

CHAPTER SIXTEEN

THE PARADOX OF “LEGALITY”: TEMPORARY MIGRANT WORKER PROGRAMS AND VULNERABILITY TO TRAFFICKING

Hila Shamir

INTRODUCTION

Human trafficking is often mistakenly associated exclusively with undocumented migratory status (Thomas, this volume). It is now widely recognized that migrant workers' undocumented status creates significant vulnerability to exploitation that may amount to trafficking. “Illegal” workers are often reluctant to report crimes committed against them out of fear of being deported. The risk of deportation makes them potentially vulnerable to exploitation by almost anyone who knows about their status, as they can threaten to turn them in to the authorities. Moreover, undocumented migrant workers are particularly vulnerable to being exploited by their employers, who can force them to provide additional labor or work in substandard conditions (Anderson and Rogaly 2005). To bolster undocumented workers' willingness to report abuse, a central component of anti-trafficking regimes that experts advocate for is the non-criminalization of crimes that trafficked persons may have committed in the course of being trafficked, including violations of immigration laws (Gallagher 2010: 284).

Yet, while undocumented status is a source of great vulnerability, neither international law nor most national jurisdictions set this as a requisite component of trafficking. In fact the definition of trafficking in Art. 3 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000 (Trafficking Protocol) (UN 2000b) does not include reference to legal status (documented or undocumented), or even border-crossing, as a

component of trafficking; the same is the case with the US Trafficking Victims Protection Act of 2000 (TVPA) (US Congress 2000).

Under Art. 3 of the Trafficking Protocol, trafficking is comprised of three components: (1) a particular action – “the recruitment, transportation, transfer, harbouring or receipt of persons”; (2) certain means for carrying out the action – “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”; and (3) the end purpose of exploitation. The protocol defines exploitation sweepingly to 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.” This broad definition is considered one of the protocol’s most significant achievements in that it is gender neutral and extends beyond sex trafficking to include various types of labor market exploitation, even within the borders of the victim’s own country, and whether the worker is documented or not (Gallagher 2009: 791). Under this definition documented migrant workers as well as citizens can be victims of human trafficking and have been identified as such. This chapter will, accordingly, focus on the vulnerability to exploitation and trafficking generated by the documented status that is part of many temporary migrant worker programs (TMWPs), also known as guest work programs.

TMWPs constitute a pragmatic solution often promoted by well-off countries which are generally reluctant to accept “unskilled” workers as citizens (Faraday 2012: 4), but require them to meet their labor market needs (Bravo 2009: 588–590). TMWPs are supposed to protect migrant workers’ rights while ensuring a “win-win” situation for all the countries involved: they provide a solution to the labor shortages in migrant-receiving countries and much needed funds, via remittances, to migrant-sending countries. Despite this presumed potential, however, TMWPs often do not live up to their promise, from the perspectives of both the migrant-sending and migrant-receiving countries (Ruhs 2003: 10–23).

Examples of severe exploitation of migrant guest workers abound and, in a few cases, have even been recognized as instances of human trafficking. Perhaps the most well-known and documented example of such exploitation – and most often linked to trafficking – is that suffered by migrant domestic workers, mostly from East Asia, working in

the Persian Gulf states under the *kafala* (sponsorship) system (Khan and Harroff-Tavel 2011; Bajracharya and Sijapati 2012; Murray 2012; Office to Monitor and Combat Trafficking in Persons 2013: 29). Yet cases of severe exploitation and possible trafficking of guest workers have been identified elsewhere as well. In the United States, the government-sponsored “cultural exchange” programs (J-1) have been recognized in the State Department’s Trafficking in Persons (TIP) Report as a hotbed of trafficking (Freedom Network USA 2012; Office to Monitor and Combat Trafficking in Persons 2012: 365), with the 2011 case of the severe exploitation of J-1 visa holders working at a Hershey’s factory in Palmyra, Pennsylvania, possibly the most prominent and publicized instance (Preston 2011). Another example is that of Thai guest workers employed in the agriculture sector in Israel, who, due to their substandard working and living conditions, have been one of the main groups to come to the men’s trafficking shelter in Israel (Hacker and Cohen 2012: 64; Shamir 2012: 122–126). The severe exploitation of migrant workers even where they enjoy documented (“legal”) status may seem surprising given that undocumented status is regarded as one of the central sources of vulnerability. Indeed, TMWPs and the documented status they provide are claimed to be one of the best guarantees against labor exploitation and trafficking and an important means of reducing these risks in certain sectors (Bravo 2009: 588–590).

There are a number of possible factors why TMWPs produce a harsh reality for many migrant workers: the deep-rooted power imbalance between migrant-sending countries and migrant-receiving countries, as well as between migrant workers and employers; migrant workers’ considerable dependence on intermediaries for information and resources; the desirability of a highly obedient labor force to employers in receiving countries; and the fact that migrant workers are “outsiders” to the political system in receiving countries and therefore lack any political agency to impact the processes that shape the terms of their migration and employment. The disparity in bargaining power between migrant-sending countries and migrate-receiving countries and workers’ lack of voice in the legal order that determines their migration and employment experiences commonly result in highly restrictive regimes that generally tend to serve first and foremost host countries’ constrained migration policies and labor market needs (Ruhs 2006).

Consequently, the very migration regimes that are supposed to protect migrant workers from vulnerability to the severe labor market exploitation caused by undocumented status paradoxically could end

up exacerbating their vulnerability (Bélanger 2014). This has not gone unnoticed in the literature on precarious work. Documented migrant workers in TMWPs are increasingly understood to be “precarious workers” (Anderson 2010: 303; Fudge 2011),¹ and some sociologists depict migrant workers in certain TMWPs as “unfree labor” due to the restrictions on their ability to circulate in the host country’s labor market (Sharma 2006). Yet despite the strong connection between TMWPs and worker vulnerability to exploitation, these programs are rarely addressed in anti-trafficking campaigns, research or recommended best practices in the field.² This chapter seeks to close this gap by exploring the vulnerability to human trafficking that is, perhaps ironically, generated by TMWPs.

