

# Migrant Workers: Contesting Definitions, Institutional Responses, and Rights

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Migration has become one of the most enduring preoccupations of our political age. It featured heavily in two of the most reverberating political shocks in recent times – the election of Donald Trump in the United States in November 2016, and Britain’s decision to leave the European Union a few months earlier. On both sides of the Atlantic (and sometimes further afield), insurgent right-wing forces have successfully traded on migration hysteria to win the support of an increasing share of the population. But it would be a mistake to see their tactics as bringing into play something new. For at least a century now, migrants and migration have been scapegoated for a whole host of social, political and economic ills. Some prominent historical examples allow us to see some of the continuities between our present age and what has gone before. The United States, for example, moved to comprehensively restrict immigration in the period following World War I because technological developments in mass production had reduced the need for a growing labour force.<sup>1</sup> In the early twentieth century, Australia went on to consolidate its reputation as the ‘working man’s paradise’ only after it passed the *Immigration Restriction Act 1901*, later dubbed the ‘White Australia Policy.’<sup>2</sup> What these examples reveal is that concerns about transformations in labour markets and their regulation fed anxieties about migration.<sup>3</sup> These close connections between migration and labour markets are still evident today. For example, as Judy Fudge has recently shown, the treatment of unauthorized work in the UK is closely

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<sup>1</sup> M. M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 19 (Princeton U. Press, 2004).

<sup>2</sup> J. Piccini & E. Smith, ‘The “White Australia” Policy Must Go’: *The Communist Party of Australia and Immigration Restriction*, in *The Far Left in Australia Since 1945* (J. Piccini, E. Smith, & M. Worley eds, Routledge 2018).

<sup>3</sup> It takes nothing away from this analysis to point out that an obsession with ‘demographic purity’, closely connected to ideas about who should be able to share in the bounty of economic production, was also a driving force.

related to a neoliberal governance project committed to the deregulation of the labour market.<sup>4</sup>

The International Labour Organization (ILO) estimates that there are around 164 million migrant workers worldwide.<sup>5</sup> According to the ILO, ‘migrant workers’ are international migrants (i.e. persons who are foreign born) of working age who are either employed or unemployed in their current country of residence.<sup>6</sup> Almost 68% of these migrant workers are employed in high-income countries, with 23% found in North America, 23.9% in Europe and 13.9% in the Arab states.<sup>7</sup> As a proportion of all workers, migrant workers constitute 20.6% of the labour force in North America, 17.8% in Europe, and 40.8% in the Arab states.<sup>8</sup> Many of these migrant workers are naturalized citizens in their countries of residence (as is the case for most migrant workers in North America and Europe), although some hold only temporary work permits (particularly in the Arab states).<sup>9</sup> Many academics point out with alarm that some high-income countries that once relied on permanent migration to meet labour market needs, such as Canada, Australia and the United States, are now turning to temporary labour migration.<sup>10</sup> Many thought that large-scale temporary labour migration programs were obsolete because of the well-documented problems that arose with the post-war guest worker programs in Europe.<sup>11</sup> However, these programs have returned with a vengeance in the twenty-first century, suggesting that history resounds even if it does not repeat.

The Canadian situation is particularly instructive because it is an example of a high-income country that has wholeheartedly embraced temporary labour migration to expand its labour supply. Canada introduced a non-industry-specific temporary foreign worker program in 1973,<sup>12</sup> which in the 1990s started to become more clearly divided into ‘high-skilled’ and ‘low-skilled’ streams. In the

<sup>4</sup> J. Fudge, *Illegal Working, Migrants and Labour Exploitation in the UK*, 38 *Oxford J. Legal Stud.* 557–84 (2018).

<sup>5</sup> Labour Migration Branch, *ILO Global Estimates on International Migrant Workers: Results and Methodology* (ILO, 2018), ix.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, at xi.

<sup>8</sup> *Ibid.*

<sup>9</sup> For a discussion of the shift from permanent to temporary migration in traditional immigrant states (Canada, the United States, Australia, and New Zealand), see P. T. Lenard, *How Does Canada Fare? Canadian Temporary Labour Migration in Comparative Perspective*, in *Legislated Inequality: Temporary Labour Migration in Canada* (P. T. Lenard & C. Strachle eds, McGill-Queen’s U. Press, 2012). For a succinct account of temporary labour migration to the Gulf states, see H. Thiollet, *The Regional Politics of Labour Import in the Gulf Monarchies*, in *The Palgrave Handbook of International Labour Migration* (M Panizzon, G. Zürcher & E. Fornalé eds, Palgrave 2015).

