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'What is exploitation and workplace abuse?' A classification schema to understand exploitative workplace behaviour towards migrant workers*

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ABSTRACT

Migrant workers and domestic workers more broadly, suffer multiple forms of exploitation but the interaction of these forms lacks theorisation. The scholarship on exploitation includes modern slavery studies, Marxism and aligned accounts of unfreedom that help clarify the position of migrant workers. Yet, none of these accounts exhaust the array of exploitative practices that migrant workers face and these approaches often privilege economic violations over other types. This paper argues that a five-type classification schema – adding criminal infringement, denial of leave entitlements, safety violations and discrimination to economic violations – best encompasses the exploitation that migrant workers experience. Drawing upon a new database of 907 court cases litigated by 1912 migrant workers in four countries, it demonstrates that while economic violations predominate they often interact with these other four types of abuse. It suggests that both policy analysis and theoretical accounts of exploitation and abuse should address a broader array of workplace violations, which may provide a jumping-off point for further empirical studies of exploitation.

KEYWORDS

Migrant workers; exploitation; abuse; empirical; labour law

Introduction

An array of exploitative practices harms migrant workers in contemporary workplaces. This concern is frequently raised in the media, in policy reports and political debates (Ewins 2015, Metcalfe 2018, Fels and Cousins 2019). Yet, we lack approaches that account for the interaction of economic forms of exploitation with other abuses that can occur in workplaces. Such a framework would be important for policymakers in devising comprehensive policies to address the mistreatment of migrants in workplaces in a way that tracks across law and regulation. It would also be useful to migrant advocates' understanding of what migrant workers actually experience as they push for policy change. Further, to the extent that many of these infringements may also apply to workers with citizenship status, such an approach could be useful in refining general analytical and empirical approaches to concepts of exploitation and workplace abuse. However, given their visa vulnerability, migrants may be more brazenly subjected to exploitation than those with citizenship and as such, they form the focus here.

This paper provides a new five-type classification schema of exploitation, reviewing and drawing upon several existing approaches to exploitation and workplace abuse. These include historical accounts of the slave trade and its abolition through to the emergence of indentured labour and

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modern slavery; theories of *unfreedom* and forced labour; Marxist approaches; as well as approaches dealing with supply chains and a continuum conceptualisation of exploitation. However, this paper argues that a schema of exploitation based on a classification of empirically demonstrated violations more accurately encompasses the array of infringements that can occur against migrants in the workplace. Further, such an approach is empirically grounded in existing investigations. The schema draws its categories from labour law scholarship. The evolution of labour law shows the emergence of labour rights from restrictions on child labour, through to reasonable working hours, the development of work, health and safety laws and, more recently, antidiscrimination provisions. This history assists in developing the five-type classification of exploitation that this paper sets out: (i) criminal infringements, (ii) economic violations of wage and hour entitlements, (iii) safety violations, (iv) various forms of denial of leave entitlements and (v) discrimination. In demonstrating both theoretically and empirically how economic violations can coexist with and are exacerbated by other violations, this paper advances our understanding of exploitation and abuse in the migrant worker space.

To empirically map this schema, the paper draws upon a new primary evidence source, the Migrant Worker Rights Database, which compiles 40 types of violations across 907 court and tribunal cases brought by migrant workers in four migrant-rich jurisdictions: Australia, Canada, The United Kingdom and the USA (California). The paper then arranges these data across the schema. Importantly the analysis reveals that, while economic violations are the core component of exploitation (an average of 81 per cent of cases in the database relates to wage and hour violations), they are not the only kind and that sometimes economic and other claims are litigated concurrently.

To begin, the paper sketches the major approaches towards exploitation and abuse. It then moves onto a discussion of the method adopted in the Migrant Worker Rights Database, some of its methodological challenges and how these were overcome. The paper sketches the five-type classification schema and how these types interact. The conclusion draws out the empirical implications of these findings for migrant workers as well as an analytical framework for future analysis of workplace exploitation and abuse – either in the migrant space or elsewhere.

Existing accounts of exploitation

Slavery studies: historical and contemporary

The exploitation of migrants is often considered through the lens of modern slavery, which draws in historical accounts of slavery. These accounts drew attention to slavery's inherent physical, mental and spiritual exploitation (Allain 2012, pp. 14–15, 38, 139–40). Justifications of slavery sought to show that some people deserved subjection, for instance, if they belonged to a different religious or racial group (Allain 2012, pp. 12–13, 38). During the slave era indentured labour was followed by chattel slavery; but after the formal abolition of the slave trade in the nineteenth-century forms of indentured labour returned and increasingly merged with migratory flows (Scott 2017, pp. 30, 54, 55, Taylor and Rioux 2018, p. 7). During this period there was a grey zone between slavery – the complete ownership of another person – and domination over a worker for profit, which may fall short of slavery but is nonetheless exploitative.

Modern slavery scholars argue that slavery is not sealed in historical accounts but continues to operate in the modern world. Julia O'Connell Davidson (2015, p. 7) credits the emergence of a neoabolitionist movement to the work of Kevin Bales, who cofounded the organisation 'Free the Slaves' in 2000 and helped develop the Global Slavery Index in 2013. With links to Christian activism (paralleling the original abolitionist movement), Bales focuses on identifying and measuring contemporary slavery and enshrining its definition in law. Bales (2012, p. 284) defines slavery as the possession of one person by another, characterised by control through violence, deception and coercion for the purpose of economic, sexual or psychological benefit. As a result, some forms of forced labour do not rise to the level of slavery, with workers bound by debt rather than the threat of violence or

transfer (O'Connell Davidson 2015, p. 37). More critical scholarship further highlights that modern slavery is not only unique to the global south, but also applies to migrants brought into receiving nations in the global north (Strauss and McGrath 2017, p. 201, Gordon 2019, p. 926). In policy circles, this links modern slavery and trafficking, with a focus on sex trafficking, the abuse of migrant workers at sea and other egregious examples of exploitation (O'Connell Davidson 2015). However, such phenomena are often seen less through the lens of modern slavery than unfreedom as well as concepts of illegality (both considered in more detail below).