The chapter briefly introduces the history and contemporary status of TMWPs and then moves to deconstruct the common features of temporary work migration programs around the world, in order to classify TMWP characteristics that reduce migrant workers’ bargaining power and exacerbate their vulnerability to exploitation. Seven main characteristics of TMWPs are discussed: recruitment practices and debt; withholding of travel documents; restrictions on labor market mobility (such as binding arrangements); restrictions on family accompaniment; housing requirements and restrictions; exclusion from labor and employment laws; and the temporary nature of migrant workers’ stay in the host country and the obstacles to naturalization there. Finally, the chapter explores the link between these characteristics of TMWPs and workers’ vulnerability to severe forms of labor market exploitation and human trafficking, using the Delphi indicators proposed by the International Labour Organization (ILO). Analyzing workers’ vulnerability brought about by TMWPs through the ILO’s Delphi indicators illuminates the way in which TMWPs can exacerbate, rather than ameliorate, vulnerability to exploitation that in turn can amount to trafficking. The chapter therefore argues that in order to effectively combat human trafficking, anti-trafficking programs should include the assessment of TMWPs, and address and advise against the elements in such programs – elaborated upon in the chapter – that increase workers’ vulnerability to severe forms of exploitation.

TEMPORARY MIGRANT WORKER PROGRAMS

TMWPs became popular in North America and Western Europe in the period of economic transition following the Second World War. Two

of the most notable programs during this period were introduced in the agriculture sector: the United States' Bracero program (1942–1964) and Germany's Gastarbeiter program (1955–1973) (Preibisch 2010: 407–409). The United States and Germany were not alone in adopting TMWPs, however. Around the same time, many of the fast-growing industrial economies in Western Europe used TMWPs to recruit low-skilled labor. This included the United Kingdom, France, Switzerland, and Belgium, which pioneered labor recruitment in the 1940s, followed by the Netherlands and Austria (Castles 2006: 742). Although these programs proliferated throughout the 1960s, they quickly began to lose popularity both in the public and among policymakers in host countries for a variety of reasons. Among policymakers, as well as the wider public, some were concerned by the unwanted settlement of TMWP migrants in host countries. In fact, in both the United States and Germany, it quickly became clear that many of the “temporary” workers were eventually settling “illegally” in the country, thereby undermining the program’s rationale. Others became concerned with workers’ welfare following extensive documentation of widespread exploitation and substandard working conditions in the programs, as well as the racism and xenophobia that workers experienced (Preibisch 2010: 408). As a result, by the mid-1970s, TMWPs were viewed as problematic and undesirable in both the United States and Germany. In 1964, the by-then highly unpopular Bracero program was shut down following a very unfavorable Department of Labor review. Similarly, in the 1970s, at the height of the energy crisis and spurred also by the growing realization that Western European economies were relying on temporary migrant labor to meet a permanent demand for labor, temporary migration under large-scale guest work programs was brought to a halt (Castles 2006: 743). It was thus not uncommon in the 1980s to find scholarly articles declaring the death of the guest work program (Castles 1986).

The decline of TMWPs was short-lived, however. In the contemporary global political economy where high-income states seek to tighten their borders and limit the migration of low-skilled workers, these programs have become an increasingly favored mechanism in many countries. Already in the 1990s, guest work programs began to reemerge in Western post-industrial economies, but this time on a smaller scale and designed to meet more particular labor market needs in agriculture and other sectors such as care work, construction, and food and entertainment (Preibisch 2010: 408). These new programs are perceived to be responding to specific local labor shortages while, at the same time,

serving foreign policy ends as economic development projects (Nyberg-Sørensen et al. 2002: 11–12). Indeed, the resurgence of TMWPs is so significant that in 2008, the International Organization of Migration (IOM) reported that “the world appears to be on the threshold of a new era in temporary labor migration programs” (IOM 2008a: 77).

There are both differences and similarities between this second wave of post-Cold-War programs and the original programs. Current TMWP programs are much more diverse: they operate in an increasing number of labor sectors requiring different skill levels, and they have set very different admissions criteria, and restrictions on market mobility and length of stay. Moreover, they are often tailored specifically to the needs of a particular labor sector at a precise point in time and, consequently, tend to be far more limited in scale than their predecessors. In addition, the complexities of administrating such programs in the age of privatization and deregulation have led governments to delegate various aspects of the program’s operation to employers or private market intermediaries, including worker assignment, rights enforcement, and even responsibility for eventual departure and for workers’ return to their home countries (Zapata-Barrero et al. 2009: 11). Yet, these important distinctions notwithstanding, the new programs share fundamental similarities with those of the past, most notably, significant constraints on labor market mobility and insistence on migrant workers’ social and political exclusion in the host country (Preibisch 2010: 408–409). In the next section, I will argue that this combination of old and new features produces worker vulnerability to severe forms of labor market exploitation that could lead to trafficking.

HOW TMWPS STRUCTURE MIGRANT WORKERS’ LABOR MARKET VULNERABILITY

TMWPs’ specific admission criteria and restrictions, and the incentive structure for the private entities involved in the program administration could lead to the paradoxical situation whereby countries that open up their borders to controlled worker migration actively contribute to, rather than ameliorate, migrants’ vulnerability to exploitation (Kemp and Raijman 2014). Already in 1987, Robert Miles made the important observation that state-imposed restrictions through work-permit systems that limit migrant workers’ entitlement to commodify their labor could, in fact, produce a form of unfree labor (Miles 1987). More recently, Judy Fudge has suggested that the structure of temporary

migration regimes may “institutionalize uncertainty” and, therefore, strongly impact migrant workers’ precarious labor market position (Fudge 2011). She explains that TMWPs often set strict limits on workers’ ability to bargain, exit, seek assistance and information, access the courts, form unions, or collectively bargain for rights in order to fight exploitative workplace practices. The discussion in this section will build on this work to show a link between certain common elements of TMWPs and vulnerability to trafficking.

