Legal Consciousness and Resistance in Caribbean Seasonal Agricultural Workers

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No chains around my feet, but I'm not free. I know I am bound here in captivity. And I've never known happiness, and I've never known sweet caresses. Still, I'll be always laughing like a clown. Won't someone help me? Cause, sweet life, I've, I've got to pick myself from off the ground, yeah.¹

Introduction

The idea that seasonal agricultural workers are ignorant of prevailing labour standards in Canada and, by extension, consensual participants in their own exploitation has gained momentum in recent years. While the debate over workers and consent in liberal capitalist societies is far from new, and legal scholars (broadly speaking) have not hesitated to join in, there is a need to explore the debate anew in light of the worker legal ignorance claim. An enthralling, relatively new area of study falling under the rubric of legal consciousness provides a basis on which to carry out the exploration.

Specifically, scholars interested in the relationship between law and society (or, to avoid “playing favourites,” the other way around) must take account of the emerging field of inquiry devoted to the legal consciousness of individuals who are not “legal professionals.” In what is essentially a Law and Society take on the study of legal consciousness, the so-called “constitutive paradigm” has plenty to say about legal ignorance and knowledge, or consciousness, and how it shapes everyday life.

By situating the discussion of migrant agricultural workers’ “consent” to exploitative working conditions in the legal consciousness debate, the analysis strives in one sense to halt the momentum of the ignorance claim, and in another to acknowledge the complexities of accounting for the functions that liberal law assumes in capitalist relations. Law functions as part of the intricacies of daily relations and in a broader way as the parameters in which those relations occur. In short, it is not just part of shaping the “ins and outs” it is “all over.”

Outline

The lyrics of Bob Marley that adorn the beginning of this article map the contours of the ensuing analysis. The late Jamaican reggae artist was no stranger to the themes that run throughout. Marley’s music brilliantly sought to expose and tear down oppressive relations and structures of power—and his visionary messages transcended his art. But “I Shot the Sheriff,” the bold but light-hearted defence of Rastafarianism and “ganja”-smoking, became one of his most memorable compositions of resistance-achieving commercial success in the United Kingdom and North America thanks to Eric Clapton’s remake.

But, Marley wrote and performed an endless string of rebellious classics that, while melodically enticing, overflowed with angst and with messages of defiance and resistance. “Concrete Jungle,” a timeless gem of a tune originally written about the disruption and relocation caused by a development project, speaks to the themes that run through this piece—and point the way for future research.

The first line constitutes a declaration of “un-freedom”—or in Marxian terms “unfree” labour. The initial section of the analysis locates migrant agricultural workers in the Marxian conception of unfree labour. Commentators have picked at the idea to expose what they believe are key deficiencies in its composition. Critical to the discussion is how employers in liberal capitalist societies arrive at the “consensual” exploitation of migrant agricultural workers in the produce sector.

The next few lines of Marley’s verse form the basis of the analysis’ second section. Marley’s “certain” captivity—his inability to know happiness and endearment—runs head-on into the desire to outwardly express sentiments contrary to that which seems fated or inevitable. Here, I believe, Marley so powerfully captures the tension and complex relationship between two themes: ideology and resistance. Knowing he is in bondage but incessantly laughing it off, Marley meets the certainty of his confinement with strategic opposition—reminiscent of the tactics employed by enslaved Africans in the historical period of slavery throughout the Americas. He aims to reject the inevitability of the way things are—i.e. the dominant ideology.

2 For instance, on 22 April 1978, eighteen months after a failed assassination attempt on his life, Marley returned to Jamaica to perform at the “One Love Peace Concert.” That night on stage Marley brought together for the first time Prime Minister Michael Manley and opposition leader Edward Seaga, the prime perpetrators of the politically charged gun-war which left bullet fragments in Marley’s left shoulder and Jamaica in a state of social turmoil. The lasting image of the concert is of Marley at centre stage, holding together the hands of the two political rivals.

3 In songs such as “War”, “Zimbabwe”, and “Redemption Song” Marley called for the oppressed to rebel against the powers that be.

4 Throughout this article, I employ the terms “seasonal agricultural worker” and “migrant worker” interchangeably. Although I do not use “guest worker” here, other literature adopts this terminology.
The second section of the analysis delves into these themes through a surveying of the history of legal consciousness studies. Special emphasis is placed on the newest variant, whose adherents take pains (empirically speaking) to both (re)discover the sources of resistance in the day-to-day activities of the powerless and to challenge the efficacy of dominant ideology.

In the concluding section, the analysis probes the legal consciousness of Caribbean seasonal agricultural workers in Ontario. At this juncture, Marley’s prophetic verse conveys further insights into consciousness and resistance. Marley asks why no one will lend him a hand, and he responds to his own query by calling for self-help. This is not a ringing endorsement of individual action; rather it is recognition of the contradictory world of the “Concrete Jungle”—“where,” as Marley asserts earlier in the tune, “the living is harder.” Ours is a world similarly fraught with contradiction. The final section attempts to address the ineffectiveness of past legal consciousness research in confronting the interplay of opposing forces; human agency and individual resistance on the one hand, and on the other the need to confront the legal-structural parameters of liberal capitalism.

Seasonal Agricultural Workers

Background

Each year, Canadian farm employers hire mostly male labourers from the Commonwealth Caribbean and Mexico (and now Guatemala) to pick fruit, vegetable and tobacco crops on a seasonal basis. Canada’s Seasonal Agricultural Workers Program (SAWP), a federal program overseen by Human Resources and Skills Development (HRSD) and Citizenship and
Immigration Canada (CIC), has been in operation since 1966. Administered in Ontario and Nova Scotia by Foreign Agricultural Resource Management Services (FARMS), a private sector non-profit organization made up of representatives of the agricultural industry, the SAWP brings migrant farm workers to Canada for up to eight months in a calendar year. Some workers arrive as early as February but the largest influx takes place in early spring with the peak season generally occurring between August and October.

According to HRSD, farm labour migration is necessary “to provide a supplementary source of reliable and qualified seasonal labour in order to improve Canada’s prosperity by ensuring that crops are planted and harvested in a timely fashion.” A “Canadians First Policy” is included in the program to ensure that when hiring employers “consider” Canadian citizens and permanent residents prior to turning to migrant workers. The SAWP assists in maintaining “the livelihoods of Canadian and permanent resident workers in the agricultural industry as well as in other industries that directly or indirectly participate in and benefit from a strong and vital agricultural industry.” The federal government singles out the “critical shortage of available workers suitable for seasonal agricultural work” in Ontario to justify the utilization of migrant labourers throughout Canada.

Scholars have contested many of the official claims surrounding the SAWP. In *Racism and the Incorporation of Foreign Labour*, the most prominent political economic study of migrant farm workers in Canada, sociologist Vic Satzewich stresses the uneven development of capitalist

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6 Jamaica signed the initial agreement with Canada and immediately sent 264 workers. Trinidad and Tobago and Barbados signed on in 1967. In 1974, Mexico and Canada entered into a similar agreement. In 1976, the Canadian government extended the program to include the Organization of the East Caribbean States—Antigua & Barbuda, Dominica, Grenada, Montserrat, St. Kitts-Nevis, St. Lucia, St. Vincent and the Grenadines. Currently, there are about 20000 workers employed through the SAWP each year; over 7500 workers are from the Caribbean. The United States has a structurally similar program, referred to as the H-2A Seasonal Agricultural Worker Program (named after the pertinent section of the U.S. *Immigration and Nationality Act.*

7 Program administration fell initially on the Department of Manpower and Immigration and the Canada Employment Commission. In 1987 FARMS assumed administrative duties. FARMS processes employer’s requests for workers and “communicates the orders (…) to the governments of the supply countries”. FARMS also works with CanAg Travel Services Ltd., the SAWP’s authorized travel agent, to arrange workers’ travel itineraries. Employers may request that CanAg coordinate the movement of workers from the airport to the farm. Some commentators have argued that the inclusion of industry representatives in the administrative and design aspects of the SAWP constitutes an important or best practice. See Philip L. Martin, “Managing Labor Migration: Temporary Worker Programs For the 21st Century” (Geneva: International Institute For Labour Studies, 2003) at 23, online: International Labour Organization <http://www-ilo-mirror.cornell.edu/public/english/bureau/inst/download/migration3.pdf>.

8 Caribbean & Mexican Seasonal Agricultural Workers Program—Overview online: HRSD <www.hrsdc.gc.ca> [emphasis added].


11 *Ibid.* [emphasis added].
relations of production, and also the racialization of Caribbean farm hands, to explain farm labour migration. Canadian fruit and vegetable farmers, according to Satzewich, encounter labour supply and retention problems. Production of fruits and vegetables is labour-intensive, but the steady decline of the rural population in the post-World War Two era—as more and more people head to urban centres to work and live—has meant that farmers have access to a much-depleted labour pool.

