarah D'Aoust,

created a [temporary] need for migrant workers to fill labour shortages. State-implemented policies and enacted laws have actively and directly generated conditions in certain employment and economic sectors which create the need for a migrant economy. Indeed, even with the newly announced changes to the TFWPs, caps on employment are not applicable to the categories of "primary agriculture" and live-in caregivers, suggesting an understanding of the permanent and entrenched need for migrant workers in certain economic sectors.[33] The reliance on temporary migrant work is therefore of both a *permanent* and *structural* character. Yet, there exists a continued denial of paths to permanent migration for this pool of workers.

The maintenance of temporary status for some groups of migrant labourers creates a particular type of legality[34] (in terms of status) which greatly benefits the state, employers and the economic landscape by enabling the importation, or immigration of *labour*, but not *people*. 'Temporary foreign workers' are subject to a "categorical slight of hand" in that they are not only non-citizens, but also non-immigrants.[35] The state "creates a variety of different migration statuses, some of which are highly precarious, that in turn produce a differentiated supply of labour that produces precarious workers and precarious employment norms."[36] The demand for a cheap, highly flexible workforce is better met where the workforce population can be excluded and contained. The proliferation of use of 'temporary foreign worker programs' enables states to

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"Provincial/Territorial Nominee Programs: An Avenue to Permanent Residency for Low-Skilled Temporary Foreign Workers?" in Patti Tamara Lenard and Christine Straehle, eds, *Legislated Inequality: Temporary Labour Migration in Canada* (Montreal: McGill-Queen's University Press, 2012) 158 at 159 [Nakache and D'Aoust].

[33] Canada 2014, *supra* note 26 at 26.

[34] Anderson, *supra* note 13 at 306-7, citing Harald Bauder, *Labor Movement: How Migration Regulates Labor Markets* (Oxford: Oxford University Press, 2006); Sharma 2006, *supra* note 5; Bridget Anderson and Martin Ruhs, "Migrant Workers: Who Needs Them? A Framework for the Analysis of Staff Shortages, Immigration and Public Policy" in Martin Ruhs and Brigdet Anderson, eds, *Who Needs Migrant Workers? Labour Shortages, Immigration and Public Policy* (Oxford: Oxford University Press, 2010).

[35] Sharma 2012, *supra* note 5 at 29,

[36] Fudge, *supra* note 17 at 6, cited also in Marsden 2012, *supra* note 5 at 210.

organize immigration and labour regimes to include this group specifically in a way which excludes and contains them, by making migrant workers "vulnerable to employers' demands through their subordinated status as "temporary," as "foreigners," and as legally enforced unfree workers,"[37] and thus creating a type of legality which is subject to greater private and public power than would be over 'citizens' and 'permanent residents.'[38] The exclusion of migrant workers – socially, politically, and legally – facilitates and supports the regulatory regime designed to achieve the state's economic objectives.[39]

The decision to utilize migrant labour to 'fill the gaps' reinforces the idea of the migrant worker as 'other' – willing to do work and under conditions which citizens and residents would not accept. Thus, states are able to "access migrants' productive power while abdicating responsibility for the rights of temporary labourers that would normally be expected for citizens or landed immigrants."[40] By using *temporary* migrant labour programs, the state is able to alleviate much of the financial and social burden it would otherwise have towards this group of migrants. In this way, the idea of "differential rights for certain (non-citizen) groups become normalized."[41] Migrant workers in Canada are distinguishable from permanent residents in relation to many rights and freedoms, including: the nature of their legal status, access to social and economic benefits, rights of and access to democratic representation and participation, and

[37] Sharma 2012, *supra* note 5 at 33.
[38] *Ibid.*
[39] Relatedly, see Bauder, *supra* note 20 at 112, commenting on how the positive perception of migrant workers as 'economic necessity' complements the negative image of migrant workers as a 'social problem' because the former encourages productive use of migrant workers as labour, while simultaneously enabling the social exclusion of migrants from the community.
[40] Janet McLaughlin, "Classifying the "ideal migrant worker": Mexican and Jamaican transnational farmworkers in Canada" (2010) 57 Focaal - Journal of Global and Historical Anthropology 79 at 80 [McLaughlin]. See also, Hahamovitch, *supra* note 23 at 72-3, and 92-4; Ruhs and Martin, *supra* note 2; Dauvergne and Marsden, "Beyond", *supra* note 2.
[41] McLaughlin, *ibid* at 80. see also, Ruhs and Martin, *ibid* at 254, suggesting that particularly as concerns low-skill labour migration, the ready supply or pool of potential migrants to fill demand creates a correlative 'downward sloping' with respect to migrants' rights.

labour mobility.[42] In other words, the construction of 'temporary foreign workers' "exist[s] within a state bureaucratic classification scheme designed to hold people in a *particular* relationship of exploitation and social/political subordination."[43]

This normalization of differential rights is particularly acute in the discourse surrounding migrant workers and, particularly, with respect to low-skilled temporary labour migration programs. The normalization of the 'othering' and exclusion of migrant workers creates a

> two-tiered society, in which some residents and citizens may develop their human potential and integrate under conditions of relative freedom, while certain categories of migrant workers are systematically excluded from national membership. Such migrants are only permitted temporarily, so long as they perform a certain script, and accept living and working under conditions of relative unfreedom.[44]

Thus, the use of and reliance on temporary migrant labour represents, in fact, the creation of an extreme form of commodification, which ultimately sees this population as a 'good' to be distributed in the globalized economy and used for economic profit and the benefit of the state.[45] The consequence of this drive towards temporary migrant labour results in state-initiated and state-controlled vulnerability of individual workers.[46]

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[42] Marsden 2011, *supra* note 32 at 45; see also, Hennebry and Preibisch, *supra* note 32 at 20, noting that temporary migrant worker programs for low or unskilled occupations are "generally designed to prevent settlement and restrict mobility."; Kerry Priebisch, "Pick-Your-Own Labour: Migrant Workers and Flexibility in Canadian Agriculture" (2010) 44:2 *International Migration Review* 404 at 409, noting that "a key feature of TMWPs [temporary migrant worker programs] has always been restrictions on labor mobility and limits on migrant's social and political franchise more broadly."; Sharma 2012, *supra* note 5 at 36.

[43] Sharma 2012, *ibid* at 35 [emphasis in original].

[44] McLaughlin, *supra* note 40 at 81. See also, Nakache and D'Aoust, *supra* note 32 at 159-61, commenting on the differential rights afforded to skilled migrants and low-skilled migrants, with the former being enticed to remain permanently in Canada, and the latter being strictly regulated to depart Canada on completion of their employment.

[45] Walia, *supra* note 15 at 72.

[46] See MacKenzie and Forde, *supra* note 20 at 144; see also, Bauder, *supra* note 20 at 100-101, in stating the reasons why migrant workers are attractive, in part, that "they are more vulnerable and exploitable than Canadian workers; they can be treated in ways not permitted by Canadian labour standards[.]"

Overall, the underlying reasons why temporary labour migration programs, specifically, are highly desirable for receiving states has largely to do with the ability to access a ready pool of flexible and disposable labour with minimal cost and attending obligations. The maintenance of temporary labour migration programs, as opposed to programs which offer a path towards permanent immigration, is undoubtedly due, in large part, to the benefits which the current regime impart on the State and domestic economy. "The exceptional freedom of globalised capital stands in stark contrast to the restrictions on those migrant workers whose precarious labour secures corporate profits."[47] The construction of an 'othered' status for migrant workers, in combination with the objectives of the state and structure of the resulting programs, create a "perfect workforce": "commodified and exploitable; flexible and expendable."[48] The next sections will go on to examine how specific legal regulations under the TFWPs work to produce conditions for and of unfreedom, and largely replicate the landscape and images of migrant labour, and labourers, described above.

II. IMMOBILITY AS UNFREEDOM: THE EMPLOYER-SPECIFIC WORK PERMIT

Whether or not mobility is seen as integral to freedom, mobility is certainly one site where the existence and exercise of 'freedom' – and unfreedom – can be examined. If we understand broadly the idea of freedom as encompassing both the capacity and ability to choose to do something, as discussed in the previous chapter, mobility plays an integral role in the latter

[47] Walia, *supra* note 15 at 72. See, relatedly, Ruhs and Martin, *supra* note 2 for a discussion of the perceived 'trade-off' between numbers of migrant workers (and labour costs), and rights afforded to them (seen as increasing labour costs).
[48] Walia, *ibid.*

conceptualization of freedom as *ability*. Though mobility can be characterized in many ways, this section focuses on the concept of mobility as both potential and actual movement, and in relation to both geographic and relational spaces. Mobility is thus concerned with both the *potential* to move (or not move) and the *ease* of movement.[49] In addition, while the coerced or compelled movement of people can certainly represent unfreedom in another setting,[50] this section is concerned with the ability to exercise choice in respect of movement or mobility where it will be typically desirable to do so, though, as mentioned above, it also implies an ability to choose *not* to move.

Determining the existence or extent of mobility thus requires us to look at what constraints exist which indicate inertia or resistance;[51] in other words, *immobility* is characterized by the obstacles or impediments to exercising the choice to move (or not move). As outlined in Chapter 2, 'unfreedom' as a conceptual framework looks primarily to those actors – both individual and institutional – who create obstacles or impediments to exercising choice. Bringing this back to the link with mobility, then, immobility bears on a state of 'unfreedom' where there exist active, external constraints on the ability to choose or exercise movement across a geographic or relational space. In this regard, the link between mobility and power may also be examined,[52] particularly from a legal perspective, as individuals with greater legal power (i.e., formal and/or permanent status) will often have greater freedom in respect of mobility.

[49] Tore Sager, "Freedom as Mobility: Implications of the Distinction between Actual and Potential Travelling" (2006) 1:3 Mobilities 465 at 466 [Sager].
[50] See, i.e., *ibid* at 471-2.
[51] *Ibid* at 467.
[52] See *ibid* at 471.

Migrant workers in Canada experience significant immobility, both in terms of their potential for and ease of geographic and relational movement, as a result of the employer-specific work permit system used to regulate entry and employment under the TFWPs. All of the TFWPs in Canada designate a work permit on the basis of employment at single location for a single employer.[53] This means that valid status and authorization to work in Canada is dependent on a migrant worker remaining with the employer, in the job, and at the location, listed on their work permit. When examining this regulatory feature through the lens of 'unfreedom' and immobility, then, the work-permit system is static in nature. The work-permit regulations actively constrain and create obstacles to a migrant worker exercising choice in both geographic movement (as their work permit is provided for a single geographic location) and relational movement (as their work permit is provided for a single employer). The work permit system also creates reliance by the worker on the employer not just for wages or a job, but also for legal status in Canada, and effectively prevents the worker from freely circulating in the labour market.[54] If, for example, a worker is dissatisfied with the working or living conditions of his employment, or where an employer is not fulfilling the contractual promises or is being abusive, migrant workers "*cannot*, for the most part, leave their employment and seek alternative employment without the written permission of the Canadian state."[55]

[53] See *Immigration and Refugee Protection Regulations*, SOR/2002-227, 185(b). See also, Nakache and Kinoshita, *supra* note 2 at 17-18.
[54] See, i.e., Marsden 2011, *supra* note 32 at 51; Jenna Hennebry, "Permanently Temporary? Agricultural Migrant Workers and Their Integration in Canada" (2012) *IRPP* No.26 [Hennebry 2012]; Binford, *supra* note 18 at 507; Fudge, *supra* note 17 at 5; Satzewich, *supra* note 5; Robert Miles, *Capitalism and Unfree Labour: Anomaly or Necessity?* (New York: Tavistock Publications, 1987); Tanya Basok, *Tortillas and Tomatoes: Transmigrant Mexican Harvesters in Canada* (Montreal: McGill-Queen's University Press, 2002); Hennebry and Preibisch, *supra* note 32 at 25. A similar system of 'sponsorship' for categories of labour migrants exists in the UK, with similar noted consequences: see Anderson, *supra* note 13 at 309.
[55] Sharma 2012, *supra* note 5 at 36. See also, Nakache and Kinoshita, *supra* note 2 at 17-8.

While procedures to exist, 'on paper', which allow a migrant worker to leave an employer and find other employment, in practice this is tremendously difficult given the procedural steps and timelines associated with the process.[56] "Although the processing time for a new work permit with a new employer has been reduced significantly since November 2008, the overall wait time for finding a new job, obtaining a new labour market opinion, and getting a new work permit is at least three to six months."[57] To date, there is no dedicated initiative to match existing migrant workers in Canada with available employers (i.e., those who have a positive LMO).[58] In addition, workers' may not have knowledge of the possibility to change employers; though, if they have, this is likely perceived as a high-risk endeavour. Further, the outcome of successfully securing another LMO would only be the issuance of a new permit "bonding" the worker to a new employer.[59] Thus, the "bonded nature"[60] of the work permit system "limits the worker's ability to change employers and thereby gives the employer considerable power over the employee."[61]

The impact of the employer-specific work permit on migrant workers is particularly acute because of the correlation between mobility and power (or lack thereof) and its impact on the employment relationship.[62] The power imbalance between employer and migrant worker created

[56] See Delphine Nakache, "The Canadian Temporary Foreign Worker Program: Regulations, Practices, and Protection Gaps" in Luin Goldring and Patricia Landolt, eds, *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (Toronto: University of Toronto Press, 2013) at 78 [Nakache]; Nakache and Kinoshita, *supra* note 2 at 17-8.
[57] Nakache, *ibid* at 78.
[58] See *ibid.*
[59] Marsden 2011, *supra* note 32 at 51.
[60] *Ibid.*
[61] House of Commons. Standing Committee on Citizenship and Immigration, "Temporary Foreign Workers and Non-Status Workers" (May 2009) (Chair: David Tilson, MP) at 24 [Standing Committee Report]. See also Nakache, *supra* note 56 at 77; Nakache and Kinoshita, *supra* note 2 at 39.
[62] Standing Committee Report, *ibid* at 24; Faraday, *supra* note 1 at 76; Anette Sikka, *Labour Trafficking in Canada: Indicators, Stakeholders, and Investigative Methods*, Report No.42 (Ottawa: Public Safety Canada, 2013) at 10

by the work permit system has been described as "the baseline of precariousness" for migrant workers, and this "baseline of precariousness colours every stage of the labour migration cycle."[63] Both the work permit and status in Canada are contingent and temporary, and most importantly, linked together.[64] The employer-specific work permit means that an individual migrant worker is dependent on his or her employer not just for the job or wages, but also for status in Canada;[65] the impact of status-dependence creates further and significant inequality of bargaining power, often assumed to be equal in employment and labour relations. Workers under SAWP are even more constrained in this respect, as employers have broad discretion and power to terminate workers for "noncompliance, refusal to work, or any other sufficient reason", and SAWP also includes an expedited repatriation regime, such that a worker who is terminated will typically be removed from Canada within 24-48 hours of termination.[66]

The employer-specific work permit was widely criticized by participants in the research study undertaken for this project. Many participants made a connection between the employer-specific work permit and vulnerability to exploitation and forced labour practices. For example, one participant described the work permit as a "control mechanism" in itself,[67] given the amount of power it provides to the employer, and thus simultaneously removes from a migrant worker. Elaborating on how the employer-specific work permits operates so effectively as a control mechanism, this participant commented:

> I think one of the huge issues we face is that the work permit is specific to one employer. When you have that kind of control over an individual, it's very easy

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[Sikka], commenting on the vulnerability created under the low-skill TFWPs, including the LCP, and the link between immigration status and vulnerability to trafficking; Marsden 2012, *supra* note 5; CLC, *supra* note 7 at 23.
[63] Faraday, *supra* note 1 at 61.
[64] See Hennebry 2012, *supra* note 54 at 22.
[65] Marsden 2012, *supra* note 5 at 217; similarly, re the UK context, see Anderson, *supra* note 13 at 309.
[66] Faraday, *supra* note 1 at 93; Sikka, *supra* note 62 at 17; Fudge, *supra* note 17 at 25.
[67] Participant 01.

> to play upon them and say to them again and again, Well, if you don't listen to me, I'm the only one you're allowed to work for. I'm going to tell CBSA or CIC that you did this and you are going to be deported. So that in itself is a control mechanism, because this individual came over with the idea that they were going to work for two years, three years. Maybe they were going to work towards their residency, because of that two or three years that they were going to spend here, they're not going to jeopardize that. By now, maybe what he is saying is true. I will get deported, so I better just put up with whatever he's asking me to put up with for two years. I think that's a huge issue.[68]

Thus, the immobility faced by individual migrant workers as a direct result of the way in which work permits are designated under the TFWP creates a significant obstacle to engaging with a free and full set of choices concerning their employment in Canada. In other words, this quote demonstrates the additional constraints placed on migrant workers' ability to exercise choice in respect of employment mobility when faced with abusive employers, by virtue of the fact that both their employment and immigration status are tied directly, and solely, to that employer.

Similarly, another participant noted the way in which the nature of the work permit immobilizes workers and makes them feel 'stuck' and without a choice to 'move on' when faced with an abusive situation:

> Because of the nature of the work permit is employer specific, occupation specific to the location and all that. When people come here, there's not a lot of mobility if something goes wrong with their job. […] What you get are people who are stuck in jobs, that with employers that are either verbally abusive or exploitative, are not paying them properly. Getting them to do lots of overtime work, and they feel they can't object. They feel, they also can't move on.[69]

Commenting also on the impact of the employer-specific work permit in relationship to choice, another participant explicitly connects this measure to the revocation of any viable options, characterizing the work permit as creating a system of bondage:

[68] Participant 01.
[69] Participant 15.

> I mean the problem is this: that foreign workers are basically in bondage. They've got a work permit that says you can only work for this employer. And everybody knows right now especially, if you get fired you are totally screwed. Totally. Just that fact alone, you've got absolutely no options, absolutely none. And there are so many employers who take advantage of that. That fact in and of itself creates a horrendous working condition. You have no options but to do whatever your employer directs you to do[.][70]

This quote demonstrates very clearly the link between immobility and unfreedom, as, recalling the definition of agency as autonomy plus viable options, the employer-specific work permit removes meaningful options and choice in negotiating employment by immobilizing and 'bonding' workers to a single employer.

Another participant noted that the employer-specific work permit not only creates vulnerability for the worker, but creates an opportunistic environment for employers to engage in abuse given the power imbalance inherent in the relationship:

> My view is that attachment to one employer creates tremendous vulnerability and also – I think most of the cases we've seen were opportunistic, not planned, not conceived for exploitation. But given the vulnerabilities, these employers go ahead and start to erode the standards of employment by not paying in full, by adding hours of work, by expecting more and more and more, by not providing the facilities that they committed to provide, et cetera, et cetera. I think the regulatory situation creates vulnerabilities and opportunities.[71]

Here we see how the regulatory environment itself creates conditions *of* unfreedom by constraining the choice and opportunity of migrant workers, and also creates conditions *for* unfreedom by constructing a situation in which the opportunity for exploitation and abuse becomes attractive and easily accomplished for unscrupulous employers, a theme which will be more fully explored in Chapter 4.

[70] Participant 09.
[71] Participant 06.

Overall, we can begin to see how the employer-specific work permit operates as the "baseline of precariousness", or in fact as a baseline of unfreedom for migrant workers, which infiltrates and impacts upon nearly every choice a migrant worker may have to negotiate during their time and employment in Canada. The immobility experienced by virtue of the work permit unreasonably constrains the ability for migrant workers to exercise agency and choice when faced with abuse and difficult decisions, as it creates a significant risk for choosing any option other than submitting to the demands of the employer. Building, then, on this baseline of unfreedom created by the employer-specific work permit, the next section will go onto consider how additional limitations on eligibility and participation under the TFWPs acts as a further layer of unfreedom by more deeply entrenching the concepts and experience of 'temporariness' and contingency in the nature of migrant worker employment.

III. Structural Temporariness as Unfreedom: Limits on Eligibility and Residency

Limits on eligibility, or in other words, the length of time for participation and conditions of renewal or re-entry into one of the TFWPs, coupled with the limited access to permanent residency, create further conditions of unfreedom for migrant workers who are legal, socially and politically excluded from Canadian society. The constructed notion of 'temporariness' – both in relation to migrant workers and in relation to migrant worker programs generally – as discussed and contested in section I, bears directly on the creation of unfreedom in this regard. While perceptions of job 'temporariness' can sometimes be positive when seen as a stepping stone to

something more, or better,[72] the manner in which the TFWPs create temporariness largely prevents an opportunistic approach for migrants to use, or utilize, the program in this manner; rather, the ability to develop permanent or long-term ties or attachments are directly obstructed and prevented by the regulatory scheme.[73] Commenting broadly on the ways in which the regulatory structure of the TFWPs creates vulnerability, one participant noted specifically the way in which the temporary nature of the program operates to facilitate exploitation and exclusion:

> I think one of the first things come to the fact of how they are incorporated into the labour market, it's in a precarious ways. Their immigration status, that is always temporary, serves as grounds for all types of, kinds of exploitation – economic exploitation, racial discrimination, racial marginalization and social and political and culture marginalization of the society that is hosting them. […] So the trends that we see, the patterns of exploitation all are started by this recognition that they are basically not part of our – of the society[.][74]

As this quote demonstrates, the structural temporariness itself imagines the migrant worker as somehow outside of society, and outside of the boundaries of legal protection. This section will focus on how these regulatory features of the TFWPs create unfreedom by structurally entrenching the 'temporariness' of migrant workers within the social and legal landscape in Canada.

Under the SLO, changes to the program introduced in 2011 create a maximum "4 year" rule on participation in the program: migrant workers may stay only for a maximum of 4 years in Canada on a work permit (work permits are designated for 2 years but can be renewed at the request of the employer), after which time those workers are prohibited from working in Canada

[72] See, i.e., Anderson, *supra* note 13 at 305.
[73] See, i.e., Nakache and Kinoshita, *supra* note 2 at 32-8 discussing the extremely limited options for permanent or long-term residency. See also, *ibid* at 306, noting a similar phenomenon in the UK.
[74] Participant 07.

for a further 4-year period.[75] The stated purpose of this new rule was to "signal clearly to both workers and employers that the purpose of the TFWP is to address temporary labour shortages,"[76] thus reinforcing the false assumption concerning the temporary nature and need for migrant labour in Canada.

Several participants in the interview study expressed concern about this new rule, and the impact it will have on migrant workers as the first 'wave' of cut-offs come in April 2015. Many participants predicted that the rule will result in a growing population of undocumented workers as individuals under the TFWPs will simply remain in Canada after the expiration of their permits, creating an even more precarious workforce than the existing one under the TFWPs.

Under SAWP, migrant workers come to Canada for a maximum of 8 months each year; employers have the ability to individually name migrant workers whom they would like to return the following season. The seasonal circularity of this program leaves migrant workers in a constant limbo, both legally and socially. Though migrant workers may, and many do, return to Canada each season, they often remain socially excluded from Canadian society.[77] Further, asserting legal rights can, and has, put workers' future employment and status in Canada in jeopardy.[78] The circularity of the SAWP program has been termed as a system of "forced

[75] *Regulations Amending the Immigration and Refugee Act Protection Regulations*, S.O.R./2010-172, s. 1 amending IRPR, s. 183(1) and s. 2(1) amending IRPR, .s. 203(3) by adding (g)(i), cited in Fudge, *supra* note 17 at 30, n33. The most recent reforms to the TFWPs will see the overall period of employment reduced, though the federal government did not announce a new figure in its report. Participants will also have to seek renewal of the work permit on a yearly basis moving forward. See, Canada 2014, *supra* note 26.
[76] Nakache, *supra* note 56 at 72; see also, Hennebry 2012, *supra* note 54 at 22.
[77] See, i.e., Tanya Basok, "Post-national citizenship, social exclusion and migrants rights: Mexican seasonal workers in Canada" (2004) 8:1 Citizenship Studies 47 at 58 [Basok]; Fudge, *supra* note 17 at 28.
[78] See, i.e., *Sidhu & Sons Nursery Ltd (Re)* [2014] BCLRBD No56 (QL). See also, Basok, *ibid* at 58, commenting on the evaluations and 'naming' process as contributing to a fear of complaining or asserting rights amongst Mexican workers under SAWP.

rotation" and "coercion" because of the impact of non-compliance on future prospects; workers who do not return home cannot be recalled under the program, thus contributing to the "success" of SAWP in international policy arenas in this regard.[79] Further, failure to be recalled by an employer can result in indefinite suspension from the program, or, at the least, damage the migrant's record, jeopardizing any future placement under the program.[80] In addition, poor employer evaluations can also jeopardize future placement and conditions under the program for migrant workers, thus acting "as powerful instruments of coercion of migrants' behaviour."[81]

Commenting on the seasonal structure of the SAWP program, one participant discusses the way in which this structure negatively impacts upon the choice processes of migrant workers:

> One of the main things that fosters exploitation is this very – the fact that they have to be constantly negotiating their contract every single year that they come to Canada. For them, the goal of the workers is to come back for the next year […]. For them, it is the nomination of the worker the next year. So not being called back, it really, for workers, means losing their job, losing a spot in the program. […] So when they lose their employer, they basically are losing their place in the program and the opportunities to come back to Canada. So, nobody wants to lose their employer. So, they feel basically that they are in this relationship that is like a servant and master.[82]

As this quote demonstrates, the seasonal nature and yearly re-negotiation of contacts under the SAWP program puts workers in an extremely precarious position. Their viable options are constrained by this process in which they may be left with the perception that they can either assert their rights or keep their job. As this participant went on to explain, "it is the fear and the anxiety of never knowing if they are going to lose their job or not. So in the context of the seasonal agricultural workers program, it is a powerful tool for the employers to have the power

[79] Preibisch and Hennebry, *supra* note 31 at 54.
[80] *Ibid.*
[81] *Ibid.*
[82] Participant 07.

to call back that worker for the next season or not."[83] Thus, when faced with abuse or unlawful conduct in the workplace, many workers may remain silent.