Current TMWPs feature seven common characteristics that institutionalize vulnerability to trafficking. Each of these components both separately and (even more so) combined has the potential to significantly reduce workers’ bargaining position, market alternatives, and access to information, thereby exposing them to vulnerability that can result in human trafficking. This does not mean to imply that every temporary migrant worker is necessarily severely exploited. Rather, I aim merely to show that given the role of TMWPs in generating vulnerability, they should therefore be one of the focal points of anti-trafficking policy.

Debt

Migrant workers participating in TMWPs often incur great debt in order to take part in them (Anderson and Rogaly 2005: 38–39; ILO 2009: 20; Office to Monitor and Combat Trafficking in Persons 2014: 33). This debt burden heightens their fear of losing their jobs and, accordingly, increases their willingness to work even in harsh conditions. This is particularly acute in the case of documented migrant workers in guest work programs that are time-restricted. The time restrictions, coupled with the need to repay their heavy debts, incentivize migrants not to leave their employers, even if abusive, so as not to risk unemployment during the little time they have to work in the host country (Haynes 2009: 29–33; Faraday 2012: 62–63).

There are various reasons for the large sums of money that migrant workers need to borrow to participate in TMWPs. Some of the debt may be the result of actual travel costs and expenses related to their arrival in the host country. Other debt may derive from intermediaries’ abuse of their position of power to extract exorbitant sums of money from potential migrant workers. While some of these intermediaries are illicit, clandestine actors, others have formal roles in the TMWPs. In the latter cases, the programs structure the degree of involvement of the intermediaries in the migration process and their leverage over

migrants. Intermediaries have become increasingly ubiquitous due to the privatization and de-regulation of TMWPs whereby governments minimize their intervention in the migration and employment aspects of the programs and delegate responsibility to intermediaries or employers for workers' recruitment, assignment, working conditions, welfare, and eventual return to country of origin (Preibisch 2010: 409; Raijman and Kushnirovich 2012: 7). Another possible source of debt in addition to travel costs and payments to intermediaries is expenses imposed by elements of the TMWPs themselves, such as training requirements (Parreñas 2011: 32–40) and security deposits (Sönmez et al. 2011).

Governments and civil society actors across the world have become increasingly concerned with the role of private intermediaries in migration processes. In response to the excessive power of these intermediaries, legislators, policymakers, and activists have sought to eliminate or at least limit this power in multiple ways. Yet many regulatory attempts and private initiatives – including highly innovative ones that are often considered leaders in the field such as Canada's Temporary Workers Program – have been unsuccessful at turning the TMWPs into fair labor programs (Flecker 2011; Ruhs 2015: 166–185). Repeated efforts to curb intermediaries have made guest work regimes a hub of regulatory experimentation.

Regulatory responses to the abuse of power by intermediaries in TMWPs usually take one of the following five forms:

- a. *Regulating private actors*: regulation of migration intermediaries through, for example, the creation of recruitment agency registries (UK Parliament 2004; Manitoba Legislative Assembly 2008) or caps on the recruitment fees that can be charged (Israeli Parliament 2006; US Congress 2013).
- b. *Replacing private actors with public ones*: eliminating private middlemen and limiting recruitment authority to governmental institutions (Governments of Israel and Bulgaria 2011).
- c. *Replacing private for-profit actors with non-profit actors*: eliminating private for-profit middlemen and limiting recruitment authority to non-profit non-governmental organizations (NGOs) (IOM 2008b; Governments of Israel and Thailand 2010).
- d. *Replacing small private for-profit actors with big private corporations*: instead of small private entities, which are difficult to monitor, regulate, and, if need be, “shame,” regulators license recruitment to big

corporations, which promise greater transparency, are supposed to be more sensitive to public opinion, and more responsive to corporate social responsibility initiatives (Verité and Manpower Group 2012; Open Society Foundations 2013: 2; IRIS 2014).

The nuanced debate and experimentation in regulatory solutions to the excessive role of intermediaries have yet to penetrate anti-trafficking discourse. This is perhaps surprising because anti-trafficking puts strong focus on traffickers, many of whom can be categorized as migration intermediaries. In the few cases in which anti-trafficking activists and policymakers have directed attention to recruitment practices and debt patterns, the outcomes have not always been promising. For example, Rhacel Parreñas' study of the migration of Filipina hostesses to Japan reveals how the institution of intermediaries and training requirements in regulation aimed at protecting workers from trafficking in fact increases hostesses' debt and constrains their market mobility. Ultimately, Parreñas poses the important question of whether the state itself can be seen as engaged in trafficking hostesses through the structures it imposes in its TMWPs (Parreñas 2011: 51–56). Such frustrating examples illustrate the clear need for greater attention to and study of the link between the structure of TMWPs and debt patterns, to formulate more effective and far-reaching anti-trafficking policies.

Withholding Travel Documents

A common practice that severely restricts migrant workers' labor market mobility and bargaining power is the confiscation of their passports (IHRB 2013). When employers withhold workers' passports, they effectively turn the workers into "hostages," who would then be taking a great risk by moving to another employer in the host country. This guarantees low worker-turnover and high levels of compliance even in extremely harsh working conditions. While employers benefit from this practice, governments, too, may have an interest in allowing it since it prevents guest workers from "disappearing" in the host country or seeking jobs outside TMWP-designated labor sectors.

Although withholding workers' travel documents is illegal under the terms of most TMWPs, the law is often not effectively enforced, if at all. For example, under the *kafala* system in the Gulf states, employers commonly retain migrant workers' passports with impunity (Khan and Harroff-Tavel 2011: 298; Jayaprakash 2014). Similarly, research

on domestic workers in Singapore indicates that employment agencies often retain workers' passports for the duration of their employment (Human Rights Watch 2005: 42–43), and such practices are also common in the context of Canadian (Faraday 2012: 63) and Israeli TMWPs (Rajman and Kushnirovich 2012: 8, 145), to name but a few.