The modern trafficking debate focuses on the Palermo Protocol to Prevent, Punish and Suppress Trafficking in Persons, Especially Women and Children (2000). The protocol does not explicitly define 'exploitation', but it does include a list of things that count as exploitation, including 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' (Art 3[a]). The European Commission has, together with the International Labour Organisation, developed the Operational Indicators of Trafficking in Human Beings (also known as the Delphi indicators) that capture the underlying components of trafficking. These include deception and/or coercion during recruitment, transfer and transportation; recruitment by abuse of vulnerability; exploitative conditions of work; coercion at destination; and abuse of vulnerability at destination. Clearly, some of these indicators relate to employment, such as exploitative conditions at work, while some also relate more to the migration process, such as the transfer and transportation of people across borders into exploitative workplaces. The overarching trafficking indicators are therefore both too broad and too narrow for the current purpose of defining exploitation.

Under this international governmental account, and in contrast to the work of Bales, modern slavery is less about physical ownership than new forms of control, including debt bondage and psychological hold over workers (Scott 2017, p. 31). Yet, ideas of forced labour remain useful. The International Labour Organisation's definition of forced labour comprises eleven main indicators: (i) abuse of vulnerability; (ii) deception; (iii) restriction of movement; (iv) isolation; (v) physical and sexual violence; (vi) intimidation and threats; (vii) retention of identity documents; (viii) withholding of wages; (ix) debt bondage; (x) abusive working and living conditions; and (xi) excessive overtime (International Labour Organisation 2012). Documents like this provide broad lists of behaviours that indicate exploitation, but they do not provide a theoretical basis for understanding exploitation or for differentiating it from presumably nonexploitative behaviours. The concept of 'forced labour' can focus on the person most closely associated with forcing the individual worker and thereby can overlook the broader structural conditions that contribute to this arrangement (LeBaron et al. 2018, pp. 11, 12). To this end other concepts are more useful, including unfree labour and exploitation.

Theories of unfreedom

Scholars of unfreedom present a series of criticisms of modern slavery and to a lesser extent the concept of forced labour.[1] They argue that modern slavery approaches are too narrowly conceived: the focus is often upon trafficking, sex slavery and forced prostitution, excluding or undervaluing other workplace violations, including some that seem less severe but still constitute important misdemeanours (Fudge 2016, p. 160, Strauss and McGrath 2017, p. 200, Davies 2018, LeBaron et al. 2018). This can lead to less serious but more routine dimensions of exploitation being minimised – or even legitimised through business and supply chain practices (O'Connell Davidson 2015, Davies 2018, p. 295).

A more thoroughgoing criticism is that modern slavery and forced labour approaches proscribe some egregious forms of employer behaviour while tacitly permitting others and overlooking the overarching economic and regulatory context that facilitates the behaviour. This would require a deeper analysis of workplace law reform, the decline in trade unionism and even the proliferation of low-skilled, cheap migrant labour in the neoliberal period (O'Connell Davidson 2015, p. 139; Fudge 2020). Further, modern slavery theory often focuses upon trafficking and thereby emphasises

illegal and forced entry into exploitative employment rather than employment than may begin legally but become unlawful (Fudge 2016, p. 160, Scott 2017, p. 41); it also centres criminal law remedies and overlooks human rights or labour law frameworks to address exploitation (Costello 2015, p. 191, Fudge 2018); and it can also assume a *perfect victim*: allowing those who commit criminal acts to protect themselves – by infringing other laws, such as immigration regulations – to fall outside its perfect ambit of protection (O'Connell Davidson 2015, p. 134).

Unfreedom scholarship also focuses on how migration status can heighten and shape existing bases of exploitation. For example, immigration visa status may be an additional regulatory tool used to structure work (Bauder 2006) and increase the precariousness of workers (Anderson 2010, Fudge 2011). The state may have an independent role in reinforcing unfreedom through its facilitation of migration, the regulation of recruiters and the adaptation of labour laws (LeBaron and Phillips 2019, pp. 8, 10–11). Immigration status may also interact with other identities, such as race, gender, occupational sector or sphere of employment to reinforce and exacerbate vulnerabilities (Fundamental Rights Agency 2015, p. 25, O'Connell Davidson 2015, pp. 149–51, 155–7, Skrivankova 2017, p. 111, Strauss and McGrath 2017, p. 203, Vosko et al. 2019, p. 231).

Marxist approaches

Marxists treat exploitation as intrinsic to capitalism: any wage relationship where an employer extracts value beyond the cost of a worker's labour is exploitative. As Marx argues (1990, p. 326) '[t]he rate of surplus-value is therefore an exact expression for the degree of exploitation of labour-power by capital, or of the labourer by the capitalist'.[2] Exploitation is seen as a social structure and subjective attitudes are not paramount: the employer does not need to be aware of their exploitative behaviour to exploit (Ferguson and Steiner 2018, p. 544). In capitalist firms, workers are not bound to their employers, as under slavery. Exploitation instead occurs through economic means, such as pay or conditions. Yet, for some Marxist scholars, capitalism itself presents forms of bondage that tie workers to certain employers and in the process reduce wage costs (Brass 1986, p. 64, Gordon 2019, p. 923). As Rioux et al. (2020) recently argued, it is only neo-Smithian Marxist accounts that see a binary between unfree labour, which entails noneconomic forms of coercion, and capitalism; they argue that slavery and other forms of bondage do feature in capitalist systems. Migrant workers, who are often bound by visa conditions, for example, could be particularly vulnerable to this form of modern unfree labour even if migrant status alone is not tantamount to slavery.

