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LIST OF ABBREVIATIONS

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of all forms of Discrimination
CFR	United States Code of Federal Regulations
COVID-19	Coronavirus - virus that sparked global pandemic in 2019
DHS	Department of Homeland Security
DOH	Department of Health
DOL	Department of Labor
FLC	Farm Labor Contractor
FLSA	Fair Labor Standards Act
H-2A	Visa providing legal authorization and nonimmigrant status to temporary agricultural laborers in the US.
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labor Organization
INA	Immigration and Nationality Act
IRCA	Immigration Reform and Control Act
L&I	Labor and Industries (Department of Labor)
MWC	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
MSPA	Migrant Seasonal Agricultural Worker Protection Act
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
NAO	National Administrative Office (established by the NAALC)
NAWS	National Agricultural Worker Survey
NLRA	National Labor Relations Act
RCW	Revised Code of Washington
SB	Senate Bill
UDHR	Universal Declaration of Human Rights
UN	United Nations
US	United States
USC	United States citizen
U.S.C.	United States Code
WA	Washington State
WAC	Washington Administrative Code
WALAD	Washington Law Against Discrimination
WHD	Wage and Hour Division (Department of Labor)
WHO	World Health Organization

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CHAPTER 1 - INTRODUCTION

Washington State is a place of great beauty and agricultural diversity. Located in the northwest corner of the continental United States, it boasts a striking combination of landscapes and ecosystems, from salty coastlines and moss-covered forests to glacier-capped mountains and from dry, rolling hills to expansive plains. This diversity supports a rich agricultural tradition, with Washington State known for leading the nation in the production of crops such as apples, hops, pears, and blueberries.¹ Less boasted-of, however, is the labor force who toils in the fields to produce this rich abundance. Many of these crops employ labor-intensive techniques for production and harvesting that are best manually; and the hands and bodies that perform this labor frequently belong to some of the most vulnerable individuals in the State: undocumented immigrants and migrant and seasonal farmworkers.² Consequently, agricultural workforce issues are a growing source of tension and debate in Washington State. While many growers argue the need for migrant and seasonal workers, pointing to a domestic labor shortage, others question the validity of this labor shortage³ and highlight patterns of exploitation experienced by foreign-born individuals who travel to work on Washington State farms. This thesis takes up the discussion of one particular category of foreign-born farmworkers – those holding H-2A temporary agricultural visas.

Problem Statement and Research Questions

In late summer 2017, a farmworker named Honesto Ibarra died after health complications that led him to collapse while working at Sarbanand Farms in northwest Washington State (WA). After Honesto fell ill, approximately 60 of his coworkers went on strike, refusing to show up to work and demanding accountability and improved conditions from their employers. They

¹ 'Agriculture: A cornerstone of Washington's economy', Washington State Department of Agriculture, <https://agr.wa.gov/washington-agriculture> (accessed 10 July 2020).

² See Chapter 2, Section 2.1 for a discussion of farmworker demographics.

³ L. Fowler, 'WA Farmers and Laborers are Struggling under the H-2A Guest Worker Program – And it May Get Worse', CROSSCUT, 28 Aug 2019, <https://crosscut.com/2019/08/wa-farmers-and-laborers-are-struggling-under-h-2a-guest-worker-program-and-it-may-get-worse> (accessed 3 May 2020).

were fired and told to leave the property within an hour.⁴ These events were followed by investigations into working conditions at Sarbanand Farms and eventually, by a class action lawsuit from over 600 of Sarbanand's employees⁵ as well as a lawsuit by the Department of Labor.⁶ Both lawsuits have since reached settlements of approximately \$3.5 million dollars, recognizing that, among other things, Sarbanand Farms LLC and its parent company Munger Brothers LLC had favored the hiring of foreign workers over U.S.-based laborers and then underpaid them, had used an unlicensed labor contractor, and had failed to provide employees with sufficient information about the requirements of their contract.⁷

Honesto, like many of his coworkers, came to the U.S. under the H-2A⁸ Program, which issues temporary visas to migrant farmworkers. His death and the subsequent lawsuits against Sarbanand Farms suggest that H-2A workers are vulnerable to exploitation within the current U.S. agricultural system.⁹ However, while the issues experienced by migrant farmworkers more generally are well documented by researchers from a variety of fields such as public health, racial and ethnic studies, and legal studies, limited research exists on the situation of H-2A workers in particular. Additionally, there is a tendency for fields to remain siloed in their research on the migrant farmworker experience, with few scholars drawing connections between experiences of inequality in its different forms. Finally, existing research tends to place blame on individual persons and entities as the sources of farmworker suffering; few scholars have analyzed the structural roots of migrant farmworker vulnerability and its connections to manifestations of human rights concerns on the farm.

⁴ United States District Court, *Rosas v. Sarbanand Farms LLC*, no.18-CV-00112, 25 Jan 2018, para. 110.

⁵ D. Bacon, 'Braceros Organize After One Worker Dies', Food First, 8 Sept 2017, <https://foodfirst.org/braceros-organize-after-one-worker-dies/> (accessed 18 May 2019).

⁶ United States District Court, *Scalia v. Munger Bros. LLC*, no.2:19-cv-02329-TLN-KJN, 19 Nov 2019, Para. 34.

⁷ G. Mohan, 'Berry Farm Company Fined \$3.5 Million Over Worker Abuses', Los Angeles Times, 9 Dec 2019, <https://www.latimes.com/business/story/2019-12-09/munger-bros-berry-farm-fined-farm-worker-abuses> (accessed 10 Feb 2020).

⁸ The name 'H-2A' is simply a technical way of demarcating the category of visas it covers. The letters are derived from the sections of the Immigration and Nationality Act (INA) that stipulate the visa program regulations. The H-2A program, for example, is codified at INA para. 101(a)(15)(H)(ii)(a),(b).

⁹ J. Quesada, L. Hart, and P. Bourgois, 'Structural Vulnerability and Health: Latino Migrant Labourers in the United States', *Medical Anthropology*, vol. 30, no. 4, 2011, p. 341.

This thesis addresses these gaps in research. It analyzes the experience of H-2A farmworkers in Washington State, combining a human rights perspective with a structural approach rooted in the social sciences. In doing so, it answers the following central research question:

In what ways does structural vulnerability influence the realization of human rights for H-2A farmworkers in Washington State agriculture?

This main research question is supported by four additional sub-questions:

- **What human rights are protected by law for H-2A farmworkers at the international, national, and state levels?**
- **What types of human rights-related concerns are being raised by H-2A farmworkers in Washington State?**
- **In what ways is the current situation generated by the COVID-19 pandemic impacting these human rights-related concerns?**
- **What is the relevance of structural vulnerability to these findings?**

Central to this analysis is the concept of structural vulnerability, which enables a deeper look at the social hierarchies that facilitate suffering. This research also recognizes the unique situation posed by the current COVID-19 pandemic as well as the inevitable impacts this situation has on the lived experiences of the local farmworker population. At a time when the increasing use of the H-2A program in Washington State coincides with a decreasing commitment to international human rights standards at the federal level, such research is especially critical and relevant.

CHAPTER 2 – LITERATURE REVIEW

This chapter discusses existing literature on migrant farm labor in the US, providing context on the problematic nature of both its historical and current state. I bring in perspectives from the fields of migration studies, legal studies, racial and ethnic studies, and public health to build a foundation for the application of a human rights perspective on the H-2A experience. Where available, I highlight scholarship specific to the category of farmworkers that is the focus of this research: H-2A workers in Washington State. The relative scarcity of research on this group underlines the relevance of this thesis. This literature review is structured in the following manner: Section 2.1 presents a brief discussion of demographics and definitions of US agricultural laborers. Then, Section 2.2 takes a critical look at the history of migrant agricultural labor in the US, leading up to the current H-2A program. Section 2.3 provides an overview of the main issues raised by existing literature on the migrant farmworker experience. Finally, Section 2.4 summarizes and looks forward to the following Chapter.

2.1 The Migrant Labor Landscape

Before entering a discussion of the issues faced by migrant farmworkers in the US, it is important to understand who we are talking about. The demographics of the agricultural labor landscape in the US are both complex and troubling in numerous ways: legal status is perhaps the most discussed aspect of this complexity. In the fields, US Citizens (USCs) work alongside permanent residents as well as both authorized and unauthorized migrants. According to the 2015-2016 National Agricultural Worker Survey, 49% of agricultural laborers did not have work authorization.¹⁰ Even amongst those with work authorization, a large majority (71%) were non-citizens.¹¹ Furthermore, 19% of all farmworkers were considered migrants.¹² These statistics are troubling, as undocumented and other non-citizen individuals have been shown

¹⁰ T. Hernandez and S. Gabbard, *Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers*, No. 13, JBS International, 2018, p. 5

¹¹ Ibid.

¹² Ibid.

to shoulder a disproportionate burden of suffering on the farm – an issue further explored in Section 2.3.

It is important to note here that NAWS does not include H-2A workers in its surveys. The available statistics on H-2A farmworkers come mainly from government sources such as the Department of Labor (DOL) and the Department of Homeland Security (DHS) and are much less nuanced in the data they capture. According to the DOL, in FY 2019 a total of 257,667 H-2A positions were certified.¹³ Washington State, had 13,689 positions, putting it in fourth place nationwide.¹⁴ Use of the H-2A program has accelerated strikingly in the past few years. According to DOL data, between 2016 and 2019, the number of certified H-2A visas increased by 35%. This is even more stark in Washington State, which experienced an increase of approximately 60% during the same period.¹⁵ The majority of these H-2A laborers are concentrated Eastern Washington, which is known for its orchards and vineyards, while the remaining – a little over 5,000 (or approximately 20%) in 2019 – fill agricultural needs on the western side of the State. The relatively recent growth of the H-2A program in Washington may contribute to the minimal nature of relevant research in this region.

Race and ethnicity¹⁶ is another area of complexity in the agricultural labor landscape, and one that has far-reaching impacts on the farmworker experience. In 2015-2016, 84% of farmworkers who took part in the NAWS survey self-identified as Latino or Hispanic.¹⁷ Regarding nationality, 69% of farmworkers were from Mexico, with another 6% coming from Central American countries.¹⁸ Over 75% identified Spanish to be their primary language, while 30% reported that they could not speak English and 41% reported not being able to read

¹³ ‘H-2A Temporary Agricultural Labor Certification Program – Selected Statistics, FY 2019’, US Department of Labor, 2019, https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2A_Selected_Statistics_FY2019_Q4.pdf (accessed 15 April 2020).

¹⁴ Ibid.

¹⁵ *Office of Foreign Labor Certification Annual Report*, US Department of Labor, 2016, pp. 40, 42.

¹⁶ The terms *race* and *ethnicity* are highly controversial. In this research, I follow S. Holmes’ conceptualization of the terms, which aligns with those of the American Sociological Association. Thus *race* refers to the categorization of an individual based on physical traits associated with certain groups in the public imaginary, while *ethnicity* refers to the social categorization of individuals based on shared history and cultural traits.

¹⁷ T. Hernandez and S. Gabbard, p.3.

¹⁸ Ibid, p. 2.

English.¹⁹ Turning to the H-2A population, Mexican individuals are by far the most represented nationality, accounting for 91% of H-2A visas in 2019.²⁰ The preponderance of Mexican individuals in the H-2A program is rooted in a problematic history of displacement and exploitation, which is further discussed in Section 2.2. Other ethno-racial issues related to the migrant farmworker experience are addressed in Section 2.3.

Gender- and age-related demographic data is publicly available for the general farmworker population through the NAWs survey, indicating that the farm workforce is majority (68%) male and 38 years old on average.²¹ The lack of published data on age and gender for the H-2A population, however, is concerning. Without such information, it is difficult to analyze hiring trends and their implications. In addition, there is a strong tendency to represent male-only narratives within the research and public discussion on the H-2A program. Not providing clear data on gender only further hides the narratives of female H-2A farmworkers and the unique challenges they face.²²

A note on terminology

When discussing the farmworker population, it is also important to be clear with definitions. Existing research on the experience of agricultural laborers reflects a sometimes-confusing patchwork of overlapping terminologies. In many cases, studies target broad groups, such as ‘Latinx farmworkers’, ‘immigrant farmworkers’, or ‘migrant and seasonal farmworkers’. Each of these terms is in turn made up of various sub-groups. It is important to be aware of the complexities underlying these terms, as the experiences of farm laborers have been shown to vary dramatically based on factors such as legal status, perceived ethnicity, and

¹⁹ Ibid., p. 10.

²⁰ State- and region-specific data on race, ethnicity, or nationality, is not available for the H-2A population, making it difficult to determine the composition of the H-2A workforce in Washington State. It is likely, however, that Mexican individuals make up the large majority of H-2A visa certifications in WA as well.

²¹ T. Hernandez and S. Gabbard, p. 7.

²² The lack of gender-specific data played into my decision to not directly address gender-related issues in this thesis. I recognize the importance of taking up a gender perspective on H-2A issues but did not feel I had access to enough data and information to do justice to this angle of discussion. This topic would be a fruitful area of future research.

nationality.²³ Thus, challenges that are attributed to all ‘migrant farmworkers’, for example, may in fact be experienced in different ways or to different degrees by members of various sub-categories such as undocumented migrants, indigenous migrants, or H-2A workers. The paucity of existing research on specific farmworker sub-groups is one of the driving factors for the current research on the H-2A farmworker population. For definitions of the terminologies used to refer to farmworker categories in this thesis, see Appendix A.

2.2 Roots of Migrant Agricultural Labor in the United States

When analyzing the state of migrant farm labour in the US today, it is important to consider its complex historical roots: roots in colonialism, territorial dispossession, and forced migration.²⁴ These themes go back to the mid-late 19th century, when the US began annexing territories after the US-Mexico war in what is now California, Texas, and New Mexico. In the following decades, as these lands became national and private property, Mexican natives became ‘foreigners’ on what used to be their own land and, in many cases, were forced to relocate.²⁵ Not only did US farmers profit from the newly acquired lands; they also began strategically using the labour of their dispossessed and economically disadvantaged neighbours to the south.²⁶ In fact, it was pressure from the agricultural sector that led the US government to enable the first waves of migrant labour to the States in the early 1900’s.²⁷ During WWII, another round of Mexican migration was generated through the Bracero Program, which was aimed to make up for labour shortages by bringing in temporary guest workers, many of whom worked on farms. This ‘temporary’ program lasted until 1964 and

²³ A. Reid and M. Schenker, ‘Hired farmworkers in the US: Demographics, work organization, and services’, *American Journal of Industrial Medicine*, vol. 59, 2016, P. 646.

²⁴ A. Castañeda, ‘Que se pudieran defender (so you could defend yourselves), Chicanas, Regional History, and National Discourses’, *Frontiers*, vol. 22, no. 3, 2001, p. 119.

²⁵ M. Barajas, ‘Colonial Dislocations and Incorporation of Indigenous Migrants from Mexico to the United States’, *American Behavioural Scientist*, 2014, vol. 58, no. 1, p. 54.

²⁶ Ibid.

²⁷ A. Shea, ‘“Don’t Let Them Make You Feel You Did a Crime”: Immigration Law, Labour Rights, and Farmworker Testimony’, *Multi-Ethnic Literatures and the Idea of Social Justice*, Spring, vol. 28, no. 1, 2003, p. 124.

brought over 4 million migrant workers to the US – 400,000 of whom came to work on farms in the Pacific Northwest.²⁸

Though the Bracero Program ‘ended’ in 1964, it essentially lives on today through the H-2A²⁹ guest worker program, which was established under the Immigration Reform and Control Act (IRCA) of 1986³⁰ with the professed goal of filling temporary agricultural needs that cannot be met by the domestic workforce.³¹ Indeed, obtaining approval to hire workers through the H-2A program involves a multi-step process in which the US employer must demonstrate³² that the acquisition of H-2A workers will not negatively impact the local domestic labor market and that there are not currently enough domestic laborers to complete the work.³³ Data on the growth of the H-2A program would suggest that there is an increasing shortage of domestic workers. Some scholars contest this assumption, however, pointing out that studies have not confirmed such a labor shortage exists.³⁴ If this is the case, then other factors must be contributing to the increase of H-2A certifications. According to these critics, it is not labor shortage that is driving the growth of the H-2A program, but rather the fact that flaws in the program allow employers to reduce costs and liability while maintaining a compliant and ‘disposable’ workforce.³⁵ These concerns are further explored in Section 2.3.

Summary and a note on migration studies

It would be fitting here to touch on the implications of this history for traditional approaches to migration studies and discussions of migrant farmworker agency. A consideration of the

²⁸ M.J., Sifuentes, ‘Public Memory, and Creating the Bracero Archive’, *Oregon Historical Quarterly*, Winter, vol. 118, no. 4., 2017, p. 590.

²⁹ The name ‘H-2A’ is simply a technical way of demarcating the category of visas it covers. The letters are derived from the sections of the INA that stipulate the visa program regulations. The H-2A program, for example, is codified at INA para. 101(a)(15)(H)(ii)(a), (b).

³⁰ The original H-2 program was established by the Immigration and Nationality Act (INA) in 1952, providing temporary visas to laborers entering the US for a specific purpose and a specified amount of time. Under the IRCA the H-2 visa category was split into H-2A and H-2B visas.

³¹ Supra note 3.

³² This must be demonstrated both to their State Workforce Agency (SWA) as well as to the Department of Labor (DOL).

³³ Immigration and Nationality Act, 8 U.S.C. sect.1188(a)(1)(A)-(B) (2000); 20 C.F.R. sect.655.90(b) (1) (A);

³⁴ Supra note 3.