Anti-trafficking reforms and best practices recommendations do tend to address passport confiscation, since it is widespread among exploitative employers of migrant workers throughout the documented and undocumented sectors (UNODC 2008b; European Commission and ILO 2009; Office to Monitor and Combat Trafficking in Persons 2014). Yet contending with such practices within the framework of TMWPs should also be a central goal of anti-trafficking campaigns. Efforts to address this phenomenon should go beyond simple criminalization, which is often difficult and expensive to enforce, and seek, instead, innovative ways to ensure compliance (see e.g. Faraday 2012: 95–98; IHRB 2013: 8–11). This may, in fact, be easier in the TMWP context, where the employment relationship is already heavily regulated and usually requires some extent of governmental intervention, than in undocumented contexts, which, due to their informal character, are more difficult to regulate.

Labor Market Mobility Restrictions

For workers to have some measure of control over their working conditions and bolster their bargaining power, they need to be able to either voice their concerns to their employers without fear of dismissal or else exit the work relationship (Freeman and Medoff 1984: 7–11, 94). The former option is ensured mostly through the right to unionize (discussed in greater detail below); the latter option can be realized by allowing workers to terminate their employment contracts at will, without financial or other penalty (Ibid.: 94–101). Even if relatively weak, the ability of workers to “vote with their feet” and resign is considered the most basic means of protection against exploitation (Jiang et al. 2009: 170–172). This is however a weak mechanism because it does not empower workers to improve their working conditions at their present workplace; yet it is necessary because one of the lessons learned from slavery and feudalism is that, at a minimum, workers must be able to move from one employer to another in order to effectively bargain for improved working conditions (Stone 2007: 86).

Many TMWPs restrict workers' labor market mobility by “binding” a worker to one designated employer, to a specific labor sector,

or to a certain geographical area within a given labor sector. Binding arrangements thus deprive migrant workers of the ability to leave their employers at will (Martin 2006: 16, 26; Ruhs 2010: 268). Under this system, the worker is tied to one specific employer, usually based on a clear stipulation in her worker visa. Leaving that employer for any reason is considered a violation of the terms of the visa and puts her at risk of deportation. States that have opted for binding arrangement schemes have done so chiefly for protectionist reasons: they seek to control and limit the entry of migrant workers into their labor markets and to regulate the eligibility of the different labor sectors to employ migrant workers. Addressing this allegedly legitimate concern by adopting a binding arrangement regime has however led to the excessive dependence of migrant workers on specific employers and an extreme vulnerability to exploitation. The risk of exploitation is further exacerbated when workers have incurred substantial debt as a result of the high recruitment fees that many are required to pay in their home countries prior to arriving in the receiving country (Agunias 2009: 52–53). This makes them even more fearful of deportation, especially when they have been granted a time-restricted work visa and there is an actively enforced deportation policy in the host country.

Binding arrangements are contributing factors to workers' vulnerability to being trafficked, and thus, their abolition or significant restructuring ought to be part of effective anti-trafficking campaigns. The state's protectionist interests, which underlie these arrangements, can be served in other ways, such as by guaranteeing migrant workers the same labor and employment protections accorded to resident workers and thereby decreasing the economic incentives to employ migrant workers. Another alternative would be to significantly relax the restrictions in the existing arrangements so that workers are bound to employment in a particular sector rather than with a specific individual employer and are ensured easy mobility within the designated sector.

Family Accompaniment Restrictions

The underlying rationale of TMWPs is to extract the benefits of the labor of able-bodied migrants without risking their permanent settlement and without any need to address their social security or family welfare. The migration of families presumably runs counter to this rationale. First of all, the chances of migrants permanently settling in the host country will ostensibly increase if married couples and families

with children are allowed to migrate to the host country. Second, such cases of settlement force the host country to contend with issues of community-building and meeting the migrants' religious, educational, and health needs. To prevent the settlement of migrant families and formation of communities and the associated costs to the host country, a common feature of many TMWPs is a prohibition on the migration of families and restrictions on starting a family.³

Family accompaniment restrictions can increase migrant workers' vulnerability by isolating them – at least at the early stages of migration – and making it more difficult for them to create and access traditional social networks. A long-standing finding in migration research is that the ability to form and rely on social and familial networks makes migrants' transition significantly easier, smoother, and more successful (Boyd 1989). Such networks are invaluable sources of information on migrant rights, labor market practices and options, legal aid, and other forms of assistance and resources. Thus, when TMWPs directly attempt to individualize workers by detaching them from their communities and families, this results in greater vulnerability and insecurity.

Recent efforts to improve other elements of TMWPs – namely attempts to reduce debt incurred by migrants – may have inadvertently exacerbated this isolation and community breakdown. Some of these initiatives have been innovative in their emphasis on randomization of the recruitment and assignment processes, as a means of preventing institutional corruption and decreasing the debt that migrants acquire by eliminating the fees and bribes commonly paid to recruiters and other decision-makers. However, an unintended side-effect of randomization can be to entrench the breakdown of migrant communities. When these processes are randomized, migrants often no longer know who they will be travelling with and where they will end up working, making it difficult for them to plan in advance the social network available to them upon arrival (Ash Kurlander 2014: 12).

TMWPs' family accompaniment restrictions and worker placement processes are, therefore, central factors in the destabilization of migrant workers' social networks. While not in and of itself a root cause of trafficking, this policy clearly intensifies workers' isolation and restricts their access to information about their rights and options in the host country. Anti-trafficking efforts should therefore address and highlight these aspects of TMWPs as contributing to worker exploitation and the risk of trafficking.

Housing Requirements and Restrictions

Many TMWPs include a strict housing requirement under which either migrant workers must live with their employers (as in the case of caregivers) or else that employers must provide housing (see e.g. Martin 2006: 17, 26–27; Tan 2010: 108; Fudge 2011: 24; Chuang 2013: 333). Some accommodation requirements also include protection clauses that ensure workers' rights to decent housing and sufficient private space (Fudge 2011: 18; Raijman and Kushnirovich 2012: 141). Moreover, employer-provided accommodations are often preferred by the workers themselves, as they have come to the host country for only a short period of time and would often rather not spend money on housing and transportation.