<sup>10</sup> See e.g. D. Costa and P. Martin, *Temporary Labour Migration Programs: Governance, Migrant Worker Rights, and Recommendations for the U.N. Global Compact for Migration*, EPI, 2018.

<sup>11</sup> See e.g. P. L. Martin & M. J. Miller, *Guestworkers: Lessons from Western Europe* 33 *ILR Rev.* 315–30 (1980).

<sup>12</sup> J. Fudge & F. MacPhail, *The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour*, 31 *Comp. Lab. L. & Poly J.* 101–39 (2009). Industry-specific

early 2000s, several changes were made to the program that expanded the low-skilled stream.<sup>13</sup> One of the consequences of these changes was to shift the source of temporary migrant workers from the Global North to the Global South.<sup>14</sup> Commentators have argued that one of the driving forces behind the growth of low-skilled temporary migration is the need to ensure the country's labour market needs without encumbering the state with citizenship obligations.<sup>15</sup> As we are learning, even this does not balance tensions between market imperatives and nativist demands. When the issue of temporary labour migration started to attract significant negative publicity in 2013,<sup>16</sup> the government implemented a range of reform measures, which were mostly designed to assuage concerns that Canadian jobs were being taken by foreigners.<sup>17</sup> Despite the compelling evidence of temporary migrant workers being treated poorly in their workplaces, subjected to wage theft, to dangerous occupational hazards, and to regular violations of other workplace rights and entitlements,<sup>18</sup> there were only limited reforms aimed at improving the working conditions of these workers. Even those measures intended to ensure better enforcement of their limited labour rights appear not to have had an unambiguously positive impact on the migrant workers.<sup>19</sup>

It is in this context that the Centre for Law in the Contemporary Workplace, with the generous support of the Queen's University Faculty of Law and the *Le Centre de recherche interuniversitaire sur la mondialisation et le travail* (CRIMT) Institutional Experimentation for Better Work Partnership Project, organized the 'Migrants at Work in Canada' symposium on 20 and 21 April 2018 in Kingston,

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temporary foreign worker programs, such as the Seasonal Agricultural Worker Program, have been in place since earlier.

<sup>13</sup> J. Foster, *Making Temporary Permanent: The Silent Transformation of the Temporary Foreign Worker Program*, 19 *Just Lab.* 22–46 (2012).

<sup>14</sup> *Ibid.*, at 29.

<sup>15</sup> See e.g. N. Sharma, *Home Economics: Nationalism and the Making of 'Migrant Workers' in Canada* (U. of Toronto Press 2006); and K. Surak, *Guestworkers: A Taxonomy*, 84 *New Left Rev.* 84–102 (2013).

<sup>16</sup> Two incidents in 2013 resulted in a flurry of media coverage. First, it came to light that the Royal Bank of Canada was using temporary foreign workers to replace local workers, and to make matters worse, required the departing workers to train their foreign replacements (see e.g. S. Cousineau, *Ottawa to Probe RBC Job Outsourcing*, *Globe and Mail* (7 Apr. 2013)). In addition, in 2013, the Federal Court dismissed an application brought by two unions, which argued that a Chinese mining company was utilizing temporary workers from China in circumstances where it had made no genuine attempt to recruit locally (see e.g. *B.C. Mine's Temporary Foreign Workers Case Dismissed*, *CBC News* (31 May 2013)).

<sup>17</sup> A Choudry & A. A. Smith, *Introduction: Struggling Against Unfree Labour in Unfree Labour? Struggles of Migrant and Immigrant Workers in Canada* (A. Choudry & A.A. Smith eds, PM Press, 2016).

<sup>18</sup> See e.g. Law Commission of Ontario, *Vulnerable Workers and Precarious Work: Final Report*, Dec. 2012; Bryan May (Chair), *Temporary Foreign Worker Program: Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities*, 42nd Parliament, 1st Session, Parliament of Canada, 2016; and C. M. Mitchell & J. C. Murray, *The Changing Workplaces Review: An Agenda for Workplace Rights*, Ministry of Labour (Ontario), May 2017.

<sup>19</sup> S. Marsden, *Who Bears the Burden of Enforcement? The Regulation of Workers and Employers in Canada's Migrant Work Programs*, *Can. J. Employment & Lab. L.* (forthcoming).