³⁵ L. Guerra, ‘Modern-Day Servitude: A Look at the H-2A Program’s Purposes, Regulations, and Realities’, vol. 29, no. 1, 2004, p.205.

problematic roots of the H-2A program, epitomized by capitalist-driven relations and neoliberal policies such as the North American Free Trade Agreement (NAFTA), highlights patterns of induced poverty that bring into question the voluntary nature of labor migration assumed in theories such as the push-pull framework.³⁶ For reasons of space, the discussion of this matter is provided in Appendix B, as it is relevant but tangential to the current research. The goal of this section was to paint a brief overview of the history of migrant labour on US farms. Pointing to its problematic roots, it illustrated how the use of migrant labour in US agriculture is linked to a legacy of dispossession, exclusion, and induced poverty which lives on today in the H-2A guest worker program. Recognizing the injustice and complexity of the past facilitates a more nuanced analysis of the issues faced by migrant farmworkers in the US today. These issues are synthesized and discussed in the following section.

2.3 Issues of the Modern-day Migrant Farmworker Experience

While many scholars have studied the challenges faced by migrant farmworkers in the United States, very few have addressed the situation of H-2A workers in particular; even fewer have discussed the H-2A experience in Washington State. To discuss only the issues raised by this limited literature would thus yield an incomplete picture of the H-2A experience. This section therefore includes issues raised by studies on migrant farmworkers more generally. I also discuss studies addressing Latinx³⁷ and Mexican farmworkers, as well as selected studies on the general farmworker population when findings are relevant to migrant farmworkers.

Literature on the current migrant farmworker experience takes three main perspectives: a legal perspective, an ethno-racial perspective, and a health perspective. Studies from a legal perspective provide the most direct criticism of the H-2A experience, raising issues regarding the tenuous nature of H-2A legal status and the incomplete protections these workers enjoy. Scholars note that that the H-2A program perpetuates the exclusion and disempowerment of

³⁶ H. Duan, *Embodied Migration: An Affective Understanding of the Push-pull Theory*. Doctoral dissertation, University of South Wales, 2012, p. 13, <http://unsworks.unsw.edu.au> (accessed 12 May 2020).

³⁷ It is, of course, important to remember that not all H-2A farmworkers fall under the category 'Latinx'. Indeed, many indigenous individuals do not identify with the term. However, as 84% of farmworkers self-identified as 'Latino' or 'Hispanic' in the previously-discussed NAWs survey, I maintain that articles discussing the experience of Latinx farmworkers are relevant for the purpose of this literature review.

the Bracero Program by tying a worker's legal status to their contracted employer.³⁸ An H-2A worker who leaves a contracted employer loses that contract and the few protections its status provides. In addition, the ability of H-2A farmworkers to return in following years also depends on employer recommendation. When combined with the precarity of H-2A status, this gives H-2A employers significant power over their contracted workers.³⁹ Critics also note that the categorization of H-2A workers as 'nonimmigrants' further complicates their legal status by limiting their rights before the law, barring them from paths to naturalization, and excluding them from many federal benefits.⁴⁰ These consequences of H-2A legal status mean that workers have fewer places to turn if employers fail to provide for their health and wellness.

Of course, regulations do exist for the protection of H-2A workers. However, critics such as A. Shea highlight that they are too few, and that they suffer from weak monitoring and enforcement.⁴¹ Enforcement is further complicated by the increasing use of Farm Labor Contractors (FLCS), which act as a kind of financial and legal buffer between employers and the H-2A program. While FLCs benefit growers, they are poorly regulated. Consequently, harmful practices, such as the use of recruitment fees that place H-2A workers deep in debt, often go unchecked.⁴² On top of this, H-2A workers enjoy exceptionally few avenues of legal redress for harm they have suffered on the job. When action is taken against employer violations, it is often in the form of sanctions, which scholars have criticized as being weak and ineffective.⁴³ Even more troublingly, the burden of sanctions may, in some cases, fall on the backs of employees rather than employers.⁴⁴ Important to note here is that, for H-2A

³⁸ J. Linares, 'Hired Hands Needed: The Impact of Globalization and Human Rights Law on Migrant Workers in the United States', *Denver Journal of International Law and Policy*, vol. 32, no. 3, 2006, p. 332.

³⁹ Ibid.

⁴⁰ P. Garcia, 'Documenting and Classifying Labor: The Effect of Legal Discourse on the Treatment of H-2A Workers', *Arch Sci*, vol. 14, 2014, p. 351.

⁴¹ A. Shea, 'Don't Let Them Make You Feel You Did a Crime': Immigration Law, Labour Rights, and Farmworker Testimony', *Multi-Ethnic Literatures and the Idea of Social Justice*, Spring 2003, vol. 28), no. 1, p. 125.

⁴² A. Guernsey, 'Double Denial: How both the DOL and Organized Labor Fail Domestic Agricultural Workers in the Face of H-2A' *Iowa Law Review*, vol. 93, no. 1, p. 317.

⁴³ L. Guerra, p. 201.

⁴⁴ S. Quandt, C. Brooke, et al., 'Farmworker Housing in the United States and its Impact on Health', *New Solutions: A Journal of Environmental and Occupational Health Policy*, vol. 25, no. 3, 2015, p. 279

workers who overstay their visas, initiating an investigation involves a certain level of risk of being fired, detained by immigration officials, and, in extreme cases, of being deported. Thus, not only is legal redress limited for migrant and H-2A workers; it also has the potential to aggravate, rather than mitigate, their experiences of suffering.

Discussions from a legal perspective clearly demonstrate the numerous ways in which policies and legal categorizations put the wellness of H-2A workers at risk. Scholars such as L. Guerra have even gone so far as to liken the program to a modern-day form of slavery.⁴⁵ Others, while not likening it to slavery, point out that dynamics of dependency and worker exploitation in the H-2A program can reach levels that qualify as labor trafficking.⁴⁶ Despite these criticisms, progress on reform of the program has been markedly slow: Case law has provided some advances, but these have been few and, at times, contradictory,⁴⁷ while policy reform is plagued by a lack of political will, the power of agricultural lobbying,⁴⁸ and the complexity of overlapping responsibilities.⁴⁹ Perhaps most troublingly though, is the thought put forward by scholars such as A. Castañeda that policies of exclusion and discrimination inherent to the H-2A program have become ‘pivotal features of the economic, political, and social development of the regions and the nation.’⁵⁰ Seen in this light, US agriculture actually *benefits* from the legal marginalization of H-2A individuals, raising challenges for the achievement of legal reform that would secure their protection.

Studies taking an ethno-racial perspective tend to focus more broadly on the experience of Latinx farmworkers. This is relevant to analyzing the experience of migrant and H-2A workers, the large majority of whom come from Mexico or other Latin American countries.⁵¹ These studies reveal that perceived ethnicity acts, both overtly and covertly, as a basis for

⁴⁵ L. Guerra, p. 207.

⁴⁶ J. Norwood, Indicators of Human Trafficking within Migrant Farmworker Communities in Western Michigan. Doctoral dissertation, Michigan State University, 2015, p.168.

⁴⁷ J. Linares, p. 339.

⁴⁸ R. Russo, ‘Collective Struggles: A Comparative Analysis of Unionizing Temporary Foreign Farm Workers in the United States and Canada’, *Houston Journal of International Law*, vol. 41, no. 1, 2018, p. 55.

⁴⁹ L. Guerra, p. 195.

⁵⁰ A. Castañeda, p. 121.

⁵¹ L. Guerra, p. 203

unequal treatment on the farm. On the one hand, the construction of brown bodies as racialized ‘others’ and as a ‘threat’ to white America shapes many aspects of US society that impact the migrant farmworker experience - from the almost-obsessive preoccupation with immigration-related aspects of labor migration to public discourse, which depicts migrants as contaminating white-communities⁵² and threatening the US-born workforce.⁵³ On the farm, this can lead to overt instances of discrimination. S. Holmes, in his ethnographic research with Triqui farmworkers in Skagit Valley, WA, documents the frequent use of derogatory, racially-charged terms by supervisors toward the indigenous migrant workforce: terms such as *burros*, *perros*, or *indios estúpidos*.⁵⁴ The use of such terms dehumanizes migrants by comparing them to animals, devoid of intelligence and human emotion. The processes of othering and dehumanization have been shown to facilitate acts of violence and cruelty, making these patterns of racial prejudice even more troubling.

A less overt but no less prevalent form of discrimination noted by researchers is the way in which race and ethnicity are used to justify the differential treatment and suffering of migrant laborers. Studies show that biology and culture are often rhetorically linked to race in ways that suggest certain racial or ethnic categories are better suited for certain jobs, even when these jobs are disproportionately dangerous or difficult. For example, when asked why indigenous workers occupied the least respected and most physically-tasking jobs on the farm where Holmes conducted research, one social worker responded: ‘Oaxacans like to work bent over,’ while other authority figures pointed out that indigenous workers were too short to perform other, more desirable tasks, such as picking apples.⁵⁵ These individuals use biology and race in concert to reason that indigenous migrant farmworkers somehow belong in the most tasking positions. An employer in another study, explaining why Latinx workers occupied the bottom jobs at their operation, said: ‘Their nature is to...do menial-type labour.

⁵² J. Cisneros, ‘Contaminated Communities: The Metaphor of ‘Immigrant as Pollutant’ in Media Representations of Immigration’, *Rhetoric and Public Affairs*, vol. 11, no. 4, 2008, p. 593.

⁵³ C. Galarneau, ‘Farm Labor, Reproductive Justice: Migrant Women Farmworkers in the US’, *Health and Human Rights*, vol. 15, no. 1, p.151.

⁵⁴ Meaning ‘donkeys’, ‘dogs’, and ‘stupid Indians.’ Respectively. See: S. Holmes, *Fresh Fruit, Broken Bodies: Migrant Farmworkers in the United States*, Berkeley, University of California Press, 2013, p. 77

⁵⁵ Holmes, 2013, p. 170-171.

They're...not ashamed to be labourers...Typically, [for] Caucasians, typical white society, that's a negative.'⁵⁶ Here, tropes of cultural difference which depict Latinx individuals as hardworking and resilient are used to claim that they are somehow better suited for difficult and dangerous jobs than their white counterparts. These studies highlight that not only legal status, but also ethnic and racial perceptions, influence the perception and treatment of migrant farmworkers.

The most common studies on the migrant farmworker experience address occupation-related health issues. In 2009, for example, the rate of occupational fatality for farmworkers was five times as high as for any other category of worker.⁵⁷ Study after study has shown that other health issues such as skin disorders, heat-related illness, and musculoskeletal injuries also plague farmworkers.⁵⁸ The health-related impacts of pesticides and other toxic chemicals used in agriculture are especially at fault here. A 1996 study found that the agricultural industry reported the highest rates of injury due to toxic chemical exposure nationwide.⁵⁹ Narrowing the focus to Washington State, studies have found higher concentrations of pesticides in the houses of farmworker families than of non-farmworker families.⁶⁰ Not only does this confirm the dangers of chemical contamination for Washington State farmworkers; it also reveals that those laboring in the fields are not the only ones to be impacted, as they may bring traces of toxic chemicals home with them.

Unfortunately, many studies do not separate data by legal status, making information on the health of migrant farmworkers more difficult to come by. However, some literature indicates these individuals are even more at-risk for injury, death, and work-related illness than US-

⁵⁶ M. Maldonado, '“It is in their Nature to do Menial Labor”: The Racialization of Latino/a Workers by Agricultural Employers', *Ethnic and Racial Studies*, vol. 32, no. 6, p. 1026.

⁵⁷ T. Mares, N. Wolcott-MacCausland, J. Doucet et al., 'Using chiles and comics to address the physical and emotional wellbeing of farmworkers in Vermont's borderlands', *Agriculture and Human Values*, vol. 37, 2019, p. 198.

⁵⁸ C. Galarneau, p. 148.

⁵⁹ L. Guerra, p. 187.

⁶⁰ N. Simcox, R. Fenske, S. Wolz et al., 'Pesticides in Household Dust and Soil: Exposure Pathways for Children of Agricultural Families', *Environmental Health Perspectives*, vol. 103, no. 12, 1995, p. 1129.

born workers.⁶¹ Studies suggest that undocumented and other non-USC farmworkers take on more jobs involving the maintenance of stressful bodily positions which, over time, lead to chronic pain and joint damage.⁶² High rates of mental health issues such as depression and anxiety are also prevalent in the migrant farmworker community, with researchers pointing to geographic isolation, separation from family, and workplace stress as contributing factors.⁶³ In addition, the prevalence of crowded and unsanitary conditions in employer-provided housing has been linked to various health issues in the migrant farmworker population.⁶⁴ These health problems are compounded by limited access to healthcare, with 75% or more of migrant and seasonal farmworkers not having health insurance.⁶⁵ By comparison, the 2008-2012 NAWS study found that 34%-46% of US-born farmworkers did not have health insurance.⁶⁶

Interestingly, what limited H-2A-specific information is available indicates that in some respects, these workers may have more health protections. These studies point out that migrant farmworker housing containing H-2A laborers was less likely to be substandard in areas such as crowding and sanitary conditions,⁶⁷ that H-2A employees are entitled to workers compensation insurance, and that they may experience less food insecurity than undocumented workers.⁶⁸ However, other aspects of the H-2A program noted in this section increase health risks for these workers: legal status may make H-2A workers wary of raising workplace concerns; non-immigrant categorization disqualifies H-2A workers from health services; and racial discrimination normalizes suffering. Additional research is necessary to better understand health-related impacts of the H-2A program, but clearly these workers are at risk.

⁶¹ A. Reid and M. Schenker, 'Hired Farmworkers in the US: Demographics, Work Organization, and Services', *American Journal of Industrial Medicine*, vol. 59, 2016, p. 645.

⁶² Ibid.

⁶³ K. Bail, J. Foster, S. Dalmida et al., 'The impact of invisibility on the health of migrant farmworkers in the Southeastern United States: A case study from Georgia', *Nursing Research and Practice*, 2012, p. 6.

⁶⁴ Ibid.

⁶⁵ T. Arcury and S. Quandt, 'Delivery of health services to migrant and seasonal farmworkers', *Annual Review of Public Health*, vol. 28, no. 1., 2007, p. 351.

⁶⁶ A. Reid and M. Schenker, p. 653.

⁶⁷ Q. Vallejos, S. Quandt, J. Grzywacz et al., 'Migrant Farmworkers' Housing Conditions Across an Agricultural Season in North Carolina', *American Journal of Industrial Medicine*, vol. 54, no. 7, p. 542.

⁶⁸ K. Bail, J. Foster, S. Dalmida et al. p. 2.; J. Linares, p. 334.

2.4 Summary and gaps in existing literature

As this section has shown, existing literature from a variety of fields - the most strongly represented including legal studies, racial and ethnic studies, and the field of health⁶⁹ - reveals unsettling patterns of inequality, exploitation, and suffering arising from the experiences of migrant farmworkers in the US. A number of gaps and shortcomings can be identified in this research, however. Firstly, there is a tendency for findings to remain siloed in their respective fields of study, where they are discussed with varied and sometimes overlapping terminologies. This is an impediment to progress in the realization of farmworker rights because, while academic fields may still be largely siloed, the challenges they study are not cleanly compartmentalized in the lives of farmworkers. Without a clear understanding of the interplay between these issues and a common way of discussing them, solutions will be incomplete, repetitive, or even counter-productive.

Secondly, and of particular import to this research, research from a human rights perspective is scarce, even though many of the issue areas highlighted by the literature are in fact protected under international human rights law. Studies that do incorporate human rights in their analyses take a markedly shallow approach: Some use the term ‘human rights’ nominally – almost as a token phrase – without discussing applicable frameworks or applications,⁷⁰ while others mention applicable treaties, conventions, and declarations, but fail to analyze the implications of this framework for the rights, duties, and obligations of the different stakeholders involved.⁷¹ An in-depth analysis from a human rights perspective could be especially effective in the case of H-2A farmworkers, whose visa-ed status yields a closer relationship to State and federal actors. These reasons all contribute to the adoption of a human rights perspective in this research, as further discussed in the next chapter.

⁶⁹ Scholars from the field of gender studies have also put forward strong criticisms of the migrant farmworker experience in the US. However, limited data on gender in the H-2A program exists and what does points to a heavily male population. While this does not make gender studies irrelevant – in fact it rather highlights the need for gender-focused research amongst the H-2A population – I have chosen to not incorporate a discussion of gender-related issues in this thesis, as minimal data sources would render it difficult to draw firm conclusions regarding the impact of gender on the H-2A experience.

⁷⁰ See, for example: P. Garcia., p. 358.

⁷¹ See, for example: J. Linares, p. 326.

A third shortcoming of the existing literature is its tendency to assign responsibility and blame for migrant farmworker suffering to individual actors or entities. This most frequently manifests via the depiction of employers as intentional agents of harm towards the migrants they employ. L. Guerra for example, in her scathing article on the H-2A program, describes growers responding to H-2A workers' requests for 'basic human treatment' with 'greed and, sometimes, violence – silencing the workers to unyielding service.'⁷² The tendency to direct focus and blame at the individual level is also evident in traditional human rights approaches, which have historically concentrated efforts on catching and punishing perpetrators rather than addressing the underlying issues giving rise to abuse.⁷³ Some scholars question the efficacy of this individual-level approach however. Holmes, for example, argues that blaming and punishing growers alone does not get to the root of the problem,⁷⁴ and warns that focusing on the individual level may even perpetuate inequality by ignoring agency and falling into victim blaming.⁷⁵ Such observations call for research that looks beyond the individual level, where suffering manifests, to the structural level, where it is produced. A clear understanding of these structural-level issues is necessary both to demystify the origins of suffering and to enable the development of lasting solutions for migrant farmworkers.

Finally, while a fairly rich base of literature exists on the migrant farmworker experience generally, research on the H-2A experience specifically is relatively scarce. To understand how the H-2A experience fits into existing theory, additional research needs to be conducted on the ways in which the H-2A program impacts other aspects of these farmworkers' lives. The current thesis addresses these gaps in knowledge, merging a human rights perspective with the implementation of social science concepts from a structural approach. The following Chapter discusses the reasons for this merging of disciplines and presents the resulting conceptual framework that serves as the foundation for this research.