The regulatory measures which limit participation are "structured to ensure that low-skilled migrant workers […] remain both precarious and permanently temporary."[84] In other words, these measures seeks to construct a very narrow and particular type of legality for migrant workers, which supports and reinforces the underlying context of and for the program, as discussed in section I. The migrant worker is made and reified as 'temporary' through the these rules, with likely little impact for employers or the economic landscape in Canada, and without acknowledging or addressing the structural and permanent reliance on migrant labour in Canada. The structural temporariness of the TFWPs create a state of unfreedom for migrant workers who face significant constraints and barriers to exercising choice as a direct result of these regulatory measures.

In addition to limits on participation, access to paths of permanent residency is extremely limited for low-skilled migrant workers in Canada.[85] During the shift towards economically minded immigration policies, starting in the 1970s, the division between "permanent immigrations" and "temporary migrants" was accompanied by a secondary division between "highly skilled" and "low skill" categories of temporary migrants and labourers, the former of whom have been incrementally given greater access to permanent residency, while migrants falling within the

[83] Participant 07.
[84] Hennebry 2012, *supra* note 54 at 22.
[85] With the exception of the Live-In Caregiver Program which does provide a direct path to permanent residency upon the fulfillment of certain conditions: see Faraday, *supra* note 1 at 24; Nakache and Kinoshita, *supra* note 2 at 32-38.

low-skill category have been increasingly denied the same access.[86] While, for example, high-skilled NOC O, A and B workers under the TFWP can use their job experience in Canada to apply for permanent residency under the "Canada Experience Class", NOC C and D workers ("low-skill occupations") are not eligible under this immigration stream.[87] The only practical access low-skill migrant workers have for permanent immigration is through the Provincial Nominee Program, which is very limited in capacity, restrictive in its application criteria,[88] and relies – insofar as migrant workers are concerned – on employer nominations, enhancing the power imbalance created by the work permit system under the TFWPs. As a result, "even in the minority of cases where permanent residence is an option, it is contingent on the relationship to a specific employer and a level of financial independence that is often unrealistic for low-income workers."[89] Thus, practically speaking, the opportunity for permanent residency is extremely limited, if not practically impossible, for most migrant workers in Canada.

For those migrant workers who may have access to the PNP programs, concerns about the power imbalance, given the requirement of employer nomination, were widely expressed amongst participants in the interview study. One participant described the PNP program as a "pathway to exploitation" because of the employer nomination requirement, which, as this participant described it, creates a pattern of a "servant-master relationship", similar to other features of the

[86] See Marsden 2011, *supra* note 32 at 45. Most recently, the federal government announced changes which will enable an expedited permanent residency process for highly skilled migrants in certain job categories, see: Susana Mas, "Skilled immigrants recruited in 50 occupations ahead of 'express entry' launch," *CBC News* (13 June 2014) online: CBC News <http://www.cbc.ca/news>.
[87] See Faraday, *supra* note 1 at 22-24; Marsden 2011, *ibid* at 48; Fudge, *supra* note 17 at 28; Nakache and Kinoshita, *supra* note 2 at 10, 32-3.
[88] Not all provinces extend participation under the PNP to low-skill temporary migrant workers. While, for example, Manitoba and British Columbia do extend this program to low-skill workers, not all incoming workers are eligible, and the criteria under the PNP varies between provinces. See Marsden 2011, *supra* note 32 at 49; Fudge, *supra* note 17 at 33-34; Nakache and Kinoshita, *supra* note 2 at 11, 35-8.
[89] Marsden 2011, *ibid* at 49; see also, Fudge, *ibid* at 33-34.

program like the work permit system.[90] The resulting consequences for migrant workers were also often reported in the research study for this thesis. Several participants noted how the promise of a nomination may be used to create a 'race to the bottom' amongst groups of migrant workers competing for the nomination, and thus willing to do anything to win it. As one participant explained, "under this program, for example, a hotel can sponsor only so many housekeeping staff. It's very limited numbers which, of course, sets up another lovely scenario. 'Okay, whoever does the most free work gets the nomination.'"[91]

The structurally temporary features of the TFWPs – limits on participation and the lack of access to permanent residency – create unfreedom for migrant workers by marginalizing and constraining their place in Canada, both socially and legally, and entrenching the political construction of migrant workers as 'othered' and 'less than'.[92] This, in turn, greatly inhibits their ability to exercise the rights to which they are formally entitled, and to be seen and treated as equal to Canadians. In addition, the structural temporariness created by the regulations can further act as a tool for control; the limited period of work opportunity, coupled in some instances with a limited possibility for extension or nomination for permanent residency, further contributes to the inherent power imbalance in the employment relationship for migrant workers.

These regulations inhibit the ability of migrant workers to exercise full and free agency in the face of significant constrains on their available choices. The finite duration of the work permit

[90] Participant 07.
[91] Participant 09.
[92] See, i.e., Deepa Rajkumar et al, "At the temporary–permanent divide: how Canada produces temporariness and makes citizens through its security, work, and settlement policies" (2012) 16:3-4 Citizenship Studies 483 at 483. See also AFL 2009, *supra* note 1 at 29-31, commenting on the growing similarities between Canada's program at the European *gastarbeiter* system.

under the SLO, and the dependence on employer nomination for continued employment under SAWP, mean that workers who voice a complaint, assert their rights, or leave their employer put their economic and employment status in jeopardy. Particularly, when considering the fact that labour migration is primarily economically motivated, the lost income resulting from a period of unemployment – or total loss of employment under the programs – is a significant risk. The limited access to permanent residency also acts as a double-edged sword; for migrant workers who do not have this prospect, the importance of maintaining employment and income for the limited durations, as just described, may become an even more important factor in the decision-making process. For those who do have a possibility for permanent residency, that factor can create a perception of even greater risk in 'rocking the boat' with the employer. The structural temporariness of the TFWPs, considered in light of the inherent connection also the employer-specific work permit, thus actively constrains migrant workers' ability and potential freedom to exercise choice, both in terms of their long-term mobility and employment prospects, but also in terms of their ability to exercise their legal rights and participate, socially legally and politically, while in Canada.

IV. JURISDICTIONAL LIMITATIONS: UNFREEDOM THROUGH INACTIVITY

Jurisdictional issues are a further persistent plague on the administration of the TFWPs in Canada.[93] In multiple and overlapping ways, jurisdictional limitations create unfreedom for

[93] See, i.e., See, i.e., Jenna Hennebry, "Who has their eye on the ball? "Jurisdictional fútbol" and Canada's Temporary Foreign Worker Program" (2010) Policy Options 62 at 67 [Hennebry 2010]; Nakache and Kinoshita, *supra* note 2 at 8, 12-21, 21-30, documenting the various overlaps and issues between federal and provincial jurisdiction on administration of the program, and employment related rights.

migrant workers through what can be termed 'inactivity' – that is, a stasis of intervention by official actors and institutions. This stasis is created by both the limits of jurisdictional responsibility, and confusion surrounding which actor or institution is responsible. As a result, migrant workers, who, at the outset, are constrained in their ability to exercise choice, are then left without substantive legal recourse to access their rights and effect choice. This section will explore three jurisdictional issues which are widely noted as problematic and illustrate well the way in which inactivity, or a lack of governance, creates unfreedom for migrant workers: requirement and enforcement of the employment contract; regulation of third-party recruiters; and, monitoring and inspection under the programs.

The federal government, specifically ESDC, may require an employment contract between employer and employee (migrant worker) to be produced and signed, which sets out various aspects of the employment, including wages, hours to be worked, etc.[94] In addition, under the SLO, the employment contract must stipulate that the employer will hold financial responsibility for airfare to and from Canada for the migrant worker.[95] The contract is thus intended to ensure that the basic employment rights and obligations of both the employee and employer are met, as well as specific requirements developed under the TFWPs at the federal level.[96] However, the jurisdictional responsibility for employment-related rights falls within provincial jurisdiction, so despite the requirement of an employment contract at the federal level, no federal agency has jurisdiction or authority to enforce the terms of that contract.[97] Further, while provincial

[94] See, i.e., Nakache, *supra* note 56 at 82-3; Marsden 2011, *supra* note 32 at 50, 52; Hennebry 2012, *supra* note 54 at 8; Nakache and Kinoshita, *supra* note 2 at 22.
[95] Nakache, *ibid* at 82; Nakache and Kinoshita, *ibid* at 22-3.
[96] For an overview of the various processes and actors involved at the federal level, see Nakache and Kinoshita, *ibid* at 12-13.
[97] See Hennebry 2012, *supra* note 54 at 21; Nakache, *supra* note 56 at 83; Marsden 2011, *supra* note 32 at 52, citing also: Human Resources and Skills Development Canada, "Just the Facts: Foreign Workers," online:

legislation may cover some of the basic aspects of the contract, or more generally of statutory entitlements, including wages and hours to be worked, provincial employment legislation may not include specific contractual terms developed for the TFWP, such as the airfare provision.[98] In addition, terms stated in the LMO may not be enforceable in provincial courts.[99] Therefore, where a written employment contract is not required, and an individual's working conditions do not reflect what is stated in the LMO, neither the worker nor ESDC would have legal recourse based on that document.[100] This, particularly, creates a significant loophole between what an employer may 'promise' to both or either of ESDC and a migrant worker under the LMO, and what the employer may in fact provide as conditions and terms of employment. Thus, employment standards procedures may not be an effective means of enforcing aspects of a contract or employment arrangement in the event of non-compliance, where the actual conditions do not violate statutory employment law. As a result, migrant workers may be left in a legal limbo of sorts.

The requirement of an employment contract and of specific terms therein can ostensibly be seen to create legal rights for migrant workers, and to provide a concrete legal document from which to enforce those rights. However, employment contracts are not required for all migrant workers, or positions for which an LMO is approved, under the TFWPs. In addition, inactivity and jurisdictional limitations may prevent effective enforcement of 'promised' terms of employment;

<http://www.hrsdc.gc.ca/eng/corporate/facts/index.shtml>. See also Judy Fudge and Fiona MacPhail, "The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour" (2009) 31 Comp Lab L & Pol'y J 5 at 30 [Fudge and MacPhail]; Fudge, *supra* note 17 at 17, 31; Nakache and Kinoshita, *supra* note 2 at 22-3.

[98] See, i.e., Nakache, *supra* note 56 at 83; Marsden 2011, *supra* note 32 at 50; Nakache and Kinoshita, *ibid* at 22-3.

[99] *Koo v 5220559 Manitoba Inc* (2010), 254 Man R (2d) 62 (QB), where the court found that an LMO was not a valid contract and could not be used to enforce payment of the hourly wage stipulated in the document, cited in Marsden 2011, *ibid* at 50, n61.

[100] As was the finding in *Koo*, *ibid*.

for example, some participants in the interview study mentioned, specifically, issues of confusion and ambiguity surrounding the return airfare obligation and its scope. Further, while the SAWP program has direct government-to-government participation, under the SLO, the Canadian government has effectively "written itself out of its responsibility to intervene in the conditions of work for those recruited through the project."[101]

Thus, despite having rights 'on paper', migrant workers may be left without effective means of exercising choice or enforcing those rights in practice. In addition, any legal recourse for conduct which violates terms of the employment contract is necessarily complaints-based, a risky and impractical option for many migrant workers,[102] given the other unfreedoms they are already exposed to, most importantly, the impact of the employer-specific work permit, as discussed earlier in this section. Many participants commented on the issues associated with pursuing a legal complaint related to employment standards or conditions, which will be further explored in Chapter 4.

In addition to issues surrounding the enforceability of employment arrangements, jurisdictional issues have prevented active monitoring and enforcement of regulations for third-party recruiters.[103] With the increase in labour migration in recent decades, a concomitant rise in the number and use of private recruiters has similarly emerged to facilitate labour migration flows; exploitation within this sphere is well recognized internationally.[104] Under provincial

[101] Sharma 2012, *supra* note 5 at 37.
[102] See, i.e., Nakache and Kinoshita, *supra* note 2 at 21-5, and at 40, for an overview of the issues regarding employment rights and complaints for migrant workers.
[103] See Fay Faraday, *Profiting from the Precarious: How recruitment practices exploit migrant workers* (Metcalfe Foundation, April 2014) for a detailed analysis of the issues related to recruitment places under Canada's Temporary Foreign Worker Programs.
[104] See Faraday, *supra* note 1 at 61; Fudge and MacPhail, *supra* note 97 at 33.

employment legislation in most provinces in Canada, limited regulations exist to govern the use of third-party recruiters. In particular, most provinces prohibit third-party recruiters from charging a prospective employee, or client, recruitment fees, and often also prevent the employer from seeking reimbursement for recruitment or related fees from workers.[105] However, despite the existing legislation and regulations, reports concerning the charging of recruitment fees are extremely common, and reports on fee amounts have ranged anywhere from $1,000 to $25,000.[106] In addition, some reports document a trend whereby agencies recruit and charge migrants for non-existent jobs in Canada.[107]

Several participants in the interview study commented on widespread practice of paying recruitment fees for jobs in Canada amongst migrant workers. As one participant estimated, "the number of foreign workers who have not paid substantial recruitment fees are in a tiny minority."[108] In line with the existing reports and literature, participants in the study provided common ranges of fees in the amounts of $3,000 to $15,000. The impact of the inability to effectively regulate third-party recruiters and enforce the existing laws with respect to

[105] *Worker Recruitment and Protection Act*, SM 2008, c23, ss15(1), 15(4), 16(1), 17; *Foreign Worker Recruitment and Immigration Services Act*, SS 2013, c F-18.1; *Employment Protection for Foreign Nationals Act*, SO 2009, c32, s7, s8 (currently applicable only to live-in caregivers); *Fair Trading Act*, RSA 2000, c F-2; *Employment Agency Business Licensing Regulation*, Alta Reg. 189/1999, s12(1); Government of Alberta, "Temporary Foreign Workers: A Guide for Employers" online: Government of Alberta <http://humanservices.alberta.ca> at 15; *Employment Standards Act*, RSBC 1996, c113; *Employment Standards Regulation*, BC Reg 396/95; Ministry of Jobs, Tourism and Skills Training and Responsible for Labour, "Employment Standards for Foreign Workers", Fact Sheet (May 2011), online: Government of British Columbia <https://www.labour.gov.bc.ca>; see also, Sikka, *supra* note 62 at 11-12, outlining the same legislation; Nakache and Kinoshita, *supra* note 2 at 13-15.
[106] Standing Committee Report, *supra* note 61 at 30-32; Faraday, *supra* note 1 at 62; Sikka, *supra* note 62 at 14; AFL 2007, *supra* note 1; Preibisch and Hennebry, *supra* note 31 at 69; Nakache and Kinoshita, *supra* note 2 at 13-15.
[107] See RCMP, *supra* note 1 at 32, 36; Standing Committee Report, *ibid* at 30-32; Faraday, *ibid* at 63; Sikka, *ibid* at 14; AFL 2009, *supra* note 1 at 24; Preibisch and Hennebry, *ibid* at 69.
[108] Participant 09.

prohibiting recruitment and related fees is significant for migrant workers, who may often begin their work and time in Canada with significant debt.[109] As one participant explained,

> It's really common to meet foreign workers who owe money, who borrow money, in order to pay a recruiter. Back in the Philippines, there is no work. Where are people going to get $5000? They don't have $5000, they don't. They borrow it, because they think they can come to Canada, they are being told they can make lots of money.[110]

As the above quote demonstrates, migrant workers may be misled about their income-earning potential. When migrant workers take on significant debt to finance travel and employment abroad, the result often means that migrants are working to pay off their debt, rather than sending sums of money home or saving their income. Thus, the practice of charging significant (and unlawful) recruitment fees, coupled with the common need to take on debt to finance the opportunity for migrant work, "have arguably increased instances of contemporary debt bondage", migrants with significant debt may feel "compelled to work regardless of the circumstances of their employment."[111] This perception is similarly reflected in a statement made by another participant in the study:

> We've had reports of people coming to Canada who owe significant amounts of money – significant as in $10,000, $15,000 or more in their countries of origin. They come to Canada, and are working to pay that off. We know in this province that it's illegal for a recruiter to charge a potential employee to find them a job, but nonetheless, recruiters are doing it, either in [Canada], or they're working in collaboration with their recruiter at home.[112]

In addition to the issues of charging recruitment fees and the existence of debt, this quote also demonstrates that the lack of enforcement enables unlawful recruitment practices to occur with considerable frequency and with a relatively low risk of adverse consequences. Issues

[109] See, i.e., Faraday, *supra* note 1 at 62-3; Sikka, *supra* note 62 at 14-5; Standing Committee Report, *supra* note 61 at 30.
[110] Participant 09.
[111] Preibisch and Hennebry, *supra* note 31 at 69.
[112] Participant 12.

surrounding third-party recruiters and abusive recruitment practices appear particularly difficult to address where recruitment agencies are located outside of Canada. In these situations, Canadian authorities do not have jurisdiction to directly pursue a case, and a lack of resource are also often cited as an obstacle to pursuing the issue with foreign governments and other actors.[113]

Overall, the lack of effective monitoring and enforcement of rules in relation to third-party recruiters has a considerable negative impact on migrant workers, who may often begin their employment and time in Canada with significant debt, and thus may spend a majority of their time working to pay off debt rather than generating personal savings or income. Again, considering the primary underlying motivation of labour migration as economic in nature, this not only negatively impacts and constrains the ability for migrant workers to possibly realize their primary goals for undertaking work abroad, but the existence of debt may, in particular, may constrain their ability to exercise full and free agency in the context of abusive or problematic situations, as the existence of debt will be a strong motivator to ensure stable and continued employment and income generation. Thus, this situation creates unfreedom for migrant workers by reducing the set of viable options available, and creating power disincentives to choose certain things. The existence of 'formal rules' but a lack of effective enforcement of them is problematic from a legal perspective, as this creates the possibility for government and other actors to make claims that are not substantively realized. In other words, the existence of these rules may allow actors to say they are ostensibly protecting rights and prohibiting practices, though in reality neither is true. Indeed, it is precisely because legislation exists prohibiting the practices which continue to exist in reality that there is a heightened duty to concretely address

[113] See Sikka, *supra* note 62 at 15; AFL 2009, *supra* note 1 at 13.

them, and therefore a lack of effective action contributes also to a condition of unfreedom for migrant workers.

Finally, coupled with a lack of concrete or effective enforcement of contractual arrangements between both migrant and employer, and migrant and recruiter, inactivity with respect to monitoring and inspecting the workplace further isolates migrant workers and contributes to conditions of unfreedom. At the outset, the ability to monitor and inspect may be difficult where provincial and federal authorities do not have an information sharing agreement, such that provincial authorities are not aware of employers or locations of employment of migrant workers in the province. Some provinces do require the registration of employers of migrant workers,[114] thus providing concrete information on the location and employment of migrant workers in its province. In addition to inconsistent registration procedures, inspection to monitor compliance with the TFWPs is perceived as largely non-existent.[115] Exceptionally, specific legislation in Manitoba does authorize any inspection or investigation to determine compliance with the *Act*.[116] Further, because most provinces do not track complaints made to relevant authorities based on immigration status,[117] such as Employment Standards branches, information concerning migrant

[114] *Worker Recruitment and Protection Act*, SM 2008, c23, s11 [*WRAPA*]. Saskatchewan recently passed legislation similar to that of Manitoba, under which employers are required to register with the provincial government before hiring a foreign worker: see, *The Foreign Worker Recruitment and Immigration Services Act*, SS 2013, c F-18.1. The province of Nova Scotia also requires employers to register with the Director of Labour Standards when recruiting, hiring and employing foreign workers in most cases: see, "Foreign Workers – Employer Registration Fact Sheet" online: Government of Nova Scotia <http://novascotia.ca/>.

[115] See, i.e., Preibisch and Hennebry, *supra* note 31 at 70; Nakache and Kinoshita, *supra* note 2 at 28-30; Dauvergne and Marsden, "Beyond", *supra* note 5 at 533, citing also Fudge and MacPhail, *supra* note 97.

[116] *WRAPA*, *supra* note 114, s19(1). In a recent news article, the manager of the Special Investigations Unit of Manitoba Labour and Immigration stated that 'sting' operations in the province uncovered a 95% non-compliance rate in the sushi restaurant industry, and an 80% non-compliance rate amongst northern Manitoban restaurants. See: Geoff Leo, "Complaint-based system failing abused foreign workers: expert" *CBC News* (27 May 2014) online: <http://www.cbc.ca/news> [Leo].

[117] Alberta, Saskatchewan and Newfoundland & Labrador formally track complaints made by migrant workers. See: Amber Hildebrandt, "Few provinces track complaints by temporary foreign workers" *CBC News* (27 May 2014) online: *CBC News* <http://www.cbc.ca/news> [Hildebrandt].

workers, and employers under the TFWP, may not be passed back to the federal government,[118] which could otherwise enable investigation, and possibly sanctions, by the bodies regulating the TFWP at that level, including ESDC and CIC. However, newly announced changes to the TFWP include statements by the federal government that it will pursue and strengthen information sharing agreements with provincial authorities in order to better investigate and monitor the TFWPs.[119]

Both ESDC and CIC do have the ability to sanction employers under the TFWPs for a host of reasons, however, these measures are rarely used, as was also noted by several participants in the research study. For example, both CIC and EDSC have available mechanisms to sanction employers under the TFWPs with suspension or permanent revocation from use of the TFWP. However, despite the numerous and extensive reports existing with respect to migrant worker exploitation, to date the CIC has not listed one employer on its list; ESDC has recently used its sanction power for the first time.[120] Use of the ESDC sanctions has come in amidst allegations concerning preferential treatment of migrant workers,[121] and shortly before announcements by

[118] Hildebrandt, *supra* note 117.
[119] Canada 2014, *supra* note 26 at 20-21.
[120] ESDC, "Employers who have broken the rules or been suspended from the Temporary Foreign Worker Program", online: Employment and Social Development Canada <http://www.esdc.gc.ca> [ESDC]; see also, Hildebrandt, *supra* note 117; Trinh Theresa Do, "Liberal motion on TFW program calls for complaint system, mandatory audits", *CBC News* (28 May 2014) online: CBC News <http://www.cbc.ca/news>. Regarding the companies listed on the ESDC list, see: Kathy Tomlinson, "McDonald's accused of favouring foreign workers", *CBC News* (14 April 2014) online: CBC News <http://www.cbc.ca/news> [Tomlinson]; "Foreign worker permit pulled at Labrador City restaurants", *CBC News* (7 April 2014) online: CBC News <http://www.cbc.ca/news>; Susana Mas, "Temporary Foreign Worker Program sanctions Nova Scotia trucking company", *CBC News* (8 May 2014) online: CBC News <http://www.cbc.ca/news>; Susana Mas, "Temporary Foreign Worker Program sanctions target 3 employers", *CBC News* (8 April 2014) online: <http://www.cbc.ca/news>. While the McDonald's locations are accused of favouring foreign workers, the Newfoundland & Labrador companies sanctioned indicate inadequate housing conditions for migrant workers in the available news reports. No additional information was presented as concerns the Ontario and Nova Scotia companies, beyond the rationale listed on the ESDC website that the companies provided "false, misleading or inaccurate information" in the context of its request for an LMO opinion.
[121] Several McDonald's franchises on the list were accused of favouring foreign workers: Tomlinson, *ibid*; not on the list, but reported in the news, was a case in Saskatchewan were two waitresses claimed they were fired and replaced with migrant workers: Leo, *supra* note 116.

the federal government of new restrictions to the TFWPs.[122] Like non-use of the available sanctions, the limited and clearly strategic use of the ESDC sanctions signals to employers that migrant workers may be treated differentially from Canadians, so long as that differential treatment is 'lesser than' in character.

New reforms to the TFWPs at the federal level include a promise of increase inspection – "one in four employers using temporary foreign workers will be inspected each year."[123] Inspections will be carried out as a result of tips, random audits, and for employers deemed as "high risk".[124] In addition, greater powers and authority have been provided to ESDC and CIC officers conducting inspections, including the abilities to conduct warrantless on-site visits, and interview migrant workers and other employees with their consent.[125] New requirements around document retention and review will also ostensibly enable ESDC and CIC to follow up to determine compliance with the program and LMIA process by employers.[126] However, given the issues discussed so far in this section, it is unclear how effective increased inspection will be in providing substantive remedies to migrants. Rather, it is likely that increased inspection may be used to increase 'blacklisting' of employers, and to be seen as protecting Canadians' livelihoods, with little positive change for the conditions facing migrant workers.

[122] 3 employers were placed on the list on April 6th, with a further 4th on May 1st: ESDC, *supra* note 120. Mid-May, the federal government announces new changes will be made to the TFWP which will "raise the cost" of hiring migrant workers and tie permits to the rate of unemployment: "Jason Kenney set to introduce new temporary foreign worker rules", *CBC News* (15 May 2014) online: CBC News <http://www.cbc.ca/news>. These changes are reflected in Canada 2014, *supra* note 26.
[123] "New Reforms for the Temporary Foreign Worker Program" online: Employment and Social Development Canada <http:// http://www.esdc.gc.ca>.
[124] Canada 2014, *supra* note 26 at 17.
[125] *Ibid.*
[126] *Ibid.*

A lack of enforcement and monitoring under the TFWPs was frequently cited as a significant contributing factor to exploitation by participants in the interview study. As one participant noted in relation to how the regulations enhance vulnerability to exploitation,

> I think the lack of the government following their own rules. They set up rule and they don't follow them, and then they constantly change them. A real lack of inspectors and the ability to follow who's hiring these people and following it out. And coming in and doing an inspection and talking to these people, and having that ability.[127]

This perception that government actors don't follow their own rules, frequently change the rules, or use the rules instrumentally, was commonly felt by participants in the study. Thus, the belief that relevant government actors and institutions are not enforcing or monitoring the TFWPs appears to be widespread.