Adding to these labour problems, the Canadian state has implemented a cheap food policy for several decades. A prerequisite for cheap food is that labour costs and other factors of production be kept to a minimum. Because of low wages, as well as the physically excruciating, unhealthy and dangerous nature of agricultural work, a recurring problem for farmers


13 But see Tanya Basok, *Tortillas and Tomatoes: Transmigrant Mexican Harvesters* (Montreal & Kingston: McGill-Queen’s University Press, 2002) [Basok, *Tortillas and Tomatoes*] (arguing farm labour migration occurs not necessarily because of cheap labour but “captive labour” as, to put it simply, the natural environment dictates the picking and production schedule. The cheap labour rationale, contends Basok, is based on the outdated notion of the family farm); David Griffith, “Peasants in Reserve: Temporary West Indian Labor in the U.S. Farm Labor Market” (1986) 20:4 International Migration Review 875 at 881 (“Coming from poor nations (...) West Indians constitute a willing, reliable, and highly docile labor force. Most importantly, the West Indians constitute a captive labor force: they are certified to work for a single apple or sugar company and they have no freedom to move on to other, subjectively better jobs (...) the primary reason for their desirability is that they are captive”). A commentator in the United States has argued that the corporatization of farming may present union organizing opportunities for farm workers. The accumulation of capital and other assets by corporate farms will allow the pool of workers to reach a critical mass at these farms from which union mobilization efforts can be launched. Rebecca Clarren “Got guilt?” Salon.com (27 August 2004), online: Salon.com < http://www.salon.com/news/feature/2004/08/27/dairy_farms/index_np.html>.

14 As one worker stated to me: “The boss has lots of work but little money.” In 2004, the standard wage for migrant farm workers in Ontario was just over seven dollars. While this rate surpassed Ontario’s general minimum wage rate of $6.85 (a rate that went unchanged throughout the nearly ten year reign of the Mike Harris neo-conservative regime), both rates fell (and continue to fall) far below a living wage. HRSD sets the agriculture wage rate on an annual basis with, according to critics, little explanation on how they make their assessment.

15 Kimberly Knowles points out that all but four of the thirty Jamaican workers she interviewed complained about the strenuous nature of farm work in Canada. Knowles, *The Seasonal Agricultural Workers Program in Ontario: from the Perspective of Jamaican Migrants* (M.A. Thesis, University of Guelph, 1997) [unpublished] at 73-75. The work can
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has been retention of workers, particularly during the harvest or peak season. Since domestic workers have not as a rule satisfied the labour needs of the agricultural industry from as early as the First World War, non-domestic labour has been recruited to do so. To facilitate the employment of workers from the English-speaking Caribbean, the Canadian state reversed its immigration policy in the late 1960s to reflect, formally at least, a willingness to consider the entrance of Caribbean peoples into Canada.

"No Chains Around My Feet, But I’m Not Free"
The exploitation and marginalization of seasonal agricultural workers is well documented. In addition to widespread employer abuse, researchers have found that the SAWP imposes politico-legal constraints on workers. The also be deadly. In August 2002, for instance, Ned Livinston Peart, a Jamaican migrant worker, was crushed to death by a 12000-pound kiln of tobacco on a farm in the Brantford Ontario area. A coroner’s inquest has not been called into Peart’s death despite vehement calls from family members and activists. In other respects, the Ontario College of Family Physicians released a report linking the use of pesticides to a number of forms of cancer and other serious illnesses. A principle finding was that exposure to agricultural chemicals on the job may lead to adverse reproductive effects, including birth defects and fetal death. See Systematic Review of Pesticide Human Health Effects, (2004), online: Ontario College of Family Physicians <http://www.ocfp.on.ca>. For a historical look at the dangers of farm work see Joy Parr “Hired Men: Ontario Agricultural Wage Labour in Historical Perspective” (1985) 15 Labour 91.

17 Calls for the use of Caribbean workers on Canadian farms began as early as 1947. These calls originated from two sources, Commonwealth Caribbean governments (along with the United Kingdom High Commissioner in Canada) and Ontario farmer and food processor organizations and their Members of Parliament. See Satzewich, supra note 12 at 146.


20 These constraints come from various sources. There are limitations (and inclusions) by way of statute and public policy, which I address below. In Canada, migrant farm workers are governed by a specific contractual agreement with employers, provincial governments, the Canadian federal government, and foreign governments. There are distinct agreements in place for workers from the Commonwealth Caribbean and for workers from Mexico. The standard form agreement covers eleven areas including: the scope and period of employment; lodging, meals and rest periods; payment of wages; deductions from wages; insurance for occupational and non-occupational injury and disease; maintenance of work records and statement of earnings; travel and reception arrangements; obligations of the
program circumscribes workers' labour market mobility. Workers must obtain permission from their employer to seek employment elsewhere in the farm produce sector, and they are not permitted to work outside of this sector. The program also grants employers the power to repatriate workers. Employers need not justify the repatriation decision. Workers are not only denied the opportunity to contest the decision, they are required to cover the return travel expenses.

Migrant farm workers encounter marginal and uneven labour standards and workplace protections. In Ontario, for instance, workers are partially protected under the Employment Standards Act and altogether excluded from occupational health and safety protection. With respect to benefits under the Canadian welfare scheme, migrant workers pay into government social assistance programs in their “host” country, namely Employment Insurance and the Canada Pension Plan, but they are consistently denied the benefits of such programs.

In other respects, the SAWP narrowly defines the scope of migrant worker interaction with host communities. The program mandates that workers live on or near their farms, which means they remain separated from their families for considerable periods of time—potentially spending more time in receiving countries than in sending ones. Despite many of these workers earning at least a decade of service on Canadian farms, and some

employer; obligations of the worker; premature repatriation; financial undertakings. Because the larger point of this paper is about “legal consciousness” I do not evaluate the specifics of these agreements. For a cogent, albeit slightly outdated, look at the SAWP contracts see Andre, supra note 12. An interesting provision of the Agreement that might speak to the validity of the notions unfree labour and captive labour is the formalized right of employers, “where the urgency to finish farm work can not be delayed”, to seek the consent of workers to postpone the one day of rest (an entitlement after six consecutive days of work) “until a mutually agreeable date”. A copy of the Agreement can be found on the HRSD internet site, see online: <www.rhdc.gc.ca>.

Seasonal agricultural workers fall under provincial jurisdiction with respect to labour regulation. The regulatory frameworks differ (sometimes drastically) across provinces.

The Act excludes migrant workers from coverage for hours of work, daily rest periods, weekly/bi-weekly rest periods, eating periods, overtime; and provides coverage for termination notice/pay, and pregnancy, parental, family medical and emergency leave.

In June 2003, the United Food and Commercial Workers of Canada (UFCW) initiated an action against the province of Ontario on the basis that the exclusion of farm workers from Ontario’s Occupational Health and Safety Act violates the equality rights provision of the Charter of Rights and Freedoms. The Ontario government has recently announced plans to amend the regulations to extend health and safety protection to some farming operations (by June 2006).


Employers must provide workers with living accommodations without cost. These accommodations are subject to inspection by officials from the Ministry of Health. Further, the employer is required to provide meals for workers, paid for by the worker, or to provide “cooking utensils, fuel, and facilities without cost” where workers prepare their own meals.
earning upwards of three decades, they are not employed in citizenship-track positions. Formal procedures are not in place to allow migrant workers to apply for landed immigrant status with special recognition of their years of service or residency in Canada.26 An important basis of the exclusionary nature of the SAWP is the legal distinction between citizens and landed immigrants on one hand, and “non-immigrants” on the other.

The imposition of politico-legal constraints has led Satzewich to characterize migrant farm workers as “unfree labour.”27 A derivative of the Marxian comparative analysis of capitalist versus non-capitalist productive relations, unfree labour “refers to relations of production where direct political/legal compulsion is used to acquire and exploit labour power, or where labour is constituted as the private property of another and therefore

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26 Interestingly, female domestic migrant workers entering under the auspices of what is now called the Live-In Caregiver Program have won the opportunity to apply for permanent residence status after two years of service in Canada (within three years of their arrival in Canada). Researchers have shown that the advantages of permanent residence status have quite often eluded female domestic workers in Canada. See e.g. Daiva K. Stasiulis & Abigail B. Bakan, Negotiating Citizenship: Migrant Women in Canada and the Global System (New York: Palgrave, 2003).