⁷² L. Guerra, p. 203.

⁷³ R. Goodman, D. Jinks, and A. Woods, 'Social Science and Human Rights', in R. Goodman, D. Jinks, & A. Woods (eds.), *Understanding Social Action, Promoting Human Rights*, Oxford, Oxford University Press, 2012, p. 2.

⁷⁴ S. Holmes, 2013, p. 26.

⁷⁵ *Ibid.*, p. 183.

CHAPTER 3 - CONCEPTUAL FRAMEWORK

This thesis analyzes H-2A farmworker experiences from a human rights perspective, while simultaneously drawing on concepts from the social sciences – especially from the fields of anthropology and sociology. My development of the conceptual framework for this research was heavily influenced by the work of medical anthropologist Seth Holmes, whose incorporation of social science concepts such as structural violence and structural vulnerability provided me with a new lens through which the concerns of local farmworkers can be analyzed and interpreted. This chapter sets-up and explains the conceptual framework I use for the analysis of H-2A farmworker experiences in Washington State. Section 3.1 addresses the motivation for combining a human rights perspective with concepts from the social sciences; Section 3.2 presents what has become known in the social sciences as a structural approach to studying inequality; Section 3.3 then addresses the implementation of a structural approach in research on migrant farmworkers, first discussing how structural approaches have been used previously in the field and then turning to the development of the final conceptual framework for the current research; Section 3.4 concludes by exploring the usefulness of a structural approach as conceptualized in this chapter to an analysis of the human rights of H-2A workers.

3.1 Why combine human rights with the social sciences?

The efficacy of international human rights law in protecting the most at-risk is contested for a variety of reasons. For one, by resting on ‘the fiction of universal equality,’⁷⁶ international human rights law perpetuates the assumption that holding a human right should be sufficient for that right to be realized.⁷⁷ As noted by scholars such as Goodman, Jinks and Wood, however, this assumption is built on outdated and misleading notions of how individuals think and act.⁷⁸ In reality, it is often the most vulnerable who have the least effective access to legal protection and remedies, be it due to geographic isolation, cultural or linguistic barriers, or

⁷⁶ M. Freeman, *Human Rights: An Interdisciplinary Perspective*, Cambridge, Polity Press, 2011, p. 108.

⁷⁷ C. Reinprecht, ‘Human Rights from a Sociological Perspective’ in M. Nowak, K. Januszewski, and T. Hofstätter (eds.), *All Human Rights for All*, Wien, Neuer Wissenschaftlicher Verlag, 2012, p.53.

⁷⁸ R. Goodman, D. Jinks, and A. Woods, p. 3-4.

corrupt government practices. In this vein, it has been questioned whether human rights *law* is really what the vulnerable need for protection.⁷⁹ Also problematic is the fact that international human rights law focuses on the relationship of duties and obligations between the individual and the state, which does not address the fact that ill-treatment often occurs between private individuals or entities. This is especially relevant to migrant agricultural workers, whose relationship to their employer is one of the most problematic sources of human rights-related concerns.

The issues of a state-centered approach also extend to the generation of international ‘solutions’ to human rights issues. Unfortunately, states are often one of the least effective entities to implement human rights-related reforms, being inefficient, bureaucratic, and – in some cases – the original source of the human rights violations.⁸⁰ In general, research has demonstrated that state-level solutions such as treaties are most effective in societies when accompanied by strong political will and public support.⁸¹ Given the private nature of most H-2A abuses, the poor US ratification record, and the current administration’s oppositional stance toward the international human rights regime,⁸² one might question the usefulness of taking a human rights perspective on H-2A farmworker issues. Still, I believe a human rights perspective is useful to the analysis of H-2A issues for several reasons:

- The international human rights framework provides globally-accepted standards for the evaluation of how individuals are treated – regardless of nationality – within a state. An evaluation using these global standards remains relevant regardless of the current prospect for that evaluation to be internalized or acted upon by the US. In addition, the political stance of the US toward international human rights regime is likely to shift again in the future, and the standards held by the international community may then enter into greater force;

⁷⁹ M. Freeman, p. 97.

⁸⁰ Ibid, p. 108.

⁸¹ B. Simmons, ‘From ratification to compliance: quantitative evidence on the spiral model’, in T. Risse, S. Ropp, and K. Sikkink (eds.), *The Persistent Power of Human Rights: from commitment to compliance*, Cambridge, Cambridge University Press, 2013, p. 45.

⁸² See Ch. 4, Sect. 4.1

- H-2A related issues are international in nature, as the individuals in question are migrant workers coming from outside the US. The application of international standards is therefore relevant;
- A human rights perspective on a situation in which the wrongdoers are primarily private persons and entities highlights the challenges of protecting the most vulnerable under the current human rights framework. This knowledge is necessary to push for change in the way human rights obligations are formulated and enforced;
- Framing issues from a human rights perspective may generate long-term impacts, even within the US, whether through strategic litigation and case law, the generation of increased public attention and pressure to migrant farmworker issues, or the use of human rights rhetoric as tools for advocacy both on the streets and in the courts.

This reasoning supports the validity of taking a human rights perspective on H-2A farmworker issues. Still, a traditional, legal human rights perspective on its own would not be sufficient. For, while law and legal studies can document which norms are being upheld and which are being violated, they do not explain *why* this is the case. As noted by M. Freeman, ‘Human rights law has social and political origins, and social and political consequences, and legal analysis cannot help us to understand these.’⁸³ Understanding how rights are realized for some but not for others requires raising the curtain on the structural forces behind human interaction, group identity, and adherence to norms. This is where the social sciences come in, picking up where traditional human rights analyses leave off.

3.2 Aspects of a social science approach toward structural issues

As mentioned above, law in general, and international human rights law in particular, perpetuates the myth that everyone has equal access to remedy and protection. In so doing, it has the deceptive effect of ‘masking structural inequalities’⁸⁴ that produce disparate realizations of human rights. The social sciences, on the other hand, have the power to do exactly the opposite: to focus their analytical energy on the dissection of social inequalities and the unmasking of their structural roots. Some of the most useful tools for this task are concepts rooted in the fields of sociology and anthropology which, collectively, produce what

⁸³ M. Freeman, p. 92.

⁸⁴ Ibid.

is known as a ‘structural approach.’ In this section, I dig a bit deeper into the theoretical underpinnings of a structural approach and outline the ways in which such an approach is useful in understanding and interpreting the suffering of traditionally marginalized groups.

What is a structural approach?

Structural approaches in the field of sociology are used to study how beliefs and actions are influenced by the organization of individuals within systems and institutions as well as by the unequal distribution of resources these systems generate.⁸⁵ One of the most influential voices on structural issues in sociology is Johan Galtung. According to Galtung, a *structure* refers to the combined systems of interactions for a determined set of actors.⁸⁶ Actors – be they individuals, organizations, or institutions – occupy different ranks, or positions, within the systems that make up a structure. The relative positionality of these actors influences the ways in which they are perceived and interact.⁸⁷

One of the central concepts of a structural approach, which is commonly attributed to Galtung, is that of *structural violence*. According to Galtung, structural violence is understood as ‘the direct violence built into repressive social orders creating enormous differences between potential and actual human self-realization.’⁸⁸ Unlike traditional perceptions of violence, structural violence may not always be traced back to a specific perpetrator. Instead, it is ‘built into the structure and shows up as unequal power and consequently as unequal life chances.’⁸⁹ The outcomes experienced by actors occupying lower-ranked positions may be compared to those produced by direct violence, but the source of suffering is less obvious. Since Galtung, structural violence has been used to study diverse aspects of social inequality such as racism, health disparities, and inter-generational poverty.⁹⁰ Some scholars have moved away from the concept, however, finding it too narrow or being unsettled by its historic links with armed

⁸⁵ J. Smith and T. Fetner, ‘Structural Approaches in the Sociology of Social Movements’, in B. Klandermans and C. Roggeband (eds.), *Handbook of Social Movements Across Disciplines*, Boston, Springer, 2009, p.13.

⁸⁶ J. Galtung, ‘Violence, Peace, and Peace Research’, *Journal of Peace Research*, vol. 6, no. 3, 1969, p.175.

⁸⁷ J. Galtung, 1969, p. 176.

⁸⁸ J. Galtung, *Peace: Research, Education, Action*, University of Michigan, Brill, 1975, p.173.

⁸⁹ J. Galtung, 1969, p. 171.

⁹⁰ T. Mares, N. Wolcott-MacCausland, et al., p. 198.

liberation movements⁹¹ and its strong criticism of capitalist, neoliberal systems such as that of the US.⁹²

A related concept that has gained popularity due to its broader application and less-charged history is that of *structural vulnerability*. Like structural violence, structural vulnerability focuses on the suffering brought about by entrenched inequalities. It goes further however, considering not only economic and political, but also cultural and social sources of this suffering.⁹³ It thus draws on understandings of social hierarchies and normativity put forward by scholars such as Bourdieu⁹⁴ and Foucault,⁹⁵ respectively. For the purpose of this research, I use Quesada, Hart, and Bourgeois' definition of structural vulnerability as: '*[A] positionality [...] in which the vulnerability of an individual is produced by his or her location in a hierarchical social order and its diverse networks of power relationships and effects.*'⁹⁶ Scholars such as Quesada et al. argue that the structural vulnerability of an individual increases as one moves down the labor hierarchy, and that this unequal vulnerability is continually 'reinforced by official and unofficial policies, practices, and prejudices.'⁹⁷ The consideration of culture, hierarchies and the dynamics of power they produce makes structural vulnerability particularly useful in the analysis of labor relations, where these dynamics tend to be overtly present in daily interactions.

Structural violence and vulnerability are propped up by *symbolic violence* and *conjugated oppression*. The concept of *symbolic violence* considers the processes by which hierarchical, unequal structures are internalized by actors, such that the suffering they produce is perceived as natural and just.⁹⁸ The extent to which actors internalize and accept structural inequality is

⁹¹ J. Quesada, L. Hart, and P. Bourgeois, p. 341.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ P. Bourdieu and L. Wacquant, *Pascalian Meditations*, R. Nice (trans.), Stanford, CA, Stanford University Press, 2000, p. 134.

⁹⁵ M. Foucault, 'The ethics of the concern for self as a practice of freedom', in M. Foucault (ed.), *Ethics, Subjectivity and Truth: The Essential Works of Michel Foucault 1954–1984 Vol. 1*, London, Penguin Rainbow Ed., 1984, pp. 281–302.

⁹⁶ J. Quesada, L. Hart, and P. Bourgeois, p. 341.

⁹⁷ Ibid.

⁹⁸ P. Bourdieu and L. Wacquant, ch. 5.

contested, however, as discussed further below. *Conjugated oppression*, according to anthropologist Philippe Bourgois, describes how multiple factors come together to produce an oppression greater than either one yields on its own.⁹⁹ The negative impacts of structural violence and vulnerability are also compounded by Galtung's observation that an individual who is ranked low in one system of interaction also tends to be ranked low in others, as these systems interact and feed into one another.¹⁰⁰ Together, concepts from a structural approach provide a nuanced perspective on why some individuals thrive while others exist in a seemingly-endless cycle of marginalization.¹⁰¹

Structural approaches, agency, and human rights

Structural approaches have direct implications on conceptualizations of agency¹⁰² because they lead to conclusions about how individuals' life options and decision-making processes are shaped and limited by the structures in which they live and work.¹⁰³ The importance of agency to human rights analyses has in turn been articulated by theorists like Gewirth and Griffin, who emphasize that rights are not meaningful on their own, but are rather made real by an individual's ability to claim and act upon them.¹⁰⁴ The assumption of structural approaches that resources and decision-making power are unequally distributed within structures is therefore significant, as it implies that not everyone is equally able to enact the human rights to which they are entitled.

The degree to which marginalized individuals and communities are symbolically straight jacketed by structural inequalities is, however, debated. Theorists from the field of what has been dubbed *dark anthropology* take a rather pessimistic view of agency, which fuses 'a Marxian focus on expanding material inequality and a class-based, capitalist exploitation with

⁹⁹ P. Bourgois 1988 'Conjugated oppression: Class and ethnicity among Guaymi and Kuna banana plantation workers. *American Ethnologist*, Vol 15, No. 2, p. 330. pp. 328-348.

¹⁰⁰ J. Galtung, 1969, p. 176.

¹⁰¹ Ibid.

¹⁰² I use here the definition of agency put forward by social geographer B. Rogaly, as 'both the intention and the practice of taking action for one's own self-interest or the interest of others'. See: B. Rogaly, 'Spaces of Work and Everyday Life: Labour Geographies and the Agency of Unorganised Temporary Migrant Workers', *Geography Compass*, vol. 3, no. 6, p. 1975.

¹⁰³ J. Quesada, L. Hart, and P. Bourgois, p. 342.

¹⁰⁴ M. Freeman, p.72.

a Foucauldian conception of ubiquitous and subjectifying power.¹⁰⁵ This perception of neoliberal, capitalist hierarchies as having almost-totalizing power over actors leaves few avenues open to the marginalized.¹⁰⁶ It also dovetails with symbolic violence's claims that those in low-ranked positions absorb and accept the symbolic assignment of meaning, value, and positionality these hierarchies produce. Given this supposed internalization, one might expect little to no resistance from marginalized individuals, even at the level of thought – something referred to by scholars such as Gramsci as an enslavement of ideas.¹⁰⁷ However, others caution that an overly-narrow perception of structural issues ignores the forms of agency that individuals and communities may retain despite the presence of oppressive systems.¹⁰⁸ One of the primary champions of this school of thought is political scientist and anthropologist James Scott, who studied marginalized rural communities in Southeast Asia. Scott found that community members considered to be low in rank still display creative, persistent, and significant forms of resistance – what he calls *everyday resistance*. This everyday resistance shows up primarily through actions and attitudes which undermine the symbolic authority of those in positions of relative power.¹⁰⁹ In contrast to acts of revolutionary or outright disobedience, everyday resistance is a blend of pushback and compliance calculated to minimize risk for those in already-precarious positions. Scott thus also speaks of it as resistance which ‘covers its tracks.’¹¹⁰ The subtle, behind-the-scenes nature of everyday resistance allows it to persist where other sorts of resistance may lead to retaliation. It will be important to not overlook the significance of these reduced, but stubborn forms of agency when considering the links between structural issues and human rights for H-2A farmworkers in Chapter 6.

¹⁰⁵ B. Heine, S. Quandt, and T. Arcury, ‘Aguantamos: Limits to Latino Migrant Farmworker Agency in North Carolina Labor Camps’, *Human Organization*, vol. 76, no. 3, 2017, p. 241.

¹⁰⁶ Ibid.

¹⁰⁷ J. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance*, New Haven, Yale University Press, 1985, p. 39.

¹⁰⁸ T. Mares, N. Wolcott-MacCausland, J. Doucet et al, p. 199.

¹⁰⁹ J. Scott, pp. 235-236: Forms of symbolic resistance are explored at length in Scott's book. Detailing them all would take unnecessary space here. What is important to note is that these forms of resistance allow marginalized community members to exercise control of the few resources which remain in their possession: namely those of social prestige and reputation.

¹¹⁰ J. Scott, p. 281.

3.3 Implementation of a structural approach in migrant farmworker studies

Researchers and academics have increasingly noted the usefulness of structural approaches to understanding the situation of (im)migrant agricultural laborers in the US. In many cases, however, researchers use terms such as ‘structural issues’ or ‘structural inequality’ in passing, without actually incorporating them into their analysis. Studies that do incorporate structural concepts in a more meaningful way focus almost exclusively on aspects of farmworker health.¹¹¹ In addition, few studies that incorporate a structural perspective address the situation of H-2A workers specifically. One exception is the research by law professor J. Gordon, who explores the structural roots and harmful impacts of what she calls the ‘human supply chain’ on the growing temporary worker population (including H-2A workers) in the US.¹¹² Another is B. Heine, S. Quandt, et al.’s study on agency in migrant labor camps in North Carolina, which indicates close ties between structural issues and restrictions on farmworker (again, including H-2A) agency.¹¹³ Turning to Washington State, Seth Holmes’ research, published in the book *Fresh Fruit, Broken Bodies*, highlights the roles of structural violence, symbolic violence, and structural vulnerability in the experiences of the undocumented Triqui individuals with whom he spent almost two years living and working. While not dealing with H-2A workers in particular, the framework Holmes generates provides a strong base for the current research. In the next section, I first present this framework and then discuss the adjustments and additions needed for my own research.

3.3.1 Seth Holmes’ Conceptual Framework

Seth Holmes’ analysis indicates that everyone on the farm is vulnerable to difficulties and suffering – even supervisors and employers - but that the quality and extent of this suffering differs depending on an individual’s position in what Holmes calls the ‘labor hierarchy.’ Figure 1 below shows a reproduction of the diagram Holmes uses to visualize the labor hierarchy and its impacts on farmworker experience.

¹¹¹ These studies highlight immigration status, ethno-cultural perceptions, and neoliberal economic policies as structural factors influencing the physical and mental well-being of (im)migrant farmworkers. See, for example: T. Mares, N. Wolcott-MacCausland, J. Doucet et al.; and C. Galarneau.

¹¹² J. Gordon, ‘Regulating the Human Supply Chain’, *Iowa Law Review*, vol. 102, no. 2, 2017, p.450.

¹¹³ B. Heine, S. Quandt, and T. Arcury, p. 244.