In addition the lack of monitoring and enforcement, confusion around jurisdictional responsibility between federal and provincial governments was noted by many participants as a factor contributing to the problematic state of the TFWPs:

> … One big one is the difficulty of sorting through provincial/federal responsibilities, and then each being able to play each other off around this and claim that the other guy should be looking after that if something is ever brought up. A companion to that is the really inadequate monitoring of every aspect in every point along the line, from initial recruiting and LMO applications, through to the situation of people once they're in the actual work places. If you're going to allow a program under law, then it's a government responsibility to make sure that program runs properly.[128]

As this quote demonstrates, the confusion around responsibility, and a perception of government actors 'passing the buck' in terms of responsibility filters down, in terms of enforcement and monitoring, to affect every aspect of the process. Specifically, this quote also demonstrates the link between a general lack of enforcement, and the specific issues of monitoring and

[127] Participant 11.
[128] Participant 14.

enforcement seen at earlier stages of the TFWP process, including both the LMO and employment contract or arrangements stage, as well as in relation to third-party recruitment agencies.

Even where inspection or monitoring may take place, either by provincial or federal bodies, individual actors responsible for carrying out inspections may be limited by their jurisdictional competency, dependent on their ministerial department such as occupational health and safety, employment standards, immigration, et cetera, meaning that where issues exist outside of the jurisdictional competency of an inspector, he or she may not be aware of the problem or have an opportunity to address it.

It is clear from both the empirical research and secondary literature that jurisdictional responsibility, and general monitoring and enforcement of the TFWPs, suffer from ambiguity and confusion at many levels. The resulting impact for migrant workers in Canada is, in effect, greater isolation from legal protections and avenues through which they can assert their rights. Considering the unfreedom experienced by virtue of the employer-specific work permit, and structural temporariness of the program, and thus of workers under it, the inactivity in relation to monitoring and enforcement of the limited existing rules designed to protect and promote the rights of migrant workers contributes greatly to the perceived risks for migrant workers in navigating certain choices, as the process and difficulty through which they may seek to exit an employment situation, voice a legal complaint, or assert their rights is much greater when there is an apparent lack of proactive support and enforcement in this regard. Thus, the inactivity concerning monitoring and enforcement of the program enhances the conditions of unfreedom

experienced by migrant workers, constraining their ability to exercise agency and choice in respect of their employment and status, and further isolating them from legal, political and social belonging in Canada.

CONCLUSION

The story told of migrant workers in the political and social arenas focuses on the rhetoric of a 'good worker' and the productivity of the labour power imported to benefit the domestic economy, minimizing space for the complexity of individual experience, as well as marginalizing discussion on the legal regulations which impact upon that experience. Like the trafficking 'victim', explored in Chapter 1, the migrant worker is silenced and relegated to an object-like status. Migrant workers are simultaneously laden with a presumption of full agency, and yet the legal regulations surrounding their status in Canada operate largely to deprive them of the ability to freely exercise agency. Thus, the public image of the migrant worker, as constructed by legal and political actors, works to both propel forward laws and regulations which create unfreedom, and also hide this reality by effectively silencing migrant workers. Indeed, the label of "temporary foreign worker" subsumes and stands in for

> the actual people whose lives are ordered by it. Their histories, their reasons and desires for moving, their struggles, and their acts of agency – indeed, every aspect of their daily lives except their exploitation as labour – are subsumed under this state category. This may be why the state and employers often see people labour as "temporary foreign workers" *only* as workers and find it difficult to accept that they are people with needs, wants, and desires that are as complex and rich as their own. It is such social distancing that in part

> legitimates the ideological separation of "temporary foreign workers" from "the community" in which "Canadians" live and labour.[129]

This dominant representation of who migrant workers are, and what their place in society is (and isn't), in turn, enables the continued use and proliferation of a legal regime which itself creates significant conditions of unfreedom for migrant workers. At the 'baseline' of this unfreedom exists the employer-specific work permit, which significantly constrains and creates obstacles to migrant workers exercising full and free agency in relation to choice about their employment in Canada, both geographically and relationally, and creates a very imbalanced power dynamic in favour of the employer. Migrant workers are effectively immobilized by this work permit system, and rendered unfree in respect of circulation and choice in the labour market. The structural temporariness of workers in relation to the duration, and continuance, of their employment and status of Canada further exacerbates the immobility already experienced and created by the work permit system, and relegates migrant workers outside of legal, social and political belonging in Canada, also contributing to a normalization of abuse and exploitation under the program, and of differential rights and entitlements, as will be explored in more depth in Chapter 4. The 'carrot and stick' approach to residency under the Provincial Nominee Programs, and to continued employment under SAWP, create even greater precariousness for workers who value their long-term prospects in Canada, and who thus face perhaps greater constraints in navigating their choices when confronted with abusive or unlawful treatment during their employment. Issues related to inactivity in monitoring the program act, in a layering fashion, to create further unfreedom and isolation for migrant workers in Canada, as unscrupulous actors can operate with relative impunity, and migrant workers are largely isolated

[129] Sharma 2012, *supra* note 5 at 39-40.

and left without effective avenues to seek support or recourse in this regard. Confusion and ambiguity surrounding federal/provincial divisions of responsibility impact both monitoring and inspection, as well as enforcement of existing rules intended to protect and promote the rights of migrant workers, thus creating an enhanced state of precariousness and negatively impacting upon the existing conditions of unfreedom experienced by migrant workers.

Overall, the current regulatory structure of the TFWPs "represents an extreme version of labor flexibility; it provides employers with a pool of unfree workers who are disposable at will […],"[130] and creates "conditions to control workers and their entire personhood that the state or employers cannot legally apply to "citizens" and "permanent residents."[131] The legal regulations discussed in this chapter thus function in a way which reduces the quantity and quality of viable options (or opportunities) a migrant worker has in navigating and effecting choice about his status and employment in Canada, creating significant negative risks and outcomes for choosing certain alternatives, and thus interfering with the process of decision-making.

The next chapter will go on to examine how the conditions of and for unfreedom constructed by the regulatory measures and legal regime governing the TFWPs directly contributes to and facilitates abusive and exploitative practices against migrant workers in Canada. This chapter will explore in more depth how concrete practices by private actors function to create effective control over workers, facilitated greatly by the conditions of unfreedom existing at the regulatory level. This chapter will also discuss in greater detail the impact of a normalization of abuse and

[130] Fudge and MacPhail, *supra* note 97 at 43-44.
[131] Sharma 2012, *supra* note 5 at 37.

'second-class status' on migrant workers' experiences of unfreedom, and the resulting lack of real access to rights and remedies, despite formal recognition under law.

CHAPTER 4

REGULATORY UNFREEDOM AND THE CREATION OF AN EXPLOITATIVE ENVIRONMENT

The underlying context in which low-skilled labour migration occurs, and in which a demand for migrant labour that is flexible and disposable is created, have resulted in the creation of a regulatory regime which creates significant unfreedom for migrant workers in Canada. Building on the layered conditions of unfreedom explored in Chapter 3, this chapter turns to examine how the regulations operate, or are operationalized, in practice to create an environment in which migrant workers are vulnerable to, and experience, exploitation. Building from Chapter 3, this chapter will explore the ways in which the regulations impact on their ability for migrant workers to exercise choice in practice, creating further unfreedom in navigating their employment and status in Canada. In other words, while the previous chapter demonstrated how regulatory measures and instruments are an independent source of unfreedom, this chapter establishes how those instruments and measures function in practice to create a landscape in which migrant workers are effectively unfree.

In undertaking this examination, the impact and importance of the social perceptions of migrant labour, as discussed in Chapter 3, cannot be understated. Migrant workers are made to bear an identity which often renders them both idealized and vilified in public and political discourse; their apparent flexibility to accept conditions and types of work which are ostensibly rejected by indigenous workers is both a welcomed and condemned attribute. While migrant workers are often perceived as more grateful and hardworking than indigenous workers, and more easily

controlled, they are also often used as the symbolic scapegoat when issues surrounding, for example, domestic unemployment arise. This greatly influences and impacts upon the way in which migrant workers may be treated in Canada, and the acceptability of treatment which would be seen as offensive in relation to Canadian workers. While the discourse and perceptions of migrant labour may be seen in a more positive (as concerns the ideal identity) or negative (as concerns the villain identity) light, both are predicated on the underlying perception of the migrant worker as flexible, disposable, and ultimately, as a commodity. These penultimate characteristics of 'who' a migrant worker is directly facilitate and enable abuse and exploitation to occur with relative impunity, and under a guise of generosity or paternalism.

The regulatory regime governing the TFWPs, as discussed in the previous chapter, largely produces measures which entrench these social and political perceptions. The measures discussed in Chapter 3, including the employer-specific work permit, limits on eligibility and participation, and limited monitoring and inspection, greatly influence practices on the ground and the ability for exploitation to occur. In discussing the issues that will be explored in greater depth in this chapter, it is thus important to bear in mind that "[p]recarious work […] is not simply at the whim of individual employers, but structurally produced" by the state.[1] In other words, while this section will largely discuss the potential, or actual, unlawful and abusive treatment of some bad employers, and its impact on migrant workers, the larger context in which the law facilitates and creates this environment cannot be marginalized; the focus on the 'external bad actor' is not meant to, and should not, overpower the constructed space law has created which allows for exploitation.

[1] Bridget Anderson, "Migration, immigration controls and the fashioning of precarious workers" (2010) 24 *Work Employment Society* 300 at 311 [Anderson].

This chapter examines first how the underlying social and legal context enables employers to exploit migrant workers with relative impunity, and how migrant workers are further constrained in responding to abuse because of a lack of substantive access to legal rights and remedies. Important to both of these points of analysis is also how perceptions about working conditions and treatment of migrant workers involve a normalization of abuse, and enable exploitation to occur under a guise of paternalism. The first section of this chapter will thus explore in greater depth this latter issue, with a view to enriching the analysis and understanding of how exploitation occurs and why migrant workers are often hesitant to voice complaints. The second section of this chapter will examine how the regulatory structure of the TFWPs, discussed in Chapter 3, translates in practice to create an environment ripe for exploitation and abuse, focusing particularly on the significant power imbalance existing in the employment relationship, and directly produced as a result of the regulatory regime. The final section of this chapter will investigate the impact of the multi-layered experience of unfreedom on migrant workers, which, it will be argued, creates a final layer of unfreedom in that migrant workers are largely disabled from exercising the rights to which they are formally entitled and experience significant constraints in navigating options for legal remedies and redress.

I. THE 'OTHERED' IMAGE OF THE MIGRANT WORKER AS NORMALIZING AND RATIONALIZING ABUSE AND EXPLOITATIVE PRACTICES

The constructed identity of migrant workers as 'other', as explored in Chapter 3, enables states to commodify their labour power while largely abdicating responsibility to substantively extend and ensure the protection and promotion of their rights, and allows for the creation of migrant worker programs which operate to create significant conditions of unfreedom. The 'othered' status of migrant workers also facilitates the rationalization and normalization of exploitation, which intrinsically works hand-in-hand to fulfil the objectives of the state in using migrant labour. Thus, the normalization of abuse is a key underlying factor to understanding the proliferation of exploitative and unfree labour practices, as well as the cumulative impact of unfreedom on migrant workers.

The 'othered' status of migrant workers – both in terms of legality and foreignness – is desirable not only for the ability to extract labour power with few correlating obligations, but also because this status entrenches certain beliefs, attitudes and practices concerning the acceptable treatment of migrant workers, as opposed to citizens. The precarious status of migrant workers may be valued by employers, who perceive that this will mean the worker will be less likely to quit, and will be more flexible and cooperative with respect to working and employment conditions.[2] In one study, researchers found that employers clearly understood that "migrants were easier to control because they had fewer options."[3] Further, migrant workers, as opposed to residents or

[2] See, i.e., Anderson, *supra* note 1 at 310; Kerry Priebisch, "Pick-Your-Own Labour: Migrant Workers and Flexibility in Canadian Agriculture" (2010) 44:2 *International Migration Review* 404 at 413 [Priebisch 2010].
[3] Bridget Anderson and Julia O'Connell Davidson, *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study* (Geneva: IOM, 2003) at 30-1 [Anderson and O'Connell Davidson].

citizens, are perceived as more "hardworking, grateful and enthusiastic"[4] and may be perceived as having a stronger "work ethic" than indigenous workers.[5] Thus, the perceptions surrounding migrant work are, to at least a degree, racialized.

The racialization of migrants, and migrant workers, is not limited to employer or public perceptions. Canada's immigration policy has also had a significantly racialized focus in the past. While racialized dimensions of immigration legislation were largely removed with the introduction of the 'points system' and economic focus in the early 1970s, critiques remain that the TFWPs, particularly, operate to preserve racial discrimination, and the racialized divides and distinctions made under previous legislative schemes.[6]

This racialized perception of migrants may enable an employer to "dress up a relation of exploitation as one of paternalism/maternalism."[7] In other words, employers may perceive their role as one of generosity, and conditions (real or perceived) of the worker's status in their home country can provide justifications for employer mistreatment (i.e., 'it is better than they'd get at home'). The self-perceived role of generosity and kindness that employers of migrant workers

[4] Anderson and O'Connell Davidson, *supra* note 3 at 30-1; see also Anderson, *supra* note 1 at 310.
[5] See Mark Gollom, "Temporary foreign workers have better work ethic, some employers believe" *CBC News* (8 April 2014) online: <www.cbc.ca/news>.
[6] Sarah Marsden, "Assessing the Regulation of Temporary Foreign Workers in Canada" (2011) 49 Osgoode Hall LJ 39 at 46 [Marsden 2011]; Harald Bauder, "Foreign farm workers in Ontario (Canada): Exclusionary discourse in the newsprint media" (2008) 35:1 The Journal of Peasant Studies 100 at 103 [Bauder]; Patti Tamara Lenard and Christine Straehle, "Introduction" in Patti Tamara Lenard and Christine Straehle, eds, *Legislated Inequality: Temporary Labour Migration in Canada* (Montreal: McGill-Queen's University Press, 2012) at 5-6, 12[Lenard and Straehle]; Sarah Marsden, "The New Precariousness: Temporary Migrants and the Law in Canada" (2012) 27:2 Canadian Journal of Law and Society 209 at 212 [Marsden 2012]; Nandita Sharma, *Home Economics: Nationalism and the Making of 'Migrant Workers' in Canada* (Toronto: University of Toronto Press, 2006) [Sharma 2006]; Vic Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada since 1945* (London: Routledge, 1991) [Satzewich]; Nandita Sharma, "The "Difference" that Borders Make: "Temporary Foreign Workers" and the Social Organization of Unfreedom in Canada" in Patti Tamara Lenard and Christine Straehle, *Legislated Inequality: Temporary Labour Migration in Canada* (Montreal: McGill-Queen's University Press, 2012) 26 [Sharma 2012].
[7] Anderson and O'Connell Davidson, *supra* note 3 at 31-2.

may take on has, in one study, been documented and suggested as a way to humanize (and, thus, rationalize) exploitative treatment of migrant workers.[8]

The interview study conducted for this research also revealed attitudes of paternalism and a rationalization of treatment of migrant workers based on comparative conditions in their home countries. For example, as one participant noted:

> And still there is – I hear it here and there – there is the idea of the popular belief that, 'Well, they have a harsher time in the country of origin'. So really, 'what's the complaint, right?' So that's a very very pervasive belief.[9]

As this quote demonstrates, public attitudes in Canada thus continue to display and rationalize a 'second-class status' concerning the treatment of migrant workers under a guise of generosity and paternalism, despite the increasing documentation of unlawful treatment. The ability to create widespread beliefs about the generosity of Canada, communities and employers who bring in and employ migrant workers, also works importantly to reify their 'othered' status, particularly in terms of legality, and creates conditions which enable easy use of migrant workers as 'scapegoats', since their status in Canada is one that has been generously bestowed upon them, and thus not one which secures any permanent or real rights.

This rationalization, and the attitudes cultivated by it, again reifies the 'othered' status of migrant workers, who are not only seen as 'stealing Canadian jobs', but combine to create general hostility amount immigration and immigrants more broadly. As one participant in the interview study commented,

> I think one of the ways that you would see the effects of it is that Canadians feel hostile about temporary workers, and most Canadians, in my experience,

[8] See Anderson and O'Connell Davidson, *supra* note 3 at 3.
[9] Participant 06.

> don't really distinguish – they don't know the differences between immigrants and temporary workers – and the public opinion research over the last five or six years has been a small but steady going backwards on Canadians feelings that they're positive about immigration and immigrants. I think the temporary worker program contributes to that, because there's all the talk around, in workplaces, that temporary workers are taking Canadian jobs.[10]

As this quote demonstrates, the rhetoric surrounding the TFWPs and migrant workers in Canada contributes to an overarching hostile environment, which also works to normalize and rationalize abuse under the program, as migrant workers are consistently seen as 'lesser than' in some form, and simultaneously, as discussed earlier, as beings who should be 'grateful' for the mere opportunity to be and work in Canada.

The 'in-between' status of migrant workers in relation to the social and political community of Canada fosters little concern for their treatment. As another participant explains,

> There is a lot of tension and a lot of the discrimination. I think that the nature of the program and the way that it's set up, and giving people, 'Okay, you get your work permit for this amount of time. We'll extend it once, if you're lucky and then you have to return home. Then you have to leave Canada.' It sets it up to see them in a way that they are temporary, expendable, disposable or however that looks. And what that perception translates into, when people interact with each other, how they're treated because of that. It certainly doesn't cultivate ongoing community, in my opinion.[11]

As this quote demonstrates, the underlying and pervasive beliefs about the TFWPs and migrant workers in Canada infiltrates their interaction – or lack thereof – in the communities within which they are situated. The structure of the program, discussed in the previous chapter, also constructs an image of migrant workers as 'expendable' and 'disposable', as this participant notes, which in turn facilitates the normalization and rationalization of exploitative practices under the program.

[10] Participant 14.
[11] Participant 15.

The guise of generosity is a commonly put-forth rationalization for the constraints placed on migrant workers under the TFWPs. Compared to the situation migrant workers face in countries like Qatar, Saudi Arabia, Dubai and other areas in the Global South, particularly, Canada's program can be seen as providing much better conditions.[12] However, regardless of the advantage or benefits Canada's TFWPs may have in a global comparison, the conditions and treatment of migrant workers here remains problematic. Some participants noted that this sentiment, combined with cultural expectations, may influence migrant workers' willingness, or lack thereof, to voice complaints or assert their legal rights, as will be discussed further in section III.

The guise of generosity has been taken on as a more widespread, public attitude towards migrant workers. Migrant workers programs, as a whole, have been represented as a 'better form of foreign aid' and as a system which provides assistance and opportunity to the global south.[13] However, this rhetoric ignores the reality that this type of economic gain or foreign aid is far more likely to create dependence than development.[14] The narrative of migrant worker programs as "providing assistance to poor families in the global south", combined with portrayals of migrant workers as both "valuable economic resources" but also "as a social problem and

[12] See, i.e., Martin Ruhs and Philip Martin, "Numbers vs. Rights: Trade-Offs and Guest Worker Programs" (2008) 42:1 International Migration Review 249 [Ruhs and Martin].
[13] See, i.e., Bauder, *supra* note 6 at 112-114; Canadian Labour Congress, "Canada's Temporary Foreign Worker Program (TFWP): Model Program – or Mistake?" (April 2011) online: <http://www.canadianlabour.ca.> at 16-18 [CLC]; Jenna L Hennebry and Kerry Preibisch, "A Model for Managed Migration? Re-Examining Best Practices in Canada's Seasonal Agricultural Worker Program" (2010) 50 International Migration 19 at 33 [Hennebry and Preibisch].
[14] CLC, *ibid* at 18; Jenna Hennebry, "Who has their eye on the ball? "Jurisdictional fútbol" and Canada's Temporary Foreign Worker Program" (2010) Policy Options 62 at 63 [Hennebry 2010].

potential criminals" culminates to create a "power discourse that legitimates the exploitative practices" contained within migrant worker programs.[15]

While legal and political actors often appear to locate the existence of exploitation outside of their control or making, the previous chapter demonstrated how the very structure and legal regulations of the TFWPs embeds an exploitative dimension within the experience of migrant labour in Canada. The rationalization and normalization of abuse under migrant worker programs thus enables exploitation and abusive practices to occur with relatively little internal conflict or guilt. Cloaked in a discourse of paternalism and generosity, employers who engage in mistreatment of migrant workers can easily rationalize and justify their actions. As captured by this participant's explanation, "[…] they are treated badly. They are not treated with respect. It's not restricted to temporary foreign workers, that's for sure. But it's rampant, because they can get away with it more easily."[16] In addition, the widespread attitudes concerning migrant workers, and legal structure of the TFWPs, further facilitate a perceived environment in which abuse and exploitation, at least to a degree, will be tolerated. Thus, as the next section will explore more deeply, a wide range of exploitative and unfree labour practices exist in which employers can exert 'effective control' over migrant workers will relatively impunity.

Coupled with the creation of an environment in which exploitation is an 'unavoidable' consequence of migrant labour, the rhetoric of 'choice' and 'agency' is often used to easily dismiss systemic problematic issues under the TFWPs as the result of private relationships and actions largely beyond the state's control. Yet, despite the fact that migrant workers are often

[15] Bauder, *supra* note 6 at 101.
[16] Participant 09.

exercising agency and choice, this discourse ignores the extremely constrained conditions in which they must do so, and which are the direct product of the legal regulations and structure of the TFWPs. In addition, as will be explored in more depth in section III, this rhetoric ignores the divide between formal rights existing for migrant workers 'on paper', and the reality in which they have little substantive access to their rights and legal protection.

II. Power Dynamics and the Culture of Impunity Towards Migrant Worker Abuse in Canada

The creation of a significantly altered power structure between employer and employee under the TFWPs is perhaps the most critical issue in understanding the systemic abuse documented in relation to the program. While employment law generally assumes equal bargaining power between employer and employee, this is clearly not the case for migrant workers in Canada; thus, the range of alternatives assumed to be present, such as leaving and finding alternate employment, are effectively unavailable to migrant workers. The employer-specific work permit particularly, though the other measures discussed in Chapter 3 bear on the dynamic, provides employers with a significant means of control over migrant workers, as both their job and status in Canada are effectively dependent on the continued employment relationship. Thus, employers can, and some do, use this power imbalance to exert demands on migrant workers which are abusive and, sometimes, unlawful.

Because employers can hold the perceived, if not actual, threat of deportability over a worker's head, migrant workers may be more willing to comply with such demands, and less likely to voice complaints or resistance.[17] This contributes to the sense that migrant workers are more flexible and accepting of certain conditions of work, and thus more desirable for employers than indigenous workers. The regulations surrounding the TFWP, and particularly the employer-specific work permit, thus give employers "mechanisms of control that they do not have over citizens."[18] Additional unfreedoms created through the regulatory regime, such as the various limits on participation, can further impact on the willingness of migrant workers to submit to demands, as these regulatory measures also provide the employer with additional power and control in the employment relationship. The additional power held by the employer over a migrant worker under their relationship, and this direct impact on the willingness of migrant workers to complains, also implies that the regulatory measures and employment dynamic operate to constrain the power of choice for migrant workers.

In practice, the level of control, and attending power imbalance, enables unscrupulous employers to exact demands from migrant workers which are abusive and, at times, unlawful, with relative impunity.[19] Evidence reveals a wide range of unlawful conduct which employers of migrant workers can and have engaged in, including:

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[17] See, i.e., Anderson, *supra* note 1 at 310, 313; Fay Faraday, "Made in Canada How the Law Constructs Migrant Workers' Insecurity" (Metcalf Foundation: 2012) at 76 [Faraday]; Anette Sikka, *Labour Trafficking in Canada: Indicators, Stakeholders, and Investigative Methods*, Report No.42 (Ottawa: Public Safety Canada, 2013) at 10, 16 [Sikka]; House of Commons. Standing Committee on Citizenship and Immigration, "Temporary Foreign Workers and Non-Status Workers" (May 2009) (Chair: David Tilson, MP) at 37 [Standing Committee Report]; Meghan Benton, *Spheres of Exploitation: Thwarting Actors who Profit from Illegal Labour, Domestic Servitude, and Sex Work* (Washington, DC: Migration Policy Institute, 2014) at 8; Alberta Federation of Labour, "Temporary Foreign Workers: Alberta's Disposable Workforce" (Edmonton: The Alberta Federation of Labour, 2007) at 10 [AFL 2007].

[18] Anderson, *ibid* at 212.

[19] As outlined in the Introduction to this thesis, not all employers will engage in abusive or unlawful conduct, and not all migrant workers will be exploited or have negative experiences during their time in Canada. This discussion,

- Payment of lower wages than indicated in the employment contract or LMO;
- Non-payment for overtime;
- Illegal deductions from workers' wages;
- Intentional misinformation to workers about entitlement to benefits, and other legal rights;
- Demands for extremely long work hours with few breaks;
- Inadequate provision of basic facilities;
- Exposure of workers to undue health and safety risks;
- Control over and restriction of movement of workers, and communication with others;
- Inadequate provision of living conditions;
- Retention of passport and other identity documents;
- Demands for performance of duties not agreed upon in contract;
- Denial of medical care; and,
- Threats of deportation/repatriation.[20]

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however, focuses on those circumstances or situations where employers do exert inappropriate control over migrant workers, and where migrant workers are exploited or abused.