Marxist accounts also make important contributions to understanding political forms of coercion. For instance, Ellen Meiksins Wood (2016, pp. 19–20) argues that while capitalist societies often divide political from economic issues, struggles such as those around democratic representation at work are in fact deeply political. This separation then acts as a 'defence mechanism' for capital. Conceptualising something like the struggle for democracy at work as simultaneously economic and political is thus necessary to combat exploitation. In this regard, we may conceive exploitation as encapsulating a broader ambit of possible issues that interact to underwrite capitalist firms. The most obvious of these is the denial of the right to collective political expression and association, while others insofar as they might support economic violations could be ancillary.

While we may conceive Marxist theory as less useful in understanding other possible dimensions of exploitation, such as discrimination on nonpolitical grounds or injuries to the body, Marx (1990) certainly considered overwork and physical injury in factories within his account of the British working class.[3] Yet, there are some limitations to applying a Marxist lens to all forms of workplace injury. While such injuries often interact with wage and entitlement violations, this is not universal. A person can be injured or harassed with no discernible pecuniary gain to the employer. And, as has been suggested by critics of Marx, even if we convert the surplus theory of labour into an economic rather than a solely class relationship, this does not obviate the fact that there are forms of exploitation that are more about racial, ethnic or gender differences than economic inequality (on critical race theory see Mills 2003, on gender, see Folbre 1982, Walby 1986).[4]

Finally, Marxist approaches assume similarities in exploitation across capitalist systems. Block (2019), for example, argues that even those theories that seek to extrapolate to broader varieties of capitalism still rely on 'property-based essentialism': an assumption that the fundamental characteristic of all systems is a shared vision of how they arrange property. That said, more recent Marxist accounts have identified variations in the ways that unfree labour is achieved across jurisdictions and across democracies and nondemocracies (Gordon 2019, p. 924), while also identifying the need for further research (LeBaron and Phillips 2019).

Global supply chains and the continuum of exploitation

More recent political economy approaches note that the rise of global supply chains has seen a rise in global inequality as workers in developing countries are exploited for their lower wages (Nilsen 2020). At times these supply chains may generate migration, insofar as workers may emigrate in order to garner higher wages overseas; at other times such structures may mean that migration halts as employment opportunities are in the country. A supply chain lens is useful for understanding the structural conditions that contribute to exploitation and how global economic inequality reinforces the precarity of workers in sending or receiving states (LeBaron et al. 2018, p. 18). The forms of exploitation that this literature identifies overlap with areas of exploitation research, including underpayment, physical violence, verbal abuse and sexual violence (LeBaron 2018, p. 2), as well as gendered dimensions of exploitation (Tsing 2009, p. 172, Luna 2018). As such, supply chain approaches can draw attention to the ways that different populations are more or less affected by exploitative practices based upon their underlying characteristics. Supply chain approaches also draw attention to gaps in labour law and enforcement governance within supply chains and even within businesses. Further, the disorganisation of global networks can contribute to exploitation (Tsing 2009, Phillips 2013, p. 185, LeBaron 2018, p. 3, LeBaron et al. 2018, p. 56). However, the global level of this analysis makes it difficult to apply to specific countries and labour law systems, which is the focus of this paper.

Focusing more specifically on the issue of exploitation at the country-level, continuum-based approaches have been applied. Some critics of modern slavery theory argue that exploitation is best conceived not as a stark dichotomy of slavery and freedom but rather as stages – or degrees of freedom – varying from enslaved to fully free (Phillips 2013, p. 177, Costello 2015, p. 191). Leading policy reports, such as the *Independent Review of the Overseas Domestic Worker Visa* by James Ewin SC in the United Kingdom, also consider exploitation along a continuum from 'slavery and forced labour at one end to more minor breaches of employment and health and safety law at the other' (Ewins 2015, p. 12, see also Metcalfe 2018, p. 5). As Scott (2017, p. 45) notes, a defining feature of the continuum approach is that as forms of exploitation worsen the wage labour relationship moves from forms of control into coercion.

The continuum approach allows for more specificity and clarity in identifying different moments of exploitation (Skrivankova 2017, p. 113), which translates more easily into policy, as a gradated understanding of exploitation corresponds to degrees of regulatory response. The continuum approach is also more expansive than a purely criminal lens that views modern slavery as the anomaly in need of criminal sanctions, set against otherwise compliant wage labour relationships (Scott 2017, p. 5, Davies and Ollus 2019, p. 89). And yet, a continuum approach still does not assist us in identifying types of exploitation empirically – it merely brings attention to the fact that exploitation can vary in its extremities.

Labour law approaches to exploitation

Labour law theorists have sought to reconcile social democratic labour rights with existing capitalist structures; they emphasise a pacifying role (Hepple 1986, pp. 6–12, Hepple and Veneziani 2009, p. 5) and break from Marxist theory in accepting that reconciliation is possible within parliamentary

democracies in capitalist systems (Dukes 2008, p. 346). Labour law can be seen as a way of partially rectifying existing economic inequalities between employers and employees in a legal sense, by detaching work from property law, to avoid treating humans as owned (Kahn-Freund 1981, p. 78) and to differentiate employment contracts from other types of contracts (Hepple 1986, p. 11).[5] Perhaps the central contribution of the labour law approach to the classification schema developed in this paper is the progressive identification of historical sites of exploitation. Many of these stem from the development of master and servant laws and the subsequent rise of trade unionism that followed the expansion of the factory as a site of production and the concomitant struggle of working people for protections there.