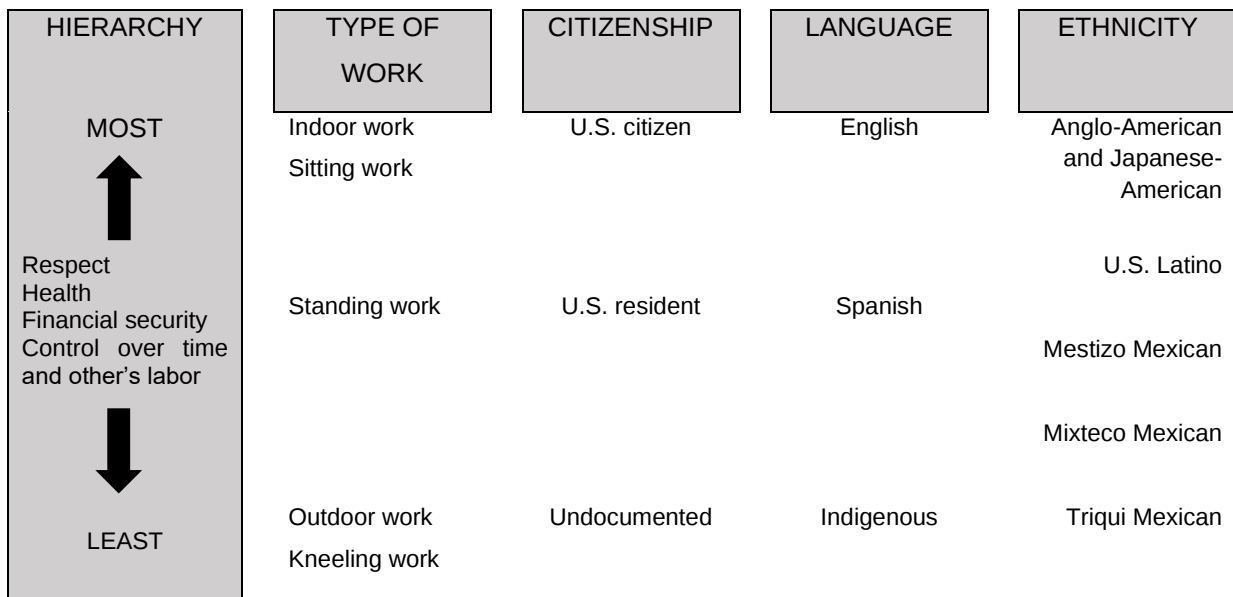


FIGURE 1: Conceptual diagram of labor hierarchy on the farm and its impacts on farmworker experience. SOURCE: Adapted from S. Holmes.¹¹⁴

Based on the diagram above, an individual's location in the labor hierarchy is determined by various factors, including 'type of work', 'citizenship', 'language', and 'ethnicity'. These factors combine to produce what Quesada et al. refer to as a positionality,¹¹⁵ which influences the ways in which farmworkers are treated and interact with others. Holmes identifies various areas of life affected by positionality for those in the labor hierarchy, grouping them into four life quality indicators – 'respect', 'health', 'financial security', and 'control over time and other's labor' – as seen in the left-hand 'Hierarchy' column.

Holmes finds the concepts of structural vulnerability, structural violence, and symbolic violence to be explanatory for this inequality of suffering on the farm. For example, he notes that the precarious legal status of undocumented workers is used by those higher up to intimidate and threaten Triqui individuals into working faster or not complaining about conditions.¹¹⁶ Simultaneously, cultural stereotypes and perceptions of indigenous individuals

¹¹⁴ S. Holmes, p. 85.

¹¹⁵ J. Quesada, L. Hart, and P. Bourgois, p. 340.

¹¹⁶ S. Holmes, p. 77.

as short, hard-working, inexhaustible, and animal-like, are used to justify their employment in the most difficult tasks.¹¹⁷ Biased systems of weighing and documenting workers' harvests lead to indigenous, undocumented workers being underpaid and cheated out of wages. Meanwhile, through all of this, the knowledge that at any time an employer could fire them and call immigration makes it difficult for these workers to speak out.¹¹⁸ The observations produced by Holmes' framework are also in line with Galtung's assertion that those who are disadvantaged in one area or system tend to be disadvantaged in others. He notes: '[T]he position of the Triqui workers at the bottom of the hierarchy is multiply determined by poverty, education level, language, citizenship status, and ethnicity. In addition, these factors produce each other.'¹¹⁹ Conjugated oppression also comes into play here, as the layering of factors such as undocumented legal status and speaking an indigenous language produce novel forms of suffering which neither of these factors would produce on their own.

Above, I have laid out several ways in which a structural approach informs Holmes' analysis of suffering on the farm. In the next section, I explain how his approach can be adapted for the current research on H-2A workers.

3.3.2 Adaptation of framework for the current research

The framework Holmes uses generates a compelling account of how and why suffering is experienced differently on the farm. It recognizes the interconnectedness of the forces and systems shaping the farmworker experience and calls for interdisciplinary approaches to address this suffering. At the same time, it is incomplete in several respects. First – and perhaps most relevant for this research – it does not address the situation of individuals in other 'citizenship' categories – such as H-2A workers on temporary agricultural visas. Not only that, it also doesn't explicitly incorporate human rights. Upon closer consideration, however, connections may be drawn between the conceptual framework Holmes uses and human rights. As noted in the previous section, Holmes links suffering to various life quality indicators

¹¹⁷ S. Holmes, p. 171.

¹¹⁸ S. Holmes, p. 77.

¹¹⁹ S. Holmes, p. 444.

which are differently realized depending on one's position in the labor hierarchy. Taking a step back, these indicators are related to various aspects of human rights. Thus, I propose modification of the existing 'Hierarchy' column to read 'Human Rights Realization'¹²⁰, with more realization of human rights at the top of the column and less at the bottom. Additionally, while Holmes uses structural vulnerability throughout his analysis, he does not explicitly include it in his conceptual diagram. I propose that 'Structural Vulnerability'¹²¹ be included under the 'Hierarchy' column, with the least vulnerability at the top of the hierarchy and the most at the bottom. Other structural concepts such as symbolic violence and conjugated oppression will be used in discussion of findings but have not been incorporated in the diagram to avoid unnecessary complication.

Finally, as explored in Section 3.2., considerations of agency are critical to understanding the ways in which actors claim and act upon the rights. Though Holmes touches on agency and resistance briefly, it is mainly in passing. I propose the insertion of 'Agency and Resistance' to the 'Hierarchy' column of Holmes' diagram, following the prediction of a structural approach that farmworker agency and forms of resistance should be shaped and limited by structural factors such as their legal status. I predict agency and resistance to be greatest at the top of the labor hierarchy and least, or most constrained, at the bottom. These adaptations produce the modified framework presented below in Figure 2.

¹²⁰ I will use the term 'human rights-related concerns' to refer to anxieties, concerns, and problems raised by H-2A workers regarding their treatment and conditions on the farm. This both encompasses the indicators given by Holmes and opens the analysis to other aspects of human rights that may be affected by the structural hierarchy of Washington State agriculture.

¹²¹ Though Holmes also refers to structural violence, I have chosen to focus on structural vulnerability for the purpose of this study, as it is a broader term, encompassing not only political and economic, but also cultural and social aspects of structural hierarchies.

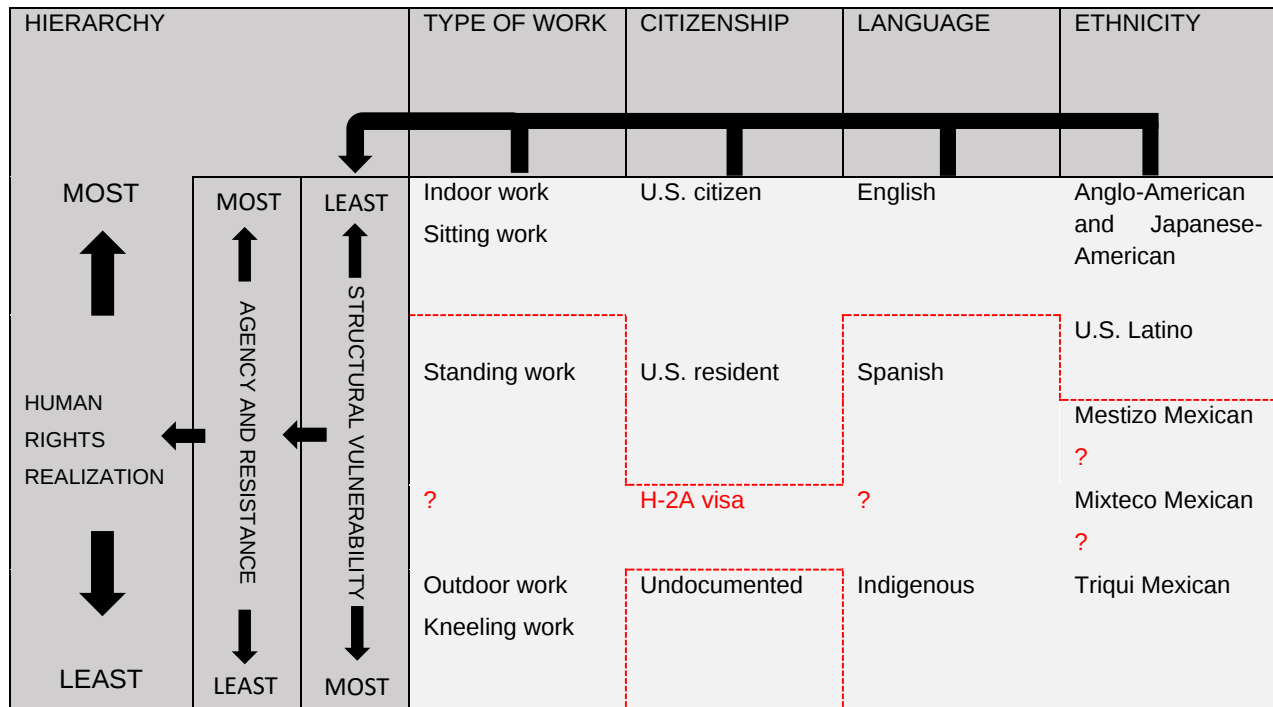


FIGURE 2: Diagram representing the modified conceptual for this research. SOURCE: Adele Eslinger

This modified conceptual diagram indicates that an individual's structural vulnerability is influenced by factors such as ethnicity, language, citizenship, and the type of work they are employed in. The structural vulnerability of an individual in turn influences their agency and resistance. Both structural vulnerability and agency affect the realization of human rights.

3.4 Summary and Predicted Usefulness of a Structural Approach

This framework is useful, as it is predictive for the experience of H-2A visa-ed individuals. Due to the authorized but temporary nature of their legal status, they should likely fall somewhere between U.S. residents and undocumented workers in the labor hierarchy. The positionality of H-2A workers regarding other aspects of this framework is less certain. For now, I have outlined in dotted red lines the potential range within which WA H-2A workers are predicted to fall regarding type of work, language, and ethnicity. Regardless of their exact positionality, this framework predicts that H-2A workers should experience less structural vulnerability than undocumented laborers but more than US residents. Conversely, they should enjoy more realization of human rights than undocumented workers but less than US residents. This framework is also useful in that it leaves open to exploration the types of human

rights which may be realized (or not) for H-2A farmworkers. It is important to note here that additional factors may be found to influence H-2A vulnerability, or that these factors may be differently categorized or grouped at the end of the research.¹²² In general, however, this modified conceptual framework provides a solid starting place from which to approach the proposed research questions.

Finally, the conceptual framework presented here should be powerful in a human rights analysis of the H-2A experience for several reasons: Firstly, not only does it suggest that human rights are not enjoyed equally by all on the farm, but by incorporating concepts such as structural vulnerability, it provides insight on the reasons for this inequality. This should produce an analysis which goes beyond that provided by a traditional, legal human rights approach. Secondly, the nuanced perspective of a structural approach highlights the fact that addressing just one aspect of H-2A concerns will not produce long-lasting solutions for the challenges they face. Additionally, the incorporation of structural vulnerability in an analysis of the H-2A worker experience should help avoid the pitfalls of victim blaming and finger-pointing – common problems in the existing literature as well as in traditional human rights approaches. By directing the analytical gaze at the structural rather than the individual level, it should be easier to pinpoint the roots of human rights-related issues experienced by H-2A workers. This, in turn, would provide the basis for more effective solutions to foster greater protections and support the rights of these individuals, both in Washington State and across the US.

¹²² One other factor missing from Holmes' framework, which almost certainly plays a role in the experience of individuals in the labor hierarchy, is that of gender. A gender perspective is critical for a comprehensive understanding of how human rights-related concerns are distributed on the farm. Gender could be added to the proposed framework as an additional column next to language or ethnicity. However, for the purposes of this study on H-2A workers, I have chosen to leave out gender, while still recognizing it as an important area of future research. I have done so for a variety of reasons: on the one hand, data on the gender of H-2A workers is scarce; reports of male-only or male-dominant hiring practices are rampant, but difficult to confirm. At the same time, the limited timeframe and resources for this study make it impossible to gather enough data on women H-2A workers to find consistent patterns or draw firm conclusions. I have therefore decided that addressing the impact of gender on the realization of human rights for H-2A workers is outside the scope of the current research.

CHAPTER 4 – LEGAL FRAMEWORK

Before analyzing the ways in which the human rights of H-2A farmworkers in Washington State are (not) being realized, it is important to first understand:

- a) the human rights framework applicable to these workers at the international level;
- b) the legal frameworks of protection for H-2A workers at the national and State levels;
- c) the extent to which the legal protections provided H-2A farmworkers at the national- and State-levels reflect international human rights standards.

This Chapter does so in the following manner: Section 4.1 outlines the framework of human rights particularly relevant to H-2A workers at the international level. In this process I differentiate between those conventions and treaties which have been ratified by the US and those which are relevant but not ratified and, therefore, not enforceable. Section 4.2 explores the federal-level legislation regarding H-2A workers, while Section 4.3 addresses State-level legislation. Section 4.4. then concludes, highlighting gaps and insufficiencies in the legal protection of H-2A workers that may leave them exposed to mistreatment. This chapter thus addresses the first sub-part of the main research question, namely: *What human rights are protected by law for H-2A farmworkers at the international, national, and State levels?*

4.1 International Human Rights Framework

Traditionally, the US has taken a rather skeptical stance in international human rights affairs. Its ratification record is more akin to countries such as Iran, Myanmar, or Somalia rather than to most of its Western European counterparts.¹²³ In defending its hesitance to ratify human rights documents, the US has emphasized the concept of State sovereignty and often points to its own constitutional and legal framework as sufficient for the protection of its people.¹²⁴ Under the Trump administration however, this general skepticism of the international human rights regime has reached new heights: in 2018, the US withdrew from the UN Human Rights

¹²³ ‘Status of Ratification Interactive Dashboard’, United Nations Office of the High Commissioner on Human Rights, <https://indicators.ohchr.org/> (accessed 13 June 2020).

¹²⁴ Ibid.

Council, calling it ‘a cesspool of political bias’ and accusing it of protecting human rights abusers.¹²⁵ Many criticized the move not as a statement of dissent over lax standards, but rather as a strategy to loosen international oversight of US human rights abuses.¹²⁶ More recently, in May 2020, Trump announced the US’s intention to break ties with the WHO and withdraw all funding, citing dissatisfaction with the WHO’s response to the COVID-19 pandemic.¹²⁷ These actions and rhetoric paint a discouraging picture of the trajectory of US commitment to the international human rights regime.

Still, while US isolationism has led to a low ratification rate, it is worthwhile to have a complete picture of the international human rights framework which should be applicable to H-2A workers. This allows for a clearer analysis of the ways in which US law succeeds and fails in meeting internationally accepted standards of human rights protection. Consequently, this section, which discusses US-ratified human rights agreements, closes with a note on the treaties and conventions which, though not ratified by the US, are nevertheless relevant to the rights of H-2A workers.

4.1.1 Ratified Human Rights Agreements Relevant to H-2A Workers

Documents delineating human rights relevant to migrant (and thus H-2A) workers have been developed by diverse international organizations such as the United Nations (UN), the International Labor Organization (ILO), and the World Health Organization (WHO), as well as by members of the North American Free Trade Agreement (NAFTA). The following sub-sections briefly review relevant agreements which have been adopted or ratified by the US.

The United Nations: The seminal human rights-related agreement at the international level is the United Nations Universal Declaration of Human Rights (UDHR). Despite its non-binding

¹²⁵ ‘US Quits ‘Biased’ UN Human Rights Council’, BBC, 20 June 2018, <https://www.bbc.com/news/44537372> (accessed 24 May 2020).

¹²⁶ C. Dwyer, ‘U.S. Announces its Withdrawal from U.N. Human Rights Council’, NPR, 19 June 2018, <https://www.npr.org/2018/06/19/621435225/u-s-announces-its-withdrawal-from-u-n-s-human-rights-council> (accessed 14 May 2020).

¹²⁷ J. Beaubien, ‘President Trump Announces that U.S. Will Leave WHO’, NPR, 29 May 2020, <https://www.npr.org/2020/05/29/865685798/president-trump-announces-that-u-s-will-leave-who> (accessed 14 May 2020).

nature, the UDHR is held in high respect, has spurred global awareness and discussion on human rights issues, and has arguably risen to the level of customary international law.¹²⁸ The rights protected by the UDHR are far-reaching and – importantly for temporary agricultural laborers like H-2A workers – are applicable regardless of nationality.¹²⁹ Other UN relevant conventions ratified by the US include the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all forms of Discrimination (CERD), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Together, these conventions produce a network of rights and corresponding duties, which also apply to H-2A workers employed on US farms. Of particular relevance to the living and working conditions of H-2A workers are the following: the right to freedom of opinion and expression;¹³⁰ the right to peaceful assembly and association (including the right to join and form unions);¹³¹ the right to equality before the law and equal protection of the law;¹³² the right to work;¹³³ freedom from forced or compulsory labor;¹³⁴ and the right to health.¹³⁵ Worth highlighting here are the positive obligations generated by Article 2 CERD and Article 16 CAT, which require states to not only take action against human rights infringements by public officials, but also by private parties¹³⁶ or individuals acting with the state consent,¹³⁷ respectively.