[20] Standing Committee Report, *supra* note 17 at 37-8; RCMP, "Human Trafficking in Canada" (Ottawa: Royal Canadian Mounted Police, 2010) at 35-6, documenting complaints related to financial exploitation, overtime issues, and differential pay [RCMP]; Julie Kaye, John Winterdyk and Lara Quarterman, "Beyond Criminal Justice: A Case Study of Responding to Human Trafficking in Canada" (2014) 56:1 Canadian Journal of Criminology and Criminal Justice 23 at 31 [Kaye et al], documenting reported instances of poor or unsafe working conditions, the withholding of passports or identity documents, confinement in warehouses, and the repayment of debts through forced work; Sikka, *supra* note 17 at 15, discussing the threat of deportation, at 16, outlining a variety of exploitative conduct by employers, such as withholding documents, wage violations, and inadequate provision of housing, and at 20-22, documenting a wide variety of 'indicators' of labour trafficking which mirror the in-text list, based on empirical and secondary data. For a broad overview of exploitative practices under the TFWPs, see also: Eugenie Depatie-Pelletier and Khan Radi, eds, "Mistreatment of Temporary Foreign Workers in Canada: Overcoming Regulatory Barriers and Realities on the Ground" Metropolis Quebec Working Paper CMQ-Im no.46, 2011; Alberta Federation of Labour, "Entrenching Exploitation" (Edmonton: The Alberta Federation of Labour, 2009); AFL 2007, *supra* note 17; Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (Toronto: December 2012).

The noted trends in exploitative practices documented above mirror closely several of the primary tactics used in relation to related concepts of unfreedom discussed in Chapter 2, including forced labour. Indeed, all of these practices seek to exert effective control over migrant workers by actively interfering with their process of choice, and often producing additional negative consequences for certain choice outcomes. In addition, most of the above cited control tactics are non-physical in nature; given the analysis presented in Chapter 1 concerning interpretations of the 'human trafficking' definition in Canada as reliant on the presence of physical violence, this then suggests one reason why research and discourse surrounding migrant worker exploitation remains disconnected from the human trafficking language, policy and action. Since the largely non-physical nature of control tactics do not easily comport within the more urgent label of 'human trafficking', the response to issues under the TFWPs, as has been demonstrated partly so far, is relatively weak when compared to the matters raised. This, in turn, further spurs on the process of normalization concerning the exploitation of migrant workers, since political and legal responses implicitly tolerate a certain degree, or amount, of these practices, due to the ineffectiveness of existing responses, and seemingly weak political will to effect positive change for migrant workers.

Participants in the interview study conducted for this thesis mentioned a majority of the above cited control tactics in discussing the trends of exploitative or abusive practices against migrant workers. A wide range of exploitative trends were discussed, including: workplace and employment standards violations; improper or inappropriate living conditions; restrictions over movements and retention of documents; and, threats of deportation and intentional irregularization of the work permit.

a. Workplace and Employment Standard Violations

Workplace and employment standard violations concerning hours of work and pay were cited by nearly all participants in this study. Violations generally related to working hours and pay, and commonly included reports of non-payment of overtime, excessive working hours, improper hourly pay, and non-provision of mandatory breaks. In general, there are many ways in which the employment and labour standards can, and are, violated by employers. As summarized by one participant,

> There's many other areas where they take advantage of them being not familiar with the labour code, and get lots of unpaid, undocumented overtime out of them, or don't pay them properly for when they're working hours that require different rates of pay – those types of things.[21]

Occasionally, participants reported that employers intentionally misled workers as to the relevant employment laws concerning these subjects.

> The other part I've noticed – and I've had people tell me about what the temporary foreign workers is – because they come here and they don't understand Canadian law and they don't understand labour standards, some of their employers will circumvent the law to some degree or 'we don't have to pay you overtime unless you work this many hours', 'we don't need to give you a coffee break', 'we don't have to give you this break', 'we can make you work 18 hours a day'. They circumvent it and most of these people don't have the understanding of how labour law works in this province.[22]

As this quote demonstrates, employment standards violations can occur with relative ease, particularly given migrant workers' often limited knowledge of the relevant laws in Canada,

[21] Participant 14.
[22] Participant 11.

another issue commonly reported by participants in this study. As this participant went on to explain,

> I think they do get taken advantage of, because they don't understand that they do have minimum rights. Because they may have come from a country, there is no standards. So all of a sudden now, I mean they were getting a dollar a day, now I'm getting six dollars an hour or eight dollars an hour. This is great. It looks wonderful. But the reality is that they're allowed $10 an hour. […] And they come up with this, 'Well, you got to pay room and board. You got to pay this, you got to pay this.' Well, that wasn't stipulated. A lot of it isn't stipulated beforehand. They factor it in fact, when they get here. And how do they go back, because now they've taken their passport or their visa documents and stuff like that, and they just can't freely travel anymore. That's the area I see as the biggest abuses.[23]

Here we can again see how the comparative circumstances for migrant workers and a possible lack of knowledge of the relevant laws in Canada, coupled with frequent violations of employment and related laws by employers, creates a situation in which migrant workers are exposed to significant conditions of unfreedom. As this quote also demonstrates, the combined use of several tactics – such as retention of documents with employment standards violations – is used to effectively immobilize workers.

Resulting from the widespread employment standards violations and the way in which these reinforce the 'second-class' status of migrant workers and normalization of abuse, the general climate of the workplace, and around employment standards, appears to be somewhat hostile towards workers, as explained by another participant:

> When it comes to employment, never being paid the contract wage, no overtime, no break, excessive use of abusive language I would say factors in as well. People being referred to as LMOs, as opposed to by name.[24]

[23] Participant 11.
[24] Participant 16.

As this quote demonstrates, verbal abuse and dehumanizing language contribute to a workplace environment in which migrant workers are clearly treated, and perceived as, different and 'lesser than', further contributing to and reinforcing the normalized abuse under the programs.

Another participant also commented on the dehumanizing language:

> These stories of poor, struggling people that are just treated so abusively by the language, the attitudes of their employers – no human-ness about it. You're here to do a job and you damn well will do that job and shut up.[25]

Here we can see how the underlying perception of migrant workers as mere 'labour power', discussed in Chapter 3 reinforces the rationalization and normalization of abuse by dislocating migrants workers' humanity in their employment relationship. The combination of multiple forces – in the way that migrant workers are perceived, and the manner in which the TFWPs are structured – thus produce conditions in which migrant workers may be easily exploited.

b. Inappropriate and Inadequate Living Conditions

Abusive treatment of migrant workers is not limited to the workplace. Many participants also discussed at length the inappropriate and inadequate living conditions that many migrant workers are subject to. Despite the fact that, under the SLO, migrant workers are not required to live in employer-provided housing, many participants reported that employers using the TFWPs will provide housing (at a cost) to migrant workers, and may punish workers who choose to live elsewhere. In addition, as noted above, the general conditions of housing provided were often found to be poor and unsuitable. Finally, in providing housing to workers, employers can add a

[25] Participant 14.

layer of control by assuming a landlord-tenant relationship in addition to the employer-employee relationship.

Participants commonly reported over-crowded conditions where workers lived in employer-provided housing, as well as employers over-charging workers for accommodations.

> Generally living conditions are pretty appalling. We are still hearing all the stories about 10 people in a house. Or 14 people in a house. And nobody's got their own bedroom and they are being warehoused in housing and paying. I haven't met a temporary foreign worker yet who is paying less than what the government said should be the maximum charge.[26]

> The living conditions seem to be – and this is just a general comment – is the owner of the company that's got the temporary foreign workers there seems to have a house that they've bought, and I'm not going to say good or bad because I haven't been in them. But they've got 12 or 13 or 14 workers in there, he's got a mortgage on it but they're all paying 2, 3, 400 dollars a month rent. So he's also making a profit on the back of them, in some senses. […] I've heard of some difficult conditions in bunking and three, four people to a room but I haven't seen it, so I can't say it's happening.[27]

As these quotes demonstrate, and as was reported by many other participants in this study, housing conditions are often over-crowded, and employers are able to use rent charges to incur significant profits, particularly so because of the large number of workers housed in one space.

Yet, employers are able to rationalize this situation through the 'guise of generosity', as noted by another participant in the study.

> We've had clients who have come here, and their employer has "helped" them find accommodation that's suitable and reasonable, and through dialogue with them in addressing their employer issue, it's revealed that their landlord-tenant, their living situation is neither suitable nor appropriate, so people who have – say an employer has six temporary foreign workers all from the same nation working for them, all six of them will be put up in one crummy little apartment, and they're collecting a huge amount of rent from each. In

[26] Participant 09.
[27] Participant 11.

> accordance with the employer is framing it as such, 'I'm fulfilling my obligation to make sure they have accommodation', but in fact, it's another mechanism to obtain financial support from these workers. It's really not in the favour of the worker at all.[28]

As this quote demonstrates, employers are able to 'dress up' this form of economic exploitation as fulfilling their obligations to workers, and under the TFWPs. However, the reality, as this participant noted, is that employers are able to both exact additional profits from, and gain additional control over, workers through the landlord-tenant relationship.

c. Control over Movements: Physical and Social

The retention of documents and control over, or restrictions of, movement and social interaction for workers was a frequently cited general trend amongst participants. These tactics can be effective both as independent control mechanisms, and also as measures to support the inherent power imbalance in either, or both of, the employment and landlord-tenant relationship. These practices, as the following quotes will demonstrate, also reinforce the dehumanization of migrant workers, thus again, allowing for a normalization of abuse and exploitation.

In discussing cases involving migrant workers which presented possible indicators of human trafficking, one participant described the multitude of ways in which restrictions over movement can be used to control workers:

> Oftentimes, there are a lot of restrictions which are placed on them. You cannot go out during this time. Once you finish your shift, you come back to your room and this is where you are going to stay. Their documents will often be taken away from them very, very early on, including their work permit, their passport, and any other – if they have a care card, et cetera. That documentation will be taken away from them. There are generally some form

[28] Participant 15.

> of threats, even if they are mild […] Restricted practices, such as only giving them electricity for two hours of the day, so they can only use the microwave in their room for those two hours, or heat their room for those two hours, and the rest of the time they just have to make do with what's available to them. The fact that they're not allowed to talk to other individuals from the same community, because they might start getting ideas in their head.[29]

As we can see from this quote, restrictions can be used in relation to living conditions, physical movement, and social interaction, to name a few. However, reports of these various kinds of restrictions were not made only in relation to potential trafficking cases; many participants reported some degree of control over movement or social interaction of migrant workers as relatively commonplace. As one participant notes, "their interactions in many, many ways are mediated and controlled. The times and the days and the hours when they are going to interact with people are controlled by the employers […]."[30] These kinds of practices further support an employer gaining effective control over workers, not just because the compliance with restrictions demonstrates the employers' power, but also because they may often limit migrant workers' interaction with external actors, such as community members, advocacy organizations or representatives, or official authorities. Control tactics which aim to restrict the physical movement and social interaction thus contribute to greater isolation of migrant workers.

d. Threats against Status

Finally, the use of threats of deportation and irregularization of migrant workers' status was also a frequently reported trend in exploitation. Many participants noted the way in which the threat of deportation is used to exact many demands and used to facilitate several other control tactics. As one participant describes,

[29] Participant 01.
[30] Participant 07.

> I think that one of the most miserable abuses that we used to hear about […] is the power imbalance that employers use. […] the way the employers said, whenever there's an, even questioning, not just grumbling about working conditions, even just mildly questioning, like 'could you explain to me why I have to do …', the employer comes in and says, 'listen, you want to stay in this country, you remember that I control your ability to have a visa to be here', which isn't completely true in lots of cases and yet when an employer says it with authority, and your temporary worker knows nothing about Canada and the laws – man, it knocks you back into line and shuts you up very fast. It's a kind of violence against workers, it's not hitting them, but psychologically it wears them down, it stresses them out, it frightens them, and those are all the emotions that I've heard in people talk about their experience here, over and over.[31]

Coupled with the commonly cited reports of document retention, the threat of deportation, and perceived power employers hold in that regard, is, as this quote demonstrates, a very powerful control tactic against migrant workers. Considering the underlying motivations for labour migration and constraints placed on migrants under the TFWPs, as discussed in the previous chapter, it is plain to see how this mechanism, in particular, is so effective at gaining compliance and exacting control over migrant workers.

In addition to threats of deportation, some participants also noted a trend whereby employers appeared to intentionally irregularize migrant workers' status by either misleading them in regard to continued employment and renewal of their work permit, or by moving workers to a different job or location than the one listed on their work permit. In response to a question concerning documented trends of exploitation, one participant replied:

> I would say as well promises to continue employment. So, 'Oh yeah, keep working for me. Your work permit's almost expired. Don't worry, I put in an extension. You're well taken care of. You don't have to worry. Keep working.' When in fact, that client, their paperwork isn't in order and never were in order. So being misled by an employer in order to get more out of the

[31] Participant 14.

> employee, and have them continue to work, so their business isn't disrupted. When really, they're working technically illegally.[32]

As this quote implies, misleading a migrant worker concerning authorization to continue employment may be in the interest of an employer, with little regard to the effect or impact on the worker. The other trends noted thus far in this chapter all implicitly produce a benefit, often economic in nature, to the employers who engage in these abusive practices.

Irregularizing a worker's status creates heightened precariousness for that worker, who may perceive a greater risk of deportation or punitive consequences, even where their irregular status was created by the employer. Commenting on this situation, one participant explained,

> If a temporary foreign worker comes out of a closed work permit, where an employer may force that individual to work somewhere else, I can make an assumption here then that the individual is not really going to be able to come forward for assistance because they're technically working illegally.[33]

As this quote illustrates, the irregularization of status thus creates a significant obstacle or impediment to exercising choice where a worker may wish to exit their situation or seek assistance.

e. The Combined Effect of Various Control Tactics and the Power Imbalance on the Experience of Migrant Labour

Overall, as this section has established, employers have a wide variety of control tactics available at their disposal. The inherent power imbalance created by the regulatory structure of the TFWPs, as documented in Chapter 3, produces a landscape in which employers can assert

[32] Participant 15.
[33] Participant 12.

control over workers, something which many participants in the interview study believe employers are readily aware of. As one participant stated, "employers are constantly reminding [workers] that they have all the power."[34] The result of this dynamic is that workers learn they must be compliant, or risk loss of employment and status in Canada:

> What in general happens is that if they get sick they are going to be sent home. If they voice concern, they are going to be sent back home, or they are not going to be called back in the program. So it's this sense that you are worth nothing if you don't have your muscles and if you are not completely compliant with what everything they tell you to do.[35]

Just as migrant workers may perceive and internalize the normalization of abusive treatment, they are likely also deeply aware of the significantly constrained conditions in which they must operate; the dehumanized construction of the migrant worker identity, as detailed in both Chapter 3 and this chapter, is apparent to migrant workers themselves, as described by one participant: "In their words they say, 'We are only workers. We are only muscles. we are only tools. We are only machines.'"[36] The awareness of the reality of their situation may thus further disempower migrant workers, facilitating a self-referential cycle of normalized exploitation by and impunity for employers.

Overall then, the acute knowledge of the power imbalance in the employment relationship, and ability to take advantage of it in a wide variety of ways, with little risk of consequence, adds a further layer of unfreedom in the experience of migrant work by allowing employers to capitalize on a state of constrained choice, and by further constraining the choice and freedom of migrant workers through the use of tactics which seek to gain effective control. The apparent lack of

[34] Participant 07.
[35] Participant 07.
[36] Participant 07.

enforcement, and minimal consequences for employers who may be 'caught', further adds to the culture of impunity that exists around migrant worker exploitation. As one participant explains,

> It's always a struggle because there's such a large percentage of employers – although aware of what their obligations are – don't feel the need to comply. There's not the enforcement and the penalty on the employer is lacking to the extent. Often we'll see the same employer […] They just keep getting different foreign workers doing to the same illegal things, like they haven't actually been reprimanded enough to make that behaviour stop.[37]

The existence, and persistence, of abusive practices under the TFWPs cannot solely be attributed to a few 'bad employers'; the consistent reporting of exploitation and abuse under the program, but lack of reported consequences for employers and recruiters, suggests that employers and other parties, like recruiters, have learned that they may operate with relative impunity concerning the treatment of migrant workers, as illustrated by the above quote. Despite employer sanctions existing, as well as other legal remedies and sanctions, these measures are rarely used, as discussed in Chapter 3. This creates an opportunistic environment in which the perceived risk of consequence for engaging in unlawful and abusive practices is relatively low, and possibly benefits or added value to, for example, economic profit, are high.

Combined, the low risk of engaging in unlawful and exploitative conduct against migrant workers, coupled with the pervasive presentation of migrant workers as 'second-class citizens' in Canada, creates a culture of impunity for employers, recruiters and other third parties who may encounter or engage with migrant workers in Canada. The sense of impunity, and low perceived risk of consequence, is also entrenched due to the fact that migrant workers do not have effective means to assert their rights or obtain redress from employers. Thus, while the inactivity of legal

[37] Participant 15.

regulations creates an opportunistic motivation for unscrupulous employers to take advantage of the situation, the unfree conditions surrounding migrant work in Canada create further, and formidable, obstacles to responding to exploitation.

III. A RIGHT TO RIGHTS WITHOUT ACCESS TO RIGHTS: THE IMPACT OF UNFREEDOM ON MIGRANT WORKERS' LEGAL POWER/EMPOWERMENT

Political discourse concerning the TFWPs, particularly in response to reports of abuse, often highlights the fact that migrant workers in Canada have all of the same legal rights as indigenous workers. This is true; but, this is also false. Formally, migrant workers possess many of the same employment and human rights as Canadians; however, when we consider how migrants' 'rights' are experienced or applied in their lived reality, we can conclude that migrant workers do not have the same *substantive* rights, or access to them, as Canadians.. First, while migrant workers are not excluded as a population from certain rights, the industries in which migrant workers make up a majority of the workforce are sometimes subjected to differential regulations,[38] or excluded outright from certain rights, such as the right to unionize.[39] However, this section seeks to focus on the latter claim, that migrant workers do not have substantive or effective access to

[38] Differential regulations often exist for both agricultural workers and domestic workers: *Employment Standards Act 2000*, SO 2000, c41, Parts VII, VIII, IX, X, XI; O Reg 285/01 made under the *Employment Standards Act 2000*, sections 2(2), 4(3), 8, 9, 24-27, cited in Faraday, *supra* note 17, n232; *Labour Relations Act*, RSA 2000, c L-l, s4(l)(e); see also, Judy Fudge and Fiona MacPhail, "The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labor" (2009) 31 Comp Lab L & Pol'y J 5 at 31.

[39] In Ontario, agricultural workers are prohibited from formal unionization and collective bargaining, see *Labour Relations Act, 1995*, SO 1995, c1, Sch A, s3; *Agricultural Employees Protection Act*, SO 2002, c16. The *AEPA* has been upheld by the Supreme Court of Canada as not violating the s2(d) *Charter* right to freedom of association: *Ontario (Attorney General) v. Fraser*, 2011 SCC 20.

the formal legal rights to which they are entitled. In terms of unfreedom, the active external constraints placed on migrant workers' ability to *access* their rights constitutes a critical issue.

Employers and other parties who exploit migrant workers are able to do with relative impunity not only because the state is not 'looking into them', but also because there is a conscious knowledge that migrant workers are highly unlikely to approach an external party or formal authority with a complaint. Migrant workers are generally hesitant to report abuse or voice a complaint about their conditions in Canada; this is widely recognized, as are the reasons why migrant workers are reluctant to do so.[40]

Migrant workers are known to face barriers to asserting or enforcing their rights due to: "lack of knowledge about their rights […]; lack of training; and in particular "being unable to exercise rights […] for fear of losing one's job, or in some cases, being deported.""[41] Migrants are tied to their employer for both employment and status in Canada, possibly with significant debt from recruitment and related fees. In addition, migrants are in Canada for a limited time and may be dependent on the 'naming' process to return, a process which often excludes workers who are considered to be 'rabble-rousers' because they have voiced concerns or complaints. Employers have terminated and removed migrant workers where complaints were made, and before those

[40] See, i.e., Faraday, *supra* note 17 at 89; Sikka, *supra* note 17 at 17; Tanya Basok, "Post-national citizenship, social exclusion and migrants rights: Mexican seasonal workers in Canada" (2004) 8:1 Citizenship Studies 47 at 48 [Basok]; AFL 2007, *supra* note 22; Delphine Nakache and Paula J. Kinoshita. "The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?" IRPP Study No.5 (May 2010) online: IRPP <http://www.irpp.org> at 39-40 [Nakache and Kinoshita]; CLC, *supra* note 13 at 9-12, discussing some of the ways in which formal rights on paper diverge significantly in practice.

[41] Faraday, *ibid* at 93, citing Tony Dean, *Expert Advisory Panel on Occupational Health and Safety: Report and Recommendations to the Minister of Labour* (Toronto: Ministry of Labour, December 2010) at 46.

complaints could be thoroughly investigated.[42] Migrant workers are therefore often in a situation of heightened precariousness and insecurity.[43]

Together, "[t]hese fears of deportation, lack of resources, and lack of information pose significant barriers to accessing appropriate mechanisms to remedy exploitative workplace conditions."[44] As regards the lack of information and resources, it is also important to consider the extent to which knowledge, training and support is made available, and it has been suggested that whether and the extent to which this is so depends on whether migrants are "viewed as members of the local communities of citizens."[45] In this way, the 'othered' and 'temporary' status of migrant workers may further impinge upon their ability to access rights or voice a complaint, as "denial of social membership" may constrain "the migrants' ability to negotiate respect for their legal rights and adherence to legal principles governing their employment and residence in the host society."[46] Finally, given the lack of opportunity many migrant workers face for income-generating work in their home countries, they are more likely to "do everything possible to please their employers and continue in the programme."[47]

Participants in the interview study conducted for this thesis described many of the same reasons as outlined above in discussing why migrant workers are hesitant to voice complaints or seek

[42] Sikka, *supra* note 17 at 17, citing also Alberta Federation of Labour. "Entrenching Exploitation" (Edmonton: The Alberta Federation of Labour, 2009) at 13, and Faraday, *supra* note 17 at 78 and 86.
[43] See, i.e., Faraday, *ibid* at 85; Hennebry and Preibisch, *supra* note 13 at 30; Judy Fudge, "The Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers" (Metropolis British Columbia Working Paper Series No. 11–15, 2011) at 32; Preibisch 2010, *supra* note 2 at 415.
[44] Sikka, *ibid* at 17.
[45] Basok, *supra* note 40 at 48.
[46] *Ibid.*
[47] Leigh Binford, "From Fields of Power to Fields of Sweat: the dual process of constructing temporary migrant labour in Mexico and Canada" (2009) 30:3 Third World Quarterly 503 at 505 [Binford].

assistance, and in discussing the obstacles and impediments migrant workers face in accessing their rights and legal remedies.

a. Accessing Knowledge as Critical to Accessing Rights

As a first obstacle or impediment, many participants noted that, in their experience, migrant workers do not often have accurate knowledge of their rights and the relevant laws in Canada. In response to a question concerning how easy or difficult it is for migrant workers to access their legal rights and remedies, one participant replied,

> I think it is extremely difficult. I think that there's very little record of success around doing it. Most of them don't even know how they would go about doing it, or whether or not they need to be doing it, because they're being taken advantage of it. It's at that level of utter ignorance, let alone those that might become aware, being able to actually act and follow through. I would say it's extremely difficult.[48]

This belief was shared by a significant majority of participants in the study. As succinctly put by another participant, "it's not easy for migrant workers to enforce their labour rights, because they don't often know what they are to begin with."[49]

Many participants also acknowledged that a lack of knowledge is not just concerning the applicable laws and standards, but also where to access assistance and seek help. In response to the same question about the level of difficulty in accessing rights, another participant explained,

> Probably very difficult. I mean, number one: they don't know their rights, a lot of times. Number two: they don't know where to look. Number three: trying to access legal advice, it's very limited because […] they really have no clue. […] I just think there's a real fear that they don't have a comfort level to speak out publicly, because they're in a strange country, they don't speak necessarily the

[48] Participant 14.
[49] Participant 05.

> language, they definitely don't understand the law and they really don't know their legal rights as an employee.[50]

Thus, as illustrated by this quote, the unfamiliarity or lack of knowledge about applicable laws and rights, where to seek assistance or advice, and even language barriers, can combine to create daunting obstacles for migrant workers who may desire to seek out information or help.

b. Understanding the Risk and Complexity of Choosing to Complain (or Not)

Participants commonly acknowledged the extreme conditions in which migrant workers must choose to voice a complaint, which is seen a significantly risky endeavour in terms of retaining employment and administrative status in Canada. As one participant explains in outlining the barriers migrant workers face in accessing legal remedies,

> Well, I feel that the first barrier is the fact that the – the dilemma for the worker. This doesn't look good. Should I endure it? To what extent? What happens if I seek help? While the employer is constantly saying, 'Well, either you do this or you go back to where you came from.' So the threat is – verbalized or not – it's always in the horizon of the temporary foreign worker. He or she knows that they have to come back eventually, but everyday they stay here, it's a financial difference that has an impact in their lives and their families. So that even if they are not paid well, even if they are paid close to nothing, they still have the hope that eventually they are going to be paid. […] So the dilemma and at what point they reach their limit of their endurance, how much I'm going to support this, to endure this abuse. So that's what we see. And just my last thing, no certainty of what's going to happen if they seek help – when they seek help.[51]

Similarly, another participant described the enormous pressure and circumstances a migrant worker may be coping with in terms of their obligations to their family, in terms of

[50] Participant 11.
[51] Participant 06.

acknowledging the extremely constrained conditions in which they must navigate choice when faced with exploitative treatment.