From 1747, master and servant laws in England mobilised people into work, created employment rules and elevated employees over subcontractors, artisans and labourers (Veneziani 2009, p. 3, Anderson et al. 2017, p. 10). Gradually protective laws emerged for employees including the restriction and ultimate abolition of child labour, the creation of health and safety laws in 1802 and the extension of worker protections through the *Factory Act* 1833 and the *Factories and Workshops Act* 1878. These acts addressed some of the social and economic crises presented by large-scale industrial factories and agitation by workers, as well as vigorous debate among employers, experts and public intellectuals about appropriate workplace conditions (Gray 1987, pp. 145, 167). Over time the so-called *Condition of England* – as the issue of workplace standards came to be known – extended outside of the factory 'into mines, child and female labour generally, the weavers, out-work and sweating, and urban conditions' (Gray 1987, p. 171). Concepts such as unreasonable overtime and the need for uniform working hours were developed through the *Factory Act* 1847 (also known as the Ten Hours Act). The tactics of collective organising, including strikes, took shape in this period. These late nineteenth century developments are the bridge between slavery, indentured labour and the array of labour rights in the contemporary workplace. Of course, these developments were not without their critics. Marx viewed the Factory Act as concentrating the power of capital, as limited in scope and easily evaded by employers (Marx 1990, Chapter 15). A central philosophical rationale behind these laws was that human welfare was primary to property, not secondary (Kydd 1857, p. 118). The rise of universal male suffrage also brought democratic force to the claims of workers and furthered the efforts of trade unionists to gain greater protections (McClelland 1987, p. 200). In the period after World War Two, recognition of the diversity of the workforce contributed to a raft of antidiscrimination laws being passed (Gordon 2019, p. 925). Through all of this history, some of the sectors that remain most subject to exploitation – domestic service and agricultural labour – have retained master–servant dynamics, which are important in the migrant worker space (Veneziani 2009, p. 46, Collins and Mantouvalou 2016).

The scholarship on exploitation and abuse provides various potential accounts of the component parts of these concepts. However, often it is focused on economic forms of exploitation to the neglect of other accounts. Further, the scholarship is often pitched at a very general level of analysis, rendering cross-country comparison difficult. At the same time, it is important to note potential critiques to the use of labour law as a metric for interpreting abuses and exploitation. Theoretically, one might argue that labour law merely reflects functional legalism or indeed, furthers the ideology of the dominant ruling class and therefore, is ill-equipped as a source to objectively define these terms. Here, I draw attention to the work of critical political economists, including Thompson (1975) who, in his chapter on the rule of law identifies the separateness of labour law from the ideology of capitalism necessarily. Thompson (1975, p. 262) notes that: '[t]he law is a pliant medium to be tussled this way and that by whatever interests already possess effective power. Eighteenth-century law was more substantial than that. Over and above its pliant, instrumental functions, it existed it its own right.' Further, as Marx (1990) notes in Capital, labour law serves a crucial function in translating the positions of the ruling class into laws but also the countering views of the worker class: 'Capital therefore takes no account of the health and the length of the life of the worker, unless society forces it to do so' (Capital, Vol. 1: p. 381). This emboldens a focus on labour law in the current paper. After all, Marx was a supporter of legislation for the eight-hour working day, via legislative reform of labour

laws. Both these works note the crucial 'translation' role that law plays in setting out the key principles of appropriate protections in the workplace. In short, while often used as an ideology of the ruling class, labour law also operated separately from it providing an important metric to benchmark rights and conditions of workers.

Second, we also look to existing empirical studies of migrant worker rights based on surveys with migrants to ascertain the types of workplace rights they focus on. This allows us to see whether migrant-initiated complaints match the types of issues as framed legally. There are limited studies of migrant workers using sufficiently large samples to address this issue but those that do, identify the following areas. In Australia, a large survey of migrant workers identified the following grievances in descending order of frequency: Underpayment and denial of other wage entitlements; racial discrimination; verbal, physical or psychological abuse; pressure to violate an immigration visa condition; and sexual harassment or violence (Hall and Partners 2016, p. 5). These features mirror the violations raised in the Migrant Worker Rights Database (MWRD) coding frame set out below. Other studies focus mainly on underpayment and overtime work, therefore capturing a smaller array of violations than the MWRD approach, or sometimes accompanied with qualitative or focus group research, that are necessarily limited in their inferences due to non-random sampling (e.g. Bernhardt et al. 2009, Berg and Farbenblum 2017). In conclusion, we argue that the additive schema of exploitation presented below has advantages in its application to the question of migrant worker rights over alternate methods. We turn now to an explanation of the Migrant Worker Rights Database.

The Migrant Worker Rights Database

The Migrant Worker Rights Database comprises 907 legal cases brought by migrant workers seeking to enforce their rights in Australia, Canada (Ontario, Alberta and British Columbia), the United Kingdom and the USA (California). These jurisdictions were chosen because they are some of the highest migrant-receiving destinations among advanced economies (Author 2). For ease of analysis in this paper, the three Canadian provinces are combined. The database covers all published cases brought in these jurisdictions between 1996 and 2016, from low-level tribunals through to the highest courts of appeal that were on the public record.[6] It covers migrants on visas, as well as in some instances, those with undocumented status. The key determinant for inclusion in the Database was whether a person was a migrant of ten years or less in the host society when they bring a case. Undocumented migrants were included because frequently they do have access to employment law protections, even if their propensity for complaint-making is reduced given the risk of deportation that can accompany litigation against an employer.[7] The Database covers employment law violations but also a variety of other claims brought by migrants seeking to enforce their workplace rights, such as criminal, tortious, human rights and antidiscrimination (outlined in more detail below). A key selection criterion for the case list was that the migrant's alleged violation occurred in the workplace and not outside the course of their employment. Collectively, across the six labour law jurisdictions, we captured 907 cases involving 1912 migrants who alleged 2640 different violations.