In contrast to the UDHR, the ICCPR, CERD, and CAT are binding and monitored by respective Committees, to which the US must submit periodic reports. The US has, however,

¹²⁸ M. Nowak, 'An Introduction to the UN Human Rights System', in M. Nowak, K. Januszewski, and T. Hofstätter (eds.), *All Human Rights for All*, Wien, Neuer Wissenschaftlicher Verlag, 2012, p. 68.

¹²⁹ Universal Declaration of Human Rights (UDHR) (adopted 10 Dec 1948), 217 A (III), Art. 2.

¹³⁰ UDHR, Art. 19; International Covenant on Civil and Political Rights (ICCPR) (adopted 19 Dec 1966, entered into force 23 Mar 1976), 999 UNTS 171, Art. 19; International Convention on the Elimination of all forms of Racial Discrimination (CERD) (adopted 21 Dec 1965, entered into force 4 Jan 1969), 660 UNTS 195, Art. 5.

¹³¹ UDHR, Art. 20, ICCPR, Art. 21 & 22; CERD, Art. 5.

¹³² UDHR, Art. 7; ICCPR, Art. 26; CERD, Art. 5.

¹³³ UDHR, Art. 23; CERD, Art. 5 (i).

¹³⁴ UDHR, Art. 4; ICCPR, Art. 8.

¹³⁵ UDHR, Art. 25; CERD, Art 5(iv).

¹³⁶ CERD, Art 2(1)(d).

¹³⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (adopted 18 Dec 2002, entry into force 22 Jun 2006), 2375 UNTS 237, Art. 16(1).

limited the power of treaty enforcement by not opting into complaint mechanisms, which allow private individuals to send complaints of violations to the appropriate treaty bodies. Further undermining the enforcement of these treaties are the ‘not self-executing’ (NSE) declarations made by the US at the time of ratification.¹³⁸ These NSE declarations limit the domestic status of treaties, restricting their direct application in US courts.¹³⁹ Even so, US ratification of the discussed treaties is not insignificant and provides a certain framework of protection for H-2A workers.

The International Labour Organization: Another source of human rights standards is the International Labour Organization (ILO). Being focused on labor issues, the ILO has developed several conventions particularly relevant to H-2A workers. Of these, the US has ratified just one: The Abolition of Forced Labour Convention (No. 105).¹⁴⁰ This Convention lists five specific areas for which the use of ‘forced or compulsory labour’¹⁴¹ is prohibited, several of which – such as ‘as a method of mobilizing and using labour for purposes of economic development’, and ‘as a punishment for having participated in strikes’¹⁴² – are of particular import for H-2A workers. Also important to note here is that, under Convention No. 105, states are obliged to take positive steps to suppress and abolish use of forced labor by non-state actors (such as growers or farm labor contractors, for example).¹⁴³

¹³⁸ D. Sloss, ‘The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties’, *The Yale Journal of International Law*, 1999, vol 24, p. 131.

¹³⁹ S. Mulligan, ‘International Law and Agreements: Their Effect upon U.S. Law’, *Congressional Research Service*, 2018, <https://fas.org/sgp/crs/misc/RL32528.pdf> (accessed 16 May 2020).

¹⁴⁰ It should be noted that the US has also ratified one other fundamental ILO Convention, namely the Worst Forms of Child Labour Convention (No. 182). While this Convention is especially relevant for other categories of agricultural laborers, such as undocumented laborers, it is less relevant for H-2A individuals, who must be of age to apply for a position. This is not to say that child labor is never an issue in connection to H-2A individuals and families. However, a consideration of child labor issues would require investigation and analysis which is outside the scope of this thesis.

¹⁴¹ While a definition of what exactly constitutes forced labor is not found in this Convention, Article 2 of the 1930 Forced Labour Convention (No. 29) defines forced or compulsory labour as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.’

¹⁴² ILO, *Abolition of Forced Labour Convention, C105*, 25 Jun 1957, C105, Art. 1.

¹⁴³ ILO, *Abolition of Forced Labour Convention, C105*, 25 Jun 1957, C105, Art.1 and 2.

Importantly, the ILO's 1998 Declaration on Fundamental Principles and Rights at Work obliges member states to respect various core, labor-related principles, whether or not the corresponding Conventions in which they are set out have been ratified. According to this Declaration, the US should be held to ILO fundamental principles such as 'the freedom of association and the effective recognition of the right to collective bargaining', 'the elimination of forced or compulsory labour', and 'the elimination of discrimination in respect of employment and occupation,'¹⁴⁴ even when found in non-ratified Conventions. When states do not adhere to fundamental principles, the ILO offers a complaint mechanism. This mechanism has occasionally been used to protest violations experienced by non-citizens working in the US. In case No 2227, for example, the ILO Committee found that a Supreme Court decision effectively rendered remedies for the protection of the freedom of association meaningless for undocumented workers.¹⁴⁵ They further affirmed that an individual's immigration status should in no way 'diminish or condition their status as workers holding fundamental rights.'¹⁴⁶ When the US Government attempted to argue that they were not bound by the conventions used in the ILO's argumentation, the Committee recalled its authority – based in the 1998 Declaration – to use all ILO principles and Conventions in their examination of complaints, regardless of their ratification status in the country concerned.¹⁴⁷ The ILO Committee's stance here is positive for H-2A workers, who, despite their authorized status, exist in a state of legal precarity that calls into question the effectiveness of protections for rights such as the freedom of association.¹⁴⁸

Unfortunately, despite these supportive statements, enforcement within the ILO system has been generally criticized as weak and marginally effective. States are the ones required to put together periodic reports on the application of Conventions they have ratified. This is

¹⁴⁴ ILO, *1998 Declaration on Fundamental Principles and Rights at Work*, 1998, para. 1.

¹⁴⁵ *United States of America (Case No 2227)* (19 Oct 2002) Report of the Committee on Freedom of Association No 332, part C., para. 604. https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2907332 (accessed 7 Jun 2020).

¹⁴⁶ *Ibid.*, part A, para.555.

¹⁴⁷ *Ibid.*, part C, para. 600.

¹⁴⁸ A deeper discussion of the precarities of this status takes place in Section 4.2 on national legislation of the H-2A program.

problematic, as governments may have motivations to present data in the most favorable light. In addition, ILO responses to complaints take the form of dialogue, recommendations, and technical assistance, rather than sanctions. For a state that is greatly concerned about their standing within the international community, recommendations and negative press may be enough to spur meaningful change. For a country such as the US, however, which shows less and less concern for their reputation within the international human rights regime, such weak enforcement mechanisms may have little effect.

The World Health Organization: Worth briefly mentioning here is the Constitution of the World Health Organization, which defines health as ‘a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity’, and declares that high health standards are the right of all persons ‘without distinction of race, religion, political belief, economic or social condition.’¹⁴⁹ The holistic approach to health taken by the WHO Constitution also notes the importance of ‘informed opinion and active co-operation’ in attaining better health for all. The power of the WHO to demand reform is limited, however, as its main mechanism of supervision is through annual state progress reports.¹⁵⁰ In addition, the WHO’s authority in the US is currently in a precarious position, due to the previously-mentioned declaration of US intentions to pull out of the WHO. Whether or not the US can so easily sever ties with the WHO, even the mere declaration indicates a lack of political will which does not bode well for US compliance with WHO standards. Consequently, while the WHO Constitution may in theory provide certain protections for H-2A workers, it is thus uncertain to which extent these will continue to be upheld.

NAFTA and the NAALC: The North American Agreement on Labor Cooperation (NAALC) was negotiated by the US, Mexican, and Canadian governments at the same time as its better-known partner, the North American Free Trade Agreement (NAFTA). The NAALC is meant to provide oversight and encourage effective enforcement of the labor standards agreed upon

¹⁴⁹ WHO Constitution, (adopted 22 July 1946, entered into force 7 April 1948), Preamble, <https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1> (accessed 12 Apr 2020).

¹⁵⁰ WHO Constitution, Ch. XIV, Art. 61 and 62.

by the three NAFTA member states. These standards apply to eleven identified labor law principles, most of which are already protected by other international agreements to which the US is party. Especially worth noting is the inclusion of principle 11, which explicitly calls for the ‘protection of migrant workers’ by ‘[p]roviding migrant workers in a Party’s territory with the same legal protection as the Party’s nationals in respect of working conditions.’¹⁵¹ In addition, article 3 of the NAALC lists seven ways in which a state party is required to take action in order to ‘effectively enforce its labor law,’ including monitoring and investigation through on-site inspections, requirements for record keeping, and sanctions for violations, among others.¹⁵² NAALC principles and requirements, however, leave the development of labor laws and the establishment of minimum standards up to the discretion of state governments.¹⁵³ In this way, governments maintain a healthy dose of sovereignty despite the positivist language of the NAALC.

The NAALC establishes a National Administrative Office (NAO) for each member state. NAOs can receive complaints regarding labor issues occurring in another member state. This means, for example, that a Mexican individual who experiences a labor violation while working in the US must file their complaint in Mexico.¹⁵⁴ The processing of complaints occurs in three stages: consultation; evaluation; and dispute resolution, with the development of remedial plans and the initiation of sanctions as a last resort.¹⁵⁵ While complaints do not generally make it past the first stage, poor press and public pressure may generate some positive results. Two examples stand out for their involvement of migrant farmworkers. In 2003, Mexican H-2A workers in North Carolina filed a complaint alleging failure of the US government to protect a variety of labor rights guaranteed under the NAALC and US law.¹⁵⁶

¹⁵¹ North American Agreement on Labour Cooperation (NAALC) (opened for signature 8 Sept 1993), 32 L.L.M. 1499, Annex 1.

¹⁵² NAALC, Art 3.

¹⁵³ NAALC, Art 3.

¹⁵⁴ C. Lance, ‘Trump, Trade, and Trabajo: Renegotiating NAFTA’s Labor Accord in a Fraught Political Climate’, *Indiana Journal of Legal Studies*, vol. 26, no. 1, 2019, p. 269-270.

¹⁵⁵ *Ibid.*

¹⁵⁶ ‘Report on the Review by the NAO of Mexico of Public Communications MEX 2003-1, MEX 2005-1 and MEX 20011-1 Pursuant to the NAALC, p. 30, https://www.dol.gov/sites/dolgov/files/ILAB/reports/mx_report_eng.pdf (accessed 26 May 2020).

Eventually, this complaint led to the development of a new agreement between the US and Mexico for enhanced labor law enforcement, and also resulted in the recognition of the Farm Labor Organizing Committee as a union. In Washington State, a 1998 complaint on behalf of 50,000 migrant farmworkers alleged violations of NAALC principle 11 to protect migrant workers, citing substandard working conditions, discriminatory treatment and threats, and insufficient protections for farmworker organizing.¹⁵⁷ The complaint drew international interest and, eventually, government conversations led to an educational outreach activity in Yakima, WA, as well as greater communication on the issues concerned. Whether or not these actions led to concrete improvements on the ground is less clear. Certainly, the relief that NAALC mechanisms provide has thus far been limited and highly politicized. Still their continued use may inform public opinion and produce long-term improvements for the protections of H-2A labor rights.

4.1.2 Non-ratified but relevant human rights agreements

Before moving on to an analysis of legal protections at the national level, it is worth pointing out several additional conventions and treaties that define rights applicable to H-2A workers. At the UN level, these include the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The MWC provides the most comprehensive protection available at the international level for migrant workers.¹⁵⁸ Unfortunately, however, almost all ratifying states of the MWC are sending¹⁵⁹ countries rather than receiving¹⁶⁰ countries. Though disappointing, this is a predictable stance, as sending countries want their nationals protected, while receiving countries may be concerned about the negative economic impacts that the relatively strict requirements of the Convention could

¹⁵⁷ C. Lance, p. 277.

¹⁵⁸ For example, it obliges States to protect migrant workers from physical violence as well as threats and intimidation, not only from public officials but also from private parties, such as employers (Art. 16, para. 2), while also reaffirming other rights such as the right to organize and join unions (Art. 26).

¹⁵⁹ (countries which tend to supply migrant workers)

¹⁶⁰ (countries which primarily employ migrant workers)

have. The US is signatory to both the ICESCR and CEDAW. As such, while not legally bound to treaty provisions, it is obliged to refrain from acting in a way ‘that would defeat the object and the purpose of the treaty.’¹⁶¹ This is a fairly low bar, but important nonetheless.

At the ILO level, two non-ratified Conventions are particularly worth mentioning: The Convention Concerning Migration for Employment (No. 97) and the Safety and Health in Agriculture Convention (No. 184). The former makes several relevant provisions, requiring for example that states take measures against ‘misleading propaganda relating to emigration and immigration’¹⁶², while the latter provides a long list of far-reaching protections for health and safety within the agricultural sector, emphasizing the state’s obligation to monitor and sanction agricultural employers as well as the right of workers to collaborate on health and safety measures.¹⁶³ Though not ratified by the US and, therefore, not directly enforceable, these agreements set international standards that may be still be influential through other, indirect means such as journalism, media representation, and legal argumentation. In addition, the US is signatory to a number of these agreements. Were the political stance toward the human rights regime to become more favorable in the future – were the US to ratify these agreements – they would be relevant for the H-2A population.

4.2 National framework of Protections

At the federal level, the framework of legal protections for H-2A workers stems from the US statutes and regulations that govern the program. As this thesis does not primarily pursue a legal analysis, the current section does not enter discussions of the finer nuances of H-2A law. Its goal is rather to briefly present the legal protections H-2A workers in order to facilitate a discussion of issues and gaps in the protection of human rights in Section 4.4.

¹⁶¹ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entry into force 27 Jan 1980) 1155 UNTS 331, Art.10 and 18.

¹⁶² ILO, *Migration for Employment Convention C97*, 1 Jul 1949, C 97, Art. 3, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312242 (accessed 28 May 2020)..

¹⁶³ ILO, *Safety and Health in Agriculture Convention, C 184*, 1 Jun 2001, C 184, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312329:NO (accessed 28 May 2020).

The organization and administration of the H-2A program is tangled and confusing for anyone not intimately familiar with US law and government institutions. The following figures help bring some visual clarity to this confusion. Figure 3 shows where laws and regulations governing the different aspects of the H-2A program can be found:

Area of Law	Source of Law	Part of H-2A program governed
Immigration Law	INA – 8 U.S.C. Sect. 1101	Definition/authorization of H-2A workers
	INA – 8 U.S.C. Sect. 1184	General requirements for admission of nonimmigrants
	INA – 8 U.S.C.Sect.1188	Requirements for admission of H-2A workers
Employment Law	20 CFR Sect.655.100-185	Labor Certification Process for H-2A workers
	29 CFR Sect.501	Enforcement of Contractual Obligations

Figure 3: Sources of H-2A law. SOURCE: Adele Eslinger.

As Figure 3 demonstrates, the statutes and regulations governing the H-2A program are codified in immigration law under the Immigration and Nationality Act (INA – also referenced as Title 8 U.S.C.), as well as in employment law under Titles 20 and 29 of the Code of Federal Regulations (CFR). Generally, the INA defines requirements for the admission and employment of H-2A workers, while the CFR deals with worker rights and protections, employer-employee relations, and H-2A contracts. These protections, found primarily in 8 U.S.C. Sect. 1188 of the INA as well as in 20 CFR Sect. 655.100-185, and 29 CFR Sect. 501, can be broken down into 3 main categories: assurances of treatment and conditions required for the approval of H-2A petitions; regulation and enforcement measures; and penalties for employer violations.

For an employer's H-2A petition to be approved, the various agencies involved in the application process must be satisfied that it ensures certain standards of fair treatment and working conditions for prospective workers. In part, these take the form of a list of benefits that H-2A employers must include in their job offers, such as free housing in compliance with federal or State standards, workers' compensation for injury and disease on the job, three meals a day, transportation between housing and workplace, records of earnings, and

employment for at least three quarters of the total work period specified in the contract.¹⁶⁴ In addition, employers must promise to abide by an additional set of standards for treatment and conditions,¹⁶⁵ though these are not required to be included in their job offer to employees.

Another conceptualization of the H-2A program is provided by Figure 4 below:

Program Area	Agency	Division(s)	Specific Responsibilities
Application	State Workforce Agency		Processing initial job order and assists employers in recruiting domestic workers
	Department of Labor	Employment and Training Administration	Administering labor certification program
	Department of Homeland Security	U.S. Citizenship and Immigration Services	Approving petition for H-2A workers
	Department of State	U.S. Embassies and Consulates	Interviewing prospective workers and issues visas
Enforcement	Department of Labor	Wage and Hour Division	Monitoring, investigation, seeking injunctive relief; enforcement of FLSA where applicable
		Occupational Safety and Health Administration	Monitoring housing conditions and workplace health and safety
	Equal Employment Opportunity Commission		Investigating complaints of workplace discrimination

Figure 4: Agencies Involved in the H-2A Program. SOURCE: Adapted and expanded-upon from P. Garcia.¹⁶⁶

The protections provided in both sets of standards described here correspond to human rights defined in international documents. To be meaningful, however, these protections must be regulated and enforced. As the above chart shows however, no less than four agencies are

¹⁶⁴ 20 CFR, Sect. 655.122(a)-(q).

¹⁶⁵ These include guarantees of protections such as: compliance with relevant federal, state, and local laws; minimum standards of conditions and treatment equal to those for US workers; no unfair treatment (generally prohibiting all forms of discrimination, threats, intimidation, and retaliation); the prohibition of payments by workers for the application or recruitment process; and the posting of worker rights, among others. See: 20 CFR Sect. 655.135(a)-(l).