> Some people will say, 'Why don't they just report them?' […] Clearly then, it's really not as bad as they're saying it is. It is, but you don't understand their desperation. You don't know the conditions they've come from, what type of life they've lived, whether they have three kids back at home, and a father and a mother who are 80 years old and they're not able to work, and perhaps they have physically-challenged siblings. And the burden falls upon this one person to keep that family going back there. So, I think some of those problems, we'll never be able to overcome them, because what do we have to offer them? There's a break in their work for a year. They have to start all over again. So, their motivators are very powerful. I don't fault them necessarily for doing what they do, because they're looking out for their best interests and that's all that they truly understand at that point in time.[52]

As both of the above quotes demonstrate, migrant workers may often place significant value on the security of continued employment and status in Canada, and for good reason. Thus, the decision to complain, and thus put these highly valued factors at great risk, is one which many workers would understandably not choose to do.

The process of choice migrant workers may navigate is complex, as one participant described,

> Do you want to risk what could happen in the aftermath of enforcing your own rights? In which I think, a lot of clients […] get the advice, find out exactly, 'Okay, I can do this, and this, and this', and then choose not to pursue it. Because they're weighing those pros and cons, or they're weighing their, 'Okay, if I do this, how will it impact my job situation and how much money I can send home every month? How will it impact my future nomination or my future PR path', those kinds of things.[53]

As this quote illustrates, in addition to obligations back home or for their family, migrant workers must assess the risk to their continued employment and administrative status, debts they may owe as a part of the recruitment and migration process, and future long-term prospects in Canada.

[52] Participant 01.
[53] Participant 15.

c. Deterring Factors in Considering a Complaint / Compelling Reasons to Tolerate Abuse

Several participants in the interview study elaborated on the perceived risks and consequences migrant workers often associate with complaining or asserting rights, providing greater insight into the reasons for which many workers may tolerate a significant degree of abuse, something which, as the above quote demonstrated, is often misunderstood. The threat of deportation, coupled often with the existence of debt and continuing obligations back home, was noted as a powerful factor operating against voicing complaints or asserting rights by many participants. As one participant explained,

> People are afraid of losing their jobs, and people are afraid of being deported. Whether a deportation would even happen or not, if there's a perception of deportation, that keeps people pretty well locked in where they are. If there's money owed in the country of origin.[54]

Elaborating on the risk to continued employment, another participant relates the difficulty of choice in the context of both the power imbalance in the employment relationship, and the impact of the underlying 'second-class' status of migrant workers:

> Workers are afraid to actually exercise their rights, because exercising their rights, it means that the employer is going to – is not going to like it. That's how they say it. […] When they have a complaint they are very hesitant, because they know that maybe for the next year they're not going to be called back. And that is – what is their crime? It's accessing their rights. It's not only a matter of accessibility and that yes in accessibility to information, and many instances they don't know that they are entitled to get, for example, workers' compensation. But when they do and they are aware, when they are informed, then it comes the issue of the risks, what it really means exercising your rights.

[54] Participant 12.

> So then we have these double standards, because of their vulnerabilities, because of their race, their occupation, their immigration status.[55]

We can see from this quote how the regulatory structure of the TFWPs, and underlying purpose and context of the TFWPs, analyzed in Chapter 3, directly impact upon the choice process of migrant workers facing unlawful or abusive treatment. Particularly where workers' status in Canada is already limited, such as through the new four-year rule, this can act as a further incentive against complaining, as one participant explained: "If you know you only have four years, you're going to be less inclined to rock the boat and speak out against an employer, if you intention is just to make as much money as possible."[56]

In addition to risking current employment and status, migrant workers may be hesitant to assert their rights or voice a complaint where they perceive an opportunity for longer-term or permanent status in Canada. In some cases, as one participant describes, workers will be misled as to their prospects for long-term status,

> I think the big vulnerability is that in most cases they've been lead to believe that temporary foreign worker visa status can be a step towards becoming a landed immigrant or permanent resident. In the great majority of cases, it's not. It's even absolutely the opposite. So they've been lead to believe that. In the overwhelming number of cases, whether or not they've been led to believe that, they want that to be true, they desire that. Those two things make them so open to do just about anything to achieve those ends, that it puts them in a very dangerous place when they're here. I think a lot of it comes back to that. […] That allows just about everything else to happen. All the abuses flow from the fact that, unlike permanent residents or Canadian citizens who could say, 'I'm not taking that, goodbye', these guys will, because if they put up with it, it might somehow open that door a tiny bit for them someday.[57]

[55] Participant 07.
[56] Participant 15.
[57] Participant 14.

As this quote illustrates, whether or not migrant workers have been misled or have a real opportunity for long-term status, the desirability of this goal is a strong motivator to accept abusive or unlawful treatment rather than complain and risk this prospect.

Where long-term status is a real possibility, this can perhaps acts as an even stronger deterrent against complaining or exiting an exploitative situation:

> People are forced to choose between accepting inappropriate or easy-go work place conditions, labour practices, et cetera. Jeopardizing their future PR which is – so we have clients who, 'I know that my employer's doing this. I know it's illegal, but I have a nomination processing. I'm just going to ride it out until I get my PR.' If people choosing to stay in conditions that they otherwise wouldn't.[58]

Together, factors concerning obligations towards family, debt, continued employment and status in Canada, and the prospect of long-term status, can act as a powerful force against asserting legal rights or voicing complaints in the context of exploitation or abuse.

While migrant workers are exercising agency and navigating choice in such situations, the conditions in which they are required to do so are unreasonable, and as demonstrated by the analysis in this section, are directly produced from the regulatory structure of the TFWPs. The perceived risks associated with complaining are tied to the structure of the programs and attending power given to the employer through that structure. Thus, the quantity and quality of viable options for migrant workers is significantly reduced, and the obstacles and impediments for existing options create significant additional risks for certain choice outcomes.

[58] Participant 15.

d. The Underlying Problem of a Complaints-Based Approach

The hesitancy to voice complaints is particularly problematic given that the available legal mechanisms for enforcing rights and obtaining remedies are complaints-driven, meaning that if a migrant worker does not complain, he or she has no practical access to enforcing his or her rights. The complaints-driven system is not one where migrant workers have an "effective voice".[59] The existence of, and reliance on, a complaints-driven process was also frequently cited by participants in the interview study as a substantial challenge to asserting rights and accessing remedies for migrant workers. Given the powerful deterrents to, and risks of complaining described above, it is unsurprising that migrant workers don't use these processes. As one participant explains,

> Well, we know that for any kind of employment standards complaint, whether you're a migrant worker or not, we know that there – any investigation in terms of employment standards is complaints driven. Even as a Canadian, I think it would be difficult for me to make a complaint against my employer knowing that it would be pretty obvious who made the complaint, because those processes are dependent on complaints and dependent on that person coming forward. I think it would be a challenge for anybody to make that complaint. And if you were a temporary foreign worker, with your employment tied to that employer, that also seems pretty intuitive, that it would be very challenging to come forward and make that complaint.[60]

Being identified, and with the level of employer control existing in the relationship, as this quote illustrates, appears to be a significant obstacle for migrant workers who may otherwise wish to seek assistance. As another participant described,

> I have been told numerous times, 'Oh, there's a 1-800 number. All you've got to do is call it.' Well, they're not comfortable calling it, because they've got to leave their name, they've got to leave a contact. They don't want the house to know that they've made this complaint. They don't want their employer to

[59] Faraday, *supra* note 17 at 95. See also Nakache and Kinoshita, *supra* note 40 at 21-25, 39-40.
[60] Participant 12.

> know they made a complaint. Because it comes back to them, and then they get fired or they're putting their family in jeopardy.[61]

The acute power imbalance in the employment relationship, coupled with the apparent lack of enforcement and punitive consequences for employers who might engage in this type of conduct, this creates additional disincentives for migrant workers who may otherwise wish to access legal remedies and processes.

Given the requirement for a complainant to identify, and possibly cooperate further, with authorities, the state and structure of complaints-driven processes for employment issues, as well as others, is thus seen as a substantially detrimental condition for migrant workers to substantively access their legal rights and remedies; as summarized by one participant, "I would really emphasize the complaints-driven process for whether it's a criminal investigation, or an employment status investigation. Having a complaints-driven process is a massive impediment to people coming forward."[62]

The perceived barriers for migrants in approaching a wide variety of services, whether legal, social or otherwise, where they will be required to identify themselves are widely known, and often cited as contributing to a hidden population in that migrants are often unwilling to come forward in such conditions. The punitive consequences often associated with identification, such as detection and deportation for irregular migrants, present the same underlying perception of risk in somehow losing status and place. Complaints-driven legal processes, as described above, all require identification which, from the perspective of the migrant worker, would thus put their employment and immigration status – and thus livelihood – in Canada in jeopardy.

[61] Participant 11.
[62] Participant 12.

An individually-based, complaints-driven process for enforcing rights or accessing remedies thus further creates unfreedom by placing migrant workers in a situation of even greater constrained choice – risk employment and administrative status in Canada, or accept unlawful treatment.

e. The Consequences of Launching a Complaint

For migrant workers who may be willing to launch a complaint, the first of many steps in accessing legal rights and remedies, further significant barriers arise which impinge uniquely on their situation. First, the procedural aspects of enforcing rights and remedies through legal mechanisms create additional obstacles for migrant workers, due to both the time and resources required to execute legal measures.[63] Because migrant workers are in Canada for only a temporary period, moving through the process of enforcing legal rights or remedies can be stalled or effectively terminated when and if they have to leave Canada. Relatedly, because launching a complaint could result in termination of employment, their income, immigration status and even housing may be suddenly withdrawn.[64] Access to the proper support and guidance to navigate the legal systems is also a widespread issue for migrant workers under the TFWPs, as most provinces do not allow public resources such as legal aid or immigrant settlement services to receive workers under the TFWPs as clients.[65] Finally, jurisdictional issues, again, can play into the ability of migrant workers to access legal rights and remedies where certain bodies, such as employment standards, have caps or limitations on claims made.[66]

[63] See, i.e., Nakache and Kinoshita, *supra* note 40 at 22.
[64] See, i.e., Faraday, *supra* note 17 at 94.
[65] See, i.e., Hennebry and Preibisch, *supra* note 13 at 30.
[66] See, i.e., Faraday, *supra* note 17 at 89. See also, Nakache and Kinoshita, *supra* note 40 at 22.

Several participants in the interview study commented on the numerous barriers and obstacles present in navigating legal procedures. At the outset, migrant workers may face significant difficulty in locating resources which a mandate to assist them; as one participant noted, "many of these workers would not be eligible for legal aid, and so the whole legal aid structure is not really conducive to assisting."[67] In addition, other impediments reported by participants included language barriers, a lack of existing or coordination of support services, continuing fears of deportation and for family members back home, difficulty in securing or regularizing immigration status in some cases, and difficult in replacing documents if they are not in the worker's possession.

The ability to seek assistance and find services with a mandate to support and advocate for migrant workers appeared both especially important, and often very difficult to locate. In discussing a case where an organization was able to successfully navigate the legal processes, one participant noted the extremely challenging nature of the situation:

> We sought and found a remedy through employment standards claim for that individual, but it took a very long time. It was lengthy and it was challenging. It was helpful that that individual had an advocate […] that could help him walk through that process. They don't think it would've been – I don't think it would've been easily accessible to him otherwise as an unskilled worker and without a great amount of English. I don't think he would have even be aware that that was something that was possible for him.[68]

Thus, for those workers who are unable to locate an organization that is able to assist them, asserting legal rights or obtaining legal remedies may be out of reach, even where a worker would choose to pursue these options.

[67] Participant 05.
[68] Participant 12.

In total, the regulatory measures of the TFWP, coupled with the existing legal mechanisms unattuned to the unique needs of migrant workers, combine with the result that migrant workers are effectively disabled from enforcing their legal rights or obtaining legal remedies.

> [T]he legislative system that is intended to protect migrant workers' rights at work fails to take into account and accommodate the economic, legal and social location of disempowerment and dependence that migrant workers experience. […] Because the system cannot be effectively accessed by migrant workers, employers remain largely unsupervised and violations of rights remain systemic.[69]

In a very small number of known cases, migrant workers have successfully used legal mechanisms to address exploitative or unlawful conduct, most often with the assistance and support of unions or very active community organizations.[70] For example, a recent case concerning the alleged blacklisting of an agricultural worker at the BC Labour Relations Board was supported significantly by United Food and Commercial Workers local union, under which the employees at the farm had sought unionization.[71] The case concerned the validity of certification and de-certification at the worksite which had attempted to unionize, and which the allegedly blacklisted worker assist in organizing. The process of the hearing, which involved the Mexican government and a BC Supreme Court ruling about the jurisdiction of the Labour Relations Board to hear the case, was extremely complex, and could likely not have been continued through to a final decision without the significant organized support. This demonstrates not just the significant impact that external organizations can have in assisting

[69] Faraday, *supra* note 17 at 94-5. See relatedly, Quebec Human Rights Commission, "Systemic Discrimination Towards Migrant Workers", summary of *La discrimination systémique à l'égard des travailleuses et travailleurs migrants*, adopted at the 574th meeting of the Commission, held on December 9, 2011, by Resolution COM-574-5.1.1.
[70] I.e., C.S.W.U. Local 1611 v. SELI Canada and others (No. 8), 2008 BCHRT 436; *Sidhu & Sons Nursery Ltd (Re)* [2014] BCLRBD No56 (QL).
[71] *Sidhu & Sons, ibid.*

migrant workers through legal processes, but cautions that, under the current state of the TFWPs, such support may be *necessary* for a migrant worker to pursue any legal mechanisms or redress.

However, it appears that for most migrant workers in Canada who experience exploitation, little recourse exists. Thus, while migrant workers may have formal rights 'on paper', something which is oft-repeated by political actors, they are effectively disbarred from any substantive access to those rights, further contributing to their dehumanization and 'second class' status in Canada.

CONCLUSION

This chapter sought to expose and demonstrate the layered experience of unfreedom for migrant workers in Canada and the multitude of ways in which it creates a landscape ripe for exploitation, with relative impunity. As demonstrated, each layer of unfreedom builds upon another, and works in conjunction with those above and below, culminating in an environment ripe for exploitation and in which migrant workers are unfree. From the root of the underlying context in which a migrant economy is created and relied upon, through the legal regulations and their operationalization and abuse on-the-ground, migrant workers exist in a space and state which creates conditions for and of unfreedom: actively creating external constraints and obstacles to exercising choice, and in doing so, denying their dignity.

As this and the previous chapters have established, migrant workers are represented and treated as both 'lesser than' and 'other to' Canadians, and to Canada. Migrant workers are an *object* of law's power, but not a *subject* of its production or protection. Migrant workers are a *means* of production for the Canadian economy; they are to be used and removed; they are a commodity. When migrant workers are objectified as "abstract labour power", an identity is created which "denies them human agency and justifies their exploitation."[72] It is this context in which the conditions and experiences of unfreedom explored in this and the previous chapters are able to flourish. The last chapter of this thesis will take up the challenge of looking forward from this current state of unfreedom, exploring alternative ideas and structures that could shift the existing legal and regulatory frameworks, and the ideologies underpinning them, in order to advance substantive inclusion, choice and freedom for migrant workers in Canada.

[72] Bauder, *supra* note 6 at 104.

CHAPTER 5

RE-THINKING RIGHTS, CHOICE AND FREEDOM FOR MIGRANT WORKERS UNDER CANADA'S TEMPORARY FOREIGN WORKER PROGRAMS

The bulk of this thesis has worked towards establishing the ways in which law impinges upon, constrains and otherwise facilitates the existence of conditions of unfreedom for migrant workers in Canada. Beginning with a discussion of the way in which migrant workers' conditions are excluded from dominant legal, social and political understandings of 'exploitation' in Chapter 1, Chapter 2 formulated a broader conceptual framework of unfreedom from which to investigate and expose the myriad ways in which law produces and facilitates unfreedom, both in regulation and in practice, for migrant workers, as detailed in Chapters 3 and 4. This last chapter thus turns to revisit the idea of freedom, and to conceptualize an alternative pathway for law that will promote and enhance real freedom for migrant workers in Canada in the future.

This thesis has made clear that what is required to enhance and promote real freedom for migrant workers is more than set of reformatory recommendations to the Temporary Foreign Worker Programs. The underlying ideology concerning migrant workers and their place in Canadian society is a much deeper shift needed to address the structural inequality, exclusion and exploitation demonstrated in this thesis. This chapter will thus examine the ways in which some fundamental concepts – like rights and equality – can be brought forward to enhance the place of migrant work, and workers, in Canada. This chapter will also use more concrete reformatory examples to illustrate the more theoretical shifts and ideas brought forward. Overall, the goal for

this chapter is to provide insight into the ways in which we might re-imagine the role and relationship of law to the many other forces bearing on migrant workers' experience in Canada, in order to begin to see possibilities for enhancing the freedom, dignity and empowerment of migrant workers.

This chapter will begin by revising the idea of freedom in section I. This section will recall the primary features of the idea of freedom set out in Chapter 2, and will elaborate on how we can envisage these features – opportunity and process – in relation to each other, and to ideas of choice and rights, in their ability to realize substantive freedom. Section II will build further on the idea of rights as an organizing framework for re-thinking the place and purpose of migrant labour. This section will set out the broad contours of how we can think of rights as related to choice and freedom, and the importance of the state-subject relationship in enhancing both the existence of rights, and meaningful enjoyment of them. This section will draw on the fiduciary concept of the state, developed by Fox-Decent, to situate this relationship and understand the importance of rights within it. Having set out the organizing framework in section II, sections III and IV will turn to examine in greater depth the specific insights that can be brought to bear in improving the experience of migrant labour under Canada's TFWPs. Section III will examine options to enhance the existence of rights as choice, focusing primarily on the employer-specific work permit, and limits on participation, discussed in Chapter 3. Section IV will explore various ways in which meaningful access to and effective enjoyment of rights can be improved for migrant workers in Canada, contributing to an improvement in the quality of choice and opportunity for freedom.

I. REVISITING THE IDEA OF FREEDOM

The previous chapters have demonstrated how migrant workers are subjected to significant conditions of unfreedom under, and as a result of, law and legal regulations that constrain their ability to exercise choice in respect of their experience and status in Canada. As demonstrated in Chapter 4, this produces a landscape ripe for exploitation and abuse. The production of unfreedom for migrant workers rests on a combination of simultaneously operating forces – legal, political, social – in relation to the constructed identity of migrant work and workers, and in relation to the dominant conceptualizations and contestations present in legal definitions of various exploitation-related phenomena, as set out in Chapters 1 and 2. Understanding how to ameliorate conditions of unfreedom must then begin by returning to the concept of freedom, set out in Chapter 2, and exploring more fully the metrics, or criteria, of what freedom entails and how it is enacted. Thus, while the previous chapters focused on the obstacles and impediments to exercising choice – or, in other words, the constraints on choice that impact upon experience – this section then turns to examine how the law can better open and facilitate choice in a way which positively enhances the 'tools' to realize freedom. This section will thus provide a backdrop from which to consider in greater depth the way in the role and relationship of law and of legal ideas, principles and rules, can be reimagined in order to foster greater inclusion and substantive freedom for migrant workers in Canada.

As introduced in Chapter 2, the idea of freedom is often presented as a binary status: "human beings are either free, in which case they are assumed to exercise self-sovereignty, or enslaved,

in which case they are imagined as evacuated of agency and reduced to an object-like condition."[1] However, as discussed in that chapter and established in the case of migrant workers in Chapters 3 and 4, presenting freedom as a binary status-driven concept ignores the spectrum of experience that can exist in relation to some deprivation of freedom or some constraint on choice. In other words, recalling the example introduced in Chapter 2 concerning the social and legal conditions impinging upon freed slaves in the post-abolition era in America, one can 'be free' while experiencing significant constraints on 'freedom', where the latter focuses on actual conditions of individual experience, rather than legal status. The binary, status-driven perception of freedom displaces the importance of structural and underlying factors impinging upon one's degree of freedom, including the impact of legal regulations and meaningful access [or lack thereof] to legal rights and remedies. The divide between 'formal legal status' and concrete, lived experience in achieving freedom and asserting choice or rights for migrant workers in Canada has been well-established in Chapters 3 and 4 of this thesis.

As set out in Chapter 2, a substantive view of freedom focuses on creating conditions that enable individuals to lead the kind of lives they value, and have reason to value.[2] In this vein, freedom can be understood as including at least two valuable, and fundamental, aspects: opportunity and process.[3] The opportunity aspect of freedom "relates to the real opportunities we have of achieving things that we can and do value."[4] While both aspects of freedom are concerned with ideas of preference and achievement, or outcome, these play a more central role in the idea of

[1] Julia O'Connell Davidson, "Troubling freedom: migration, debt, and modern slavery" (2013) 1:2 Migration Studies 176 at 177.
[2] See Amartya Sen, *Development as Freedom* (Toronto: Random House, 1999) at 18 [Sen 1999].
[3] Amartya Sen, *Rationality and Freedom* (Cambridge, MA: Harvard University Press, 2002) at 506 [Sen 2002]. See also, Sen 1999, *ibid* at 17.
[4] Sen 2002, *ibid* at 506.

opportunity due to their strong connection to values. The opportunity aspect of freedom also implicates more directly the internal characteristics affecting choice and substantive freedom. Thus, social forces, such as underlying contextual and circumstantial factors such as gender, race, age, ethnicity, socio-economic circumstances, and their external representation and impact on exercising choice in the external environment, can play an important role in defining an individual's opportunity for freedom.

The process aspect of freedom focuses on the way in which particular achievements, or freedoms, come about, and entails an understanding of both personal process, and systemic process concerns.[5] This aspect thus implicates both an internal dimension of autonomous decision-making, or having "the levers of control in one's own hands",[6] and an external dimension concerning the existing rules and procedures operating in society.[7] While, like the opportunity aspect of freedom, both internal and external factors bear on the process aspect of freedom, the external environment – whether this be an immunity of interference from external actors, or the rules governing society – tends to be of greater focus and importance in evaluating this aspect of freedom. Law, in particular, does significant work to advance or constrain the process aspect of freedom, by developing and implementing rules that impact upon individual choices processes in both direct and indirect ways. Recalling the legal regulations discussed in Chapter 3, these all established the significant impact law has on process (regardless of actual, individual choice preference or outcome).

[5] Sen 2002, *supra* note 3 at 624.
[6] *Ibid* at 506, 624.
[7] *Ibid* at 624.

Both the process and opportunity aspects of freedom invoke choice in important ways. However, it is not just the quantity, nor just the quality, of choice which is important; it is the quality and quantity of choices, taken together, and in their ability to advance the lives that individuals' value, and have reason to value, that matters. For example, thinking back to the limitations imposed on migrant workers by the employer-specific work permit, whether or not a migrant worker would otherwise choose to seek out alternative employment to the employer he currently works for, the existence of this limitation is a significant violation of the process aspect of freedom as it relates to mobility and choice in employment, as the quantity of choices, or options, has been effectively reduced to zero. This example also implicates some degree of loss relevant to the quality of choice and freedom of the worker, because even if he would otherwise choose to stay with his current employer, his choice in this context is not made on account of his personal values and preferences, and the imposed outcome of remaining with the employer may impact on other values and preferences the worker might experience during his time in Canada. Thus, the example, though more directly concerned with the process aspect of freedom, also bears on the opportunity aspect of freedom. However, while the opportunity aspect of freedom is impacted in the above example regardless of actual choice preference or outcome, it would be impacted to a greater degree where a migrant worker was subject to abusive practices and would choose to find alternate employment if he was able to do so within the confines of the regulations attending his status in Canada.[8]

[8] See Sen 2002, *supra* note 3 at 601-2 for another example demonstrating the interrelationship and relevance of the process and opportunity aspects of freedom in respect of quantity and quality of choice or options.

It is important to see, as the above example demonstrates, both the relationship between process and opportunity, and their distinct roles in developing freedom.[9] Taken together, a focus on what Sen calls "positive freedom" examines a "person's ability to do the things in question *taking everything into account* (including external restraints as well as internal limitations)."[10] Indeed, as Chapters 3 and 4 of this thesis established, the process and opportunity aspects of freedom are, in many ways, interdependent in their impact on an individual's overall experience of freedom, and of unfreedom. A focus not only on the outcomes achieved (the 'culmination outcomes'), but the *way* in which they are achieved (the 'comprehensive outcomes') is important in understanding a broader idea of freedom that understands and values the process of choice as much as the outcomes that certain choices can, or will, produce.[11] In other words, we can distill the essence of this conceptualization of freedom as a substantive state of being that includes both the *conditions* necessary to meaningfully engage with choice, or produce desirable outcomes, and *processes* to enable the effective exercise of choice with a view to achieving those desirable outcomes.

This perspective of freedom, and role of law in relationship to it, also brings forward the theoretical underpinnings advanced in the Introduction to this thesis concerning law's determined and responsive self.[12] It is not enough to only focus on independent, pure, and procedural aspects of law (it's 'determined' self), or only on the consequences of its operation in practice (it's responsive self); rather, these must be seen together, interdependent, and mutually existent. Both are necessary, just as both process and opportunity are necessary to the fulfilment

[9] See Sen 1999, *supra* note 2 at 17.
[10] Sen 2002, *supra* note 3 at 586 [emphasis in original].
[11] See Amartya Sen, *The Idea of Justice* (Cambridge, Mass: Belknap Press, 2009) at 230 [Sen 2009].
[12] See Ben Golder and Peter Fitzpatrick, *Foucault's Law* (New York: Routledge, 2009) at 53-4.

of individual freedom. Further, these dual aspects of law must be understood in relation to both their intended, or independent content, and to their effects on concrete experience; in other words, in relation to their impact on both the process and opportunity aspects of freedom. The problematic consequences associated with a closed approach to understanding law and its impact on both "fair processes" and "good outcomes",[13] as we might term the process and opportunity aspects of freedom, was well-established in Chapters 3 and 4 in relation to migrant workers in Canada. While migrant workers possess many formal legal rights on paper related to their employment in Canada, Chapter 4 established how, in practice, these are insufficient to achieve "good outcomes". Relatedly, Chapter 3 examined how certain processes attending migrant labour in Canada directly create conditions of unfreedom, calling into question the fairness of these processes which rest most directly on a distinction of citizenship status directly constructed by the state in developing and utilizing migrant labour under the TFWPs.