Using the database to empirically map exploitation raises a series of methodological challenges. First, effectively defining exploitation cross-nationally given that labour laws and regulations differ. The fact that the database contains data drawn from four countries and six separate labour law jurisdictions, raises potential comparability issues as lawful minimums vary across countries, subnational regions and across time. We undertook several inclusion decisions to minimise this. Employment protections that were only available in one jurisdiction were not included for comparative purposes and in the case of workplace rights that are themselves contested for all workers in the relevant laws, or that have been reduced over time, such as a blanket right to strike, such indicators were excluded from coding. A series of intercoder reliability tests were undertaken to ensure that indicators worked across jurisdiction and time and were reliable in their construction.[8]

Second, determining whether exploitation includes nonpecuniary violations. In a Marxist sense, we may view exploitation as centrally related to the extraction of surplus value from labour and therefore as excluding physical abuse or discrimination. However, insofar as physical abuse and discrimination can increase employer control, these violations are consistent with a working definition of exploitation based on unfreedom. Dymski (1992) argues that domination on racial or gender grounds can operate after an employee has been hired to increase the rate of exploitation already occurring.[9] Qualitatively this argument has also been made by critical race scholars (Robinson and Kelley 2000). Empirically it is useful to explore quantitively whether this is actually the case in the migrant worker area through an assessment not only of labour law legislation but also antidiscrimination and workplace health and safety laws and their intersections.

Third, determining whether the remit of exploitation is individual or collective in nature. For instance, the right to strike is a collective right that is generally violated at either the enterprise or sector level rather than individually. Given that the cases analysed were primarily brought by individuals or groups of individuals rather than trade union or worker associations, we focused our attention on discrimination against individuals for trade union activity rather than the violation of a collective right to strike. This position is consistent with the view of some labour law theorists that collective rights should be distinguished from individual labour rights (Hepple and Veneziani 2009, p. 12).

Fourth, clarifying who is a possible violator and what constitutes an employer. In developing a population of possible cases of exploitation, it is necessary to consider who is responsible for these acts. At times, it is clear it is the employer. However, at other times additional issues of intersecting liability arise. This can occur either through a contributory role played by recruiters or through subcontracting arrangements, meaning that liability is split. Recruiters are often identified as key players in the exploitation of migrant workers (Skrivankova 2017, p. 115, Davies 2018). However, while recruiters may play a role in exploitation, their behaviour is generally independent from breaches by the employer (Faraday 2014). Further, it is not uncommon for a series of subcontractor arrangements to be used to minimise the liability of the actual employer for their exploitative behaviour. So-called letter box companies, or shell companies without employees or assets, are sometimes used to avoid contractual liability (Rusev and Kojouharov 2019, p. 22). Alternately, a sequence of companies can engage in subcontracting arrangements that obscure one another's liabilities and reduce the end payment to employees (Davies and Ollus 2019, pp. 99, 1010). Subcontracting arrangements can also be coupled with informal employment practices that reinforce the vulnerability of workers (Phillips 2013, p. 182); these are commonly used within supply chains (Tsing 2009, p. 157). For the database, we coded all employers who were listed in the case as employers, at times requiring multiple defendants or respondents to be coded for each case.

Fifth, defining exploitation as happening to employees and excluding analysis of the rights of independent contractors – although the misclassification of workers as contractors is relevant. The question *Who is an employee?* goes to the heart of labour law, demarcating between employee and independent contractor and if either labour or contract law will govern a dispute. As such, the definition was driven by the coding of case law and whether decision-makers themselves determined the status of individuals as employees or subcontractors. Misclassification as a subcontractor was identified as a violation indicator.

Finally, clarifying that the relevant benchmark for the analysis of exploitation is existing lawful minima as averaged across the six jurisdictions.[10] The classification of exploitation presented in the schema is not drawn from an ideal type, 'best practice' or normative framework. Rather, it is located in the actual laws of each of the four jurisdictions. Therefore, the classification does not account for employment behaviour that is lawful but not ideal – what Davies and Ollus (2019, p. 89) call the 'moral grey area'. A jurisdiction may have poor employment protection laws, or weak antidiscrimination provisions, but a violation was not recorded in the database unless a legal provision was actually violated. The chosen methodology of analysing court cases is also pragmatic: in the vast majority of instances, legal counsel would not bring claims on behalf of a migrant

worker if those claims had no basis in existing law. However, this is an applied schema that can also be used to also analyse violations that do not make it to the courts.

Classifying exploitation

We now set out the component parts of our five-type classification schema for exploitation and abuse, which is drawn primarily from the labour law scholarship discussed above.[11] This classification schema can be viewed as a series of five additive classes, with more and less serious violations within each of the constituent classes rather than a single continuum ranging from minor through to serious infringements. These classes are based on the areas where violations can occur, from bodily and psychological integrity through to freedom from criminal violations against one's personhood, economic rights, safety, the right to leave and freedom from discrimination. These categories map onto the historical development of labour and other workplace protection laws that together provide the most coherent and broad array of possible abuses; abuses that are not contained in the economic violations that are the focus of existing political economy accounts. These categories offer the opportunity to consider abuses that are quite separate to economic approaches but may reinforce the severity of such violations.

Criminal infringements

Both some form of harm and a lack of employee consent – or at least a lack of capacity to consent, given vulnerability – are intrinsic to criminal violations (Skrivankova 2017, p. 111). For instance, sometimes a person may voluntarily enter into a forced labour arrangement due to a lack of alternate choice (O'Connell Davidson 2015, p. 136). There are also crimes for which there is a strict liability on the part of the accused, notwithstanding the actual or constructed consent on the part of the employee. Physical harm may comprise part of criminal violations, such as sexual assault and general assault, however, they can sometimes occur without any form of physical damage, such as psychological or economic offences. Another aspect is that sometimes the allegations of exploitation against the employer are so serious – such as attempted murder, sexual assault, grievous bodily harm – that they can include self-protective cross-claims on the part of the defendant. In these instances, the migrant may be accused by the employer of having committed a criminal offence, having broken other laws or being vicariously liable (Skrivankova 2017, p. 116).