¹⁶⁶ P. Garcia, p. 350.

involved in the H-2A application process while just one (the DOL) deals with most aspects of enforcement.¹⁶⁷ This unequal distribution is further confirmed by noting that only one of the five sources of law listed in Figure 3 (29 CFR Sect. 501) deals with program monitoring and enforcement. The other four outline a complex, multi-stage application process spread across multiple agencies. According to scholars such as P. Garcia, the disproportionate attention given to the H-2A application and admission process reflects the increasing concern of the US government – especially post-9/11 – with the tightening of immigration control.¹⁶⁸ It suggests that, at the federal level, monitoring who can *enter* the country is deemed more worthy of attention than ensuring the fair treatment of migrants *within* the country. Some enforcement measures do exist though. For example, Title 29 of CFR Sect. 501.1 delegates authority to DOL's Wage and Hour Division (WHD) to carry out 'certain investigation, inspection and law enforcement functions [...] concerning the obligations of the work contract between an employer of H-2A workers and the H-2A workers [...].'¹⁶⁹ This covers such areas of H-2A employment as housing, meals, transportation, and payment. Standards used for enforcement are provided not only by the INA and CFR code that regulates the H-2A program, but also by the Office of Safety and Health Administration (OSHA) and, the Fair Labor Standards Act (FLSA) and, where applicable, state and local laws. Any individual, including any H-2A worker, may submit complaints regarding violations of these standards to the DOL or other local workforce agency. Complaints and any subsequent investigations must remain confidential.¹⁷⁰

If violations are found, a number of consequences are prescribed by federal H-2A law. These may take the form of civil money penalties, other remedies necessary 'to make the employee whole' again, and even the denial of future H-2A certifications for a period of up to three years,¹⁷¹ Denial of an employer's H-2A certification may also occur at the time of application,

¹⁶⁷ The Equal Employment Opportunity Commission (EEOC), though listed, rarely gets involved, reacting only occasionally to complaints.

¹⁶⁸ P. Garcia, p. 346.

¹⁶⁹ 29 CFR Sect.. 501.1(c).

¹⁷⁰ 29 CFR Sect. 501.5.

¹⁷¹ 29 CFR Sect. 501.3.

given the existence of a current strike or labor dispute, substantial violations of labor certification terms within the past two years, or insufficient proof that employees will be provided sufficient coverage in case of injury or disease.¹⁷² Taken together, these three areas of assurances, enforcement measures, and penalties, present a seemingly-robust framework of protections for H-2A workers. Further consideration in Section 4.4 however, brings the meaningfulness of this protective framework into question.

4.3 Washington State-level Framework of Protections

As noted in the previous section, H-2A employers are required to comply with applicable State laws and regulations. In Washington State, relevant laws are codified in the Revised Code of Washington (RCW), while state agency regulations are codified in the Washington Administrative Code (WAC). These codes stipulate standards covering a variety of areas affecting H-2A workers, such as workplace safety, worker's compensation requirements, temporary housing requirements and non-discrimination in employment. Enforcement of these standards is largely the responsibility of the Washington State Department of Labor & Industries (L&I). L&I also monitors wages, conducts worksite inspections, and responds to labor-related complaints.

While the laws and regulations contained in the RCW and WAC are relevant and enforceable for H-2A worksites, they were largely not created to address the specific situation of H-2A workers and I therefore do not go into a detailed analysis of them here. In fact, very little legislation has been enacted at the state level which deals directly with the regulation of the H-2A program. One exception is Senate Bill (SB) 5483, 'Concerning the H-2A Temporary Agricultural Program', which was recently passed in 2019. The bill aims to improve oversight of the H-2A program in Washington State, which farmworker advocates have long said suffers from weak enforcement.¹⁷³ It does so by, among other things, establishing an office tasked with monitoring the various requirements for conditions and treatment on farms employing H-

¹⁷² 8 U.S.C.Sect.1188(b).

¹⁷³ 'SB 5438 Unanimously Passes in WA House Bringing Hope for H2A Farmworker Protections', Community to Community, 12 Apr 2019, <http://www.foodjustice.org/blog/2019/4/12/sb-5438-unanimously-passes-in-wa-house-bringing-hope-for-h2a-farmworker-protections> (accessed 24 May 2020).

2A workers.¹⁷⁴ The bill didn't pass without modification though: both farm owners and legislators resisted the imposition of an additional hiring fee which would have funded the new office. They claimed it would put unnecessary financial strain on farmers, citing the estimated \$2500 they already pay to participate in the H-2A program.¹⁷⁵ While it is still too early to assess the impacts of SB 5483, farmworkers and activist groups hope it will bring concrete improvements to the lived experience of H-2A workers.

Another recently-passed bill, SB 6261, was drafted to address the right of H-2A workers in Washington State to organize or strike without retaliation. In its original form, the bill included an entire section which, in detailed language, expanded upon the definitions and prohibitions of retaliation against H-2A employees who file complaints, testify in court, or otherwise take action against their employer. However, this section produced strong objections from large agricultural associations such as the Washington Growers League and the Washington State Farm Bureau, and was subsequently removed from the bill.¹⁷⁶ The form of the bill that passed still heralds progress though: before its passage, FLCs registered as non-profits were exempt from the Farm Labor Contractor Act (FLCA), which regulates the treatment of FLC-hired workers; SB 6261 gets rid of this exemption in Washington State, closing a loophole that previously left many H-2A laborers vulnerable to abuse.¹⁷⁷

As this section demonstrates, State-level law provides some increased protection for H-2A workers in Washington. At the same time, the pressure of agricultural politics and economics poses challenges to the passage of legislation aimed at securing their rights. The impacts of this dynamic will be further explored in Chapter 6. We now turn to an evaluation of national- and State-level protections in view of international human rights standards.

¹⁷⁴ Ibid.

¹⁷⁵ T. Martinell, 'Worker Fee Removed From H-2A Bill', *The Lens*, 15 Apr 2019, <https://thelens.news/2019/04/15/worker-fee-removed-from-h-2a-bill/> (accessed 17 May 2020).

¹⁷⁶ S. Potter, 'Advocates Applaud State Senate Passage of Farmworker Rights Bill', *Public News Service*, 20 Feb 2020, <https://www.publicnewsservice.org/2020-02-20/rural-farming/advocates-applaud-state-senate-passage-of-farmworker-rights-bill/a69306-1> (Accessed 27 Apr 2020).

¹⁷⁷ Final passed form of SB 6261: <http://lawfileext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/Senate/6261-S.SL.pdf?q=20200620213501>.

4.4 Issues, Gaps and Considerations in Light of Human Rights Law

Having reviewed the relevant federal and State statutes and regulations, we can analyze the extent to which they align with the human rights outlined in Section 4.1. Important to remember in this analysis is that nation states, not private individuals or entities, are primarily the ones bound to respect, protect, and fulfill the human rights outlined by international law. Analyzing the legal protections for H-2A workers then, is largely a consideration of the extent to which the US satisfies state obligations to *protect* ratified human rights by taking action when they are infringed upon by third parties and to *fulfill* human rights by creating laws and systems that facilitate their enjoyment.

At first glance, it would seem that existing law ensures a wide range of rights: requirements for non-discrimination in the hiring and treatment of workers and prohibitions of retaliation against employees correspond to the freedom of assembly, to the freedom of opinion and expression, to the prohibition of forced and compulsory labor, to freedom from discrimination, and to freedom from torture and cruel, inhumane, and degrading treatment. Requirements to provide workers with meals, workers compensation insurance, housing meeting federal standards, and the highest of applicable minimum wages correspond to the right to health and an adequate standard of living. The requirement to provide minimum standards of treatment equal to those provided to US workers aligns with the right to equal protection of the law. And requirements for wages, insurance, and full-time employment for at least 75% of the work contract correspond to the right to work. Several provisions at the federal- and State-levels even seem to protect rights contained in conventions and treaties not yet ratified by the US. For example, US code prohibits employer confiscation of identity and work authorization documents,¹⁷⁸ which is protected under the non-ratified Migrant Workers Convention.

A closer look, however, reveals that many of these laws and regulations provide less protection than they would suggest. One of the reasons for this is a lack of clarity in the definition of requirements. Take for example the federal meal requirement: while the law stipulates that

¹⁷⁸ 20 CFR Sect. 655.135(a)-(l).

employers must provide three meals a day to H-2A workers,¹⁷⁹ it makes no comment on the quality or nutritional content of those meals. This leaves the decision up to employers, who are restricted by general financial pressures as well as by the amount they are legally allowed to deduct from workers' pay each day for food.¹⁸⁰ Requirements to inform workers of their rights are also poorly defined. According to US code, rights must be visibly posted in a language understood by 'a significant portion of the workers.'¹⁸¹ On the one hand, it remains unclear exactly which rights must be included. Equally concerning, however, is that it is not required that *everyone* be able to read their rights; just a 'significant portion' of the workforce – whatever that may be interpreted to mean. The requirement also doesn't take into consideration that some employees may be illiterate and unable to read whatever rights are posted. Many other regulations suffer from a lack of clarity: threats and intimidation are prohibited but not defined in detail; family housing must be offered when it is the 'prevailing practice', but what constitutes prevailing practice is uncertain;¹⁸² transportation must be provided to and from the workplace, but the law does not define whether workers should be provided with transportation for other purposes, such as going to stores or community events.¹⁸³ Likewise, worker's compensation is required for injuries or illness that are directly work-related, but employers are not required to cover other healthcare needs that may arise for workers or their families.¹⁸⁴ The list could go on. Suffice it to say, upon closer observation, many of the human rights-related benefits and assurances outlined by US law are not clearly defined in a way that optimizes their effectiveness for H-2A workers.

Weak enforcement also undermines the meaningfulness of worker protections. The law itself is in-part to blame for this. For example, while 29 CFR Sect. 501 clearly gives WHD the authority to conduct investigations, it does not clarify how often these investigations should occur. This means that housing issues arising during a worker's employment may go

¹⁷⁹ 20 CFR, Sect. 655.122(g).

¹⁸⁰ 20 CFR, Sect. 655.173(a).

¹⁸¹ 20 CFR, Sect. 655.135(a)-(l).

¹⁸² 8 U.S.C., Sect. 1188(c)(4).

¹⁸³ 20 CFR, Sect. 655.122(h)(3).

¹⁸⁴ 20 CFR, Sect. 655.122(e).

unchecked. Another problematic aspect of enforcement is that workplace inspections arising from complaints are generally preceded by a notice to employers. This reduces their meaningfulness, as employers can ensure that on the day of inspection, conditions and treatment comply with regulations. In addition, employers are required to keep documentation of worker hours and pay for a period of three years, but they are not required to report this unless requested, meaning these records are rarely analyzed.¹⁸⁵ What's more, having multiple sources of law that govern the H-2A program can give rise to confusing – even contradictory – requirements, which undermines enforcement. For example, regulatory H-2A law stipulates that employees must be reimbursed for travel from their country of origin after 50% of their contract, while other federal standards with which H-2A employers must comply require reimbursement to occur during the first week of employment.¹⁸⁶ Such legal inconsistencies make enforcement and sanctions more difficult.

Legal flaws contribute to weak enforcement of the H-2A program, but they are not the only cause. Poor regulation also stems from the fact that the recent growth of H-2A program use in WA has not been matched by an increase in funding for program oversight. Accordingly, the Employment and Security Department, which partners with other agencies to regulate employer compliance, recently requested \$1.7 million from the US DOL for its H-2A responsibilities but received only \$300,000.¹⁸⁷ Without increased funding, these agencies are forced to use their already-thinly-stretched staff and resources to meet the needs of a growing number of employers and H-2A workers, reducing both the frequency and quality of inspections they are able to provide.

Delving deeper into the legal provisions for H-2A workers also reveals troubling loopholes and gaps in protection. For example, 20 CFR 655.135^e mentions that qualifying H-2A employers must comply with the FLSA.¹⁸⁸ The FLSA, establishes standards for various areas

¹⁸⁵ 20 CFR Sect. 655.122(j)(2).

¹⁸⁶ P. Garcia, p. 354

¹⁸⁷ D. Jenkins, 'Washington House Budget Panel Nixes H-2A Fees', Capital Press, 9 April 2019, https://www.capitalpress.com/state/washington/washington-house-budget-panel-nixes-h-2a-fees/article_dd0fe486-5ae4-11e9-a8ac-67bb3168f9dc.html (accessed 12 Jun 2020).

¹⁸⁸ 20 CFR 655.135(e)

of labor protection, such as pay, recordkeeping and child labor. It applies to enterprises with a gross volume of sales of at least \$500,000 per year,¹⁸⁹ which would place most farms hiring H-2A employees under its regulation. Nevertheless, a loophole exists involving FLCs, especially those registered as non-profits. Though FLCs take on the role of ‘employer’ in their recruitment and distribution of agricultural workers, they are not selling goods and therefore, do not trigger the gross sale volume required for the application of the FLSA. This strips H-2A farmworkers recruited through FLCs of FLSA protection. Another loophole involves the three-quarters rule and the 50% rule. The three-quarters rule requires employers to guarantee H-2A workers with employment for at least $\frac{3}{4}$ of the period specified in the work contract.¹⁹⁰ The 50% rule, however, requires employers to offer an H-2A-occupied job to any qualified US applicant until halfway through the contract period. An H-2A worker may thus be terminated before $\frac{3}{4}$ of their contract is up if it means compliance with the 50% rule. Unlike in other cases of early termination, employers meeting the 50% rule are not required to provide pay compensation for the shortened contract.¹⁹¹ This clearly reduces protections for H-2A employees

These are just a few examples of loopholes that leave H-2A workers without important protections. Other gaps in protection exist because H-2A workers are blatantly excluded from relevant legislation, such as the National Labor Relations Act (NLRA) and the Migrant Seasonal Agricultural Worker Protection Act (MSPA). All agricultural workers are excluded from the NLRA, which provides the right to organize and strike to most private employees, so the exclusion of H-2A workers here is lamentable, but not targeted.¹⁹² Exclusion of H-2A workers from the MSPA, however, is explicitly singled out in the language of the Act, whose provisions otherwise provide the most comprehensive protections for agricultural employees

¹⁸⁹ 29 U.S.C. Sect. 203 (s)(1)(a)(ii).

¹⁹⁰ 20 CFR Sect. 655.122(i)(1)

¹⁹¹ 20 CFR Sect. 655.122(i)(4)

¹⁹² L. Guerra, p. 197.

in the US. According to some scholars, excluding H-2A workers from the MSPA leaves them with less protection than even undocumented workers, who are covered by the Act.¹⁹³

Summary and Conclusion

As this section has shown, the legal protections seemingly promised to workers by US statutory and regulatory law are weakened by poor definition, insufficient enforcement, and loopholes. Weaknesses are compounded by the confusion arising from multiple sources of law and the involvement of numerous agencies with overlapping responsibilities. Unfortunately, consistent pressure by agricultural lobby groups and growers' associations has impeded the passage of tighter regulations on employer compliance – in fact, scholars have noted a tendency toward deregulation of the program over the years since its establishment.¹⁹⁴ The resulting framework of 'protection' is not only incomplete – it is also biased. It places great trust in the good will of employers toward the H-2A workers they hire, while placing these workers in positions of great vulnerability if employers do not in fact act in goodwill. As a result, human rights which should be protected based on the US's ratification record – such as the right to health, freedom from discrimination, freedom from forced labor, liberty of movement, and freedom of expression, opinion, and association – ring somewhat hollow when one considers the situation of H-2A workers. This calls into question whether the US federal and State-level governments are truly in line with its obligation to protect and fulfill human rights as outlined in international conventions and treaties.

¹⁹³ Ibid.

¹⁹⁴ R. Russo, p. 55.

CHAPTER 5 – RESEARCH DESIGN AND METHODOLOGY

One of the most important stages of the research process is the consideration and selection of methods that ensure rigor and complement research goals. From the beginning, it was clear to me that the current research would employ a qualitative approach for two main reasons: it is the tradition in which I have the most previous research experience and in which I am therefore most confident in producing high quality work; and I wanted a research design that centers the narratives of H-2A farmworkers and advocates. Selecting a specific approach within the broad area of qualitative inquiry, however, entailed in-depth consideration. This chapter presents the results of that consideration, outlining the chosen research design and methodology as follows: Section 5.1 presents the central research questions, Section 5.2 and 5.3 discuss the approach taken to sampling and data collection and to data processing and analysis, respectively. Finally, Section 5.4 closes with some reflections on my personal research experience and how the emergence of COVID-19 shaped both the process and results of this thesis.

The selection of appropriate methodology relies on the development of clearly articulated research questions. Generating research questions took considerable time and followed the process described in Alan Bryman's *Social Research Methods* as a 'progressive focusing down' and a movement 'from a general research area down to specific research questions.'¹⁹⁵ Sources for the central questions guiding this research include existing theory, personal interest, and social issue.:¹⁹⁶ The situation of H-2A farmworkers represents the intersection of two key areas of personal experience and interest: immigration issues and issues related to US food systems. The reading of Seth Holmes' *Fresh Fruit, Broken Bodies* further inspired me to explore the use of theoretical concepts from structural approaches to the analysis of H-2A experiences, while instances such as Honesto Ibarra's death highlighted the social import of

¹⁹⁵ A. Bryman, *Social Research Methods*, 2012, Oxford University Press, New York, p.89.

¹⁹⁶ See A. Bryman, p. 88 for a description of commonly-recognizes sources of research questions.

exploring these issues. The process of ‘focusing down’ yielded the following main research question:

In what ways does structural vulnerability influence the realization of human rights for H-2A farmworkers in Washington State agriculture?

To facilitate the operationalization of this main question, four sub-questions were developed:

- ***What human rights are protected by law for H-2A farmworkers at the international, national, and State levels?***
- ***What types of human rights-related concerns are being raised by H-2A farmworkers in Washington State?***
- ***In what ways is the current situation generated by COVID-19 impacting these human rights-related concerns?***
- ***What is the relevance of structural vulnerability to these findings?***

Having settled on research questions, I was able determine how to answer them most effectively. The next section presents the resulting selection of sampling and data collection methods used in this research.