To summarize, the idea of freedom is significantly, and intrinsically, related to the concept of choice. We can imagine the existence of and ability to exercise choice as the 'tools' by which individuals realize freedom. In this regard, there exist two fundamental aspects of the concept of choice (and idea of freedom): the existence of fair processes in which individuals can exercise choice; and, the existence of particular conditions that facilitate meaningful engagement of choice. These two aspects work together to facilitate outcomes that are both desirable as an ends, and that are reached through appropriate and fair means. Building from this, the next section will use the idea of rights, broadly understood, as an organizing framework from which to consider in greater depth how space for choice is, and can be, preserved within the legal order in relation to important aspects of individual life impacting on freedom. In other words, this section will

[13] Sen 2002, *supra* note 3 at 637.

demonstrate how the idea of rights is a vehicle by which we can identify, preserve and promote space for choice as a necessary tool for achieving individual freedom. Relatedly, this section will explore a conception of the state-subject relationship that more firmly grounds the 'idea' of rights within the legal order, and as a fundamental aspect of that relationship, with a view to establishing a stronger argument of the role of the state in preserving and promoting rights that is separated from any distinction based on citizenship status.

II. RIGHTS AS AN ORGANIZING FRAMEWORK FOR ADVANCING SUBSTANTIVE FREEDOM

Having set out an understanding of freedom that focuses on both the quantity and quality of choice, and the existence of fair processes to exercise choice, as well as their mutual dependence, this section turns to explore the idea of rights as an organizing framework from which to examine the role of law in advancing freedom. The idea of rights is to be interpreted broadly, not limited only to explicit legal entitlements laid down in constitutional frameworks, like the *Charter of Rights and Freedoms*,[14] or international instruments, like the *Universal Declaration of Human Rights*,[15] though these types of documents are important foundations for rights in the legal sense. The use of rights as an organizing framework, rather, seeks to underscore the relationship between freedom, as conceptualized above, and law, including both legal rules and institutions responsible for governing society. While the idea of rights under this organizing framework will therefore encompass the fundamental rights explicitly set out in legal instruments like those above, it also allows for the possibility of a broader scope of rights, even if these may

[14] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[15] *Universal Declaration of Human Rights* (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

be contested or lacking supreme legal authority, such as a right of mobility, which we will later see is integral for improving conditions of freedom for migrant workers.

a. The Idea of Rights and Its Critics

The idea of rights, and access to them, as an organizing framework at its broadest level seeks to create and preserve space for choice in doing (or not doing) something in relation to aspects of individual life that have determined to be fundamental to personal liberty.[16] In this way, we can understand the place of rights, and its relationship to choice and freedom, in liberal democracies as putting forth a "commitment to shape a free political and economic order by combining rights of choice with rules designed to ensure the effective enjoyment of these rights."[17] Importantly, this formulation of the idea of rights seeks to understand rights as preserving space for choice, rather than prescribing particular choices, and also as emphasizing the interrelationship between process and outcome, or opportunity, in relation to choice. This idea of rights and its relationship to choice thus allows for pluralistic understandings and interpretations of the values and needs that different individuals or groups have. Within this framework, we can see the importance the idea of rights has in allowing individuals to lead a life they have reason to value, by ensuring that space for the existence and exercise of choice is preserved in the legal order. Together, rights of choice, and space for exercising choice in a meaningful way, enable and empower an individual to realize, or achieve, substantive conditions of freedom.

[16] While the idea, or importance, of rights and personal liberty is not necessarily universal in scope, this thesis focuses on the Canadian context, where these concepts do form an important component of the legal and political systems, and as such, the analysis engaged in within this chapter can be limited to this context and comparable jurisdictions, where rights and personal liberty are acknowledged as forming an important component of the legal and political systems, and are [often] codified in law through bills of rights or similar instruments. This issue will be briefly explored in the following pages.

[17] Roberto Mangabeira Unger, "Legal Analysis as Institutional Imagination" (1996) 59:1 Mod L Rev 1 at 1 [Unger].

Before turning to examine in more detail the structure of this framework, it is important to address the limitations that can, and have, been associated with 'rights-based' approaches. 'Rights-based' approaches, broadly termed, are often critiqued both for their inability to account for pluralistic moral and social values, particularly in respect of the idea of 'universal' human rights, and equally for their limitations in effecting concrete change, despite their potentially aspirational value. The first common critique put forth in respect of rights-based approaches challenges the universal character of human rights in light of morally and socially diverse societies, under what is commonly discussed the 'cultural relativism' argument.[18] While it is beyond the scope of this chapter to delve into the details of the debate on the universal versus relative character of human rights, the analysis to be undertaken in this section will focus narrowly on those social and political contexts in which fundamental rights form a foundation of the legal order. At this level, domestic legal instruments can be helpful by identifying certain important aspects of individual life that are seen as deserving of protection, though they must always be balanced against other individuals' rights and broader social interests.

Two additional limitations that will govern the analysis in this chapter can be imposed to facilitate an examination of rights within the confines of the overall goals of this thesis and chapter. As mentioned earlier, the focus of the broad idea of rights advanced here seeks to

[18] See, e.g., Evan Fox-Decent and Evan Criddle, "The Fiduciary Constitution of Human Rights" (2009) 15 Legal Theory 301 at 304 [Fox-Decent and Criddle]: "basic questions regarding the scope and content of international human rights law have proven to be deeply controversial, fueling skepticism about international human rights law and subverting the modern human rights movement's universalist ambitions." See also, Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42 Harv Int'l LJ 201 [Mutua]; Paul Dubinsky, Jeremy Waldron, Tracy Higgins, Michel Rosenfeld, and Ruti Teitel, "What is a Human Right? Universals and the Challenge of Cultural Relativism" (1999) 11 Pace Int'l L Rev 107; Costas Douzinas, "The End(s) of Human Rights" (2002) 26:2 Melb U L Rev 445 [Douzinas]; Ratna Kapur, "Human Rights in the 21st Century: Take a Walk on the Dark Side" (2006) 28 Sydney Law Review 665 [Kapur]; Uprenda Baxi, "Voices of Suffering and the Future of Human Rights" (1998) 8:2 Transnational Law & Contemporary Problems 125 [Baxi].

underscore their importance and relationship to the idea of preserving space for the exercise of choice. What values, needs or goals that choice relates to, and to which rights are often delineated, may indeed vary with context. However, for the purposes of this thesis, that context is already identified as focused on Canada, and on migrant workers as a population. Thus, the examination here, within the confines of Canadian law and in respect of migrant workers, will be concerned with two areas of rights: (1) existing legal rights that apply to migrant workers, as have been discussed in the preceding chapters; and, (2) specific rights that it will be argued should be recognized for migrant workers in Canada as necessary to enhance and improve their conditions of freedom. To varying degrees, the content and function of these sets of rights as will be discussed below may, or may not, be applicable beyond the confines and context of this specific site of examination.

The second critique often raised in respect of rights-based approaches focuses on the limitations of rights to facilitate concrete change in practice, and to address deeper underlying issues that create situations of inequality, systemic rights violations and other problematic practices.[19] This critique has been directly raised in respect of migrant labour by Dauvergne and Marsden.[20] Indeed, as they point out, rights-based approaches are limited in their ability to shift the underlying ideology bearing on political and social conceptions of migrant labour, the contours of which have also been discussed in Chapters 3 and 4 of this thesis. As Dauvergne and Marsden demonstrate, while "[r]ights arguments are the principal tool within Western legal systems in

[19] See generally, Mutua, *supra* note 18; Douzinas, *supra* note 18; Kapur, *supra* note 18; Baxi, *supra* note 18; Wendy Brown, "The Most We Can Hope For … Human Rights and the Politics of Fatalism" (2004) 103:2-3 South Atlantic Quarterly 451. For a response to the dominant critiques, see: Jeremy Perelman and Katharine G Young, "Rights as Footprints: A New Metaphor for Contemporary Human Rights Practice" (2010) 9:1Nw U J Int'l Hum Rts 27.
[20] Catherine Dauvergne and Sarah Marsden, "The ideology of temporary labour migration in the post-global era" (2014) 18:2 Citizenship Studies 224 [Dauvergne and Marsden, "Ideology"].

fashioning arguments for individuals"[21] and thus hold importance and a place in advancing overall change, "they can only ever offer up partial remedies for temporary migrant workers"[22] as a fundamental reconceptualization of the ideology, structure and relations of migrant worker programs, and of temporary migrant labour generally, would be needed to truly alleviate the attending and underlying issues commonly understood to form a part of those programs.[23]

Despite the limitations of rights-based approaches in fully addressing the problematic state of migrant worker programs, the idea and content of rights can make important advances in this respect, as Dauvergne and Marsden acknowledge.[24] While this chapter also has acknowledged the much greater fundamental shift that must occur in relation to political and social perceptions and constructions of migrant labour, re-thinking ideas about rights, choice and freedom, and the role and relationship of the state in this process, can assist, as a starting point, in developing a deeper conversation about labour migration and migrant worker programs in respect of the underlying ideologies at play. Before examining the specific ways in which rights for migrant workers can be improved in sections III and IV, this next section will begin by exploring a shift in the impact and weight that rights-based approaches can have by resituating their character under the state 'fiduciary' relationship, which can thus more firmly ground an entitlement to, and the substantive character of, the specific rights to be examined.

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[21] Dauvergne and Marsden, "Ideology", *supra* note 20 at 238.
[22] *Ibid.*
[23] See *ibid* at 236-8 for a fuller analysis on the issue of 'rights'. See also Catherine Dauvergne and Sarah Marsden, "Beyond Numbers Versus Rights: Shifting the Parameters of Debate on Temporary Labour Migration" (2014) 15 Journal of International Migration & Integration 525 at 528-9 [Dauvergne and Marsden, "Beyond"].
[24] Dauvergne and Marsden, "Ideology", *ibid*. See also, Dauvergne and Marsden, "Beyond", *ibid* at 542, commenting on a need to recast the relationship between states, employers and workers in relation to rights, as this next section will take up, in part.

b. The Role and Relationship of the State under a Rights-Based Approach

One important way in which the idea of rights can be resituated begins with the character of the state's role and relationship towards migrant workers in its territory. To begin, we can recast the idea of rights as "structur[ing] relations – of trust, responsibility, care, power – and that the core values we can about require structures of relationships that foster them."[25] Characterized this way, rights are not simply an abstract or static notion of set of entitlements that individuals may possess; rather, rights are fundamentally relational and mutually dependent with the structures in which they operate: "[r]ights structure relations, and one cannot enjoy rights without the structures of relations that constitute freedom, security, or equality."[26] This approach to rights brings out its mutually existent relationship to ideas of choice and freedom, and their primary features of process and opportunity, as discussed in section I of this chapter. Rights, conceived of as relational, thus bear directly on the existence and quality of fair processes in which individuals can exercise choice, and of conditions that facilitate meaningful engagement of choice.

Conceiving of rights as relational impacts the way we understand an individual's relationship with all of other individuals, institutions and structures, and the state. This approach thus highlights the need for deeper inquiry into these relationships, and what corresponding obligations or responsibilities attend those parties. This section will thus explore the content and place of rights within the state-subject relationship, with a view to grounding more concretely both their importance, and also the obligations and duties of the state in relation to preserving and promoting rights for its subjects. This will lay the conceptual groundwork for examining

[25] Jennifer Nedelsky, "Relations of Freedom and Law's Relations" (2012) 8:2 Politics & Gender 231 at 234-5 [Nedelsky].
[26] *Ibid* at 236.

specific ways in which the existence of, and access to, rights for migrant workers in Canada can be improved.

As stated above, rights shape and structure relations based on "trust, responsibility, care, power".[27] These characteristics can also accurately describe the role and responsibility of the state towards individuals in its territory, or under its authority. As Fox-Decent sets out in his development of the fiduciary theory of the state, "the relationship between the administration and the people possesses the constitutive features of fiduciary relationships: trust, authorization, discretionary and unilateral power, and vulnerability."[28] The fiduciary conception of the state thus brings to the forefront those characteristics that inhere to the idea of rights as relational, and can be grounded also in the legal instruments creating rights for individuals in their relationship with the state. Importantly, this conception also highlights the inherent power imbalance between the state and individuals under its power or authority, and as will be further explored below, is heightened in respect of migrant workers.

Within its private law origins, as Fox-Decent sets out, there are three primary features of a fiduciary relationship:

> (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interest; and (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[29]

[27] Nedelsky, *supra* note 25 at 234-5.
[28] Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (New York: Oxford University Press, 2011) at 29 [Fox-Decent 2011].
[29] *Ibid* at 29-30. See also, Chapter 4 (89-112) for an elaboration of the primary characteristics of the state-subject fiduciary relationship.

Building from this foundation, the idea of a fiduciary conception of the state requires two primary duties, translated from the private fiduciary principle: fairness and reasonableness. Fox-Decent further explains the characteristics of the fiduciary relationship in the public realm as existing "if, and only if, one party holds discretionary power of an administrative nature over the important interests of another, and this latter party (the beneficiary) is unable, either as a matter of fact or law, to control or exercise the power held by the fiduciary."[30]

Importantly, Fox-Decent does not base the existence of a state-subject fiduciary relationship on citizenship status:

> […] [T]he fiduciary relationship, at its most abstract level, is between the state and each person subject to its power and authority. The civil or political status of the person subject to state authority does not matter because the relational view looks to the characteristics of the relationship alone to establish legal standards and obligations. For this reason, I refer to the person subject to state authority as a subject, agent, individual, or party rather than a citizen. The fiduciary and relational conception explains why anyone subject to legal authority, regardless of status, is an equal co-beneficiary of the rule of law.[31]

This explanation on the focus of the relationship and its characteristics, rather than the formal status of individuals in a state's territory, is key to acknowledging and highlighting the importance and impact of the power [im]balance that exists in the state-subject relationship,[32] and especially in cases where the subject is not a citizen of the state, which has been historically characterized as a fundamental criteria for possessing rights.[33] As will be discussed later in this chapter, and was also explored especially in Chapter 3, migrant workers are placed in a

[30] Fox-Decent 2011, *supra* note 28 at 30. See also, Chapter 4 (89-112) for an elaboration of the primary characteristics of the state-subject fiduciary relationship.
[31] *Ibid* at 40.
[32] See *ibid*, Chapter 4 (89-112) for a discussion of the relationship between power and vulnerability, and power and authority.
[33] See, i.e., Dauvergne and Marsden, "Ideology", *supra* note 20 at 237, commenting on Ardent's formulation of citizenship as a 'right to have rights'.

relationship of heightened subordination,[34] given the regulatory constraints imposed on workers under the TFWPs, such as the employer-specific work permit and limits on participation. The focus on power and authority inherent in the fiduciary relationship is thus of significance in understanding and re-thinking the relationship between the state and migrant workers.

As Fox-Decent sets out, the fiduciary conception of the state is composed of two primary duties: fairness and reasonableness. To be fair, fiduciary power must be exercised "in a manner consistent with each person's equal dignity,"[35] and in a way which does not arbitrarily discriminate against its subjects.[36] Complementing a fair exercise of power, the fiduciary principle also requires that power to be exercised reasonably. Where "fairness sets a limit on how the fiduciary may exercise power … reasonableness establishes a floor."[37] This second principle of reasonableness requires some minimum obligation or standard of conduct related to the *content* of the rights and obligations of the state in its relationship to individuals subject to its authority; thus, "[a] fiduciary could not claim to fulfill her duty by disregarding wantonly but even-handedly the interest of each and every beneficiary."[38] Rather, "[r]easonable exercises of these powers […] must give significant weight to important, practical interests" [39] that are at stake in a given context or issue.[40]

[34] See, i.e., Dauvergne and Marsden, "Ideology", *supra* note 20 at 237.
[35] Evan Fox-Decent, "The Fiduciary Nature of State Legal Authority" (2005) 31 Queen's LJ 260 at 265 [Fox-Decent 2005].
[36] *Ibid* at 266. See also Fox-Decent 2011, *supra* note 28, Chapter 7 (175-201) for a more elaborate discussion of the duty of procedural fairness.
[37] Fox-Decent 2005, *ibid*.
[38] *Ibid.*
[39] Fox-Decent 2011, *supra* note 28 at 204.
[40] See *ibid*, Chapter 8 (202-233) for a more elaborate discussion of the features of reasonable decision-making under this theory.

While this explanation of Fox-Decent's theory is somewhat circumspect, the goal here is to identify the broad contours of this theory insofar as it represents one way in which we can begin to reconceive of the relationship between the state and migrant workers. Under this theory, the interests of migrant workers are placed on more equal footing with other public interests the state must exercise is powers in respect of, rather than being subordinated to 'domestic' interests, such as economic development and labour markets. This conception also does some work to reverse the idea of that migrant workers should possess less rights and entitlements than citizens, as the formal status of subjects as a basis for the exercises of state authority is replaced with a more nuanced understanding of the role of power relations in this relationship. With the broad contours of the fiduciary character of the state in mind, composed of its primary duties to act in a fair and reasonable manner, we can now turn to examine the place of rights within this relationship.

c. Understanding the Role and Function of Rights in the State-Subject Relationship

Fox-Decent directly addresses the issue of human rights as forming part of the "permissible content" and "substantive constraints" placed on states' exercises of power under the fiduciary theory of the state.[41] For Fox-Decent, the obligation of the fiduciary state to govern in accordance with the rule of law also entails a commitment to human rights,[42] and human rights provide a kind of "mid-range principles which […] mediate the relationship between abstract ideals of agency and dignity, on the one hand, and the many conditions under which governance

[41] Fox-Decent 2011, *supra* note 28 at 234. See generally, Chapter 9 (234-265) for a discussion of the place of human rights under the fiduciary theory of the state.
[42] *Ibid* at 237-8.

through law is possible, on the other."[43] Human rights can be understood as the tools by which human dignity and agency are recognized and empowered. Thus, the state, as fiduciary, must act in a way which respects the human rights of its subjects, and is constrained in exercising its power or authority in a way which unreasonably or unfairly constrains the rights of its subjects.

The fiduciary character of the state requires that it treat its subjects in a manner consistent with the principles of non-instrumentalism and non-domination; "[h]uman rights flesh out the contents of these norms."[44] Like the purpose of the fiduciary state, the function of human rights is centrally to "protect us from domination by ensuring that we do not live under subjection to arbitrary power held by the state or third-parties."[45] Thus, the ideas of non-instrumentalism and non-domination form a core justification for the reason and commitment to human rights that must exist under the state-subject relationship.[46] These principles further give a unique legal quality to the idea of human rights beyond the moral bases put forth for their existence.[47] Finally, bringing the idea of human rights within the fiduciary model, as described by Fox-Decent and Criddle, recognizes the necessary flexibility and adaptability to change that can, and indeed has many times, occur with respect to the content of human rights, without losing a firm legal and institutional grounding for their existence.[48]

In flushing out the legal bases for a commitment to secure and promote human rights under the fiduciary model, Fox-Decent and Criddle put forth three compelling substantive requirements of

[43] Fox-Decent 2011, *supra* note 28 at 261.
[44] *Ibid* at 262.
[45] *Ibid* at 261.
[46] Fox-Decent and Criddle, *supra* note 18 at 317.
[47] See *ibid*.
[48] See *ibid*, especially at 315-318.

the character of human rights: integrity; formal moral equality; and, solicitude.[49] With respect to integrity, "human rights must have as their object the good of the legal subject rather than the good of the state's officials."[50] The requirement of "formal moral equality" means that human rights "regard individuals as equal cobeneficiaries of the fiduciary state."[51] Finally, the principle of solicitude means that "human rights must be solicitous of the legal subject's legitimate interests because those interests […] are vulnerable to the state's nonconsensual coercive power."[52] The requirements to promote the 'good of the legal subject' and consider the subject's legitimate interests are of particular importance in understanding, especially, the role and duties of the state towards noncitizens because their interests are often presented and acted upon in a way that is subservient to the interests of the state. In addition, the requirement of formal moral equality is important to diminish the perceived acceptability of affording noncitizens fewer rights than citizens.

Fox-Decent and Criddle characterize the objective of understanding human rights within the fiduciary model as "establish[ing] a regime of secure and equal freedom under the rule of law"[53] for all persons subject to the state's power and authority. Under this conception, human rights provide the "blueprint" to achieve this objective,[54] and can be first understood in relation to the fundamental rights set out in international instruments like the *International Covenant on Civil and Political Rights*,[55] and *International Covenant on Economic, Social and Cultural Rights*,[56]

[49] Fox-Decent and Criddle, *supra* note 18 at 318.
[50] *Ibid* at 318.
[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid* at 315.
[54] *Ibid.*
[55] *International Covenant on Civil and Political Rights*, GA Res 2200A(XXI), OHCHR, 1966 [ICCPR].
[56] *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A(XXI), OHCHR, 1966 [ICESCR].

which include, for example, rights in relation to equality under the law,[57] unionization,[58] political participation,[59] working conditions,[60] and an adequate standard of living,[61] amongst others. Importantly, the fiduciary model of human rights is able to take account of their "institutional preconditions" because "human rights are viewed as normative demands arising from the subjection of persons to public institutions."[62]

Building from this conception, we can see how other fundamental rights in a domestic context can take on a similar character. In the Canadian context, for example, rights prescribed in statutory instruments related to labour and employment law are capable of forming a similar character to that described above, and receive legitimacy from their location and development within state structures and public institutions. Similarly, this conception provides added strength to the argument that public institutions and state actors have obligations and duties towards noncitizens, in relation to immigration law, human rights law, and other areas of legal interaction between the state and noncitizens. The fiduciary theory of the state, coupled with this fiduciary model for understanding the content and structure of rights, thus provides a more robust foundation from which to consider the current and future state of migrant labour under Canada's Temporary Foreign Worker Programs.

Recalling the relationship between freedom and choice explored section I, we can add to this the role and function of rights as identifying those areas of personal liberty or interaction with public

[57] ICCPR, *supra* note 55, art 26. See also Fox-Decent and Criddle, *supra* note 18 at 316.
[58] *Ibid*, art 22. See also Fox-Decent and Criddle, *ibid.*
[59] *Ibid*, art 25. See also Fox-Decent and Criddle, *ibid.*
[60] ICESCR, *supra* note 56, arts 6-8. See also Fox-Decent and Criddle, *ibid.*
[61] *Ibid*, art 11. See also Fox-Decent and Criddle, *ibid.*
[62] Fox-Decent and Criddle, *ibid.*

institutions where preservation of choice and independence is important for the 'good' of the legal subject and in order to provide space for his 'legitimate interests' to be considered. Rights can thus act as a signal for those facets or qualities of life which are seen as holding special and significant interest regarding the preservation of choice so that individuals may lead the life they can, and have reason to, value, which brings us back to Sen's understanding of freedom. Further, rights acknowledge and aim to respect the fundamental agency and dignity of individuals; they are thus intended to function, as set out above, to constrain the exercise of public power in order to promote non-instrumentalism and non-domination. However, I would go one step further in ascribing the duties and obligations of the state to include an active, positive duty to both provide for rights, and to promote and enhance meaningful access to and effective enjoyment of existing rights for individuals. The latter, particularly, can be seen as necessary to fulfil the broader duty of the state to govern and act in the best interests of its subjects, and to prioritize the 'good' of its subjects.

We can thus characterize the state's obligations as including a commitment to both refrain from exercising its power in a way which unduly constrains the choice, freedom and rights of its subjects, and as requiring positive and active obligations to enhance and promote both the existence of rights as choice, and meaningful access to their effective enjoyment. The existence and enjoyment of rights are central to the creation of processes and conditions in which individuals can meaningful engage with choice, and thus realize substantive freedom. This conception, and its formulation of the place of rights in the state-subject relationship, also provides a foundation and justification for re-imagining the structure and experience of migrant labour under the TFWPs. The next two sections will thus explore in greater detail what this

might look like, focusing first on the concept of rights as choice in section III, and then on meaningful access to and effective enjoyment of rights in section IV.

III. RIGHTS AS CHOICE: RE-THINKING LIMITS ON MOBILITY AND ELIGIBILITY

The examination of the current state of the TFWPs in Chapters 3 and 4 demonstrated that, despite holding (formally) many rights in Canada, the structure and character of migrant workers' legal and employment status is an area where migrant workers do not possess rights normally allocated under law in Canada. This is of significance because of the extreme constraints on choice, and ability to exercise choice, resulting from the way in which legal and employment status is allocated. These constraints on choice operate to create immobility for migrant workers, and produce, as was discussed in Chapter 3, a 'baseline' or core foundation of the conditions of unfreedom existing under the TFWPs. The constraints on exercising choice in respect of employment and immigration thus represent an issue in urgent need of attention.

If we understand the idea of rights as preserving and promoting space for choice in relation to important aspects of, and interests within, individual life, and we understand the role of the state in its fiduciary relationship with its subjects as imposing a duty to secure and promote the rights of those subjects, we can see how, for migrant workers, a right to mobility is of fundamental importance and creates a correlating duty on the state to reconsider the structure and character of legal and employment status under the TFWPs. It is important to recognize that "[f]or every right of individual or collective choice, there are different plausible conceptions of its conditions of

effective realisation in society as now organized. For every such conception, there are different plausible strategies to fulfil the specific conditions."[63] As such, what is discussed here is one vision or conception of the many ways in which the existence and access to rights can be reorganized to improve conditions of migrant workers.