27 In Satzewich’s words: “The condition of unfreedom derives from the inability to circulate in a labour market (indeed the absence of a labour market), the inability to determine to whom one must provide surplus labour and the inability (or lack of necessity) to enter the market to purchase commodities for the reproduction of the capacity to work.” Satzewich, supra note 12 at 42. As well, the denial of the opportunity to permanently settle in Canada also constitutes a defining characteristic of unfreedom (ibid, at 107). Some workers employ identical language to describe their situation on Canadian farms. “In my mind, slavery has not yet disappeared”, states one Mexican tomato picker in Leamington Ontario. The worker made these comments in the course of the 2003 documentary entitled, “El Contrato”. The documentary, directed by Torontoonian Min Sook Lee, and produced by the National Film Board of Canada, examines the relationship between workers, growers and community members in Leamington Ontario—one of North America’s largest greenhouse growing communities. Local activists also support this contention, openly employing terms such as “slave labour” and “indentured servitude” to refer to the role that migrant workers play in Ontario’s produce industry; and, describing the SAWP as a “form of slavery.” Interview of Chris Ramsaroop (30 November 2003). Ramsaroop is a co-founder of Justicia For Migrant Workers (J4MW), a group of Toronto area activists that function to provide assistance to seasonal agricultural workers as well as to advocate for legal and social reform on issues related to migrant workers. J4MW is the only group of its kind in Ontario, and operates the only Canadian Internet site dealing with migrant worker issues. See online: J4MW <http://www.justicia4migrantworkers.org/>. Employers also employ this language. See e.g. El Contrato; Sarah McGregor “A Program That Works” Embassy (1 September 2004), online: Embassy <http://www.embassymag.ca/html/index.php?display=story&full_path=/2004/september/1/mcgreg3/> (citing Laurent Cousins, the vice president of Paul Cousineau & Fils Inc, a broccoli farm in Montreal, in reference to the seventy-two workers employed at the farm: “It’s like having 72 dependents with me”). Similar claims have been made about the employment of illegal immigrant workers in the United States. See the three-part special report of the Palm Beach Post “Slavery is not just the shameful stuff of history books—not in Florida” (December 2003), online: Palm Beach Post.com <http://www.palmbeachpost.com/ hp/content/moderndayslavery/index.html?track=mb>.
forms part and parcel of the means of production."\textsuperscript{28} Highly contentious both within and outside Marxian scholarly circles, the notion of unfree labour has undergone intense scrutiny.\textsuperscript{29}

Tanya Basok, a sociologist studying the plight of Mexican migrant farm workers in Canada, forcefully argues that the notion of “unfree labour” lacks sufficient explanatory power.\textsuperscript{30} In constructing an artificial dichotomy between free and unfree,\textsuperscript{31} the notion falls short on three fronts. First, unfree labour obscures the complexity of the migrant worker-farmer relationship, which is based on a mixture of economic compulsion and politico-legal constraints imposed on workers.\textsuperscript{32} Second, the notion problematizes labour on a national level, an outdated and confining approach as the experience of migrant labourers transcends individual nation-state boundaries. The same worker could be free and unfree—depending on employment circumstances at home and away. Third, unfree labour neglects human agency or “the degree of choice the worker has to enter and remain in the circumstances that render him/her unfree.”\textsuperscript{33}

Despite the “freedom” granted in “mature” liberal capitalist democracies to workers to enter into and exit out of contractual relations of employment, employers still gain the consent of workers to exploitative conditions.\textsuperscript{34} In Basok’s view, it is important to explore the mechanisms by which employers gain that consent. Basok points to the paternalistic role of farmers as one such mechanism and to workers “ignorance of the prevailing labour standards” as another.\textsuperscript{35} This analysis concerns itself with the latter

\begin{thebibliography}{9}
\bibitem{Sat} Satzewich, \textit{supra} note 12 at 42. See also Satzewich, “Unfree Labour and Canadian Capitalism: The Incorporation of Polish War Veterans” (1989) 28 Studies in Political Economy 89; Robert Miles, \textit{Capitalism and Unfree Labour: Anomaly or Necessity?} (New York: Tavistock, 1987); Ellen Wall, “Personal Labour Relations and Ethnicity in Ontario Agriculture” in Vic Satzewich, ed., \textit{Deconstructing A Nation: Immigration, Multiculturalism and Racism in '90s Canada} (Halifax: Fernwood, 1992). The term unfree labour is used in contrast with free or wage labour which, in Marxian terms, refers to mere economic compulsion. Marx did not actually employ the term in his work.
\bibitem{Ibid} \textit{Ibid.} at 196.
\bibitem{Ibid} \textit{Ibid.}
\bibitem{Ibid} \textit{Ibid.} at 194. See also Knowles, \textit{supra} note 16 at 30.
\bibitem{Friedman} For a searing attack on the capitalist notion of freedom that was so freely perpetuated in the work of neo-classical economists like Milton Friedman see C.B. Macpherson, “Elegant Tombstones: A Note on Friedman’s Freedom” in \textit{Democratic Theory: Essays in Retrieval} (New York: Oxford University Press, 1973) 143.
\bibitem{Basok} Basok, \textit{supra} note 30 at 218. See also Basok, “Post-national Citizenship, Social Exclusion and Migrant Rights: Mexican Seasonal Workers in Canada” (2004) 8:1 Citizenship Studies 47 at 50 [Basok, “Post-national Citizenship”] (arguing “[t]o formulate claims individuals and groups need to understand that they are denied legal rights and that extant legal or human rights frameworks make it possible for them to seek redress. These individuals and groups also require communication skills to translate their understanding

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mechanism of consent. Basok implies that, as framed in positive terms, increased awareness of the established workplace regulatory regime and ensuing rights would allow migrant workers to resist, or at least begin resisting, the exploitative nature of farm working conditions in Canada.Crudely put, the assertion is that legal knowledge constitutes power.

The idea that legal knowledge is power amounts to, in part, a straightforward empirical claim about the relative faintness of migrant farm workers' sensibilities or awareness about their legal entitlements. I have set about to explore the empirical claim through the use of qualitative research methods. Thus far the project has incorporated both naturally occurring data, through observation of work and community interaction, and generated data. The preliminary findings seem to show that, apart from a lack of knowledge about the specificities of legal entitlements guaranteed under the Ontario labour law regulatory regime, Caribbean migrant workers acknowledge the inadequacy of the prevailing legal system and their dissatisfaction with labour conditions. I develop this argument below. However, the point now is to set up an explanation for the discrepancies of the oppression into demands for justice using the language that is understood and accepted by those who deny them equal treatment (...). Some groups of migrants, by virtue of their exclusion from the host society, may lack linguistic skills, knowledge of their legal entitlements, mechanisms required to access benefits, or support from sympathizers, to be able to claim their rights") [original emphasis].

For a discussion on paternalism see e.g. Basok, Tortillas and Tomatoes, supra note 14; Cecil & Ebanks, supra note 19.

I must stress that this qualitative research is not yet finished. It has been delayed by two central factors. First, access to workers who are openly willing to discuss their experience in the SAWP has been difficult. Even fewer workers are willing to discuss their daily acts of defiance and resistance. Second, the preliminary results have raised myriad theoretical challenges. In particular, workers bring with them legal sensibilities formed in their home societies, and in turn these sensibilities are re-shaped in Canada. Legal scholars (broadly defined) have done little to examine these "transnational" issues to date, and a reliance on social scientific approaches to transnationalism presents complex conflicts and challenges for the legal researcher.

The primary method of data collection, generated data in the form of group discussions, was conducted at the Root farm on 26 October 2003 in the Holland Landing area. Holland Landing is the home of the Holland Marsh, the Dutch farming settlement at the heart of Ontario’s produce industry. I met with at least eight Jamaican migrant workers, but had extensive discussions over several hours with Clark, George, and Adam. I am deliberately vague about the exact location of the farm to ensure the anonymity of the workers interviewed. I have changed individual’s names, and the name of the farm, also out of respect for these workers. In addition, I have conducted in-depth interviews with activists working on migrant worker issues. Finally, participant observational research was conducted at three J4MW meetings in 2003 and 2004.

To be clear, Basok acknowledges this point. Basok also describes an incident during the course of research interviews of Mexican migrant workers which supports the view that workers likely know little about their legal entitlements. On this occasion, Basok and research assistant Nicole Noel were “bombarded” with questions about legal rights by workers. The pair later conducted a legal education session in which about 200 workers participated. They also arranged for representatives of the Occupational Health Clinics for Ontario Workers to conduct an information session. Basok, “Post-national Citizenship”, supra note 35 at 52-53.
between the view that legal knowledge is power and these new, albeit tentative, findings.

The legal knowledge is power assertion relies on not just an empirical but also theoretical claims about law's role in society. Specifically, the assertion collides with "critical" theoretical insights from the study of legal consciousness and knowledge. This presents, in my view, an intriguing opportunity for the application of legal consciousness studies.