Ontario. The symposium assembled a multidisciplinary group of academic researchers as well as advocates from prominent migrant justice organizations. The four articles that appear in this special issue are the fruits of this exchange. Some of the articles have a Canadian and US focus although their significance reaches well beyond the borders of North America, while others take a more explicitly international approach.

The theme of *contestation* inflected the proceedings at the symposium. Contributors sought to broaden our definition of a migrant worker, while others challenged the language we use to describe some forms of work performed by migrants. Other speakers contested the adequacy of existing institutional responses, even when government actors have made good faith attempts to improve the situation. Finally, the contribution made by the seven migrant justice organizations present (Agricultural Workers Alliance, Coalition of Immokalee Workers, Farmworker Legal Assistance Clinic (Cornell), Immigrant Workers Centre, Justice in Motion, Justicia, and Transnational Legal Clinic (University of Pennsylvania)) helped foreground the agency of migrant workers, who actively contest their subordination through acts of resistance, both small and grand.

## CONTESTING DEFINITIONS

Bridget Anderson's keynote address to the symposium posed an important question: who counts as a migrant? Anderson has written elsewhere that the figure of the migrant serves a symbolic function to delineate and define the nation-state as a particular 'community of value.'<sup>20</sup> This provides a useful way to understand why our political discourse is riven with anxieties about some kinds of mobility (the movement of the poor from the Global South) while being largely indifferent to the movement of others (e.g. high-skilled workers moving as a result of intra-corporate transfers or youth traveling and working under youth mobility schemes). The figure of the migrant worker attracts opprobrium from both the political right and left for allegedly stealing jobs, driving down wages, placing an undue burden on the welfare state, undermining union organizing, and generally being resistant to collective action. Despite countless economic studies disproving many of these accounts, at least in the aggregate,<sup>21</sup> and plenty of inspiring examples of migrant worker struggles,<sup>22</sup> these myths remain difficult to dislodge. In circumstances

<sup>20</sup> B. Anderson, *Us & Them? The Dangerous Politics of Immigration Control* (Oxford U. Press, 2013).

<sup>21</sup> A comprehensive study by the Migration Advisory Committee in the UK recently found that migrants have no or limited impact on the overall employment and unemployment outcomes of local workers, and is not a major determinate of wages: Migration Advisory Committee, *EEA Migration in the UK: Final Report*, Sept. 2018.

<sup>22</sup> Choudry & Smith, *supra* n. 17.

where governments in ‘post-industrial’ countries are keen to acclaim the neoliberal state model while precarious work arrangements grow and the provision of state services diminish, is there any wonder that migrant worker can become such a potent talisman?

One of the contributions in this special issue asks us to expand our view of migrant work to include a broader range of cross-national labour mobility. Asa Odin Ekman and Samuel Engblom’s article looks at free trade agreements that contain provisions for the temporary movement of persons. They consider in detail three recently negotiated free trade agreements: the Comprehensive Economic and Trade Agreement (CETA), China-Australia Free Trade Agreement (ChAFTA) and Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP). The CETA and TPP agreements are plurilateral agreements involving several countries, while the ChAFTA is a bilateral agreement between Australia and China. Their review suggests that while these arrangements go beyond countries’ scheduled commitments through the General Agreement on Trade in Services, they do not create additional channels that exceed existing systems for labour migration. However, the authors caution us to be alert to the ways in which these agreements still operate to facilitate labour mobility.

Supriya Routh’s contribution takes a different tack and asks us to re-evaluate our understanding of temporary labour migration as a temporary phenomenon. He develops a far-reaching critique of the ‘temporariness’ of Canada’s Migrant Caregiver Program – a scheme that allows employers to hire migrant workers on a short-term basis to provide care and nursing for children, elderly persons, and people with disabilities or illness. Routh argues that the contribution of these workers should not be considered temporary since they play an ongoing role in social reproduction, which includes not only the reproduction of labour power but also cultural and ideological reproduction. Routh is critical of existing claims for extending rights to migrant caregivers predicated on the economic productivity of care work because this logic can undervalue the contribution made by caregivers, and therefore, justify a range of de jure and de facto restrictions of their political/civil and socio-economic rights. Instead, Routh develops a ‘social perspective’ that sees care work as a part of the public relationship between workers and the society in which they work.