While there are many ways of conceiving of rights and strategizing for their realization, as set out at the beginning of this section, key to any strategy or idea for reform involves not only recognizing and affirming certain rights to choice, but also what Unger terms the "institutional imagination" to conceptualize, implement and evaluate series of institutional changes:

> […] [T]he reach toward a recognition of the empirical and defeasible character of the rights of choice should be simply the first step in a two-step movement. The second step, following closely upon the first, would be the legal imagination and construction of alternative pluralisms: the exploration, in programmatic argument or in experimental reform, of one or another sequence of institutional change. Each sequence would redefine the rights, and the interests and ideals they serve, in the course of realising them more effectively.[64]

It is the second step, which Unger comments is rarely taken up, which might represent an ideal form of the state's role in advancing the goals set out above. This section will focus directly on reconceiving status under a rights-based approach, as set out in the previous section, examining both the employer-specific work permit, and the limits on eligibility and participation that impact on workers' rights and status in the longer-term. This section will also engage in the "institutional imagination" Unger calls for by outlining pragmatic possibilities for implementing effective change in respect of these rights.

[63] Unger, *supra* note 17 at 3.
[64] *Ibid.*

a. Allocation of Employment Status: Alternative Considerations

At the core of the legal regulations creating unfreedom under the TFWPs is the employer-specific work permit. As was seen in Chapter 3, the allocation of employment status on the basis of a single employer, location and job description produces a situation in which migrant workers are significantly constrained in their ability to exercise choice or options in respect of their employment and status in Canada. This regulatory measure constrains and excludes migrant workers geographically, legally and relationally, by 'bonding' the worker to the employer, site and type of work. Thus, it is not just the unfreedom of immobility which this regulation produces; it acts as the baseline for a much broader experience of unfreedom and exclusion by producing significant precariousness for workers to make many choices in respect of their experience in Canada, as detailed in Chapters 3 and 4.

Considering the fiduciary characteristics of the state-subject relationship and idea of freedom put forth earlier in this chapter, the employer-specific work permit is also problematic because of the potential it creates for domination and instrumentalization. Not only does the employer-specific work permit operate to diminish, or remove, a migrant worker's own control and autonomy, it places control and power in the hands of a private third party. This could be seen as violating the state's fiduciary duty because it allocates power to a party that does not possess the same duties and obligations that the state has towards its subjects. In other words, the power allocated to employers under the current model enables abuse and exploitation to occur arbitrarily, and allows employers to act in a manner of domination towards workers. Transferring power and control from worker to employer may also contribute to the instrumentalist perception that is

held of migrant workers, as explored in Chapters 3 and 4. Overall, the current work permit system results, both in law and in practice, in effective abdication of the state's fiduciary responsibilities, in addition to the significant impact it has on migrant workers' ability to exercise choice in respect of employment and status in Canada.

One of fundamental way in which the TFWPs could operate differently, to better capture the proposed theoretical re-orientation suggested in this chapter, would thus be to consider alternative structures to the current allocation of employment and immigration status under the work permit system which would enhance the opportunity for choice, recognize a right to mobility, and place the 'levers of control' properly within the migrant's, and state's, hands and not in those of a private third party. Drawing on Unger's identification of the processes associated with reform,[65] we must consider what sequences of institutional change or experimental reforms will allow for the more effective realization of rights, and of freedom for migrant workers, while also accommodating the practical and legitimate interests of the state and public institutions responsible.

The removal of the employer-specific work permit is an often and widely called for proposal for reform in respect of the TFWPs.[66] Many participants in the interview study conducted for this thesis mentioned this as a vital recommendation for reform. However, considering alternative structures in a meaningful way requires going beyond the simple assertion that work permits

[65] See Unger, *supra* note 17 at 3.
[66] See, i.e., Quebec Human Rights Commission. "Systemic Discrimination Towards Migrant Workers", summary of *La discrimination systémique à l'égard des travailleuses et travailleurs migrants*, adopted at the 574th meeting of the Commission, held on December 9, 2011, by Resolution COM-574-5.1.1 [Quebec Human Rights Commission]; House of Commons. Standing Committee on Citizenship and Immigration. "Temporary Foreign Workers and Non-Status Workers" (May 2009) (Chair: David Tilson, MP) [Standing Committee Report].

should not be allocated to a specific employer, or should be allocated to an industry or province, or should be open completely. This section will thus explore what changing the permit system requires in order to be effective, both from the interests of migrant workers and from those of the state and public institutions involved. In this analysis, I will focus on an alternative system that would allocate status to specific industries in specific provinces.[67] A sector-specific and provincially bound work permit system would both serve the interests of migrant workers in enhancing their opportunity for choice and mobility, while also addressing the legitimate and necessary concerns of the state and public institutions involved in governing the TFWPs moving forward.

The current work permit application and allocation model is seen as an important mechanism by which to monitor the labour market needs in Canada and thus prevent overuse or expansion of migrant labour to the detriment of Canadian workers, as discussed in Chapter 3.[68] Despite the problematic underpinnings of these, and associated, claims, as also discussed in Chapter 3, the basis of this position also communicates legitimate interests concerning employment and economic needs in Canada. While these interests should not take priority over the legitimate interests of migrant workers in respect of their basic rights and freedoms, as related to the primary tenets of the fiduciary model in the previous section, they neither can be completely abandoned in considering alternative structures, if these are to have realistic potential. Any

[67] In line with the common alternative suggested as sector-wide work permits: see, Quebec Human Rights Commission, *supra* note 66; Standing Committee Report, *supra* note 66.

[68] The employer specific work permit is predicated on the rationale that temporary labour migration programs "serve as a tool to fill specific shortages in the labour market and are thus designed to respond to current employer needs." Delphine Nakache and Sarah D'Aoust, "Provincial/Territorial Nominee Programs: An Avenue to Permanent Residency for Low-Skilled Temporary Foreign Workers?" in Patti Tamara Lenard and Christine Straehle, eds, *Legislated Inequality: Temporary Labour Migration in Canada* (Montreal: McGill-Queen's University Press, 2012) 158 at 158 [Nakache and D'Aoust]. This rationale fails to acknowledge, as discussed in Chapter 3, the persistent and permanent need for labour in several "low-skilled" economic sectors. See also Nakache and D'Aoust, *ibid.*

possible alternative structures for the work permit system must therefore take into account the legitimate interests of the state and related public institutions, though such interests must be balanced with, or subservient to, the significant interests of migrant workers' fundamental rights and freedoms.

Providing space to accommodate the legitimate interests of the state in regulating employment and labour market needs and figures, and also in monitoring the TFWPs on the one hand, while addressing the legitimate interests of migrant workers to have opportunity of choice and a right of mobility during their time in Canada on the other hand, leads to a possible alternative structure (amongst many) that would allocate immigration and employment status on the basis of provincial boundaries and in specific labour market sectors.

A sector-specific, provincially-bound work permit would allow the state to monitor labour market conditions and effectively govern the use of migrant labour, while also enhancing mobility options for migrant workers. Industries in which migrant workers are commonly employed, though they may vary between provinces, are well-known, and it is unlikely that, for example, one Tim Hortons in Vancouver, BC, would have a demonstrable need for migrant workers while another Tim Hortons in Richmond, BC, would not. In other words, while some industries in a province may have a demonstrable need for migrant workers under the current LMIA regime, and while the same industries may not have the same needs across provinces, it is unlikely that individual employers within the same industries and same geographical region would have significantly different needs in this respect. Thus, allocating work permits on a

sector-specific and provincially-bound system would be unlikely to disrupt the structure and objectives of the current LMIA regime.

However, in line with Unger's call for "institutional imagination",[69] we must understand the practical implications of a change in the work permit allocation system under the TFWPs, and the necessary institutional changes that would make this a practical alternative to the current model. Firstly, changing the permit structure under the TFWPs is obviously complicated by the lack of information sharing between provincial and federal governments, as discussed in Chapter 3. In its most recent set of reforms, the federal government has pledged to develop appropriate information sharing agreements with provinces,[70] and indeed some already exist. ESDC (formerly HRSDC) has developed information sharing agreements with both CIC, and several provinces, including Alberta and British Columbia.[71] This foundation can be used to inform the expansion of information agreements, while also providing an opportunity for important evaluation of their effectiveness, in order to improve upon the existing model going forward. Increasing the transparency of information and its distribution between federal and provincial authorities is thus an important precursory step to any reform to the work permit system.

Along with increased information sharing, structures at, particularly, the provincial level to gather and monitor information on employers and workers utilizing the TFWPs in the province is equally important in order for any reform to the work permit system to result an efficient system

[69] See Unger, *supra* note 17.
[70] See Government of Canada. *Overhauling the Temporary Foreign Worker Program: Putting Canadians First* (Ottawa: Government of Canada, 2014) online: Employment and Social Development Canada <http:// http://www.esdc.gc.ca> [Government of Canada 2014].
[71] See HRSDC, *Evaluation of the Labour Market Opinion Streams of the Temporary Foreign Worker Program* (September 2012) online: Employment and Social Development Canada < http://www.esdc.gc.ca/> at vii, ix.

and the actualization of meaningful improvements in the experience of migrant labour and use of the TFWPs going forward. Institutional structures that enable efficient and effective use of information and data on the presence, location and availability of migrant workers, as well as of employers seeking workers, would assist in achieving the intended increased mobility for workers. In addition, if work permits were allocated on a sector-wide basis, the need to apply for and process a new LMIA or work permit with federal authorities would be eliminated, an important step considering the delays documented in Chapter 3, and strong disincentive to thus changing employers for workers under SLO.

Some provinces have enacted legislation requiring the registration of employers and migrant workers in their territory.[72] These statutes provide another optional mechanism for gathering relevant data and information on migrant workers in a province, as well as the employer with whom and industry in which they are engaged. These statutes also set out many other provisions regarding the regulation of migrant work in the province, which, while not necessarily substantially different from the applicable laws in other provinces, add clarity and simplicity by locating relevant laws and regulations within one, specific statutory instrument regarding migrant labour. Manitoba was the first province to enact such a statute, and evaluation of its effectiveness, now seven years on, could be beneficial to determine whether such an approach would make a strong recommendation for other provinces, especially those with substantially larger numbers of migrant workers.

[72] See *Worker Recruitment and Protection Act*, SM 2008, c23; *Foreign Worker Recruitment and Immigration Services Act*, SS 2013, c F-18.1.

Another example of institutional support at the provincial level could exist in the Temporary Foreign Worker Advisory Office model developed by the Government of Alberta.[73] While the Office currently operates primarily with the objectives of information distribution and complaints assistance, it could provide a foundation for considering a similar model, where gathering, monitoring and sharing information on employment of migrant workers could also be included in its mandate. Directing resources towards a governmental department focused directly, and solely, on the administration of the TFWPs would provide a centralized body and services for all actors involved in the TFWPs. This could assist significantly in addressing some of the issues of confusion noted with respect to the program's administration, as discussed in Chapters 3 and 4. As will be discussed in greater detail in the following section (IV), a centralized body could also facilitate access to rights in respect of a wide array of issues for migrant workers.

The suggestions put forth in this section concerning distribution of power and institutional organization establish the practicality of suggestions to allocate work permits on a sector-wide, and provincially-bound, basis. Indeed, as demonstrated through the examples provided, many of the important institutional features required to carry out such a reform already exist in some provinces, providing concrete evidence and support of the possibility of such a proposal. Thus, the legitimate interests of the state can be met within this model.

Importantly, a sector-specific work permit would significantly increase the availability of choice and freedom for migrant workers in respect of their employment in Canada, and provide the

[73] See, "Temporary Foreign Workers" online: Government of Alberta < http://work.alberta.ca/Immigration/temporary-foreign-workers.html>.

important right of mobility within this context. Even though this solution is not perfect, as migrant workers would continue to experience some constraints on mobility, being limited to a particular province and sector of employment, this model would advance their ability to exercise choice in respect of their employer, with whom the majority of problematic issues stemming from the current work permit system are experienced, as documented in Chapter 4. In addition, just as this model would be applicable to migrant workers under the SLO, this could also very easily translate to application under the SAWP, as the province and industry/sector are already identified by virtue of the nature of the program. For SAWP workers, whose immigration status is more tightly contingent on employment status, work permit allocation under this model would also have to sever, formally, this connection, as is already the case for workers under the SLO. While SAWP workers experience additional disincentives under the program structure due to the 'naming' process discussed in Chapter 3, increased mobility during their time in Canada may provide a partial avenue around this problematic facet of the program.

While a change to the allocation of employment status under the TFWPs is not sufficient to address the myriad problems attending the experience of migrant work under these programs, it offers an option to address one of the most pressing concerns affecting migrant workers' ability to exercise choice and rights, and experience conditions of freedom, under the TFWPs. The foregoing analysis offered preliminary analysis and insights into what this might look like, and key factors that would require a greater depth of consideration to effectively implement any reform or institutional change. However, this analysis has also endeavoured to establish that such change is possible, and that existing institutional structures and arrangements can be drawn on to support change in this regard. Complementing the change in employment allocation, the next

part of this section will consider alternative arrangements concerning eligibility and participation, and long-term residency prospects, under the TFWPs going forward.

b. Beyond 'Temporariness': Improving Eligibility, Participation, and Residency Prospects

The function of the perception of 'temporariness' in relation to migrant labour and the TFWPs contributes significantly to the problematic regulatory measures and concrete experiences of migrant workers in Canada, as discussed in Chapters 3 and 4. Any discussion of, or change to, rights in relation to migrant workers will necessarily remain limited because of the entrenched inequality produced by virtue of their 'temporary' status. As Dauvergne and Marsden explain,

> Rights for temporary migrant workers are necessarily constrained by their limited and contingent social membership. Because *temporary* workers cannot have *permanent* rights […], rights entitlements cannot address the fundamental inequality of these workers. […] [T]he overwhelming fact of temporary status makes the inequality fundamental.[74]

As discussed briefly earlier in this chapter, the underlying ideologies and perceptions governing migrant work thus remain a significant challenge to any proposals for reform or change aimed at improving their conditions and experience in Canada. Thus, a key area for alternative considerations that can expand rights and choice in a meaningful way, along with the employer-specific work permit, is to re-think the limits eligibility, participation and long-term prospects for residency under the TFWPs.

Limits on eligibility and participation under the TFWPs, and their function in constraining the ability for workers to exercise choice, was explored in Chapter 3. The SLO has become increasingly restrictive, with a series of recent reforms premised on the need to ensure

[74] Dauvergne and Marsden, "Beyond", *supra* note 23 at 528.

appropriate use of the program and convey its 'temporary' and supplemental nature.[75] Limits on eligibility and participation under SAWP operate quite differently, in a manner which connect to the 'seasonal' nature and demand for work. Both streams of the TFWP thus connect the existence of limitations on eligibility and participation to 'natural' market forces dictating their use.[76]

As discussed in Chapter 3, the effect of limits on eligibility and participation under the TFWPs not only create strong disincentives for workers to exercise choice and rights in respect of their employment and broader experience in Canada, but also operate to reify and entrench the false perception of 'temporariness' associated with the place of migrants in the labour market in Canada. While this section will focus on the former, connected to shifting the experience for migrant workers, this may also do some work to shift the underlying problematic perceptions of 'temporariness' associated with broader aspects of the program, though that aspect of the function of 'temporariness' is also deserving of independent and sustained attention.[77]

A first proposal for consideration would be to reverse the increasing restrictions placed on migrant workers under the SLO. Previously, workers under this stream were not limited in their length of participation under the program, nor had limitations on prohibition from the program after a certain period of time.[78] Despite claims that these restrictions were introduced to convey

[75] See, i.e., Delphine Nakache, "The Canadian Temporary Foreign Worker Program: Regulations, Practices, and Protection Gaps" in Luin Goldring and Patricia Landolt, eds, *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (Toronto: University of Toronto Press, 2013) at 72; see also, Jenna Hennebry, "Permanently Temporary? Agricultural Migrant Workers and Their Integration in Canada" (2012) *IRPP* No 26 at 22.
[76] For a critical analysis of this claim, see Dauvergne and Marsden, "Ideology", *supra* note 20.
[77] See, i.e., Dauvergne and Marsden, "Ideology", *supra* note 20, and Dauvergne and Marsden, "Beyond", *supra* note 23, where this latter issue concerning the ideology and function of 'temporariness' is explored in greater detail.
[78] See Nakache and D'Aoust, *supra* note 68 at 158-9.

the limited and 'temporary' nature of the TFWPs, these limitations only operate to the detriment of migrant workers. The significant increases in migrant workers admitted under the TFWPs, and especially under the SLO, in the past decade, would suggest a reality in which the demand for migrant workers is anything but 'limited' and 'temporary'.

While participants under the SAWP do not have limitations on their long-term eligibility for participation in the program, they are not eligible to apply for permanent residency.[79] In addition, while workers under the SLO are eligible to apply for permanent residency, their options to do so are very limited.[80] As such, the remainder of this section will focus on exploring options for long-term or permanent residency for all workers, which would suggest a proposal to allow SAWP participants equal access to permanent residency along with all other migrant workers in the 'lower-skilled' streams.

Because of the significant restrictions under Canada's current immigration system, the "best bet" for lower-skilled migrant workers in accessing permanent residency is through one of the Provincial Nominee Programs,[81] as discussed briefly in Chapter 3. The PNPs were developed "as a means to address the unique demographic and economic challenges that provinces and territories" have faced in Canada,[82] and operated to decentralize, to a degree, federal control over immigration. Under the PNPs, provinces "play a greater role in recruiting, selecting, and attracting immigrations according to the economic needs of the region" and typically in

[79] Nakache and D'Aoust, *supra* note 68 at 162.
[80] See, i.e., *ibid* at 162-3.
[81] See *ibid* at 161, 164
[82] *Ibid* at 160.

accordance with guidelines, such as quotas, developed with the federal government.[83] The PNPs, in addition to being the primary existing vehicle for residency for migrant workers, also present an option for reform, or perhaps more appropriately, expansion, that would align well with the recommendations made under sub-section (a).

Currently, not all provinces allow migrant workers under the SLO stream, or in 'lower-skilled' occupations, to apply for permanent residency under the PNP.[84] Options in some provinces for lower-skilled occupations are also very limited.[85] Thus, a starting point in considering expansion of the PNP to address the long-term needs for low-skilled migrant workers, and their options for long-term residency, would be to ensure the creation of a category for lower-skilled workers under all PNPs.

In addition to the limited existence of current options for lower-skilled workers under most PNPs, applications are commonly also made in conjunction with a specific employer.[86] Applications are made in conjunction with an employer ostensibly to ensure the employment prospects and economic participation of the applicant. Most provinces require an applicant to have acquired a certain length of work experience in Canada, and have an offer of long-term employment.[87] Several provinces appear to reserve a right to withdraw applications from individuals who lose their job, change employers or have their work permit expire.[88] These conditions could have the effect of replicating and compounding the issues regarding employer

[83] Nakache and D'Aoust, *supra* note 68 at 164-5.
[84] See *ibid* at 168, 173-5.
[85] *Ibid* at 168, 171-3.
[86] See *ibid* at 167.
[87] See *ibid* at 170-3.
[88] See *ibid*.

control explored in respect of the work permit in Chapters 3 and 4. However, if work permits were allocated on a sector-wide basis, as suggested in subsection (a), then a similar shift under the PNPs could be contemplated, or at the least, mobility in respect of employment could allow a worker greater choice in navigating a satisfactory job situation from which to then apply for permanent residency under the PNP.

Despite the possibility to apply for permanent residency under the PNPs, their extension, in practice, to 'lower-skilled' migrant workers appears quite limited.[89] However, the existence of some streams for application in respect of lower-skilled work provides a foundation from which expansion of the PNPs could be contemplated in order to provide migrant workers with greater and more meaningful access to long-term residency. Given the demonstrated long-term need of migrant workers in several industries and provinces, this proposal would not operate negatively towards the state's interests in governing the labour markets and domestic employment in Canada. Indeed, several of the PNPs that allow applications from lower-skilled workers already designate specific industries for such applications,[90] which align to the dominant industries in which migrant workers at that level are already employed through the TFWPs.

Considering the earlier proposal to develop a centralized body to coordinate the administration of the TFWPs in each province, the existing department under which PNP programs are nominated could serve as an appropriate vehicle for such a body, which could then also include administration of the PNP program. Like the recommendations made in respect of the employer-

[89] Nakache and D'Aoust, *supra* note 68 at 171-5.
[90] See *ibid*. For example, in Alberta, applications are accepted from food- and beverage-processing, hotel and lodging, manufacturing, long-haul trucking and food services industries, primary sectors of migrant worker employment under the SLO.

specific work permit, this recommendation to consider expansion of the PNP program would require a greater depth of analysis; however, the goal here is to provide some insight into options for reform based on existing practices, and to provide a foundation for a more elaborate discussion and analysis of alternative considerations going forward.

Together, expanding the options for mobility in respect of employment, and long-term residency, under the TFWPs could serve to create a much stronger foundation for migrant workers in their ability to exercise choice and rights in Canada. These kinds of reforms or alternatives would work to alleviate some of the most pressing concerns and issues documented in respect of migrant workers' conditions of unfreedom under the TFWPs, and would also provide a more protected sphere from which to exercise other rights and choices, especially in the face of abuse or exploitation. Building from this foundation of an expanded set of rights and choices in respect of fundamental aspects of the terms of employment and status under the TFWPs, the final section of this chapter will go on to examine some options to increase the ability for migrant workers to effectively exercise and enjoy rights.

IV. RIGHTS IN PRACTICE: FOSTERING MEANINGFUL ACCESS TO AND EFFECTIVE ENJOYMENT OF RIGHTS FOR MIGRANT WORKERS

As identified in previous chapters, migrant workers face numerous obstacles to exercising choice due to constrained opportunity and constrained access in relation to their employment and other rights, and the impact of the regulatory measures of the TFWPs, which create strong

disincentives for migrant workers to assert their rights or voice complaints. Exploring how to improve meaningful access to and effective enjoyment of rights is therefore key to improving the experience and freedom of migrant workers in Canada moving forward.

This section will first examine the duties and obligations of the state in relation to improving access to legal rights and remedies, focusing primarily on issues relating to monitoring and enforcement in relation to existing rights. While simply expanding the set of rights and access to them for migrant workers will not likely remedy the systemic issues explored in this thesis alone, they remain important steps in improving the situation for migrant workers in Canada. In addition, based on the understanding of fiduciary role of the state, explored earlier in this chapter, and the firmer grounding rights within the state-subject relationship under a fiduciary conception, these considerations can do some work towards shifting the overall conversation about the place and state of migrant labour in Canada moving forward.

This section will then go on to explore the role of civil society, drawing on examples of creative advocacy and solutions developed outside of the state-subject relationship. Understanding the role of external actors, and their potential impact in advocating for and advancing rights, is an important component to effecting broader social change. In addition, the need to provide a meaningful voice for migrant workers in dialogue about their place and rights in Canada will be discussed.

a. State-Based Solutions to Advance Access to Rights: Monitoring and Enforcement as a Foundation for Improvement

The lack of monitoring and enforcement of rights under the TFWPs, as explored in Chapter 3, directly contribute to the creation of an environment in which abuse against migrant workers can occur with relative impunity, and in which migrant workers may be reluctant to assert their rights or seek legal remedies in the face of abuse, as discussed in Chapter 4. While the federal government has pledged to improve its monitoring of the program through increased labour inspections,[91] understanding what meaningful change is required in respect of monitoring and enforcement is key to its ability to form a successful component of broader reform on the TFWPs.

Monitoring and enforcement activities would be best integrated into broader reforms where migrant workers' status in Canada was already more secure. As was seen in Chapter 4, the precariousness of their immigration status, especially (as well as the fact that it is often linked, in fact or in perception, with their employment status), results in significant reluctance to voice complaints or seek assistance. As such, without a more secure status, monitoring and enforcement would likely do little to advance meaningful access to and enjoyment of rights for migrant workers. As such, the discussion contained in this sub-section builds from the recommendations already considered in the previous section (III).

Monitoring and enforcement of legal regulations typically occurs through inspection. As such, suggesting increased workplace inspections may provide an important mechanism through which

[91] See Government of Canada 2014, *supra* note 70.

to ensure that basic employment, safety and other workplace standards are being met. Inspection activities can operate to motivate employers to ensure that applicable laws and regulations governing the workplace are met in practice, and can thus act to prevent rights violations. However, the structure and specific activities undertaken under inspection schemes are important considerations in order to avoid negative consequences.

The structure of labour inspection schemes, in other words, who is involved and for what purposes, is a key factor in determining their success. This is so because several different provincial departments may be responsible for the several different aspects of workplace regulations. In order to avoid duplication of effort, labour inspection may be best accomplished on a 'team structure' basis, with a representative from each relevant department. This structure can allow teams to provide a holistic assessment of the workplace, and avoid multiple visits and a silo-approach that can result in issues 'falling through the cracks'. However, equally important to a 'team' structure is the absence of immigration enforcement officers. Labour inspections commonly involve interviews with on-site employees to determine any underlying issues or conditions that may require attention, such as with respect to wages, duties, and hours of work. Where migrant employees are involved, the presence of immigration enforcement officers is likely to create reluctance amongst the workers to be candid and honest about workplace issues.

In some industries and provinces, a proactive team approach to labour monitoring and inspection already exists. For example, in BC, the Agricultural Compliance Team, under the BC Employment Standards Branch, undertakes inspections in the agricultural industry.[92] In addition, BC formed the Agriculture Inter-Agency Committee in 2007, including the Ministry of Labour

[92] "Agricultural Compliance Team Visits" online: Government of BC <http://www.labour.gov.bc.ca/>.