Some forms of violations have both criminal and monetary components. The question is whether these are best classified as criminal or economic forms of exploitation. For instance, forced labour is a concept originally defined by the International Labour Organisation in 1930 to include 'abuse of vulnerability, deception, restriction of movement, isolation, physical and sexual violence, intimidation and threats, retention of identity documents, withholding of wages, debt bondage, abusive working and living conditions and excessive overtime' (International Labour Organisation 2012). This concept includes both criminal violations (physical and sexual violence) and wage theft (wage and hour entitlements). Given that forced labour is often criminalised, it is included under the criminal component of the classification; however, this example does clarify how various components overlap and reinforce one another. The key violations identified for this section are infringements such as visa fraud, assault or battery by the employer or another employer is vicariously liable. False imprisonment or unlawful restraint by the employer is also included in this category. There is some overlap here with trafficking, which also involves restraint; however this category of imprisonment is differentiated as it does not involve movement across borders. Forced or compulsory labour without consent on the part of the employee, harassment by an employer or a colleague where the employer should have intervened and is vicariously responsible is also included. Sexual misconduct, which includes sexual harassment and other sexual misdemeanours short of sexual assault (rape) is considered separately, both by the employer or where the employer again is vicariously responsible

for an employee's actions. Being subjected to sexual assault (rape) and sexual servitude[12] are considered as individual categories given their severity. The severe offences in the modern slavery realm, including being trafficked by the employer and being a victim of industrial manslaughter or industrial homicide, are also included. These two crimes require either death caused by the employer or their direct liability for the crime and the death must occur in the workplace not outside of it. Manslaughter and homicide are differentiated on the basis of the general legal requirement that homicide necessitates both the act and the mental state, whereas negligence alone causing death constitutes manslaughter.[13]

Economic violations of wage and hour entitlements

The second major category of exploitation is the economic violation of wage and hour entitlements. This component of the classification covers what Jon Davies (2018, pp. 295, 305) refers to as 'routine exploitation' by 'civil, regulatory or labour law'. It frequently includes underpayment and links most clearly to the accounts of economic exploitation discussed above. Included here are fraudulent independent contractor arrangements when the person is in fact an employee. Such arrangements, which may be used to circumvent employment laws, are often employed in the migration and modern slavery setting (Davies 2018, p. 298, Jokinen and Ollus 2019). The key violations identified for this section are: unpaid wages (including when an insolvent employer in unable to pay a former employee), unpaid leave, superannuation, minimum wage requirements, wage penalty rates, meal and rest period violations and unlawful business practices.[14] Focusing on unpaid wages is important not only because partial underpayment may be a more common phenomenon than slavery but also because of its frequent identification within policy debates (Phillips 2013, p. 179). Being required to work inhumane hours, which includes denial of meal breaks, is counted as a separate variable. This is distinguished from other work, health and safety issues that are considered in a separate section below. Denial of severance pay at the point of dismissal or redundancy, being dismissed unfairly, unlawfully or wrongfully is also included. This covers species of violations where a migrant worker loses their job and leads to economic loss. Finally for this category, we included cases where the employee is subjected to breach of contract, such as at the migrant worker's contractual requirements related to wages going unfulfilled or being subjected to misrepresentation at the point of contractual agreement, where the employer falsely induces a person to enter a contract. As contractual breaches hold economic implications for the worker, they are included in this section.

Safety violations

Workplace safety issues have also been raised in other studies on migrant worker exploitation (Davies 2018, p. 305) and can include injuries, overwork and other unsafe work practices. Depending upon the severity of these violations, they may be better categorised as criminal infringements. However, as this is rare, workplace health and safety issues are characterised as an independent category in the classification, separate from criminal violations. Instances where industrial oversight leads to murder or manslaughter are considered under criminal categories. For this component, we included the single, but important, variable of whether the migrant worker was denied workplace safety.

Denial of different leave entitlements

This battery of variables encompasses the denial of forms of leave to which the employee is entitled. This works from the general assumption under labour law that rest and breaks are required for a person to be able to function in the workplace. These entitlements encompass denial of carer's leave, holiday leave, maternity leave, paternity leave, sick or personal leave and not being informed

about pension (retirement) rights upon the commencement of employment. These leave entitlements are important to consider both because they are often excluded from subcontractor arrangements that frequently affect migrant workers. They also carry with them distinctive gendered dimensions, as women are disproportionate users of parental and carers leave.[15]

Discrimination violations

Discrimination can be divided into discrimination related to access, expressive discrimination and racism. While most workplace discrimination is expressive rather than physical (Bleich 2003, p. 9), this does not reduce its severity. Further, it can be viewed as a form of exploitation insofar as discrimination can further other pernicious goals, such as underpayment. In this section, we included being denied the right to privacy through surveillance and monitoring – but note that this is a negative right, freedom from interference, so a little different from the other rights against discrimination – as well as being denied the right to privacy through the use of employee's personal details. We also included being discriminated against on basis of age, family or carer responsibilities, impairment or disability, relationship status, political conviction, pregnancy, sex, race, religious activity, sexual orientation or gender reassignment. Denial of freedom of expression is included, as was being discriminated against on the basis of trade union activity and freedom of association. When a worker was denied rights of expression unrelated to freedom of association these generally related to political expression in the workplace, stemming from denial or obstruction of activities by members of trade unions or those attempting collective action.

Empirical analysis

The rest of this paper sets out the findings of the most common violations in each of the four jurisdictions. We focus here on violations that are substantiated by the decision of a judge or tribunal member, rather than allegations of violations, as 34 per cent of the time migrant claims are unsuccessful (Ref insert after review). Table 1 sets out substantiated violations according to the five major classes of exploitation across the four countries. As is clear, in all jurisdictions claims related to economic interests are the largest grouping of substantiated violations, ranging from 92 per cent of all successful claims of events in Australia down to 53 per cent in the United Kingdom. On average, 81 per cent of the violations brought by the migrants are economic in nature. Next comes discrimination-based claims (10 per cent), followed by criminal infringements (5 per cent), safety violations (4 per cent) and denial of leave and other workplace entitlements (0.1 per cent). In short, consistent with expectations, a large majority of the patterning of workplace violations is economic in nature (related to wages and conditions), however this does not capture the entire landscape of possible violations.