These significant benefits notwithstanding, in certain cases, housing requirements can also exacerbate migrant workers' vulnerability, for they increase employers' control over workers' private time, blur the boundary between work and rest, and allow intense supervision and control over all aspects of workers' lives. These requirements might also isolate workers from one another (as in the case of care workers), as well as from their communities and civil society in the host country. This is particularly acute when a worker has no other housing alternative because his or her visa is contingent on living under the employer's roof or in accommodation provided by the employer.

An additional problem caused by housing requirements is the deduction that employers are commonly allowed to make from a worker's paycheck when they provide housing, to cover either some or all of the cost, usually limited to a certain percentage of the total wages. It has been well-documented that employers tend to deduct the maximum amount allowed even if this exceeds the actual market price for the accommodations provided and, at times, actually deduct more than the permitted amount (Anderson and Rogaly 2005: 42; Parreñas 2006: 155; ILO 2009: 31). As a result, the wages that workers receive are in violation of minimum wage legislation (if such legislation applies to them), or else in violation of their employment contracts, if these exist, without their being aware of the wage-theft. Since migrant workers derive practical and financial benefits from employer-provided housing, determining the optimal way to regulate housing requirements is quite a challenging task.

Current anti-trafficking reforms and best practices do not address wage-theft and the impact of housing requirements on vulnerability.

Housing requirements should in fact be treated with suspicion by all those concerned about trafficking and as a possible factor for producing workers' isolation and disempowerment. Further, states must focus on deduction-related practices as a common method of wage-theft and wage withholding.

Exclusion of TMWP Workers from Labor and Employment Laws

Long working hours, poor health and safety protections, withholding of wages, excessive wage deductions, and no vacation or sick leave are all common features of human trafficking (UNODC 2008b: 261–262). In most countries, labor and employment laws protect against such working conditions. However, either due to enforcement problems or legislated exclusions, this protection does not extend to all workers. The non-application and non-enforcement of labor standards in certain employment sectors or with regard to certain workers make the workers in these sectors particularly vulnerable to trafficking. Domestic work is one such example, as the legal systems in many countries exclude them from protective labor legislation (ILO 2010: 25–28). The same is true for undocumented migrant workers who are excluded *de jure* or *de facto* from the scope of protective labor and employment laws due to their undocumented status (Shamir 2011: 616–620). Deprived of labor and employment rights, these migrant workers have no legal recourse when exploited, making them all the more vulnerable to trafficking.

Generally, since national labor inspection bodies tend to suffer from underfunding, formal inclusion alone will not suffice. Rather, an anti-trafficking framework aiming to contend effectively with TMWPs' structural flaws will also require greater backing and funding for labor inspectors in their work and, more generally, establishing monitoring apparatuses that ensure the enforcement of migrant workers' labor and employment rights (ILO 2009: 45–46). Given the chronic insufficiency of central monitoring bodies (Weil 2008: 349–350), however, direct enforcement of these rights by the workers themselves will remain essential, through trade unions and collective representation, which can lead to relatively high rates of compliance (Colling 2006: 144–145; ILO 2009: 59–60), alongside access to the justice system for individual migrant workers.

An anti-trafficking perspective that understands TMWPs to be a source of migrant worker vulnerability will seek to amend these aspects of the programs, and ensure the extension and application of labor and employment law protections and rights to migrant workers by formally

including them in the scope of the relevant legislation (Gallagher 2010: 440). Indeed, the 2014 ILO Protocol to the Forced Labor Convention of 1930 and associated recommendations (ILO 2014a; ILO 2014b), that reflect the ILO's most recent attempt to achieve international agreement around the elimination of human trafficking and forced labor, address these issues. The 2014 Protocol requires members to ensure that "the coverage and enforcement of legislation relevant to the prevention of forced or compulsory labour [...] apply to all workers and all sectors of the economy; and that labour inspection services and other services responsible for the implementation of this legislation are strengthened."⁴ However, it should be noted that unfortunately the effect of the 2014 Protocol is limited since only a few member states have ratified it so far.⁵

Temporary Status and Pathways to a Secure Migratory Status

The temporary time frame of TMWPs is one of their defining characteristics and a central justification for their existence. Migrant-receiving countries establish guest work programs specifically because of the temporary stay they entail and, accordingly, require workers to leave after a certain period of time, which can range from several months to several years. Yet this temporality may function as a further source of vulnerability for migrant workers, especially those heavily in debt, for it can make them more willing to work in substandard and exploitative conditions, in the effort to repay their debt and earn some money before their visa ends. Moreover, just as migrant workers become more accustomed to the host country – perhaps learning the local language and customs, making friends, and accessing community resources and information – they are required to leave. The temporary nature of their stay usually also means that they are not extended rights accorded to residents and citizens, such as voting rights, which excludes them from the political processes that shape their migration. It is also difficult to unionize migrant workers when they know that their stay in the country is limited, as they have little incentive to pay union fees and take collective action (Mundlak and Shamir 2014: 110–111). Lastly, TMWPs facilitate the circulation of insecure and vulnerable workers, which creates disincentives for employers to address complaints about working conditions, wages, and training. As Faraday suggests, "This cycling effectively creates a permanently temporary working class that is unable to organize, unable to enforce its rights, and, as non-citizens, is unable to

participate in the democratic process to change the terms of their disempowerment” (Faraday 2012: 100).

Programs that offer a path to naturalization are rare. One such program is Canada’s Live-In Caregiver Program (LCP). Under the terms of this program, migrant workers can apply for permanent residence if, within four years of having entered Canada, they have completed either two years of full-time caregiving work or, alternatively, 3,900 hours while residing in the private household of the person to whom they have provided care (CIC 2014). However, even programs that include such a naturalization option may institutionalize worker vulnerability. During the first years of their stay workers are highly dependent on their employers’ cooperation in reporting their work hours and maintaining their employment. The situation is particularly complicated for workers who care for elderly employers in the final stages of life, since they may find themselves unemployed and in need of new employment on multiple occasions when the employer passes away; this makes it far more difficult to comply with requirements for naturalization under schemes like the LCP (Faraday 2012: 101). Therefore, even a path to citizenship does not guarantee a more secure migration process and can, paradoxically, exacerbate workers’ vulnerability during certain stages of the migratory cycle.