(Employment Standards Branch), WorkSafe BC (responsible for occupational health and safety), the Ministry of Transportation (Commercial Vehicle Safety and Enforcement), the Ministry of Agriculture and Lands, and the BC Agriculture Council.[93] The Committee is involved in initiatives related to education, prevention and enforcement. While available statistics do not indicate that the Committee (or, possibly, Compliance Team) has conducted site visits from 2011 to date, older statistics establish an active presence, with an average of 99.5 site visits per year from 2007-2010.[94] What this example from BC does establish is the possibility of creating dedicated inspection teams that combine relevant government actors and operate in a contextual manner, dependent on the areas and industries in which migrant workers are employed in the province.

While monitoring and enforcement activities by relevant government actors and departments may go some distance towards preventing abuse against migrant workers, and achieve some level of proactivity in that regard, the broader issue of complaints-driven processes for making legal claims or seeking remedies remains a complex problem for migrant workers. With greater security of status, it is possible that the disincentives to complain may be reduced, though the extent of this impact is debatable considering the numerous factors attending the decision-making process as discussed in Chapter 4. The proposal of a dedicated government Office to centralize services and coordination with respect to migrant workers at the provincial level may be of some value in increasing access to rights in this regard, particularly if the Office was developed with a mandate to receive, assist with or otherwise address complaints. In addition, it would be important for such an Office to have the rights and interests of migrant workers as their

[93] "Farm Workers' Inter-Agency Compliance Committee" online: Government of BC <http://www.gov.bc.ca/farmworkers/>.
[94] 100 (2007), 109 (2009), 98 (2009), 91 (2010). See *ibid*.

central objective and focus, and some distance or independence from other branches of government would be key to effectively carrying out this objective.

Whatever proposals or reforms might be contemplated in respect of more effective monitoring and enforcement practices in relation to the TFWPs, several considerations must be borne in mind, as discussed in this sub-section. First, monitoring, inspection and enforcement activities must be carried out with the interests and rights of migrant workers as the forefront consideration. This would mean, at a minimum, ensuring the separation of immigration enforcement activities from other forms of monitoring and inspection. Second, the complexity of issues associated with the disincentives for migrant workers to voice complaints or assert their rights, as discussed in Chapter 4, must be carefully contemplated in developing institutional changes. Complaints-driven processes are particularly problematic in this regard. Third, any changes or reforms must monitor and evaluate its actual impact in relation to the objectives and factors above; a static approach to institutional reform is unlikely to effect meaningful change in the long-term. Building from this, the final sub-section of this chapter will explore the role of civil society in advancing meaningful access to rights, and will draw on further examples of promising practices in this regard.

b. Creativity and Collaboration by Civil Society in Advancing Rights for Migrant Workers

Civil society plays an important role in advancing meaningful access to rights for migrant workers. Through both advocacy and other efforts, community groups, NGOs and trade unions have made concrete changes at local and larger scales in relation to important features of migrant

work, including wages, status and long-term residency prospects. The presence of community and advocacy organizations, as both a site for self-organizing amongst migrant workers (i.e., a 'meeting place'), and as an important support for organization activities, is key for continued success in improving access to rights.[95] This section seeks to canvass some of the creative solutions and campaigns that have been engaged in by civil society with a view to improving access to and enjoyment of rights for migrant workers.

First, with respect to the presence and influence of union and other advocacy organizations, there are several ways in which these groups can positively impact change in the regulations and conditions of migrant labour in Canada. For example, the Coalition of Immokalee Workers in Florida successfully campaigned for an increase in the buying price of tomatoes for several large corporations, which in turn directly produced an increase in pay for the migrant workers harvesting those crops, in addition to a few other requirements under this "Fair Food Campaign".[96] Given the size of both the agricultural industry and migrant worker population, this campaign was able to successfully lobby for a small increase in the buying price of tomatoes that translated into a more significant increase in the wages of the migrant workers employed in that industry.

This campaign is just one example of the kind of work that advocacy organizations can undertake, or assist in, to help positively impact the conditions and experience of migrant work

[95] See, i.e., Jill Hanley, Eric Shragge, Andre Rivard, and Jahhon Koo, ""Good Enough to Work? Good Enough to Stay!" Organizing among Temporary Foreign Workers" in Patti Tamara Lenard and Christine Straehle, eds, *Legislated Inequality: Temporary Labour Migration in Canada* (Montreal: McGill-Queen's University Press, 2012). In this book chapter, the authors draw on several empirical projects to explore the ways in which migrant workers have organized in Quebec, and the role of advocacy and community organizations.
[96] Coalition of Immokalee Workers, "Campaign for Fair Food" online: <http://ciw-online.org/campaign-for-fair-food/>.

in certain industries or geographic areas. Advocacy organizations can bring together various groups of workers and other interested individuals through campaigns and varied reform initiatives, which provides a common space and platform to bring particular issues to light, and to thus engage in public discussion (in its broadest sense) about those issues. This, in turn, can enable the identification of pressing local issues (though they may be commonly experienced across employment sectors and geographic regions), and creative ideas to address them while also accounting for the primary objectives of employers, business, government and other interested actors. The Fair Food Campaign example captures this kind of innovative public negotiation well.

Relatedly, where unions have a presence in the industries in which migrant workers are employed, they can use their status and bargaining power on behalf of migrant workers in the formation of contract negotiations with the employer, to ensure both equal, or equitable, pay and conditions of work for migrants alongside resident workers, and to promote long-term employment and/or residency for migrant workers. For example, a branch of the United Food and Commercial Workers (UFCW) Union, Local 1118, was able to have a unique requirement written into their collective agreement, which stipulates that "if employers hire temporary foreign workers, they must help them apply to become permanent citizens."[97] This also means that where migrant workers don't meet eligibility requirements for permanent residency, such as English language skills, the employer must assist them in meetings the requirement, such as through providing language instruction.[98] In addition to the contract stipulation, new migrant workers under UFCW Local 1118 may undergo a union-organized orientation program upon

[97] Amber Hildebrandt, "How a little Alberta union helps temporary foreign workers become Canadian", *CBC News* (8 May 2014) online: <http://www.cbc.ca/news> [Hildebrandt].

[98] *Ibid.*

arrival.[99] Though employment-related concerns are not erased through this measure, or through the union's support of migrant workers, the presence and influence of the union in the workplace, coupled with the guarantee of residency support, appears to balance the power between parties (employer and worker) to a great extent.

In addition, the presence and influence of union and advocacy organizations can also provide additional assistance for migrant workers in accessing the processes and tools needed to effect choice or assert rights. The two cases cited in Chapter 4 concerning legal complaints in relation to migrant workers' experiences, one at the BC Labour Relations Board,[100] and the other at the BC Human Rights Tribunal,[101] both demonstrated the significant value that unions and advocacy organizations can have in mobilizing the necessary resources and tools to assist migrant workers' in accessing legal procedures to assert their rights, where they wish to do so.

Like the presence of advocacy organizations, then, unions can also effect significant, positive change on the working conditions and long-term prospects of migrant workers. Although union support for migrant workers remains a divided issues in Canada, taking active steps to improve conditions for *all* workers, including migrant workers, would appear to have long-term benefits overall, and could contribute to a decrease in both unequal treatment for migrant workers and negative public perceptions about their place in the economic and employment market in Canada.

[99] Hildebrandt, *supra* note 97.
[100] *Sidhu & Sons Nursery Ltd (Re)* [2014] BCLRBD No56 (QL).
[101] *C.S.W.U. Local 1611 v. SELI Canada and others (No. 8)*, 2008 BCHRT 436.

However, while advocating on behalf of migrant workers is an important step in fostering inclusion and belonging, initiatives which directly bring migrant workers 'to the table' are critical. Providing a direct platform for migrant workers' voices to be heard directly, in communicating their stories, needs and values, will greatly enhance the potential that changes focused on the development of capabilities, rights and opportunities for choice will be best targeted towards what the individual needs and values of workers, in fact, are. There should thus be real and genuine consultation and inclusion of migrant workers in both the development of legal rules and processes bearing on their experience in Canada, at the 'bargaining table' with the employer, and in many other possible venues.

Overall, this section has established that many potential, creative avenues for change exist that can work, in concert with other reforms, to improve migrant workers' access to and enjoyment of rights. Developing effective change will require an understanding and appreciation of the needs and interests of migrant workers, placing their interest and rights at the centre of the conversation, and designing change on a broad scale, connecting various aspects of legal regulations and concrete practices that all impact upon the overall experience of migrant work in Canada.

CONCLUSION

This chapter sought to provide preliminary insights into a different way of imagining the state and place of migrant labour within the Canadian landscape. Most important to any change is a shift in the underlying ideology, discourse and perception of migrant labour as a part of Canada, and a reorientation of the state's understanding of its role and relationship towards migrant workers. This chapter drew on the fiduciary theory of the state, developed by Fox-Decent, to propose an alternative way of thinking about the state-subject relationship in the context of migrant work, and the place of rights within this relationship. Drawing on this conception, this chapter went on to explore some examples of existing and potential practices that could effect meaningful change for migrant workers in Canada. However, as stated at the outset of this chapter, no small series of independent changes or reforms to law or in practice will accomplish the much more fundamental shifts that must occur. The future of migrant labour, and particularly in respect of 'lower-skilled' or "3D" work, must be evaluated and reconsidered from more than an economic perspective. This thesis has provided a starting point for that deeper conversation, and this chapter offered some broad ideas of the various pathways that can be taken in that regard.

CONCLUSION

This thesis sought to offer a richer understanding of the state and place of migrant labour under Canada's Temporary Foreign Worker Programs [TFWPs]. Building from the identified gap between discourse and practice in relation to migrant workers, with the former increasingly centering on exploitation, and the latter focusing on heightened restrictions for migrant workers, this thesis shed light on the numerous, complex and intersecting legal, political and social issues that impact on the experience and understanding of both migrant labour, and ideas of exploitation.

In Chapter 1, we saw that the conceptualization of human trafficking relies largely on a privileged idea of the 'sex trafficking victim', and is deeply connected with underlying political ideology aimed at restricting and controlling territorial borders and sovereignty. These two facets of law's understanding of 'human trafficking' work in concert to propel forward specific legal rules and interpretations, which as was seen in Chapter 1, operate largely to the exclusion of many individuals and groups who may be, or be vulnerable to, labour exploitation and other abuses that could be broadly situated within the concept of human trafficking.

Moving from this conclusion, Chapter 2 thus investigated in greater depth the legal meaning, and possibilities, associated with the concept of human trafficking under international law. Despite the controversial, and largely ideologically-driven creation and interpretation of the international legal definition of human trafficking, the broad inclusion of many concepts related to

exploitation in that definition provides space for imagining the concept differently. Working from an analysis of the many related ideas: slavery, slave-like practices, servitude, debt bondage, and forced labour, Chapter 2 brought to light the common underlying features presented in each of these concepts to articulate a conceptual framework that was both unattached to the problematic political and social interpretations associated with the existing concepts, and which could more accurately account for the core issues embedded within the individual concepts alike. Chapter 2 thus advanced a conceptual framework of 'unfreedom', which focuses on the way in which external actors (both individuals and institutions) exert effective control over individuals, and the way in which individuals' ability to exercise and effect choice is unreasonably constrained by those external actors' control or constriction over them.

Using the conceptual framework of 'unfreedom', Chapters 3 and 4 then turned to investigate the state of Canada's Temporary Foreign Worker Programs, focusing on the Stream for Lower-Skilled Occupations and the Seasonal Agricultural Workers Program. The TFWPs, as mentioned in the Introduction, have seen a growing discourse of concern in relation to the potential and existence of labour exploitation, forced labour practices, and human trafficking under the programs. Yet, little concrete action or policy reform have occurred in response to these increasing concerns. Given the privileged ideas about 'human trafficking' and related concepts, the idea of 'unfreedom' thus provided a more suitable framework for analysis in relation to these programs.

Chapter 3 exposed the multitude of ways that the legal regulations surrounding the TFWPs act to effect control over migrant workers in a way which unreasonably restricts their ability to effect

or exercise choice in relation to fundamental decisions about their life and conditions. Moreover, the analysis of the legal regulations established how they often work in concert to produce conditions of extremely restrained choice for migrant workers. Coupled with the legal regulations, this chapter uncovered that the underlying ideology driving forward the use of the TFWPs in Canada, like with other temporary migrant labour programs around the world, directly correlates to the way in which these programs are structured. Thus, the political and social context underlying the programs both influences the resulting legal regulations, and further acts as a bundle of forces together with the legal rules, to create a state of significant unfreedom for migrant workers in Canada.

Chapter 4 went on to explore how this impacts the experience of migrant workers in relation to two important points: first, how the landscape exposed in Chapter 3 produces conditions in which employers and other parties may abuse or exploit migrant workers with relative impunity; and, second, how all of these factors constrain migrant workers' abilities to access or exercise the substantive rights to which they are formally entitled under Canadian law. Overall, the issues discussed in Chapters 3 and 4 in relation to the experience of migrant workers in Canada act together to create a significant state of unfreedom in relation to migrant labour under the TFWPs. Importantly, the existence of multiple forces, and their interaction, suggest that the issues highlighted with respect to the TFWPs cannot simply be solved by changing one law or regulation, by enhancing one element of the program or its monitoring, by only levying greater penalties in respect of employers who abuse or exploit workers.

Chapter 5 took up the challenge of offering preliminary insights into the ways in which the conditions of migrant work in Canada can be improved. The combined effect of the forces and issues discussed in the previous chapters suggested that a much deeper change must be imagined, one which is centrally concerned with the role and relationship of the state towards migrant workers, and the ideas of freedom, choice and rights under this relationship. Chapter 5 thus explored how the fiduciary theory of the state, developed by Fox-Decent, can provide firming grounding for resituating the relationship of the state towards migrant workers. This theoretical orientation directly acknowledges the inherent power imbalance migrant workers experience in the law and in respect of their participation in Canada, and roots the interests and rights of migrant workers within a concrete legal framework. This chapter also examined how, conceiving of the relationship between freedom, rights and choice as integrally connected, offers a more complete understanding of the requirements of law in advancing substantive rights and freedom for migrant workers. This chapter thus concluded by offering examples of what this reorientation could mean in terms of concrete change for migrant workers, focusing on expansion of the work permit system and long-term residency prospects, as well as improved monitoring and participation from civil society in asserting rights and accessing legal remedies.

As discussed in the Introduction to this thesis, a primary underlying goal of this work was to expose the stories that law tells of individuals, society and its relationship to each, by uncovering: (1) the dominant conceptions in relation to certain categories of experience and individuals that law privileges; and, (2) the underlying ideology driving forward particular legal ideas and interpretations in relation to those categories of experience and individuals. While this thesis has undertaken an in-depth analysis of this within the context of the TFWPs, the

framework and concepts developed through this thesis offer a rich platform for continued dialogue and research in man regards.

First, this thesis provides a strong foundation for a much broader conversation about the current and future role and place of labour migration in a global sense, and particularly can be used to further investigate the development promises associated with labour migration today. Often positioned as a 'triple win' for the migrant, receiving state, and sending state, labour migration programs appear far more to operate in a negative way for all actors involved, when considered from a long-term perspective. This thesis has demonstrated the numerous ways in which formalized labour migration programs impact negatively on migrant workers themselves. However, it has also highlighted briefly the long-term potential problems for receiving states, that may inevitably construct and then become dependent on migrant economies in order to remain competitive in a global marketplace. Similarly, while remittances from labour migrations are a significant domestic revenue source for many sending states, this has not translated, to date, into the development of domestic labour markets that would see migrants return home. Rather, evidence suggests that the increased flow of, and dependence on, remittances will translate to a long-term dependence on labour migration programs for economic stability of these states.

Second, the examination of modern legal concepts related to exploitation, as undertaken primarily in the first half of this thesis, offers a more nuanced understanding these concepts beyond their historical origins, political and social divisions, and criminal legal confines. The conceptual framework of 'unfreedom' developed in response can serve as an important tool for research and scholarship examining a variety of problematic practices around the globe. It can

offer a more precise lens through which to rethink existing practices and approaches to sensitive and controversial issues that cannot be clearly or easily decided in a zero-sum, either/or manner (despite law's propensity for such an approach). The conceptual framework of unfreedom can also offer a more balanced perspective that acknowledges and understands the limitations individuals face in navigating choice, but without evacuating them of their agency in the process. This framework centres to a much greater extent, than existing definitions, on the values and needs of affected individuals, and the variety of external constraints that they may experience in endeavouring to meet those needs or live out their values. This framework can thus be further developed and adapted to address key cultural, religious, gender-based, and a variety of other social issues at the local and global scales.

The underlying current of this thesis, as focused on stories, narratives and identity constructions in law, can also provide a focus for further research and comparison in relation to numerous other sites, populations and experiences that fall prey to similar problematic representations and prescriptions under law. This work can also be used to reorient and bring to the forefront the narratives and experiences of individuals directly impacted by law. While this project was not the appropriate site or venue for direction interaction with migrant workers, for example, it can serve as a platform for a larger conversation that does bring migrant workers and other voices into the fold. It can thus serve as a foundation to engage with multiple stories, to change stories, to refocus law and its stories in relation to individual experience, and to broader ideas about freedom, choice and rights in society. As author Chimamanda Adichie notes, "[s]tories matter. Many stories matter. […] Stories can also be used to empower and to humanize. Stories can

break the dignity of a people but stories can also repair that broken dignity."[1] This thesis has sought to contribute to a broader, ongoing conversation about these ideas; while it established in many ways the problematics of current approaches and perceptions that operate to, in Adichie's word, "break the dignity of a people", it can also set the stage for future work and ideas that will help "repair that broken dignity".

[1] Chimamanda Adichie, "The Danger of a Single Story" presented at TEDGlobal conference, Oxford, UK, July 21-24 2009, online: <www.ted.com> at 17:40.

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APPENDIX A

McGill

Research Ethics Board Office
James Administration Bldg, room 429
845 Sherbrooke St West
Montreal, QC H3A 0G4

Tel: (514) 398-6831
Fax: (514) 398-4644
Ethics website:www.mcgill.ca/research/researchers/compliance/human/

Research Ethics Board I
Certificate of Ethical Acceptability of Research Involving Humans

REB File #: 45-0712

Project Title: At Your Service: Forced Labour in Canada's Low Skills Economy

Principal Investigator: Bethany Hastie **Department:** Law

Student Status: Ph.D. Student **Supervisor:** Prof. F. Crepeau

This project was reviewed by delegated review.

Rex Brynen, Ph.D.
Delegated Reviewer, REB I

Approval Period: __15 Aug. 2012_____ **to** ____14 Aug. 2013_____

This project was reviewed and approved in accordance with the requirements of the McGill University Policy on the Ethical Conduct of Research Involving Human Subjects and with the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans.

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* All research involving human participants requires review on an annual basis. A Request for Renewal form should be submitted 2-3 weeks before the above expiry date.
* When a project has been completed or terminated a Study Closure form must be submitted.
* Should any modification or other unanticipated development occur before the next required review, the REB must be informed and any modification can't be initiated until approval is received.

APPENDIX B

RESEARCH CONSENT FORM

This is to invite you to participate in a study entitled "At Your Service: Forced Labour in Canada's Low Skills Economy" which is being conducted by Bethany Hastie, O'Brien Fellow and Doctoral Candidate, Faculty of Law, McGill University.

Title of Research: At Your Service: Forced Labour in Canada's Low Skills Economy
Researcher: Bethany Hastie, O'Brien Fellow and Doctoral Candidate, Faculty of Law, McGill University
Contact Information: Tel: (514) 439-4345 email: bethany.tapp@mail.mcgill.ca
Supervisor: Professor François Crépeau, Oppenheimer Chair, Faculty of Law, McGill University
Contact Information: Tel: (514) 398-2961 email: francois.crepeau@mcgill.ca

Purpose of the research:
The purpose of this research is to examine in-depth issues of trafficking for forced labour under Canada's Temporary Migrant Worker Programs, and propose effective policy recommendations to confront this problem. This project aims to uncover dominant trends in the exploitation of migrant workers, as well as particular institutional and pragmatic facets of the program which increase vulnerability and enable exploitation to occur. Based on these findings, the response by federal and provincial governments will be critically evaluated from a comparative perspective. Global best practices in confronting labour trafficking and migrant worker abuse will be drawn upon to propose policy recommendations and law reform.

What is involved in participating:
Your participation in the study will entail an oral interview, lasting between 60 and 90 minutes, to be conducted by Bethany Hastie. With your permission, this interview will be tape-recorded in its entirety. All information obtained in this interview will be used for the purposes of this research project and may be used in future related studies developed by the Researcher.

In this interview you will be asked to provide information on your experience in relation to human trafficking for forced labour and exploitation of migrant workers, including known cases of trafficking and migrant worker abuse, as well as your opinions and information on the existing response to this issue in Canada, such as problematic facets of the migrant worker programs, victim services, prosecutions, etc. Information and quotations from this interview may be used in the publication of research results. The attribution of information and quotations from this interview to you personally as the interview subject may be made in resulting publications with your permission. At this time, intended publication of the results will take the form of the researcher's doctoral thesis, and may at a later date take the form of academic articles, a monograph, and/or conference presentations.

Your participation is entirely voluntary and you can choose to decline to answer any question or even to withdraw at any point from the project. Anything you say will only be attributed to you with your permission. Otherwise, the information will be reported only by reference to your organization. My pledge to confidentiality also means that no other person or organization will have access to the interview materials. All electronic and hard-copy files will be stored in a secure manner, and will only be accessible to the Researcher, her supervisor, and any research assistants under her employ.

If you have any questions or concerns regarding your rights or welfare as a participant in this research study, please contact the McGill Ethics Officer at 514-398-6831 or lynda.mcneil@mcgill.ca.

Consent:

I agree to be tape-recorded ____YES _____NO

I agree that quotes attributable to my person from my interview may be used in resulting publications ____YES _____NO

I have read the above information and I agree to participate in this study.

Signature: _____ Researcher's signature: _____

Name: _____ Date: _____

APPENDIX C

LIST OF PARTICIPANTS

Participant 01	Government
Participant 02	Government
Participant 03	Government
Participant 04	Government
Participant 05	Government
Participant 06	Government
Participant 07	Non- Government
Participant 08	Government
Participant 09	Non- Government
Participant 10	Government
Participant 11	Non- Government
Participant 12	Non- Government
Participant 13	Non- Government
Participant 14	Non- Government
Participant 15	Non- Government
Participant 16	Non- Government
Participant 17	Government
Participant 18	Government

APPENDIX D

INTERVIEW QUESTONS

At Your Service: Forced Labour in Canada's Low Skills Economy

Principal Investigator:
Bethany Hastie, O'Brien Fellow and Doctoral Candidate, Faculty of Law, McGill University
Tel: 514-439-4345, Email: bethany.tapp@mail.mcgill.ca

Questions are organized around specific modules or topics. Depending on the area of expertise or knowledge of the interviewee, questions from the relevant modules will be asked. The interviews are semi-structured, and the questions may be used as a starting point for discussion on the relevant topics and issues. Not all questions in relevant modules may be asked of participants.

All questions should be answered only in relation to the participant's experience or knowledge in the area, and only to the extent that he or she feels it is appropriate to share that information.

MODULE 1: GENERAL MIGRANT WORKER QUESTIONS

1. What streams of the TFWP are you aware of being used in your area?
2. What industries predominantly utilize the TFWPs in your area?
3. What source countries have you seen migrant workers brought from?
4. What are the conditions of work you have typically seen with respect to migrant workers in your area?
5. What are the living conditions you have typically seen with respect to migrant workers in your area?

MODULE 2: GENERAL HUMAN TRAFFICKING QUESTIONS

1. How do you define human trafficking?
2. Which countries are source countries for individual trafficked to Canada and exploited here under the TFWPs?
3. In what industries employing migrant workers have you encountered human trafficking for forced labour?
4. What do think are the most common indicators to identify an individual as a trafficked person or abused worker?

MODULE 3: CASES OF MIGRANT WORKER ABUSE

1. How do cases of migrant worker abuse or exploitation primarily come to your attention?

Specific Case Questions:

2. From what country did the worker enter Canada?
3. What methods or tactics were used to exploit the worker?
4. Did the worker belief that he/she was subject to some form of debt bondage?
5. What were the primary social services needed by the worker?
6. Were there any challenges/barriers involved in working the case? For example:
    a. Were there problems communicating with the worker? (language)
    b. Were there issues with cooperation?
    c. Were there challenges with respect to identification?
7. Was there a lack of resources?
8. What happened to the worker after short-term recovery/assistance?

MODULE 4: LEGAL AND INSTITUTIONAL ISSUES UNDER THE TFWPS

1. What facets of the TFWPs enable exploitation to occur?
2. Are you aware of inspections occurring in your area for workplaces employing migrant workers?
3. Do you believe the employer-specific permit system contributes to the facilitation of exploitation amongst migrant workers?

MODULE 5: PRAGMATIC ISSUES UNDER THE TFWPS

1. What are the primary practical or pragmatic issues that enable exploitation to occur under the TFWPs?
2. How easy or difficult is it for migrant workers to access legal aid or remedies?
3. How easy or difficult is it for migrant workers to enforce their labour and other rights with employers?
4. What are the main barriers or obstacles to enforcing applicable laws and regulations under the TFWPs?

MODULE 6: RECOMMENDATIONS AND BEST PRACTICES

1. What do you feel needs to be improved under the TFWPs to reduce abuse and exploitation?
2. What other provinces or countries have you identified best practices arising out of?
3. What do these best practices look like?

MODULE 7: FINAL COMMENTS

1. Do you have any final comments you would like to make before we conclude the interview?