To assert that legal knowledge is power is to take for granted that: (i) the educative process of learning about law and its potential, ultimately results in positive social outcomes—namely, successful assertions of workers' rights claims; (ii) the actions and inactions of individuals (in this instance migrant workers) are not informed by an understanding of the relative efficacy of law (namely, labour standards) to produce desired social outcomes. A critique of these twin assumptions reveals deficiencies in the legal knowledge is power assertion.

Legal Education & Workers

The first assumption adopts a far too straightforward account of the relationship between legal knowledge and desired social outcomes, or conversely legal ignorance and acquiescence. Such an account lends itself to reinforcing liberal values and perspectives related to the significance of legal knowledge in capitalist societies. The second section of the analysis confronts these liberal tendencies through an exploration of the history of legal consciousness studies. In particular, the discussion hones in on the constitutive paradigm on legal consciousness. Constitutive theorists have sought to transform the study of legal consciousness to attend explicitly to law's role in shaping the daily activities and forms of resistance of individuals not trained in law. Far more nuanced and intricate than previously portrayed, the relationship between legal knowledge and the successful assertion of legal rights is, in constitutive terms, complicated by an individual's understanding of law's utility.

Law's Efficacy & the Action/Inaction of Workers

The second assumption falls short in accounting for the role of law in influencing the actions and tactical forms of resistance present in the daily lives of individuals. Here, again, the insights of the constitutive paradigm are pertinent. Resistance, as constitutive theorists note, is shaped by an individual's perceptions of the efficacy of law. The assertion that legal ignorance amounts to consent or acquiescence—to return to its original form—misses the crucial function that understandings of law take on in the formulation of everyday struggle. Ignoring for a moment questions about, for lack of a better word, the validity of those perceptions, the constitutive paradigm on legal consciousness provides important insights for scholars interested in the intersecting roles of worker action and inaction, and law.

But questions about validity ought not be ignored forever. For law does not just shape consciousness, it serves other functions integral to the
furtherance of capitalist society. In particular, law forms the background rules that shape and sustain capitalist relations. It is important then to account for these rules as they, among other things, privilege the claims and actions of certain claimants over others. In the context of workplace relations claims supported by private property are privileged at the expense of competing claims. There is a need to, in normative terms, entertain questions surrounding an individual’s legal consciousness and its reliance on capitalism’s background rules.\(^4^0\)

In this sense, the third section of the analysis attempts to modify the study of legal consciousness. The balance of the paper, then, aspires to sharpen our theoretical perspective on legal consciousness as it relates to seasonal farm labourers, and to bring the focalized perspective in line with critical questions about the legal-structural impediments to the legal consciousness, action and inaction of these workers.

**Legal Consciousness Studies**

**Historical Development**

The notion of legal consciousness has transitioned through three definitive epochs. The study of legal consciousness initially developed within the framework of liberal legalism. Commonly associated with the work of Ronald Dworkin, liberal legalism served as the dominant paradigm in the legal consciousness discourse until the late 1970s. Dworkin, perhaps liberal legalism’s best known and most articulate backer, fixed the understanding of legal consciousness to interpretations of “the law” made by jurists. Liberal legal theorists accepted that ultimately “[l]aw is an interpretive concept”: “[j]udges should decide what the law is by interpreting the practice of other judges deciding what the law is.”\(^4^1\)

In liberal terms, to sum up, legal consciousness equates to a legal professional’s understanding of what judges say the law is.\(^4^2\) Note that the liberal view rests on the assumption that legal knowledge constitutes power or the successful assertion of legal claims.

In the late 1970s, scholars predominantly housed in the legal academy who were critical of liberal legalism took up the cause of exploring the gap or chasm between, to borrow Sarat et al.’s words, “the bold promise of [legal] doctrine and the painful shortcomings of reality.”\(^4^3\) Critical legal

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\(^4^0\) I believe that by taking seriously questions about the relationship between legal consciousness and the structural parameters of law, we open up important possibilities for legal activism. The task is to foreground law’s role as background rules; that is, to bring them into the consciousness of workers and activists alike.


\(^4^2\) Dworkin, *ibid*.

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scholars, or Crits, of whom Karl Klare and Duncan Kennedy were leading exponents, re-formulated the study of legal consciousness to confront the supremacy of liberal legalism in American law school training, and legal scholarship and practice. Although Crits were swayed by myriad theoretical perspectives,44 in one respect they loosely followed the Marxian tradition.45 Crits adopted the notion of ideology and the accompanying idea of reification to explain the chasm between law’s promises and reality.

Regarded as the common sense understanding that shapes people’s views of the world, ideology was—and still is—employed as a means of assessing the power of ideas to initiate or direct action, specifically the way in which ideas contribute to and conceal power relations.46 The task of legal consciousness research was to “uncover the constellation of assumptions, values and sensibilities about law, politics and justice [legal] texts evince, to reveal their latent patterns and structures of thought (...).”47 Legal consciousness referred “to the constellation of assumptions underlying law and the structures and patterns of thought about law.”48 The critical notion was meant to capture both “conscious and unconscious assumptions and

44 Klare has described his politics as traditional leftist and Kennedy’s as modernism/post-modernism, or MPM. See Karl Klare, “The Politics of Duncan Kennedy’s Critique” (2001) 21 Cardozo L. Rev. 1073 at 1083, especially 1088-1093 [Klare, “Politics”].
45 As Richard Bauman argues, this adherence to Marxian (and Hegelian) philosophy is likely more about “inspiration rather than models strictly to be followed”, see Bauman, Ideology and Community in the First Wave of Critical Legal Studies (Toronto: University of Toronto, 2002) at 44. Klare reiterates these sentiments about Kennedy, noting Kennedy’s acknowledgement of “Marx’s influence” but arguing that “the strand in Marxism looking toward insurrectionary seizure of the organs of state finds no resonance in Kennedy’s work; if anything, it is treated as a dangerous fantasy”, see Klare, ibid. at 1089. The discrepancies between the critical legal understanding of legal consciousness and what might be deemed Marx’s own understanding cannot be explored in detail here. An appropriate starting point for such an exploration might be Marx’s Preface to the Critique of Political Economy. “Consciousness,” as Marx put it, “must be explained rather than the contradictions of material life, from the existing conflict between the social productive forces and the relations of production.” The Marxian legal project underwent a serious revision in the late 1970s and early 1980s. Neo-Marxian critiques adopted the relative autonomy of law thesis as a response to questions about determinism. See e.g. Issac Balbus, “Commodity Form and Legal Form: An Essay on the ‘Relative Autonomy’ of the Law” (1977) 11 Law & Soc’y Rev. 571; Steven Spitzer, “Marxist Perspectives in the Sociology of Law” (1983) 9 Ann. Rev. Soc. 103; Alan Stone, “The Place of Law in the Marxian Structure-Superstructure Archetype” (1985) 19:1 Law & Soc’y Rev. 39; Eric Tucker, “The Law of Employers’ Liability In Ontario 1861-1900: The Search For A Theory” (1984) 22 Osgoode Hall L.J. 213.
values” about law’s role in society held by legal professionals.\(^49\) Moreover, the notion disputed the inevitability of the prevailing legal and social order. Liberal legalism merely stood as one of many approaches to constructing that order.\(^50\)

**Legal Consciousness as Social Construction**

In the 1990s a third variant of legal consciousness studies arose from a socio-legal questioning of the descriptive significance of dominant ideology and false consciousness. Titled new legal consciousness studies, or more aptly the constitutive paradigm by virtue of its' dependence upon “constitutive theory of social action,” this newest take on legal consciousness claims that “ideologies lose their ability to define and organize social life when people start to question the inevitability of ‘the way things are’ and come to recognize the interests that operate to construct such a vision of truth and reality.”\(^51\) With, as they claim, the “collective, widespread rejection of the version of reality offered by the ideology such that it no longer holds sway…an ideology loses its capacity to conceal much of anything.”\(^52\)

From this perspective, ideology “is not a single giant schema that determines how and what people think.”\(^53\) Rather, it is sewn together like a patchwork quilt, appropriately mismatched and conflicting patches of ideals both shaping and shaped by practices.\(^54\) The gaps or “internal contradictions” in the pattern act as important distractions to individuals, and ultimately as a source of law’s hegemony,\(^55\) so long as they guide the “reworkings” of everyday social relations, setting the parameters of social discourse and practices.\(^56\)

While liberal legal apologists cling to the belief that legal doctrinal interpretation (performed by jurists) is paramount to an understanding of

\(^49\) Ibid. The relationship between law and society as Crits saw it, was dependent on a more nuanced understanding of “the degree to which law can be a relatively autonomous phenomenon.” See Bauman, supra note 45 at 8. Despite this altered conception of legal consciousness, Crits share a basic understanding of adjudication with liberal legal theorists. In his review of Kennedy’s *Critique of Adjudication*, Klare characterizes Kennedy’s view on adjudication as follows: “Legal texts must be interpreted through legal work. Interpretation is a meaning-creating activity, so that ‘the law handed down’ to adjudicators consists in part of meanings created by prior adjudicators.” See Klare, “Politics”, supra note 44 at 1083. In a partial restatement of the Crit position, Klare notes that “the judge’s personal/political values and sensibilities cannot be excluded from interpretive processes and adjudication” (ibid. at 1087).