Despite the inherent disadvantages of the temporariness of the stay for migrants, I do not propose that anti-trafficking policy be opposed to TMWPs *per se*. Following Ruhs (Ruhs 2015: 185–186) I too do *not* think TMWPs are morally objectionable, since in a world of increasing border control and migration restriction they offer one of the most promising paths to the desirable outcome of providing many more workers with access to the labor market of higher income countries. There is, admittedly, a trade-off, between the access they provide and the restrictions on migrants’ rights that they may entail, but as I argue here and elsewhere (Shamir 2012), if the elements of the programs that render workers vulnerable are considered and carefully addressed, the trade-off may be minimized. Anti-trafficking strategies should therefore pay greater attention to the temporary nature of the stay, the interaction with other admission requirements and visa conditions, and the consequences that employers bear for violating workers’ rights.

I have explored so far seven common characteristics of TMWPs that exacerbate migrant workers’ insecurity and vulnerability, and have suggested what anti-trafficking agendas that are attentive to these issues should include. The vulnerabilities created by TMWPs will now be

assessed in relation to the definition of trafficking under international law.

TMWPS AND TRAFFICKING

What exactly constitutes trafficking, under either international or many national laws, has shifted over time and remains contested (Chuang 2014). Although the 2000 Trafficking Protocol's definition of the term "trafficking" is intended to clarify the forms this can take (Gallagher, this volume), there is still some ambiguity in how the purpose and means components are interpreted and operationalized under domestic law. To begin with, the term "exploitation" is not defined in the Trafficking Protocol, creating uncertainty regarding the conditions under which exploitation amounts to trafficking. Likewise, the details of the means element are not fixed, raising the question of what level of coercion and abuse is required (Andrees and van der Linden 2005: 58). It is quite clear, of course, that not all detrimental employment practices should amount to trafficking, and that a certain "seriousness" threshold, accepted by the majority of activists and scholars, must be met for a practice to be thus considered (Gallagher 2010: 49). Yet, the precise parameters of this threshold are unclear, and so what exactly constitutes trafficking remains uncertain.

Despite this definitional ambiguity, both national and international experience with applying the international definition has imbued the means element of the definition with content (UNODC 2013). For example, it is now quite clear that physical coercion is not required for a practice to constitute trafficking and that relatively more subtle forms of intimidation suffice. Withholding wages or identification papers, continually threatening to inform the authorities of a worker's undocumented status, and using indebted labor⁶ are all understood to satisfy the means element (ILO 2009: 13). Moreover, abduction or deception regarding the type and nature of the work – for example, a woman is falsely promised that upon arrival in the host country she will work as a waitress but in fact she is forced into prostitution – are not the only types of behavior that can be considered human trafficking. The reality is that many migrant workers who are trafficked appear to have voluntarily embarked on their journeys, seeking paid employment in a line of work they had agreed to in advance (Richards 2004: 154).

The nature of the "exploitation" element of the definition of trafficking is gradually, and not without contestation, becoming identifiable

(Chuang 2014). Trafficking is often recognized in circumstances of exploitation and manipulation that relate not only to the type of work the worker is forced to engage in, but to the working conditions in an agreed-upon type of work. This includes situations in which a worker has consented to a certain job but not to some of its working conditions, such as restrictions on his freedom of movement, excessively long working hours, excessive wage deductions, delayed wage payment, and low wages (IOM 2004: 23–27). Human trafficking emerges, therefore, as a series of labor rights violations, where each one in itself might not amount to trafficking, but combined, they do (ILO 2009: 13).

As my earlier analysis suggests, TMWPs often set up the background conditions that enable such a series of violations both in relation to the means of recruitment and working conditions and, at times, practically necessitate them. Anti-trafficking policies however tend to focus on the role of private actors in exploiting vulnerable workers and the role of the state in prosecuting traffickers, protecting victims of trafficking, and preventing traffickers' activity. As a result, the active role that state policies play in creating the vulnerability that is in turn exploited by traffickers, is rarely addressed (Anderson 2010: 306; Bravo 2015).⁷

Recognizing TMWPs as a root cause of trafficking is an integral part of what I have called elsewhere a “labor paradigm for human trafficking” (Shamir 2012). This approach discards the notion that trafficking is an exceptional and distinct crime perpetrated by deviant evil-doers and instead sees trafficking as part of a continuum of exploitative labor market practices (Ibid.: 108–112). In this view, most workers enter into a work contract under some form of economic compulsion and, in many cases, with the sense that they have few other options. In labor sectors where there is a surplus of labor, workers are in a relatively weaker bargaining position and, therefore, more vulnerable to exploitation and commodification. A worker who is dependent on her job for income and fears losing her livelihood could likely also fear causing trouble at her workplace by complaining or going to the authorities to lodge a formal complaint. This general depiction of the reality of the inequality between capital and labor is at the heart of the ILO motto “Labour is not a commodity.”⁸

This structural power imbalance between the parties to a labor contract characterizes the work conditions of almost all workers, and is the normative justification for protective employment legislation that prescribes, for example, minimum wages, overtime regulation, and safety standards as well as protections for workers seeking to unionize

(Offe 1985: 10, 14–20). From this perspective, there is a broad spectrum of forms of economic coercion and commodification. Some level of coercion exists across the entire spectrum, with trafficking and slavery at the extreme coercive end. Devising effective ways to combat the forms of exploitation on the more coercive end requires an understanding of the background legal, market, and social conditions that impact workers' bargaining power all along the spectrum of commodification.