Economic violations are the most frequently substantiated claim, as is clear from both Table 1 and Figure 1. Yet while economic violations are the most frequently raised claim there are instances where they intersect with other violation areas. This is in the form of multiple claims by migrants and their representatives within each legal case that are then validated by a judicial finding.

Table 1. Number of migrants with successful claims of events, by violation category and jurisdiction.

Violation category	Australia	Canada	England	California	Overall
Criminal infringements	29 (4%)	8 (2%)	14 (18%)	32 (8%)	83 (5%)
Economic Violations	698 (92%)	213 (54%)	41 (53%)	415 (84%)	1367 (81%)
Safety Violations	28 (4%)	30 (8%)	1 (1%)	5 (1%)	64 (4%)
Denial of Leave and Entitlements	0	1 (0.3%)	0	1 (0.2%)	2 (0.1%)
Discrimination	4 (1%)	140 (36%)	21 (27%)	12 (3%)	177 (10%)
Total	759	392	77	465	1693

Source: Migrant Worker Rights Database.

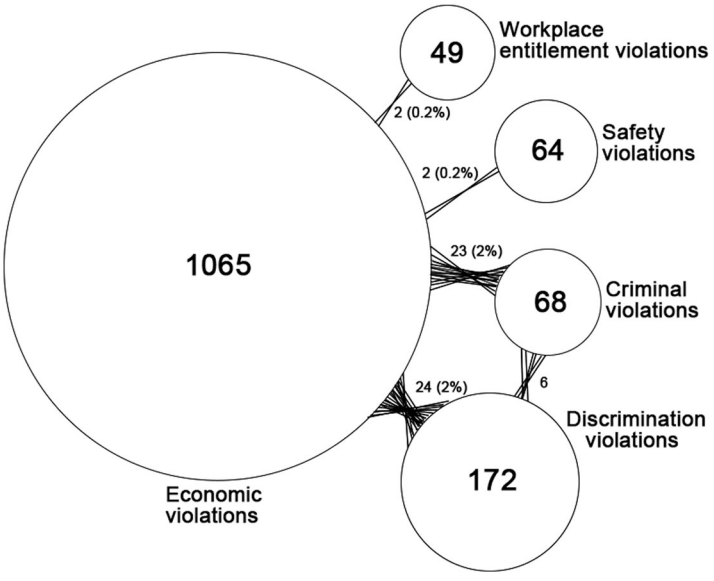

Figure 1. Percentage of substantiated violation claims and relationship to other violations. Source: Migrant Worker Rights Database.

In Table 2 we list successful violation claims by type and the concurrent claims that are brought, as percentages across the entire database. In 34 per cent of criminal violations an economic violation is also substantiated, demonstrating that criminal infringements against the body often correlate with wage and hour infringements. In 9 per cent of criminal cases there are also discrimination violations. Economic violations standalone 96 per cent of the time, however in two per cent of these cases they are combined with criminal and discrimination violations. This supports our earlier point that discrimination can be a means to exacerbate economic deprivation. In a third of these cases, the discrimination type is race (which covers race, ethnicity, nationality and national origin). One startling example is the Canadian case of *Monrose v Double Diamond Acres* where a seasonal agricultural worker from St Lucia was racially vilified, denied 25 per cent of his wages and was ultimately dismissed. The Human Rights Tribunal of Ontario found that he had been dismissed in a discriminatory manner. Cases such as *Monrose* and the accompanying quantitative data, reinforce the views of critical race Marxist scholars and theorists of unfreedom that economic and racial injustice have a mutually reinforcing effect.

The next highest concurrent violations are economic and discrimination on the basis of trade union membership, which again relates to the view that exploitation is often not only economic but also has a political basis (Meiksins Wood 2016). By way of example, in the case of *Australian Licensed Aircraft Engineers Association v International Aviation* (2011), an Indonesian migrant worker employed as an aircraft engineer in Australia, Mr Djoko Puspitono, was unlawfully dismissed

Table 2. Concurrent successful violation claims, by *N* of migrants bringing claims.

Violation type	Total	Only violation	Criminal violations	Economic violations	Safety violations	Denial of Leave Entitlements	Discrimination violations
Criminal violations	68	44 (65%)	-	23 (34%)	0	0	6 (9%)
Economic violations	1065	1019 (96%)	23 (2%)	-	2 (0.2%)	2 (0.2%)	24 (2%)
Safety violations	64	62 (97%)	0	2 (3%)	-	0	0
Denial of leave entitlements	49	47 (96%)	0	2 (4%)	0	-	0
Discrimination violations	172	147 (85%)	6 (3%)	24 (14%)	0	0	-

Source: Migrant Worker Rights Database.

following trade union activity. As such, he experienced both an economic loss (dismissal) and a denial of his right to collective action. He also received a negative assessment of his working capacity to the Indonesian airline, Garuda, which meant he would return to Indonesia without viable employment opportunities. The court found in his favour and issued a considerable remedy. This example demonstrates the intersection of economic and discrimination claims that can frequently feature in migrant worker cases.

There is only a very small overlap of 2 per cent in economic and safety-based violation. This is most likely because often safety-based claims happened as stand-alone actions or within specific workers compensation tribunals. This is validated by the fact that 59 per cent of substantiated safety violations are brought in workplace-specific tribunals.[16] Finally, leave entitlement violations are raised less frequently across the database (see Table 1 and Figure 1) and there is less overlap.

On this basis, we can see that while the bulk of substantiated claims for workplace violations are economic (81 per cent) not all are and there is sometimes overlap with other areas of the classification schema – especially discrimination. This provides some support for the argument that workplace exploitation and abuse, while predominately an economic phenomenon, have other components.