5.1 – Sampling and Data Collection

Sampling

In his book on social research methods, Bryman describes purposive sampling as a process in which ‘units of analysis are selected in terms of criteria that will allow the research questions to be answered.’¹⁹⁷ Purposive sampling was thus selected as the most useful method for the current research, as it offers a structured and focused approach to data collection. The sampling process involved three main phases: the selection of cases, the selection of existing sources of information on the H-2A experience, and the selection of key informants for interviews.

While this research is not a case study, it closely follows the case of H-2A farmworker death and the corresponding protests and lawsuits that involved Sarbanand Farms in Northwest

¹⁹⁷ A. Bryman, p. 418.

Washington State. The selection of this case as a central narrative and point of focus is an example of ‘critical case sampling’ as described by Bryman.¹⁹⁸ It was deemed useful to the exploration of the proposed conceptual framework because it provided particularly well documented instances of H-2A suffering and resistance. In general, the selection of existing sources of data and of key informants was done in the manner of generic purposive sampling which, unlike theoretical sampling, is not iterative.¹⁹⁹ In other words, almost all data sources were selected before beginning the data processing and analysis phase, based on criteria meant to ensure a diverse range of sources and perspectives on the H-2A experience. However, some additional sampling was conducted during later phases of the research: in some cases, this occurred as snowball sampling, as key informants made me aware of additional sources of information; in other cases, I intentionally sought out additional data sources to flesh out categories and themes as they began to surface during the coding process.

Data Collection

Data collection involved the gathering of both primary and secondary data for later processing and analysis. Secondary data collection began in the literature review stage, in which I used u:search to locate existing research and scholarship on the situation of H-2A workers both nationwide as well as in the State of Washington. The scarcity of Washington-specific scholarship highlighted in the literature review led me to seek out other types of data sources, such as government reports and policy briefs. Being aware of the incident at Sarbanand Farms, I also consulted case documents and new reports to provide a richer understanding of those events. Additional news articles, senate hearing reports, and other public documents provided insight into the concerns and dissatisfactions of various actors with the H-2A program.

Having familiarized myself with the main issues being highlighted in regard to the H-2A program, I determined it was necessary to gather primary data as well in order to allow a more in-depth exploration of the structural aspects of these issues. I chose to do so through the execution of semi-structured interviews with key informants. Key informants were selected in

¹⁹⁸ Ibid., p. 419.

¹⁹⁹ Ibid., p. 422.

a purposive manner to fill gaps in existing knowledge and provide additional insight on areas or events of central importance to the research. Between late March and early April I reached out to approximately nine individuals or organizations whose perspectives I hoped to obtain, including a brief description of my research and the purpose of our proposed interview. After one initial response and a number of follow-up emails, I was able to secure three informants who represented key areas or perspectives relevant to the situation of H-2A farmworkers: an organizer with the farmworker-led union Familias Unidas por la Justicia (FUJ) based in Northwestern Washington; an attorney with Colombia Legal Services (CLS), the organization representing H-2A workers in the class action lawsuit against Sarbanand Farms; and a farm owner in Western Washington who, though he does not employ H-2A workers, was able to provide general insight on the challenges and pressures faced by small to medium growers in Washington State agriculture. These key informants are referred to respectively as ‘FUJ Informant’, ‘CLS Informant’, and ‘Grower Informant’ throughout the text to preserve their anonymity.

Interview questions were developed in a systematic fashion to ensure that information gathered during interviews would be optimally useful in the answering of research questions. At the suggestion of my supervisor, I created a table displaying my research question and sub-questions. I then developed interview questions corresponding to each sub-question (see Appendix D). An interview guide was also developed to assist in the preparation and execution of interviews. Interviews were conducted in a semi-structured fashion, meaning that I allowed room for exploration of relevant topics that came up during interviews, while still ensuring that core questions were addressed.

Ensuring the informed consent of interviewees was a top priority for the design and execution of primary data collection. A short, two-page consent document was developed and provided to each interviewee before our scheduled conversation. This document described the purpose of my research, clarified the role of the interviewee, and informed them of how the interview would be conducted and the methods I would take for the protection of their data. An additional page provided space for the interviewee to sign in indication of their consent (see

Appendix C). The general format of the informed consent document was inspired by a previous student of the Vienna Master in Human Rights Program, K. Siewert,²⁰⁰ upon the suggestion of my supervisor. Siewert in turn based her forms on models provided in King and Horrocks' *Interviews in Qualitative Research*.²⁰¹ I chose this model of consent form because it was brief but comprehensive, written in easily-understandable language, and provided spaces for individuals to provide (or withhold) consent for various aspects of the interview process. Verbal consent was additionally recorded for interviewees who did not return the signed consent form until after our scheduled conversation.

5.2 - Data processing and analysis

Initial transcription of interviews was conducted with the use of the algorithmic software Sonix. I then re-listened to interviews and cleaned up the transcripts to accurately reflect what was said in places where the algorithmic software had made errors. Both the transcribed interviews as well as secondary data sources²⁰² were imported into the MAXQDA platform, where they were then processed and analyzed using methods of qualitative content analysis. Open coding – which Strauss and Corbin define as ‘the process of breaking down, examining, comparing, conceptualizing and categorizing data’²⁰³ - was used to identify recurring concepts and categories within the data. To code data sources, I read carefully through documents and labelled phrases or short sections of data that was somehow interesting or relevant for the experience of H-2A workers. As the number of codes grew, I assigned colors to similar codes to group them into categories. Eventually, I merged some codes with overlapping concepts and developed a hierarchy of relationships between others to begin to draw out overarching themes and insights from the data.

²⁰⁰ See: K. Siewert, *A Tale of Two CEDAW Cities: Investigating the Process and Outcomes of Women's Human Rights Localization in San Francisco and Los Angeles*. Master Thesis, University of Vienna, 2019, Appendix A, <http://othes.univie.ac.at/58714/> (accessed 15 Apr 2020).

²⁰¹ N. King and C. Horrocks, *Interviews in Qualitative Research*, London, SAGE Publications, 2010, p. 113.

²⁰² Not including scholarly sources used in the literature review.

²⁰³ A. Strauss and J. Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques*, Newbury Park, CA, Sage Publications, 1990, p. 61.

This last step of data processing bled into and overlapped with data analysis, the first steps of which also occurred in the MAXQDA platform. As I began to merge and hierarchically order coded concepts, I also began to analyze their relationship to each other. I used a few tools within the MAXQDA platform, such as Code Matrix Browser, to see where different codes and categories of codes occurred most frequently across data sources. Additional stages of analysis used visual tools such as mind-mapping. Scholars such as Tony Buzan have claimed that mind-mapping stimulates analytical thought by more closely mirroring the nonlinear, nodal way the brain ‘prefers’ to process data.²⁰⁴ These visual models, which I adjusted and modified as coding progressed, were critical in capturing the relationships between concepts generated in the coding process and their connection to human rights.

5.3 – Research experience

The research experience was both a rich and challenging process. Several unforeseen challenges came up which led to adjustments in scope and focus. Originally, I intended to restrict the geographic area to a particular county within Washington State – Skagit County – as it is the main location of Seth Holmes’ research and as I am familiar with the area, having previously lived and worked there. However, during the data collection process, I found that relatively little H-2A activity occurs in Skagit County, as the bulk of H-2A employment is concentrated in Eastern WA. Thus, I expanded my data collection to include discussions of H-2A across the State. This led to the substitution of *Skagit Valley* with *Washington State* in the second sub-question. As research progressed, I also realized that I wanted to more-explicitly include a discussion of structural vulnerability in the research sub-questions and simultaneously determined that limited time and space would make it difficult to discuss future policy and law initiatives. Thus, I adapted the last sub-question, changing it from *What is the relevance of these findings for future legal protections?* to *What is the relevance of structural vulnerability to these findings?*

²⁰⁴ ‘Theory behind mind maps’, *Mindmapping.com*, <https://www.mindmapping.com/theory-behind-mind-maps.php> (accessed 21 Jun 2020).

The most significant development for this research, however, was the outbreak of the COVID-19 pandemic. Originally, I intended to travel home in April to conduct interviews. However, travel was continuously postponed due to COVID-19. I finally arrived home in early June, leaving little time to develop on-the-ground relationships with farmworkers and farm owners. Upon arriving home, I entered into self-quarantine for two weeks. Even after exiting quarantine I chose not to pursue in-person meetings out of an abundance of caution and due to the growing rates of coronavirus infection in Washington State. This led to the eventual adaptation of key informant sampling from my original focus on H-2A farmworkers themselves to a highly intentional sampling of experts. These interviews were also conducted via video call or phone call to protect participant safety. While this was not the situation I had imagined for interviews and while it precluded on-the-ground observations of H-2A workplace interactions, it also allowed a deeper analysis of fewer data sources which, for the limits of space and time, was a wise choice.

While it presented challenges to data collection, COVID-19 also provided some unexpected opportunities in the analysis of H-2A experiences in Washington State: The disproportionate health impacts of the coronavirus on farmworkers – especially migrant and H-2A workers – rose to the forefront of national and State discourse at the same time that farmworker-led resistance via protests and strikes broke out in Eastern Washington, as further discussed in the following chapter. This offered the chance to analyze H-2A vulnerabilities during a global crisis, adding an unexpected layer of richness to my research.

This chapter has reviewed the design and methodologies which were selected for the execution of this research. Though the trajectory of my research experience has been difficult and at times unexpected, I am grateful for the ways in which it shaped my process and findings. The following chapter turns to a discussion of these findings and their implications for the conceptual framework introduced in Chapter 3.

CHAPTER 6 – DISCUSSION OF RESEARCH FINDINGS

This chapter presents the findings which resulted from the processing and analysis of data – in the form of interviews and documents - on the H-2A farmworker experience in Washington State. In so doing, it addresses the three remaining sub-parts of the central research question. These are: *What types of human rights-related concerns are being raised regarding the situation of H-2A farmworkers in Washington State?*; *In what ways is the current situation generated by COVID-19 impacting these concerns?*; and *What is the relevance of structural vulnerability to these findings?* These sub-questions are addressed in the following manner: Section 6.1 presents the concerns of H-2A workers, which were coded and grouped into four main themes, each with various sub-themes. Section 6.2 then discusses the impacts of the COVID-19 pandemic on these concerns. This is followed by Section 6.3, which considers the relationship of H-2A concerns to various human rights and discusses the limitations of a human rights perspective on the understanding of these concerns. In response to these limitations, Section 6.4 applies aspects of a structural approach, considering the influence of structural vulnerability on H-2A farmworker agency and enjoyment of human rights

6.1 – H-2A farmworker concerns

In order to know what human rights-related concerns are being raised, it is first important to identify and categorize these concerns. This step involved the coding of data sources using the methodology discussed in Chapter 5. Some of these sources, such as news reports and investigative journalism, provided access to concerns related in the words of farmworkers themselves.²⁰⁵ Other sources, such as key informant interviews, summary reports of public hearings, and case documents, provided insight via reflections of non-H-2A farmworkers on the structure and implementation of the program. The concerns that came up span multiple aspects of life and work before, during, and even after their authorized stay. Together, they

²⁰⁵ Though it should be noted that there is room for error on the end of the reporter or journalist recording the conversation.

reveal troubling patterns of suffering and hardship experienced by H-2A workers on Washington State farms.

Most of the concerns coded within the data can be grouped into four main themes:

1. harsh living and working conditions;
2. poor treatment by managers and supervisors;
3. lack of awareness of rights and protections; and
4. laws and regulations that favor employers over workers.

Each of these four main areas are, in turn, composed of various sub-themes, or categories, of concerns. In this section, I briefly explore these themes and sub-themes before bringing in a human rights perspective in Section 6.3.

Harsh living and working conditions

Concerns raised within the theme of harsh living and working conditions were grouped into three sub-themes, or categories: *insufficient food and amenities*, *prison-like isolation and vigilance*, and *negative health impacts of work*. Comments about poor food quality arose repeatedly across sources. Farmworkers at Sarbanand Farms told L&I investigators that they were given spoiled food, specifying that ‘the food was not cooked well. The chicken was bloody,’²⁰⁶ According to the class action lawsuit filed against Sarbanand Farms, food even ran out at some meal periods.²⁰⁷ These deficiencies are corroborated by the observations of key informant interviewees, who mentioned reports of portion sizes at Sarbanand Farms that were ‘*miserable at best*,’²⁰⁸ and that could certainly not be considered sufficient to sustain laborers working long hours in often harsh weather conditions.²⁰⁹

²⁰⁶ S. Robson, ‘Seeking Truth in the Case of Sarbanand Farms’, The Searchlight Review, 27 May 2018, <https://searchlightreview.com/2018/05/27/seeking-truth-in-the-case-of-sarbanand-farms/hjnbu> (accessed 25 May 2019).

²⁰⁷ *Rosas vs. Sarbanand Farms LLC*, 2018, para.90.

²⁰⁸ Interview with CLS Informant, 12 Jun 2020.

²⁰⁹ Interview with FUJ Informant, 2 Jul 2020.

Concerns with amenities involved reports of overcrowded housing and unsanitary facilities.²¹⁰ Most-frequently, however, were comments on the almost prison-like isolation which employer-provided housing imposes on H-2A workers: 25% of the coded data sources referenced isolation, highlighting the rural, sometimes hidden locations of H-2A housing,²¹¹ which are aggravated by the reliance of H-2A individuals on employer-provided transportation. Isolation for H-2A workers is not just geographic, however. A full 14% of data sources mentioned feelings of isolation generated by repressive security or over-vigilance. One article even displays images of fenced, barrack-like H-2A buildings featuring barbed wire and ‘No Trespassing’ signs.²¹² Both key informants who work closely with H-2A workers also mentioned the presence of fences and the implications of strictly monitored housing in their interviews: one likened the housing situation of workers at Sarbanand to being ‘*caged up*,’²¹³ while the other observed that some housing has locks, and that ‘*it’s kind of like you herd people in, you lock ‘em in, and then they don’t come out ‘till you say so.*’²¹⁴ The use of phrases like ‘caged up’ and ‘herd in’ are more frequently used in reference to captive animals than humans, highlighting the dehumanizing aspects of H-2A housing.

As discussed in Chapter 2, the adverse impacts of living and working conditions on farmworker health are well documented for migrant laborers in the US.²¹⁵ In this research, negative health-related impacts were also frequently coded for the H-2A population, occurring in over 50% of the data sources. These ranged from comments on long working hours in the heat and sun²¹⁶ to pesticide exposure²¹⁷ and the resulting development of allergies,²¹⁸ to trouble with insufficient healthcare coverage or the inability to get to a clinic due to worker

²¹⁰ A. Wise, ‘Finding a Home for Farmworkers’, Whatcom Watch Online, Sept 2017, <https://whatcomwatch.org/index.php/article/finding-a-home-for-farmworkers/> (accessed 22 May 2020).

²¹¹ Interview with CLS Informant, 12 Jun 2020.

²¹² D. Bacon, ‘Washington Farmers Become COVID-19 Guinea Pigs’, *The Reality Check*, 21 May 2020, <https://capitalandmain.com/>, (accessed 15 June 2020).

²¹³ Interview with FUJ Informant, 2 Jul 2020.

²¹⁴ Interview with CLS Informant, 12 Jun 2020.

²¹⁵ See Chapter 2, Section 2.3.

²¹⁶ C. Sieh, ‘Death Sparks Labor Dispute at Sumas Berry Farm’, *Cascadia Weekly*, 9 Aug 2017, https://www.cascadiaweekly.com/cw/currents/death_sparks_labor_dispute_at_sumas_berry_farm (accessed 10 Apr 2020).

²¹⁷ ‘SB 5438 Unanimously passes in WA House bringing hope for H2A farmworker protections’.

²¹⁸ A. Wise, ‘Finding a Home for Farmworkers’.

dependence on employer-provided transportation.²¹⁹ While health hazards are, to some extent, part and parcel of farm labor,²²⁰ they can be mitigated by adherence to safety procedures and swift attention to emerging issues. Unfortunately, these precautions are not always taken, as further discussed in the following section. As a result, H-2A workers experience unnecessary and, in some cases, preventable suffering.

Poor treatment by managers and supervisors

Already-challenging conditions of work are aggravated for H-2A laborers by poor treatment from those in positions of power on the farm. Codes related to this theme were grouped into the categories *denial of basic services and benefits to workers*, *threats and intimidation*, and *retaliation and blacklisting*. Denial of basic services and benefits showed up in a number of ways: Workers claimed that they were forced to eat in the sun,²²¹ that they were deprived of sufficient water,²²² and that they were told to pay for their own medical attention.²²³ These comments should cause us to consider the death of Honesto Ibarra more carefully. According to the autopsy conducted after his passing, Honesto died of ‘natural’ causes, due to complications from diabetes, and not tied to occupational issues.²²⁴ Nevertheless, coworkers mentioned that Honesto had reported his symptoms and had been forced to return to work twice before collapsing and being taken to the hospital.²²⁵ Whatever the ultimate cause of Honesto’s death, its circumstances suggest a dangerous dynamic in which the denial of services and benefits by employers heightens health risks for H-2A laborers.

The use of threats, intimidation, and coercion by persons in positions of authority on the farm was also frequently coded. The class action lawsuit against Sarbanand Farms alleged that

²¹⁹ L. Fowler, ‘WA Farmers and Laborers are Struggling under the H-2A Guest Worker Program – And it May Get Worse’.

²²⁰ Due to exposure to elements, use of tools and machinery, and long-term wear and tear on farmworker bodies

²²¹ S. Robson, ‘Seeking Truth in the Case of Sarbanand Farms’.

²²² *Rosas vs. Sarbanand Farms LLC*, 2018, para. 103.

²²³ S. Robson, ‘Seeking Truth in the Case of Sarbanand Farms’.