\(^50\) See e.g. Kairys, supra note 46.


\(^52\) Ibid.

\(^53\) Ibid. at 1036.

\(^54\) Ibid. at 1040.

\(^55\) Ibid.

\(^56\) Ibid. at 1037.
legal consciousness, scholars of the constitutive paradigm embrace legal consciousness for an alternate reason. They see it as a tool for exploring not legal doctrine or "the rule of law," but rather the role of law in moulding ideologies, action and inaction in everyday life. They contend that legal consciousness touches on the hidden effects of law on people's lives. Law "can be present even when [it] is seemingly absent from an understanding or construction of life events." That is, as one exponent maintains, "[e]ven as 'law' is invoked, not invoked, ignored, and resisted, it is assigned a role in people's everyday lives."

The constitutive approach, therefore, strives to widen the space for socio-legal interrogation of varying forms of individual resistance that are shaped and formed out of perceptions about the efficacy of law in initiating desired social outcomes. Concerned not with the question of which forms of daily resistance enjoy political value or praxis—an inquiry commonly attributed to Marxian analyses—this strand of legal consciousness research aims to refine understandings of human agency vis-à-vis marginalized individuals everyday dealings with political power and domination. Within the routine or mundane activities of an individual, constitutive theorists find differing forms of resistance. They uncover "not only masked resistance to power and domination but also unarticulated, taken-for-granted acts and agreements that enact power while constituting normal social interaction." In acknowledging these taken-for-granted acts and inactions, we are "reminded that 'our practical daily activity contains an understanding of the world—subjugated perhaps, but present.'"

The tactical forms of resistance mounted by "ordinary people" are important, even though they are ignored, because "[f]or most of those without power or position, the only alternative to conformity is resistance:

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57 Bauman finds the critical legal studies approach offers an important benefit. A focus on legal consciousness of elites does hold some promise "in so far as it parallels explanations of change and resistance to change in the history of scientific disciplines. It could illuminate how certain elite conceptions of justice and of the very notion of legality have managed to hold the field against alternative conceptions based on different political or economic premises." In essence then, it "demonstrate[s] the conservative nature of what passes for legal scholarship." See Bauman, supra note 45 at 49-50.


59 Ibid.

60 Ibid. at 1060. See also Patricia Ewick & Susan S. Silbey, "Conformity, Contestation, and Resistance: An Account of Legal Consciousness" (1992) 26 New Eng. L. Rev. 731 at 736 [Ewick & Silbey, "Conformity"], "[t]o know the uses of law, we need to know not only how and by whom the law is used, but also when and by whom it is not used.

61 Ibid. at 748. "(...)" [P]recisely when an act becomes transformed from mundane practice to rebellious praxis is an empirical question, and the effects of an act may not be visible until some future date" (ibid. at 748-49).

62 Ibid. at 732.

63 Ibid.

64 Ibid. at 742-43.
poaching, appropriation, or silence. Legal consciousness is thus socially constructed. Researchers must empirically (re)discover legal consciousness by probing the day-to-day activities of “ordinary people” in search of the ways in which law is invoked, avoided and resisted.

At its core, new legal consciousness studies holds that legal professionals—lawyers, judges and legislators, as well as law professors—interpret legal doctrine differently from non-law types. Lesley Jacobs notes that two fundamental assumptions about legal consciousness develop from this core understanding, differentiating new legal consciousness from earlier approaches.

Insider-Outsider Dichotomy

The first assumption relates to the dichotomous relationship between legal professionals or insiders, and outsiders. The insider-outsider dichotomy constitutes a transitioning away from the essentialist nature of jurists as lone interpreters of law’s true meaning and function. Reliance on the perspective of legal insiders is seen to understate the significance of non-expert understandings of and experiences with law. Thus, law and society scholars turn to the perspectives of outsiders—“ordinary citizens,” “ordinary people,” the have-nots, the marginalized, the non-law masses, the minorities, the powerless, the excluded etc.—to make sense of law’s place in social relations.

To the extent that constitutive theorists promote a shift in the analytical frame of reference beyond jurists and other legal professionals, they offer a forceful and compelling critique of liberal legal and critical legal studies approaches to legal consciousness. The liberal legal approach focuses too intently and uncritically on the privileged perspective of legal insiders, which has served only to buttress the dominance and privilege of that perspective. The critical legal studies approach, despite its important revision to liberal legalism, focuses more on marginalized perspectives among non-liberal legal professionals than on the perspectives of non-jurists outside the legal academy.

In contrast, the constitutive paradigm calls into question the preoccupation with legal elites. In so doing it exposes some of the values

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65 Ibid. at 747.
66 Ibid. at 736.
67 Jacobs supra note 41 at 63.
68 In Jacobs’ words, “[t]he insider perspective is that of lawyers, judges and other legal professionals. They view legal rules and procedures from inside the legal system, as repeat players in the system. Practically everyone else has an outsider perspective” (ibid. at 63).
69 Ewick & Silbey, “Conformity”, supra note 60 at 736.
70 Ewick and Silbey, and Nielsen, employ the term “citizen.” I find the use of the term troubling and problematic particularly in the context of the relevance of new legal consciousness studies to migrant farm workers who are not Canadian citizens.
71 The use of the term “ordinary” is also problematic. I employ the term in quotations to recognize that it takes on a particular meaning, in contrast to legal professionals, in the new legal consciousness studies literature.
and biases implicit in prior theoretical approaches to legal consciousness and to what might more generally be termed the disciplining of law. The apathy of liberal legal theorists and to a lesser extent Crits to outsiders and their experiences with law reflects, as Richard Bauman notes, a disciplinary trend towards conservative and elitist interpretations of legal doctrines.\(^7^2\) Resting on the view that critical explorations of the relationship between law and society must take seriously the experience of non-legal professionals with law, and further their understanding about law and its institutions, the constitutive critique is emphatic. Moreover, the message of new legal consciousness studies is clear. Simply put, the legal consciousness of “ordinary people” is pertinent to socio-legal analysis.

The dichotomization of legal insiders and outsiders presents an important basis on which to expose both the essentialist and elitist tendencies of liberal legal theory. The insider-outsider dichotomy also challenges critical legal studies on this front, noting that Crits have not ventured far from the elitist roots of liberal legal consciousness studies.

Despite the validity of the calls to de-emphasize the insider perspective, there are equally valid questions surrounding the outsider perspective. Indeed, it is one thing for constitutive theorists to advocate de-emphasis and quite another to explain what such an approach might entail. A preliminary question that must be posed to constitutive theorists is: Who fits within the outsider category, and on what basis?

The insider-outsider dichotomy as constructed by constitutive theorists, in my estimation, fails to capture fully the complexity of legal knowledge. The dichotomy turns on the definition of an insider, treating a legal professional’s formal awareness or knowledge of law as the lone source of inequality in social relations. But there are myriad real-life examples where the categorical lines blur. With respect to “insiders,” there are questions about whether and how ideological affiliations blur the distinctions. While judges may share a more unified ideological commitment to core liberal legal values, Canadian legal scholars are ideologically fragmented in ways that challenge the idea of a singular or exclusive insider perspective.\(^7^3\)

The same could be said about individuals deemed outsiders. We might also point to specific instances where work tasks performed by, for example, corporate executives, legal administrative assistants, or social justice activists, often require a more than novice understanding of the legal system. The insider and outsider categories are far more fluid and contentious than portrayed. Constitutive theorists provide an incomplete explanation of the

\(^7^2\) Supra note 57.

\(^7^3\) The discipline is so fragmented that some scholars have even questioned whether non-liberal perspectives on law have a legitimate place in legal professional education at all. See, for instance, the call from then Duke University Law School Dean Paul D. Carrington to banish critical legal studies from the legal academy, and for Crits to resign from their academic positions in law schools, Carrington, “Of Law and the River” (1984) 34 J. Legal Educ. 222. These close-minded and intolerant views continue to haunt legal education in both Canada and the United States.
composition of the categories. To the extent that new legal consciousness studies are a challenge to the centrality of legal expert knowledge, any ambiguity might in fact reinforce the essentialist and elitist vision of legal professionals.