## CONTESTING INSTITUTIONAL RESPONSES

The remaining two contributions in this special issue assess various institutional measures in North America designed to alleviate the vulnerability of migrant workers. Relying on previously unanalysed administrative data, Eric Tucker, Leah Vosko, and Rebecca Casey take a critical look at the Ontario Ministry of Labour’s (MoL’s) efforts to enforce the employment standards of temporary

migrant agricultural workers in that province. In addition, Shannon Gleeson and Xóchitl Bada examine how domestic enforcement agencies in the United States work in partnership with consular representatives to defend the rights of migrant workers. Both studies reveal a wide gap between the rights that migrant workers are supposed to enjoy and their actual experiences. As a result, these studies challenge narratives about the adequacy of existing institutional responses.

To assess enforcement strategies, we must have some understanding of the legal and social processes that result in migrant vulnerability. On this point, two intersecting bodies of literature yield some important insights. First, it is important to note that some migrant workers have precarious legal status, which is commonly understood to come about because migrant workers usually only have permission to remain in the country for temporary periods, or they may have no authorization at all in the case of those working illegally. However, some scholars suggest that we should think about precarious legal status in broader ways. For example, Luin Goldring argues that precarious legal status can encompass ‘the absence of any of the following elements associated with permanent residence (and citizenship)’, which includes: (1) restrictions on access to social citizenship rights, such as healthcare; (2) dependence on a third party for the right to enter or remain in a country (e.g. employer or spouse); and (3) limits on the right to family reunification.<sup>23</sup> In addition, migrant workers often work in sectors of the economy that are characterized by precarious work arrangements. *Precarious work* refers to jobs where there is uncertainty about continuing employment, lack of control over the labour process and working conditions, weak regulatory protection, and low income levels.<sup>24</sup> The vulnerability of migrant workers is rooted in the intersection of precarious legal status with precarious work, which occurs in complicated and contingent ways.

The contingent nature of the relationship between precarious legal status and precarious work means that the actions of certain actors – labour inspectorates, trade unions, unconventional labour organizations – can impact the extent to which migrant workers actually experience vulnerability. Tucker, Vosko, and Casey’s examination of the strategies adopted by the MoL to address employment standards violations for agricultural workers (of which migrant farm workers are a significant component) finds that the MoL relies heavily on workers making complaints, as

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<sup>23</sup> L. Goldring, *Resituating Temporariness as the Precarity and Conditionality of Non-Citizenship in Liberating Temporariness? Migration, Work, and Citizenship in an Age of Insecurity* 235 (L. F. Vosko, v. Preston, & R. Latham eds, McGill-Queen’s U. Press 2014).

<sup>24</sup> See e.g. J. Fudge & R. Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms in Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (J. Fudge & R. Owens, Hart, 2006) and L. Vosko, *Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity in Precarious Employment: Understanding Labour Market Insecurity in Canada* (L. F. Vosko eds, McGill-Queen’s University Press, 2006).

opposed to conducting proactive inspections of its own to detect violations, and shows a clear preference for compliance over deterrence measures. Both aspects are deeply problematic. First, the literature on labour enforcement is clear that migrant workers are hesitant to make complaints due a particularly short-term understanding of their working lives and fear of deportation.<sup>25</sup> The authors find that this is exacerbated by the ‘multiple layers of vulnerability’ experienced by migrant farm workers, which includes the global system of racialized capitalism in which migration is embedded. Secondly, the authors argue that the MoL’s reliance on worker complaints, poor targeting of workplaces for inspections, and partiality for compliance methods of enforcement often mean that employers suffer no penalty for violations. They conclude that the MoL’s enforcement strategies are inadequate, and that therefore, migrant workers continue to suffer significant wage theft.

Finally in this issue, Gleeson and Bada review a recent development in the United States where various federal agencies charged with enforcing employment-related statutes (e.g. Fair Labour Standards Act and the Civil Rights Act) partner with the Mexican government to conduct their work. As Gleeson and Bada explain, these partnerships have been made possible because of US government agencies’ greater willingness to engage in forms of tripartite co-enforcement and the Mexican government’s growing engagement with its diaspora population. These consular relationships allow US government agencies to access migrant populations in the US, disseminate information about worker rights, and obtain ready access to translators. The authors find that these partnership agreements face many challenges but should not be dismissed too quickly as deficient, particularly because there is a vibrant ecosystem of labour and immigrant rights organizations that can leverage these relationships. According to Gleeson and Bada, one of the major impediments to the success of these arrangements lies in the limitations of relying on worker complaints as a mechanism to uncover violations, echoing a point made by Tucker, Vosko and Casey. Other challenges include the difficulties inherent in coordinating between several federal and state agencies and the limited resources allocated to these initiatives. However, all things considered, the authors present a hopeful picture of an emerging ‘transnationally coproduced regulatory enforcement’ model.