From a labor perspective, the exploitation of workers that amounts to human trafficking is a matter of degree and not kind. All forms of labor entail some degree of human commodification, and forced labor and trafficking are simply its most extreme manifestations. This conception of trafficking as escalated exploitation of worker vulnerability looks at the pervasive labor market dynamics that enable the exploitation and commodification of trafficked workers, and allows for the possibility of attaining less exploitative working conditions. Accordingly, this paradigm also places more emphasis on TMWPs as programs that shape the bargaining power of the participating workers and employers.

The plasticity of the trafficking definition and the wide span of situations it can encompass have led various actors to attempt to articulate concrete indicators that can assist in identifying a trafficking situation (IOM 2004; UNODC 2008b: 277–283). One of the most significant of such attempts is the formulation of the “Delphi indicators” by the European Commission in collaboration with the ILO (European Commission and ILO 2009). These indicators – named after the Delphi methodology that aims for a result based on consensus across a wide group of experts – were developed in 2008 by a group of sixty-eight experts from twenty-seven EU member states. At the end of the process, the experts agreed on a list of sixty-seven indicators, each categorized under six major features that were observed in cases of human trafficking: deceptive recruitment, coercive recruitment, recruitment by abuse of vulnerability, exploitative conditions of work, coercion at destination, and abuse of vulnerability at destination. Each category has a list of indicators that are classified as strong, medium, or weak. Each category is considered independently. In order to be assessed as positive (i.e. a trafficking indicator), a category must be identified as having at least two strong indicators, or one strong indicator and one weak or medium indicator, or three medium indicators, or two medium indicators and one weak indicator (Ibid.: 3).

The use of indicators in human rights work has been strongly criticized (Merry 2011; Davis et al. 2012; Merry, this volume) and justifiably

so. Indicators in the area of trafficking raise some specifically grave concerns as well.⁹ However, the Delphi indicators are, arguably, somewhat less problematic, since unlike other indicators, that are intended to assess the prevalence of trafficking (such as the Global Slavery Report and Index), and performance of anti-trafficking interventions or compliance with anti-trafficking related requirements (such as the US TIP Report ranking), the Delphi indicators aim at the identification of individual instances of trafficking (Gallagher and Chuang 2012: 320). Using these widely accepted indicators, I will argue that TMWPs can be identified as a root cause of human trafficking and that migrant workers in a TMWP with some or all of the characteristics described earlier in this chapter can quite readily be identified as victims of trafficking.

To begin with, indicators of *deceptive recruitment* can be seen to be present in the substandard working conditions many TMWP workers experience; this can include deception about wage and earnings, about the conditions of work, or about housing and living conditions (three medium Delphi indicators). In terms of *coercive recruitment* indicators, many TMWP workers can be regarded to be working in debt bondage due to the large sums of debt they have incurred, the confiscation of their travel documents, and the conditions of isolation, confinement, and surveillance in which they work due to the program's housing requirements and restrictions (three medium Delphi indicators). With regard to indicators of *recruitment by abuse of vulnerability*, many TMWP workers can be understood to be participating in the program due to economic constraints, where employers or employment agencies abuse their fear of losing their legal status or where they are under the control of the exploiters (three medium Delphi indicators). Looking at indicators of *exploitation*, workers in many TMWP programs can be found to be working excessive work days or hours (a strong indicator), in poor working conditions, for little or no salary, and with the terms of contracts they signed not being upheld or under wage manipulation in the form of, for example, excessive wage deductions (all medium Delphi indicators). In terms of indicators of *coercion at destination*, many TMWP workers have their documents confiscated and work in isolation and debt bondage (three strong Delphi indicators). And finally, with regard to indicators of *abuse of vulnerability at destination*, workers in many TMWPs are dependent on their employers and exploiters, cannot escape this situation for economic reasons and out of fear of losing their visas and legal status (three medium Delphi indicators). The analysis is summarized in Table 1.

TABLE 1 Applying the Delphi Indicators* to Common Characteristics of TMWPs

| Trafficking Dimensions | Strong Indicators | Medium Indicators |
|---------------------------------------|---|---|
| Deceptive recruitment | | <ol style="list-style-type: none"> 1. Deceived about wage/earnings 2. Deceived about conditions of work 3. Deceived about housing and living conditions |
| Coercive recruitment | | <ol style="list-style-type: none"> 1. Debt bondage (due to the large debt that workers in TMWPs incur) 2. Confiscation of documents 3. Isolation, confinement, and surveillance (experienced by many TMWP workers, due to the program's housing requirements and restrictions) |
| Recruitment by abuse of vulnerability | | <ol style="list-style-type: none"> 1. Participation in the program due to economic reasons 2. Relationship with authorities/legal status (abuse of fear of losing their legal status) 3. Control of exploiters |
| Exploitative conditions of work | <ol style="list-style-type: none"> 1. Excessive work days or hours | <ol style="list-style-type: none"> 1. Bad working conditions 2. Very bad living conditions 3. Low salary 4. No respect for labor law or contract signed 5. Wage manipulation (e.g. excessive wage deductions) |
| Coercion at destination | <ol style="list-style-type: none"> 1. Confiscation of documents 2. Debt bondage 3. Isolation, confinement and surveillance | |

(cont.)

TABLE 1 (cont.)

| Trafficking Dimensions | Strong Indicators | Medium Indicators |
|---------------------------------------|-------------------|--|
| Abuse of vulnerability at destination | | <ol style="list-style-type: none"> 1. Dependent on exploiters 2. Relationship with authorities/ fear of losing legal status 3. Economic reasons |

* How are the indicators used? “For each potential victim, each of the six dimensions of the trafficking definition is assessed independently from the others. The result of the assessment is positive if the dimension is present for the potential victim, negative if not. In order to be assessed as positive, a dimension must include at least: Two strong indicators, or One strong indicator and one medium or weak indicator, or Three medium indicators, or Two medium indicators and one weak indicator. After an assessment is done for each dimension, the final analysis involves combining the six elements to identify the victims of trafficking.” See: ILO 2009: 3.