Although a source of difficulty for the constitutive paradigm on legal consciousness, arguments based on the blurring of distinctions likely do not prove fatal. An individual’s legal fluency or similarly their access to lawyers and other legal knowledge brokers, contributes to the inequality between the haves and have-nots. The insider-outsider duality, therefore, points to the accessibility of legal knowledge as a factor contributing to the unevenness of social relations.

A more decisive criticism develops around the intra-relationship of outsiders. On what basis do we distinguish between specific groups of outsiders? How, if at all, does law and legal consciousness factor in? And, how do citizenship and “race”/racism enter the analysis? Simply put, all outsiders are not created equal. The challenge of explaining the particular differences between outsider groups weighs heavily on the insider-outsider dichotomy. Deeper exploration of these issues opens the door to transnational lines of inquiry. Where do migrant workers, as participants in “home” as well as “host” labour markets, albeit in limited and discontinuous forms, develop their understandings of law’s role in society? Does this transnationalism assist or interfere with workers’ conceptions on the exploitative nature of farm labouring conditions? These questions present significant challenges to the insider-outsider dichotomy.

Consciousness, Not Doctrine

The second assumption identified by Jacobs, that legal consciousness is different from dominant interpretations of legal doctrine, specifically takes aim at Crits’ implicit acceptance of false consciousness. As opposed to regarding the consciousness of non-legal professionals as mistaken when it deviates from legal expert interpretations, constitutive theorists accept that “ordinary people” may interpret law and legality differently. Legal consciousness reflects an individual’s engagement with legal and social forces shaping the world. Because it is fluid, many-sided and ever developing, an individual’s legal consciousness is full of tension and, at times, even contradiction. Notwithstanding this complexity, legal

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75 In Jacobs’ words, “allowing for divergence in interpretations of script [“statutes, treaties, case law”] does not mean that the legal consciousness of ordinary people is necessarily mistaken; this conception of legal consciousness rejects, like much contemporary literary theory, the view that there is one true interpretation of a script and therefore the very intelligibility of the charge that the legal consciousness of ordinary people is ‘false.’” See Jacobs, supra note 41 at 63.


77 Ibid. at 742.
consciousness “has shape and pattern;” it is bounded, depending on context and circumstances, and can be mapped or patterned and, ultimately, organized and understood.

This assumption provides a valuable insight. The approach acknowledges both the significance and complexity of the relationship between law, individual consciousness and action. Law engages with individuals in ways that affect their understandings of, and shape their future interactions with, law and legality. In this respect, law initiates a form of social change, namely a change to individual consciousness, which escapes rigorous consideration in debates about law’s transformative social potential. The social change brought on by law’s impact on an individual is intimate and personal. The approach stresses the “significant creative, constructive capacity” of social actors as they manoeuvre institutional obstacles. We need to find solace in the fact that, despite repressive institutional arrangements—the inequality, devastation and misery wrought in the name of the free enterprise system—individual struggle persists.

The desire to bring into legal analysis accounts of everyday life represents the crucial insight of new legal consciousness studies. The turn to the routine and mundane, if not aimed at spurning critical insights from the episodic and eventful, provides an opportunity to fill crucial gaps in our understanding of how law operates to shape individual behaviour. Indeed, scholars operating with a structuralist slant have conceded the exclusion of everyday relations in pursuit of detailed characterizations of activities that shaped legal regimes. Legal consciousness becomes a lens through which law’s day-to-day functioning can be appreciated. To acknowledge law’s impact on an individual’s “symbolic worldview,” however, is not to wholeheartedly condone the constitutive approach.

The Role of Ideology
Problems with the first two assumptions aside, new legal consciousness studies rest on an additional assumption not expressly acknowledged by Jacobs. This third assumption, relating to ideology and its explanatory potential, appears far more troubling. Recall that the constitutive critique of dominant ideology hinges upon the qualitative discovery that individuals question the inevitability of the way things are. This questioning, according to the critique, undermines the descriptive value of ideology. The difficulty

78 Ibid.
79 Ibid. at 741.
80 See e.g. Byron Sheldrick, Perils and Possibilities: Social Activism and the Law (Halifax: Fernwood, 2004).
82 See e.g. Judy Fudge & Eric Tucker, Labour Before the Law: The Regulation of Workers’ Collective Action in Canada, 1900-1948 (Toronto: Oxford, 2001) at 15 (“our focus on legal institutions [represented in a concentration on “strike-related and trade union activity”] inevitably tends to obscure the texture of daily life against which class relations are played”).
with this analysis is that it assumes the enquiries penetrate beneath surface-level understandings of the relationship between law and capitalism. The qualitative findings are accepted without taking seriously the potential implications of their own contention about the spaces between ideologies.

They rightly point to the empty spaces as a source of law’s hegemonic power. By their own admission, however, these spaces work to divert attention away from the pivotal role law assumes in naturalizing substantive inequalities in social relations. In the terms employed earlier, the gaps in the pattern of the patchwork quilt of overlapping ideologies prevent direct and meaningful confrontations with law’s indispensable role in the preservation of capitalist relations. To sum up, in questioning the value of the notion of dominant ideology constitutive theorists cling to a highly contentious empirical claim. More decisively, they reject the explanatory power of dominant ideology without offering a credible account of the relationship of daily social action to the fundamental structural parameters in which that action occurs.

**Revising “New Legal Consciousness”**

Law takes on myriad functions in liberal capitalist societies. The constitutive paradigm rightfully stresses law’s role in constructing consciousness and, in turn, the role of consciousness in shaping future interactions with and without law. Absent from this account, however, is acknowledgement of the functioning of liberal law to ensure the continuation of capitalist relations. Insofar as it overlooks law’s maintenance function, new legal consciousness studies offers a fragmentary analysis of law and capitalism.

The relationship between liberal law and capitalist relations rests on, according to Alan Stone, law’s underlying or core values. Termed “essential legal relations,” private contract and property, and credit, delineate the form of relations in liberal capitalist societies. Because it is designed to uphold capitalist relations, law both legitimizes capitalist rule and contributes to

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83 It is significant to note that the idea of overlapping and competing ideologies is supported in neo-Marxian accounts. See e.g. Stone, supra note 45 at 44 (explaining Pashukanis’ understanding that capitalist law both reinforces an ideology that embraces individualism, private autonomy and material self-interest on one hand, and mutual obligation and obedience to external authority on the other).

84 Ibid. at 48-54. In Harry Glasbeek’s words, “(...) it is not necessary that the constructs of private property and private contract have to have a specific meaning or content. Indeed, it would be ahistorical, acontextual, i.e., profoundly anti-Marxian, to hold that the meaning and content of these constructs be written in stone. Historical struggles and material conditions will dictate the scope of these constructs (...)” See Glasbeek, “Class War: Ontario Teachers and the Courts” (1999) 37:4 Osgoode Hall L.J. 805 at 820.

85 “To assert that liberal law plays a central role in the maintenance and perpetuation of capitalist relations of production,” as Glasbeek asserts, “is not the same as saying that law automatically reflects the needs of capitalism”. This, according to Glasbeek would be “too crude a view of the way in which law works.” Instead, “[l]aw does more than reflect the fundamental needs of capitalism, in part because it is not clear what the precise scope of the needs its has in any one place at any one time”, see Glasbeek, ibid. at 819. For an elaboration of the relative autonomy of law thesis see Eric Tucker, supra note 45.
Legal Consciousness and Resistance

the naturalization of material conditions. Through essential legal relations, law also assists in maintaining social conformity. In serving these ends law privileges certain claims over others in each of the essential relations.

This privileging is observable in workplace relations. In terms of private contract, workers enter into an agreement to sell their labour power to owners in exchange for wages. Liberal law facilitates the wage-labour power transaction and renders the exchange lawful or legitimate. This not only makes the exchange one of equivalence, but also obscures a fundamental feature of capitalism: the production for value instead of use. With respect to private property relations, law privileges private property owners' claims, which imposes reciprocal duties on workers as opposing non-property claimants. Employers, on the whole, enjoy the momentum in workplace relations.

Generally speaking, in capitalist relations of production employers not workers have wielded overarching control over the particulars of labour power deployment. Owners have prodded and elbowed workers into "sharp legal objects" (to borrow and re-phrase Stephen Wexler’s words)—and into more and more precarious positions (of employment). That said, workers have refused to go along without objection, proving time and again that, as Herbert Aptheker the renowned U.S. historian of slave rebellions once put it, "[r]esistance is the core of history, not acquiescence." Herein lies the significance of ascertaining the legal consciousness of marginalized individuals. The challenge for researchers preoccupied with the relationship between law, consciousness, and resistance, lies in probing both consciousness and resistance to determine whether, and to what extent, an individual embraces, relies on or resists essential legal relations.