Conclusion

This paper has operationalised exploitation and abuse in an analytical schema to understand violations of migrant worker rights, encompassing infringements against the body and mind, economic violations, safety violations, denial of leave and other discriminatory action. Different workplace components of exploitation have become relevant over time, from historical slavery studies, to Marxist conceptions of exploitation, concepts of freedom and forced labour, through to continuum-based approaches and supply chain approaches. Clearly, economic injustice is a significant component of any working approach to exploitation. At the same time, only considering economic violations overlooks how other forms of abuse – criminal violations, safety, leave and discrimination – can exacerbate or reinforce economic infringements, or indeed exploit a worker in economically irrational but still deeply problematic ways. For instance, an employer may not extract a financial benefit through harsh racial discrimination – such behaviour may even lead to financial loss for the employer – and yet the effect upon the migrant employee may be very damaging and thus exploitative. Moving beyond a wage-based conception of exploitation to consider these other violations is important, not only to capture the full scope of workplace exploitation and abuse, but also because it paints a more accurate picture of what is actually occurring in court cases brought by migrant workers. As evidenced in this paper, while not universally, there are cases where the largest category of economic violations overlaps in an additive fashion with other violations in the experiences of migrant workers, most predominately, discrimination-based claims. This finding validates the inclusion of less commonly considered forms of exploitative behaviour that interact with economic violations.

The 5-type classification schema in this paper provides a framework for the analysis of exploitation and abuse that will be useful to scholars seeking to connect the Marxist focus on economic exploitation with other forms of workplace abuse in a singular and conceptual way. It has applications to the fields of empirical analysis in political economy, industrial relations, migration studies (across a broader array of countries) and within sociolegal studies, where scholars are interested in developing empirical ways to analyse legal behaviour. Insofar as the schema and the coding exercise demonstrate a way to quantify workplace violations, this method could also be useful for scholars and practitioners who wish to consider the exploitation and abuse of other vulnerable workers, including young people. Such an application could give rise to new theoretical insights regarding the concepts of exploitation and abuse and their empirical approaches. This approach could be complimented or further tested using qualitative methods to validate its application among particularly vulnerable populations, such as undocumented migrant workers who may be among the least likely to bring formal legal complaints due to concerns over retaliatory dismissal. Therefore, we may see higher rates of criminal violations such as slavery and forced labour in the

migrant worker area, and particularly for undocumented workers, than for workers with citizenship status, although this proposition would need to be tested empirically. Finally, government bodies, nongovernmental agencies and human rights lawyers could use such a schema to analyse exploitation and abuse in their respective jurisdictions and to ensure that the full scope of interacting violations are considered when they report or litigate on these issues.

Notes

1. As noted below, some Marxist scholars (such as Brass 1986) also use the term 'unfree' labour to define forms of bondage in capitalism, suggesting a linkage between unfree labour theory and Marxism.
2. Others, such as John Roemer, have conceived of this 'labour surplus' in terms of the ownership over the means of production (property relations) rather than the labour exchange itself. If inequality would have lessened under a different ownership system, then there has been exploitation in the first instance (Roemer 1982). This approach is difficult to relate to contemporary capitalist wage labour relationships as it is principally concerned with inequalities in ownership of property, not employment.
3. Injury was included in Marx's rich descriptions of English factories (Marx 1990, Chapter 15) and in Engel's *The Conditions of the Working Class in England* (2001). An alternate analysis is that physical injury is tied to the alienation of labour. More recent studies have considered how aspects of workplace conditions can increase both economic exploitation and injury, for instance studies of piece work (Wrench and Lee 1982).
4. See however Capital I on indigenous persons and under-analysed aspects of ethnicity (Marx 1990, Chapter 10). To some extent, Marxist approaches also consider exploitation through gendered and racialised lenses to understand how hierarchies of inequality are justified and perpetuated (Callinicos 1995, Marx 1990, Selwyn and Miyamura 2014, p. 643).
5. While a central proponent of labour law, Otto Kahn-Freund's earlier work was critical of the pacifying effects of labour law and its potential to 'suppress class contradiction' (Kahn-Freund 1931), his later work was seen as more supportive of a separation of labour law and trade union organising, as in the thesis of collective laissez-faireism, see Kahn-Freund (1959, p. 225). This led some to argue that his exposition of labour law theory was divorced from its earlier social democratic responsibility to mediate class conflict (Lewis 1979, Ewing 1998).
6. As such, it does not cover resolved, settled or unpublished decisions. A codebook and annex will be made available on author's website following publication.
7. The instances where undocumented migrants have access to legal protections and where they do not vary across the six labour law jurisdictions and four countries considered. However, often employment law protections are in place, at least at law. This issue is explored further in Author x
8. Krippendorff's Alpha > 0.67 was achieved for all indicators considered in this paper. Further details of intercoder reliability are available in the online annex.
9. Dymski (1992, p. 299) argues that the two threats of racial domination to exploitation are structural – a greater risk of underpayment compared with workers not of that racial group and a greater risk of unemployment following dismissal for racialised minorities – but also ascriptive or perceptual – assumptions made by the employer about the nature of the worker based on their racial grouping.
10. For some of the jurisdictions the indicator set in the database is thus an improvement on what the laws in that jurisdiction provide.
11. We refer to classification schema rather than a typology because a typology involves multidimensional variation within each class, whereas a classification system does not. As the central point of variation in this classification is across rather than within each class, classification is the best descriptor (Bailey 1994, p. 4).
12. This is different from forced labour: it encompasses instances where the person's forced labour relates specifically to sexual servitude, sexual slavery or compulsory sexual labour that is unrecompensed.
13. The exact legal definitions of these crimes across the different jurisdictions in included in the codebook.
14. This is mainly the offence of failing to keep information regarding payslips, which is largely an issue in Australia. Further details of these forms of violations, including the relevant statutory or common law basis can be viewed in the codebook, see endnote 6.
15. Further details on these indicators are available in the codebook, see endnote 6.
16. The relevant courts and tribunals here being the NSW Workers Compensation Commission (Australia), the Ontario Workers Compensation Appeals Tribunal, the Ontario Workplace Safety and Insurance Appeal Tribunal.

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