I have no intention of suggesting that the outcome of this analysis of TMWPs and their seven common characteristics through the prism of the Delphi indicators is that every migrant worker in a TMWP is trafficked. What the analysis reveals, however, are the many features of TMWPs in their currently most widespread form that can and should be understood as having the potential to lead to trafficking and, therefore, should be high up on the anti-trafficking agendas of all involved stakeholders.

CONCLUSION

In this chapter, I have explored components of contemporary guest work regimes that institutionalize documented migrant workers’ insecurity, vulnerability, and precarity and have suggested that TMWPs with some or all of these features should be regarded as a root cause of human trafficking. The chapter therefore calls on anti-trafficking policymakers and activists to pay greater attention to the structure of TMWPs in their anti-trafficking campaigns.

This analysis raises, of course, the question of whether TMWPs are inherently harmful to migrant workers and if their overall legitimacy should therefore be challenged in anti-trafficking campaigns. Yet as was

shown, some of the detrimental elements are incidental and unnecessary aspects of the programs, particularly, exclusion from the scope of employment and labor laws, confiscation of travel documents, and restrictive housing requirements. An effective anti-trafficking agenda should, therefore, resist and work against these elements. With respect to other harmful elements of the TMWPs, the harm (such as heavy debts and abusive recruitment practices) seems surmountable through careful program design. Accordingly, an anti-trafficking agenda should seek the introduction of regulatory prescriptions that limit or eliminate the sources of these harms. Some harmful elements of TMWPs, however, do appear to be inherent to the programs given their objective – namely, the temporary nature of the workers' stay in the host country and certain limitations on family accompaniment and labor mobility.

Despite the entrenched restriction on migrant workers' rights in TMWPs, I contend that these elements do not necessarily make TMWPs objectionable from an anti-trafficking standpoint. While these programs do indeed inherently and necessarily limit migrant workers' market mobility and bargaining power to some extent, the degree of harmfulness of these limits and restrictions is contingent on the wider context of employment and labor market practices. For example, the temporary nature of the workers' stay in the host country is problematic mostly if they have large debts to repay and if their status remains temporary for a prolonged period of time. Similarly, family accompaniment limitations are objectionable mainly when workers are prevented from starting a family or reuniting with their family for an extended period of time and when workers who do form families face harsh sanctions. Finally, restrictions on market mobility are alarming when they eliminate altogether (though, not merely limit) the availability of alternative employment for workers. Given the potentially problematic consequences and effects of TMWPs (Ruhs and Martin 2008), all those concerned with workers' rights should be attentive to their details, for if crafted carefully, the programs' harms can be reduced and benefits strengthened (Martin 2006: 42). Bringing anti-trafficking pressure to bear on regulating guest work regimes has the potential, on the one hand, to summon the political will which is so often missing in receiving countries to reform TMWPs for the benefit of migrant workers and, on the other hand, to make anti-trafficking work more relevant and effective in transforming exploitative labor market conditions and preventing trafficking.

NOTES

1. Although there is no single precise definition of precarious work, it is mostly understood to capture some combination of “instability, lack of protection, insecurity and social or economic vulnerability.” (Rodgers and Rodgers 1989: 5).
2. Note, for example, the absence of any reference to TMWPs in three key documents: UNODC 2009, which is designed for signatory states seeking to implement the 2000 Convention against Transnational Organized Crime (UN 2000a); UNODC 2008a, which is designed for NGOs working with victims (focusing on India); and the UNODC Global Report on Trafficking, which in identifying causes of trafficking, omits such structural elements as an analysis of TMWPs (UNODC 2012: 92). See also the US State Department’s approach, in US State Department: Senior Policy Operating Group Grantmaking Committee 2012.
3. See, for example, the restrictions in Israel (Procedure for the Treatment of a Pregnant Foreign Worker or a Foreign Worker Who Gave Birth in Israel 5.3.0023 (May 20, 2013); Procedure for the Employment of a Foreign Worker in the Caregiving Sector 5.3.0002 (December 31, 2013); Kemp 2010: 23; Raijman and Kushnirovich 2012: 20; Shamir and Mundlak 2013: 127–128, 156); in Canada (Preibisch 2010: 412–413); in the Gulf states (Bajracharya and Sijapati 2012: 5); in the UK (Government of the UK 2016); in Germany (Federal Ministry of the Interior 2014; Palmer 2013); in Norway (UDI 2014); and in Austria (Government of Austria 2014).
4. Art. 2(c) ILO 2014a; and see also paragraph 4(e) (“ensure that national laws and regulations concerning the employment relationship cover all sectors of the economy and that they are effectively enforced”) (ILO 2014b).
5. As of the date of publication of this chapter, the 2014 ILO Protocol (ILO 2014a) was ratified only by ten countries. For an updated list of ratifying countries see http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:3174672
6. I use the term “indebted labor” to refer broadly to labor performed by a worker who has borrowed heavily in the hope of repaying the debt after a certain period of employment. This can include both indentured servitude and bonded labor and is the situation of many migrant workers who incur heavy debts to pay inflated sums to official or unofficial migration intermediaries. This debt makes the workers particularly vulnerable to exploitation because they fear losing their jobs or being deported before they have managed to repay their debts. See Agunias 2009: 2, 22–23; Halley, this volume.
7. There are some noteworthy counterexamples (see O’Connell Davidson 2010), as well as a new trend in the US State Department’s approach, which is evident in its recent Trafficking in Persons (TIP) Reports (Office to Monitor and Combat Trafficking in Persons 2012: 23–24; Office to Monitor and Combat Trafficking in Persons 2013: 32).
8. Constitution of the International Labour Organisation, Annex, May 10, 1944 (concerning the aims and purposes of the International Labour Organisation).

9. One such concern relates to the fact that the Delphi indicators separate indicators of trafficking in the context of sexual exploitation from those in the context of labor exploitation, despite the fact that the international definitions of trafficking do not make such distinctions. While I find this approach problematic, I believe it is not troubling for the purpose of this chapter, which engages with TMWPs that relate to labor exploitation outside the sex industry.

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