Missing from the constitutive approach is an attempt to evaluate the interaction between an individual’s taken for granted action and inaction related to law and the values that underlie liberal law; that is, the relationship between legal consciousness and essential legal relations. In a question: Do individuals contemplate the cherished nature of liberal law’s underlying values?

While the legal consciousness of “ordinary people” should be appreciated as an indication of disguised acts of defiance, students of legal consciousness must expect more than just the retrieval of routine daily

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86 Law does this not only by supporting the tenets of liberalism “and democratic forms within the framework of those liberal tenets,” but by facilitating the turn to markets (and “market transactions”). See Glasbeek, ibid, at 818.
87 Stone, supra note 45 at 60.
88 Fudge & Tucker, supra note 82 at 10-11. See also Adrian A. Smith, Industrial Democracy and Industrial Legality in Canada: A Critique of Communitarian Corporate Law (LL.M Thesis, Osgoode Hall Law School, 2005) [unpublished].
89 Cited in Michael Craton, “Proto-Peasant Revolts? The Late Slave Rebellions in the British West Indies 1816-1832” (1979) 85 Past Present 99. Owners struggle to contain and suppress workers’ acts of resistance to the extent desired for the most efficient extraction of surplus value.
90 Balbus, supra note 45 at 582-83.
activities. In normative terms, probing one's legal consciousness ought to constitute an examination of resistance to essential legal relations: how and to what extent an individual embraces, invokes or discards freedom of contract and private property as characteristic of the functioning of liberal law. We will only begin to appreciate the relationship of law and capitalist relations of production when forms of resistance are situated in relation to the challenge posed to the capitalist system of production and the supporting liberal legal framework.

**Applying Legal Consciousness to Migrant Workers**

*Migrant Agricultural Workers, Law & Resistance*

Employing the modified legal consciousness approach developed above, and drawing on my ongoing qualitative research on Caribbean seasonal workers in Ontario, the analysis now returns to the legal power is knowledge assumption embedded in some of the literature on seasonal agricultural workers. That research examines workers’ consciousness about the workplace regulatory regime and ensuing rights. The constitutive paradigm of legal consciousness approach is adopted but not without an important revision. Whereas the constitutive paradigm refrains from assessing individual legal consciousness in relation to the essential legal relations which privilege the claims of private property owners and naturalizes capital-labour inequality, my approach starts the task.

To be clear, the aim is not to dispute that migrant farm workers are ignorant of the formal legal entitlements provided for by the workplace regulatory framework in Canada. This finding seems plausible intuitively and is backed both anecdotally and by more general empirical research on non-agricultural workers. Instead I argue that, in contrast to the knowledge is power assertion, an interpretation that aligns with liberal legal consciousness, this represents only part of the story about the exploitative nature of farm labouring in Canada. Indeed, my interaction with Caribbean farm workers fundamentally shifts the storyline.

Contained within worker stories about their work experiences on Southwestern Ontario farms we find understandings about the efficacy of law and the wider regulatory regime. They acknowledged the need and even desire to earn wages through the SAWP. Yet they voiced several complaints about their working arrangements. They expressed their desire to earn a greater wage because of the job-related hazards and risks they endure while serving on Canadian farms. Workers objected to the lack of severance pay—or redundancy as it is more commonly referred to in the Caribbean—to offset the seasonal loss of employment. Some spoke about job-related safety and health issues and reported on cohorts who encountered these difficulties. They also spoke about the lack of satisfactory rest periods during the workday, and the desire of employers to increase the workload without adequate financial and temporal compensation. Complaints were also heard
about living accommodations and the lengthy period of separation from their loved ones.

True, workers certainly never referenced specific legal statutes or provisions in these discussions—the one exception perhaps being the direct reference to redundancy. And, they sometimes (but not always) conveyed their responses in less than legally precise or technical language. That said, in their daily working lives in Ontario they encounter various deficiencies in the prevailing regulatory regime. These clear and reasoned observations mark the desires of workers to both secure acceptable working conditions and dispose of unwanted obstacles to their desired vision.

Admittedly, these findings are tentative in two respects. First, to the extent that they gloss over the transnational and political economic implications of seasonal farm labour migration greater thinking and theorizing is needed. From a socio-legal perspective, we know very little about migrant workers' experiences in their countries of origin with law and the state, and employers. We have yet to locate discussions on Caribbean migrant workers fully within the historical and political economic context of the Commonwealth Caribbean. The point is not just to raise awareness of the undercurrent of resistance prevalent in the pre- and post-emancipation histories of the Caribbean working classes, but to determine the structural parameters, including legal and political economic ones, which mould that resistance.

In supporting the construction of Black Canadian identity bounded by a particular understanding of the nation-state, law takes on a pivotal role in shaping the disciplinary boundaries of Canadian labour studies. Liberal law imposes politico-legal constraints on migrant farm workers as non-citizens, which in turn legitimizes their exclusion from nation-state confined definitions of "Canadian," or more specifically "Black Canadian"; consequently, legitimizing their exclusion from the study of Canadian labour. As mentioned above, Basok similarly criticizes earlier Marxian political economic studies on migrant labour for adopting a nation-state confined approach. See Basok, supra note 30. In a recent article, Satzewich acknowledges the validity of the transnational critique. See Satzewich & Lloyd Wong, "Immigration, Ethnicity, and Race: The Transformation of Transnationalism, Localism, and Identities" in Wallace Clement & Leah F. Vosko, eds., Changing Canada: Political Economy as Transformation (Montreal & Kingston : McGill-Queen's, 2003) 363.

To say I sympathize with the view that transnational factors complicate the study of seasonal migrant labour is not to advance claims about state sovereignty and disempowerment. We must be careful not to confound transnational insights on the limitations of nation state-bounded analytical approaches with sweeping claims about diminished state sovereignty and the decline of domestic law-making, which derive from current debates over the impact of "globalization" on the state.

I have uncovered three important exceptions: Andre, supra note 12 (drawing on the political economy of labour migration in the historical development of the Caribbean in an analysis of the legal framework governing migrant labour in Canada); Knowles, supra note 16 (locating discussions on migrant farm workers in Ontario within the post-emancipation history of Jamaica); Sherrie N. Larkin, Workin' On The Contract: St Lucian Farmworkers In Ontario A Study of International Labour Migration (Ph.D Dissertation, McMaster University, 1998), (locating labour migration within the post-emancipation history of St Lucia in a discussion of St Lucian seasonal agricultural workers in Simcoe).
Second, the contours of seasonal farm worker resistance are not yet mapped. Currently, there is little scholarly knowledge of the forms of resistance these workers utilize in their daily lives. Fearful of employer retribution, and mindful of familial economic needs, workers are quite reluctant to discuss their acts of rebelliousness on the farm and in the community.

While academic discussions on seasonal farm worker resistance have yet to surface, some indirect and second-hand accounts exist. The accounts confirm that workers are by no means acquiescent in the hyper-exploitative conditions of Canadian farming. Two recognized acts of individual resistance include worker flight and worker slowdowns. Scholars in this field must push to document worker resistance out of deference and recognition to be sure; but also as a means of assisting workers in developing strategies to overcome the opprobrious conditions of employment.

Confronting Essential Legal Relations

Workers’ consciousness about the ineffectiveness of legal systemic entitlements fails to result in meaningful assertions of those entitlements. We must now ask whether workers’ heightened consciousness leads to a questioning of essential legal relations. Recognizing that the deficiencies in our knowledge of seasonal farm worker resistance inhibit the analysis, I merely lay out the broad areas in which future work must probe the relationship between legal consciousness and essential legal relations. Future analyses concerned with the relationship should, with a view to exposing the actual impact of essential legal relations, interrogate the entire regulatory and legal framework erected to facilitate seasonal farm labour migration in both the sending and receiving countries. Here, I stress a few key features of

94 Farmers and government officials in the receiving and supplying nations have noted their concerns about worker flight—using the military acronym, absent without leave or “AWOL.” See Knowles, ibid, at 89-90 (including a statistical breakdown of the number of AWOL cases between 1986-1995. Farmers in the late 1980s saw a spike in the percentage of AWOL cases with 4.2% of all migrant workers in the SAWP in 1988 and 3.8% the following year. By 1995 the percentage had fallen to 1.4%). Moreover, we can draw on the second-hand accounts from activists and others of the actual tactics employed by migrant workers. For instance, J4MW member Chris Ramsaroop notes that workers have acknowledged purposely slowing the pace of work to disrupt the picking process—although he had never heard of workers feigning sickness or destroying crops. See also Basok, “He Came, He Saw, He (...) Stayed. Guest Worker Programmes and the Issue of Non-Return” (2000) 38:2 Int. Migr. 215.