The institutional approaches of those charged with enforcing labour and employment laws can have a major impact on the extent of precarious work in the economy by ensuring that regulatory protections are made real. This has obvious benefits for migrant workers, who are over-represented in these sectors. Nevertheless, enforcement of existing rights alone cannot address the vulnerability

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<sup>25</sup> See e.g. S. Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 L. & Soc. Inquiry 561–602 (2010).

of migrant workers because of the various legal rules that condition migrant workers' lives to generate precarity. This suggests that reform of the various immigration rules is also needed.

## CONTESTING RIGHTS

Migrants are arguably not an inert group of workers. They organize in their workplaces to achieve fairer treatment, and they band together with allies in the community to pressure governments to provide additional rights. In other cases, they campaign to reject the notion of statehood and sovereignty altogether. In several post-industrial countries, migrant workers have been front and centre in the new wave of labour activism – labour movements today are multiracial and multiethnic.<sup>26</sup> It is clear that these collective actions have been undergirded by a range of solidarities between actors. Some of these solidarities arise on the basis of participants' class location, but other forms of solidarity, such as solidarities based on racial and ethnic identities, are also a major feature of these movements. If we needed any evidence of the effectiveness of this organizing, we only have to look at how undocumented workers in the United States have through their advocacy transformed their plight from a niche political issue to a central component of a progressive political imagination.<sup>27</sup>

On occasion, these groups have gone to the courts to advance their cause. There is a long history of socio-legal scholarship examining how social movements relate to the law, and some of this scholarship has focused specifically on labour movements.<sup>28</sup> More recent work has focused on the ways in which migrant workers with precarious legal status have legally mobilized.<sup>29</sup> In a recent book, Adelle Blackett, who served as a discussant during the symposium, demonstrates the role played by cross-border movements of domestic worker in pressuring the ILO to develop a convention regulating domestic work (Convention C189 – Domestic Workers Convention, 2011 (No. 189)) and

<sup>26</sup> In one recent example, a group of Somali-American workers from Minnesota managed to pressure Amazon, a notoriously anti-union company, to the bargaining table: see K. Weise, *Somali Workers in Minnesota Force Amazon to Negotiate*, *The New York Times* (20 Nov. 2018). In another case, a mainly migrant workforce of cleaners went on strike to demand that the University of London bring back in-house its cleaning functions: B. Chapman, *Outsourced University of London Workers to Strike Over Pay and Conditions*, *Independent* (15 Mar. 2018).

<sup>27</sup> Many of the candidates who have announced their intention to run in the Democratic Party primaries have endorsed, or previously endorsed, favourable policies towards the US' undocumented population. Even Kamala Harris, one of the more establishment candidates, has been full-throated in her support—see e.g. J. Stein, *Kamala Harris's Immigration Gamble*, *Vox* (1 Nov. 2017).

<sup>28</sup> See e.g. M. W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (U. of Chicago Press 1994).

<sup>29</sup> See e.g. M. Dias-Abey, *Justice on Our Fields: Can 'Alt-Labor' Organizations Improve Migrant Farm Workers' Conditions*, 53 *Harv. C. Rights-C. Liberties L. Rev.* 167–211 (2018).



ensuring that the legal norms contained within were alive to the reality of their working lives.<sup>30</sup>

In 2014, introducing an edited collection titled 'Migrants at Work', Mark Freedland and Cathryn Costello argued that there was a 'highly significant and still somewhat under-considered intersection and interaction between migration law and labour law.'<sup>31</sup> A number of scholars have taken up the challenge, resulting in numerous articles, edited collections, and monographs.<sup>32</sup> The contributors of this special issue add to this growing body of literature in some important ways by contesting the way we think about the problematic of migrant work and labour law's role in devising answers.

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<sup>30</sup> A. Blackett, *Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labour Law* (ILR Press, 2019).

<sup>31</sup> M. Freedland & C. Costello, *Migrants at Work and the Division of Labour Law* in *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford U. Press 2014).

<sup>32</sup> The full range of scholarship is too extensive to list, but for a sample, see Freedland & Costello, *supra* n. 31; L. Berg, *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour* (Routledge 2015); J. Howe & R. Owens, *Temporary Labour Migration in the Global Era* (Hart 2016), 71 (4) *ILR Rev.* (2018), 39(1) *Comp. Lab. L. & Pol'y J.* (2018).