95 From this perspective, future research could contrast the experiences of seasonal workers to the histories of enslaved and indentured agricultural workers throughout the western hemisphere. Slaves in the antebellum era in the United States and in the Caribbean sugar plantation period adopted varying forms of labour resistance, including crop destruction, collective slowdowns and flight. Such an approach would assist in more detailed understandings of how strategies of resistance employed by Caribbean migrant workers were influenced by the ineffectual nature of liberal law, and how old strategies might now be adapted.
the framework in Canada, which, among other things, act as boundaries funnelling worker in/action away from collectivist forms and into individualistic ones.

The SAWP fits into a wider regulatory and legal framework that facilitates the enduring use of temporary, cheap and captive migrant labour. Labour extraction occurs through a framework that splinters the 20,000 or so migrant workers employed through the SAWP into tiny factions, minimizing the potential for their collective assertion of power. The SAWP draws on workers with different national, “racial,” linguistic, familial, and social backgrounds. The framework then, at times quite subtly, exploits the differences—transforming them into formal distinctions.96

The basis for the exploitation lies in immigration law. A formal legal classification distinguishes seasonal migrant workers as “non-immigrants” from Canadian citizens and landed immigrants. The non-immigrants classification justifies, for example, the placing of restrictions on the employment relationship that narrow the opportunities for worker-community interaction. This inhibits the potential for non-immigrant and citizen collective worker organizing and action. More generally, the classification normalizes and legitimizes the differential (read: opprobrious) treatment of those not deemed Canadians or almost Canadians.

In other respects, authority to repatriate workers and to prevent them from changing employers rests in the hands of growers. The formal restriction of migrant workers to the agricultural labour market also fortifies growers’ power over workers. Collectively, the authority granted to employers, whether by direct or indirect means, flows from the prerogative power enjoyed by all employers under liberal capitalism. Underlying this power is the essential legal relation of private property. In the employment relationship we also find the essential legal relation of contract. In liberal legal terms the worker-owner bargain and exchange occurs on an equal and voluntary basis. The exchange is, however, economically coercive on the whole,97 and in the case of the SAWP contract conspicuously so.

Although the Supreme Court has struck down statutory efforts to deny freedom of association rights to agricultural workers as a whole98 in practice the benefits of formal collective bargaining elude migrant workers.99 The

96 The best example of the transformation is the creation of two standard form agreements one that applies strictly to Caribbean migrant workers the other to Mexican workers. This approach downplays the common work and other experiences of Caribbean and Mexican workers.

97 See Macpherson, supra note 34.


99 Kirk Makin, “Farm workers take issue with ‘useless’ law” Globe and Mail (15 March 2005) A9, noting the arguments put forth by UFCW lawyer Paul CavaUuzzo “(...) that a new law passed by the province, the Agricultural Employees Protection Act, is a cosmetic response to the top court’s ruling and provides virtually no genuine rights or protections to the province’s estimated 80,000 farm workers.”
lack of collective bargaining rights contributes to the legal-structural privileging of individual worker action. In contrast, agricultural businesses in Canada have grown and consolidated without similar threats of curtailment.

Differential treatment of agricultural workers under provincial employment standards legislation (including occupational health and safety) is the result of agricultural employee exclusions that originated with the "family farm" model of agricultural production. Whether justifications for agricultural employee exclusions existed under family farming, which seems debatable at best, they are certainly not relevant in the new phase of agri-business consolidation.

In light of the overwhelming power and authority granted to agri-employers, it seems obvious why migrant workers would be reluctant to speak about their acts of defiance. In furthering the process of capital accumulation, the legal and regulatory structure of the SAWP not only brings cheap, captive and economically needy labour to Canada; and diminishes opportunities for collective worker action; it also intervenes in the employment relationship in ways that obscure the operation of private property and freedom of contract in the first place.

Because of the often hidden or disguised operation of essential legal relations, there is the perception that workers consent to the oppressive working environment on Canadian farms. The task for researchers and activists alike is to expose the operation of essential legal relations (and the immigration and other laws which feed essential relations) in the regulatory and legal framework governing seasonal agricultural workers in Canada. The task need not—and should not—be one-sided. The lived experience of migrant workers, in the context of new legal consciousness studies, assumes a crucial role. The study of legal consciousness provides an opportunity for the researcher, worker, and activist, to meet—perhaps for the first time. Legal consciousness studies may assist workers to clarify and strengthen their claims and resistance if it is used, as I argue, to reveal how essential legal relations bring together the inconsistencies in the patchwork quilt of ideologies which characterizes capitalist economic arrangements. It may also assist researchers and activists in their efforts to appreciate the complexities of the migrant worker experience.

Conclusion

Seasonal agricultural workers might be bound in intricate transnational relations in which they experience elements of liberal freedom and captivity, but we must not think they do not rebel against what holds them captive.

101 That is to say, even without the interference of the SAWP and related regulatory and legal intrusions, agri-employers benefit from power and privileges extended through the employment relationship.
How, and to what extent, do their tactics of resistance cope with liberal law’s role as background rules in capitalist relations? The paper does not directly answer this query. But it does point the direction for future research. We must ascertain how and in what ways the daily action/inaction of workers is informed by understandings of law and its efficacy. Future work must delve into and make sense of the strategies of resistance utilized by migrant workers, and tie these strategies to the legal-structural parameters of non-immigrant labour regulation. In this respect, future work could involve comparative analyses of agricultural worker regulation in the colonial context throughout the Americas—including slavery, apprenticeship, and indentureship—and in the “post-colonialist” context.

The new strand of research on legal consciousness has provided some assistance in our effort to understand how law shapes individual assumptions. That approach attempts to shift focus away from the study of the rule of law, presenting an insightful adjustment to conventional legal consciousness analysis. The new approach assists in our understanding of the relationship between law and consciousness insofar as it encourages researchers to probe the assumptions, action, and inaction of marginalized workers. This appropriately complicates earlier approaches to legal consciousness which presented legal knowledge and ignorance as dichotomous, a far too straightforward assessment.

That said, new legal consciousness is narrow and limiting to the extent that it refrains from measuring the level of devotion to essential legal relations within “ordinary” constructions of legal consciousness. The essential relations of private contract and property are evident in agricultural workplaces, and, as we have seen, facilitate the privileging of growers’ claims and interests.

The Marley lyrics that begin this paper speak to the incessant need for self-reflection and self-scrutiny. It is meant to be perpetual and consuming: deeply personal for individuals and constructively critical for a society. We must be willing to hold “our-selves” to the level of critical self-reflection that one day might create the desired conditions of existence for a humane world.

Résumé

On considère que les travailleurs des Antilles du Commonwealth qu’embauchent les producteurs agricoles au Canada en vertu du Programme canadien des travailleurs agricoles saisonniers ignorent tout des normes du travail en vigueur. Cet état de fait constitue non seulement une affirmation empirique concernant l’ignorance et la connaissance du droit, mais aussi une affirmation théorique concernant le rôle du droit dans les relations capitalistes, et surtout la façon dont il façonne les consciences et les comportements. Le cas des travailleurs agricoles saisonniers présente une occasion intéressante d’appliquer les études sur la conscience du droit. En s’appuyant sur les assises de ce nouveau domaine en émergence qui examine la conscience du droit chez les non-juristes, le présent article conteste l’aspect à la fois empirique et théorique de l’affirmation relative à l’ignorance du droit. Les nouvelles études en conscience du droit font l’objet d’une révision importante pour expliquer
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le rôle du droit dans l’énoncé des règles de base d’un capitalisme libéral. En ce sens, cet article ouvre la voie à des études subséquentes sur le rapport qui existe entre la résistance du travailleur agricole saisonnier et le droit.

Abstract

Workers from the Commonwealth Caribbean employed seasonally on Canadian farms through the Canadian Seasonal Agricultural Workers Program are thought to be ignorant of prevailing labour standards. This marks not only an empirical claim about legal ignorance and knowledge, but also a theoretical claim about the role law assumes in capitalist relations, particularly in the ways law shapes consciousness and behaviour. The seasonal agricultural worker context presents an intriguing opportunity for the application of legal consciousness studies. Drawing specifically on the emerging field of new legal consciousness studies, with its emphasis on the legal consciousness of non-legal professionals, the paper contests both the empirical and theoretical aspects of the legal ignorance claim. New legal consciousness studies undergo an important revision to account for law’s role in forming the background rules for liberal capitalism. In this respect, the paper points the direction for future study of the relationship between seasonal agricultural worker resistance and law.

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