²²⁴ ‘L&I cites and fines Sarbanand Farms for missed breaks and late mealtimes’, Washington State Department of Labor & Industries, 1 Feb 2018, <http://www.lni.wa.gov/News/2018/pr180201a.asp>, (accessed 2 June 2019).

²²⁵ C. Williamson, ‘L&I investigating Sumas blueberry farm after temp worker collapses, dies’, The Seattle Times, 9 Aug 2017, <https://www.seattletimes.com/seattle-news/l-i-investigating-sumas-blueberry-farm-after-temp-worker-collapsed-died/> (accessed 21 May 2019).

threats of contract termination were consistently used to force compliance with the one-portion policy at mealtimes,²²⁶ to exact inhumane rates of production from workers,²²⁷ and to ensure that workers did not complain about conditions.²²⁸ Individuals at Sarbanand reported being told to work ‘unless they were on their death beds.’²²⁹ Managers at Sarbanand also made use of their ties to law enforcement and the proximity of the farm to the US-Canada border to intimidate their employees.²³⁰ Several workers mentioned frequent threats of being sent back to Mexico if they did not comply with employer demands.²³¹ As noted by the CLS Informant, who worked on the class action lawsuit, ‘...for any problems that [workers] were trying to correct on their own or trying to make the employer aware, they were getting these responses like, well, you will just go back to Mexico.’²³² Coming from positions of authority, such threats are likely to have a chilling effect on worker organization and resistance.

Coding revealed that when resistance does occur, retaliation often follows. Individuals who went on strike in the aftermath of Honesto’s death, for example, were fired and then threatened with the involvement of immigration authorities if they did not gather their belongings and leave the farm within an hour.²³³ Retaliation may also occur in the form of blacklisting, which was mentioned frequently in the sources reviewed.²³⁴ It is easy for an employer to blacklist a non-compliant H-2A worker. As CLS noted in a letter to the governor of Washington State, ‘an employer can exclude a worker from future jobs in an instant by simply refusing to put the name of the worker on a list sent to labor recruiters in Mexico.’²³⁵ One article reviewed notes that Consular Services Incorporated (CSI), a labor contractor involved in the hiring of Sarbanand Farms H-2A workers, has employees sign a pledge which essentially acknowledges

²²⁶ *Rosas vs. Sarbanand Farms LLC*, 2018, para. 93.

²²⁷ *Ibid.*, para. 82.

²²⁸ *Ibid.*, para. 43.

²²⁹ *Ibid.*, para. 77.

²³⁰ S. Robson.

²³¹ *Ibid.*

²³² Interview with CLS Informant, 12 Jun 2020.

²³³ *Rosas vs. Sarbanand Farms LLC*, 2018, para. 120.

²³⁴ For example: Interview with CLS Informant, 12 Jun 2020; *Rosas vs. Sarbanand Farms LLC*, 2018, para. 44.

²³⁵ ‘Request for repeal of emergency temporary worker housing provisions’, *Columbia Legal Services*, 20 May 2020, <https://columbialegal.org/wp-content/uploads/2020/05/Letter-to-Inslee-opposing-ag-housing-emergency-rules.pdf> (accessed 14 Jun 2020).

the potential of blacklisting if workers do not perform adequately on the job;²³⁶ the class action lawsuit filed against Sarbanand Farms alleges that managers threatened to do just that for the workers who struck after Honesto's death.²³⁷ The extent to which blacklisting occurs is uncertain, but that employers have the power to do so is no secret.

Lack of awareness of rights and protections

Concerns about a lack of awareness and information regarding H-2A worker protections were coded in over 50% of the documents analyzed, with a total of 44 instances. These concerns can be grouped into two main categories: issues of a) *insufficient information* and b) *ineffective information*. Issues with insufficient information were coded especially frequently in relation to the process of recruitment and hiring of H-2A workers. For example, the CLS Informant mentioned that many H-2A individuals receive extremely little information about the location and nature of their work during the recruitment process, even though laws require this information be included in an employer's job contract.²³⁸ Some workers in the Sarbanand case, for example, were not even aware that they would be travelling to Washington.²³⁹ The gravity of this issue was reflected in the final order of the DOL lawsuit involving Sarbanand Farms, which enjoined them from 'fail[ing] to include all of employment terms and working conditions on the job order' as well as from 'fail[ing] to provide H-2A workers with a copy of the work contract or job order'²⁴⁰ by the time of their application. Growers are not the only ones at fault here though; FLCs are equally to blame. For example, CSI allegedly withheld information from H-2A applicants about unlawful production standards and additional food costs that would be deducted from workers' wages.²⁴¹ By providing only partial information

²³⁶ D. Bacon, 2020. According to Bacon, this text reads 'I understand that if I don't follow the rules at work, in housing or conduct, or my productivity on the job isn't adequate, the boss has the right to fire me and I will lose all the benefit of my work visa, I will have to go back to Mexico and the boss will report me to the authorities. This will obviously affect my ability to return legally to the United States in the future.' I was not able to locate this text on CSI's website.

²³⁷ *Rosas vs. Sarbanand Farms LLC*, 2018, para. 44.

²³⁸ Interview with CLS Informant, 12 Jun 2020.

²³⁹ *Ibid.*.

²⁴⁰ *Scalia v. Munger Bros. LLC*, para. 4-5.

²⁴¹ *Rosas vs. Sarbanand Farms LLC*, 2018, para. .3

or not supplying copies of contracts, growers and recruiters may be able to attract applicants who would otherwise turn down an H-2A job offer due to unfair terms or conditions.

Keeping H-2A workers in the dark about the terms of their contract during hiring may be compounded by the withholding of information regarding rights and protections during their time on the farm. For example, the class action lawsuit recounts how, at no time during the eviction of fired strikers at Sarbanand Farms did those overseeing the process ‘inform the terminated H-2A workers that they could not be forcibly and summarily evicted from their housing under threat of arrest without due process of law.’²⁴² Consequently, workers believed they had no other option than to leave immediately. Key informant interviews with legal and community experts confirm that the situation at Sarbanand Farms is not a mere outlier. The FUJ Informant highlighted the tendency for H-2A workers to be uninformed of the protections at their disposal, noting: *‘From what we’ve experienced, not many know about the complaint process...not many people know how to even enter a simple claim for Labor and Industries to see whether or not their rights were violated.’*²⁴³ That H-2A workers are unaware of protections points to the troubling fact that, for some reason, the relevant information is not reaching them in a meaningful way. This could be due to the insufficient sharing of information. It could, however, also be due to the *ineffective* sharing of information – the second area of concern regarding information sharing identified in the data.

Distribution alone does not ensure that information on worker rights and protections is accessible to farmworkers: the way information is distributed is equally important. When asked whether they were aware of L&I posters detailing workplace rights at Sarbanand Farms one employee answered ‘No’ but then followed that up with the comment ‘Maybe in English. Everything was in English’.²⁴⁴ Available data indicates that 41% of farmworkers are not literate in the English language.²⁴⁵ Posting information only in English, therefore, means that this information may not actually reach a significant portion of H-2A workers unless it is

²⁴² Ibid., para. 126.

²⁴³ Interview with FUJ Informant, 2 Jul 2020.

²⁴⁴ S. Robson, ‘Seeking Truth in the Case of Sarbanand Farms’.

²⁴⁵ See Ch. 2, Sect. 2.1.

explained by management or translated by others on the farm. Even if workers are aware of the protections at their disposal, fear of employer retaliation may prevent them from filing complaints or seeking redress unless their employer explicitly states they will not do so. According to the lawyer with CLS, these explanations and assurances do not seem to be given by employers in Washington State with the frequency that would be hoped.²⁴⁶ In fact, the opposite is occurring in some cases. One individual who stated that they were aware of L&I posters at their workplace followed their answer with the comment: ‘But anytime anyone would speak up or complain they were threatened w/termination.’²⁴⁷ Information on worker rights and protections is of limited use when employers take advantage of power dynamics to keep workers from acting on them.

Laws and regulations that favor employers over workers

As addressed in Chapter 4, Section 4.4, the legal framework which governs the H-2A program is problematic due to significant gaps in protection and issues of enforcement. Not surprisingly, these issues were evident in the data sources reviewed for this research as well. Incomplete protection provided by laws and regulations for H-2A workers in Washington State was coded in 28% of reviewed documents, while insufficient quantity and quality of enforcement was coded in 25% and 21% of documents, respectively. Coded concerns were separated into the sub-themes *vague and limited guidelines*, *exceptions and loopholes*, and *low standards for treatment of workers*. The first and last of these sub-themes are intricately connected. For example, the CLS Informant criticized that minimal guidelines regarding employer-provided housing and food leave room for employers to meet standards while at the same time saving money by offering poor quality shelter and sustenance to their workers.²⁴⁸ This is exacerbated by the fact that employers often contract out services for housing construction or meals, turning the provision of services into ‘*a game with finances*’²⁴⁹ where both contractor and employer are trying to maximize their profit while just barely meeting

²⁴⁶ Interview with CLS Informant, 12 Jun 2020.

²⁴⁷ S. Robson, ‘Seeking Truth in the Case of Sarbanand Farms’.

²⁴⁸ Interview with CLS Informant, 12 Jun 2020.

²⁴⁹ Ibid.

standards. The situation surrounding food and housing for H-2A workers in Washington underlines what is identified across data sources as a bias of laws and contracts to favor growers and recruiters over the farmworkers they are supposedly designed to protect.

Deficient guidelines also undermine the effectiveness of enforcement in a way that favors employers. Sources echoed the concerns raised in Chapter 3 of employers being notified prior to inspections and investigations, with the CLS Informant likening the employer-friendly nature of inspections to ‘*a courtesy call.*’²⁵⁰ He also mentioned that guidelines do not ensure that State agencies respond in a way that enables workers to share easily and freely:

*You have to look at who's going out to do the inspection. Are they talking to workers? Are they capable of talking to workers? Or is it just some suit who doesn't speak any Spanish or whatever the language might be? ...Are they asking the right questions? ...If I'm going to ask you ... 'Hey, do you have any complaints about your employer?' and the employer is standing right there ...I don't know. ...If the focus is to just make the existing laws work, I think you got to look at how they're being implemented as it is and what the problems are.*²⁵¹

This comment highlights that optimizing legal protections requires recognizing the power dynamics between employers and H-2A workers. Unfortunately, concerns indicate that current regulations do not do so, leaving workers at a distinct disadvantage.

Concerns also highlighted the role of loopholes and exceptions in the generation of bias that undermines enforcement. For example, when L&I calculated the fine for meal and rest period violations at Sarbanand Farms after Honesto’s death, they significantly reduced the number of days and employees affected, citing it as a good will measure due to ‘the employer’s cooperation with the investigation, openly sharing information we requested and made immediate corrections to avoid future meal/rest period violations’.²⁵² The resulting fine amounted to \$73,000 rather than the almost \$3,000,000 which could have resulted. Subsequent appeals by Sarbanand reduced this to a mere \$36,000.²⁵³ Both L&I and the court demonstrated

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² S. Robson, ‘Government Agencies Fail to Adequately Protect H-2A Workers’, The Searchlight Review, 24 Jun 2018, <https://searchlightreview.com/2018/06/25/government-agencies-fail-to-adequately-protect-h-2a-workers/> (accessed 20 May 2019).

²⁵³ Ibid.

significant lenience in their assessment of grower culpability in this case. Not only do these grower-friendly exceptions undermine the effectiveness of enforcement measures; they also damage trust between the individual and institutional level: ‘Many people don’t believe L&I or a lot of the state agencies are on their side,’ commented the FUJ Informant, ‘So they reach out to us and we try to do our best to make sure that we explain what we do and how we can help.’²⁵⁴ While the involvement of community organizations is an encouraging step, and while advocates and community organizations have had some recent success in pushing through protections for H-2A workers, it should not be necessary. Ultimately, the need for their involvement points to the fact that laws, regulations, and enforcement of the H-2A program in their current state are doing a poor job of protecting H-2A workers.

6.2 - The impacts of COVID-19 on H-2A concerns

It would be remiss to discuss the experience of H-2A workers in Washington State without addressing the current situation brought on by the COVID-19 pandemic. This situation has altered dramatically, even over the course writing of this thesis. Still, coding yielded two main insights regarding the potential impacts of COVID-19 on individuals of H-2A status: on the one hand, COVID-19 is acting as a magnifying glass for existing concerns of H-2A workers; at the same time, however, the crisis generated by COVID-19 also has the potential to act as a catalyst for change. Here I briefly discuss these two themes before turning to a consideration of how H-2A concerns are related to various human rights in Section 6.3.

6.2.1 - A magnifying glass for concerns

[D]uring the pandemic...we’re categorizing people as essential workers. And guess who those essential workers are? It’s like the lowest paid. People who don’t have the most benefits. But we need Wal-Mart. We need our coffee. ...Why are they the lowest paid individuals, or why are they the ones with the least protections? ...[A]t a very broad level you could say it’s society’s value on manual labor.’²⁵⁵

From the start, advocates and unions warned that foreign-born farmworkers will be disproportionately impacted by the health dangers of the coronavirus. This is partly due to the

²⁵⁴ Interview with FUJ Informant, 2 Jul 2020.

²⁵⁵ Interview with CLS Informant, 12 Jun 2020.

inherent nature of work done by these individuals; work that often involves close quarters, shared housing and amenities, and products that pass from hand to hand. In Eastern Washington, the situation is especially acute, as many H-2A workers work indoors in packing and processing warehouses. Farmworker support groups such as FUJ pushed early and hard for regulations that would take these dangers into account. However, while the federal government was quick to declare farmworkers as ‘essential’ and to promise financial assistance to growers, protective measures for laborers in the field were slow to take shape.²⁵⁶

Unfortunately, the prioritization of growers over workers has remained at the forefront of the government’s approach to the H-2A program throughout the pandemic. In the early stages of the outbreak, President Trump declared the suspension of visa processing for temporary workers, including H-2A workers. Strong backlash from the agricultural industry, however, led the administration to later repeal this restriction and even to go in the opposite direction, approving an increase in H-2A certifications.²⁵⁷ Breaks for growers do not stop at the approval of additional H-2A visas though. They are equally evident in the emergency guidelines issued by the DOH to address the situation of foreign farmworkers during COVID-19. Shortly after their publishing, CLS wrote a letter to Washington State Governor Inslee claiming that the issued regulations ignore scientific recommendations on how to effectively prevent the spread of the virus by allowing shared living quarters of up to 15 individuals, the use of double bunk beds, and the separation of living quarters with only plastic sheeting.²⁵⁸ In addition, the letter criticized that the guidelines do not require re-inspection of employer-provided housing and amenities, relying instead on the good faith of growers to comply.²⁵⁹ At the same time that State-level regulations put the physical safety of H-2A workers at risk, national-level negotiations threatening H-2A wage cuts to help struggling farmers endanger their financial

²⁵⁶ ‘Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency’, Department of Homeland Security, 20 Apr 2020, <https://www.federalregister.gov/documents/2020/04/20/2020-08356/temporary-changes-to-requirements-affecting-h-2a-nonimmigrants-due-to-the-covid-19-national> (accessed 20 Jun 2020).

²⁵⁷ F. Ordoñez, ‘White House Seeks to Lower Farmworker Pay to Help Agriculture Industry’, NPR, 10 Apr 2020, <https://www.npr.org/2020/04/10/832076074/white-house-seeks-to-lower-farmworker-pay-to-help-agriculture-industry> (accessed 26 May 2020).

²⁵⁸ ‘Request for repeal of emergency temporary worker housing provisions’, *Columbia Legal Services*.

²⁵⁹ *Ibid.*

security as well.²⁶⁰ Advocates claim that these COVID-19 measures show a clear bias for securing the financial survival of growers rather than the physical survival of their foreign-born employees.²⁶¹

Regardless of their intent, the effect of the easy-on-growers approach has been to put H-2A and other farmworker lives at risk. Eastern Washington has become a prime example of this, with reports of outbreaks²⁶² and the denial of testing and protections²⁶³ reported in various warehouses around the region. The criticisms of insufficient protection, lenient enforcement, and willful ignorance of regulations raised in this section are interesting in that they closely mirror the criticisms made of the H-2A program more generally. In this way, the pandemic seems to be magnifying existing deficiencies in H-2A regulations while aggravating their already-vulnerable situation. Of course, it is not only H-2A farmworkers who are suffering during the pandemic. As revealed by the opening quote to this section, the coronavirus is revealing just how ‘essential’ - and simultaneously, how vulnerable - those who work in positions considered undesirable by most Americans are. These reflections suggest that H-2A farmworkers are part of a broader category of individuals whose jobs are not deemed worthy of the same level of pay or protections as the rest of society. When crisis strikes, they are the ones hit hardest. And yet, it is exactly these individuals who provide the food and services that keep Americans alive. This points to a certain irony in the way value and respect is awarded within the labor hierarchy in the United States, the impacts of which are further discussed in Section 6.4.

6.2.2 - Crisis as a catalyst for change?

Interestingly, while the coronavirus is increasing the suffering of H-2A workers, it may also be acting as a catalyst for positive change. One example of this is the emergence of farmworker

²⁶⁰ F. Ordoñez, ‘White House Seeks to Lower Farmworker Pay to Help Agriculture Industry’.

²⁶¹ E. Perez de la Rosa, ‘Are their Apples Worth More Than Our Lives?’ Yakima Valley Fruit Workers Strike for Protections’, NW Public Broadcasting, 21 May 2020, <https://www.nwnewsnetwork.org/post/are-their-apples-worth-more-our-lives-yakima-valley-fruit-workers-strike-protections> (accessed 28 May 2020).

²⁶² D. Bacon, ‘Washington Farmers Become COVID-19 Guinea Pigs’.

²⁶³ E. Perez de la Rosa, ‘Are their Apples Worth More Than Our Lives?’ Yakima Valley Fruit Workers Strike for Protections’.

organization and strikes in the face of mounting cases in Eastern WA.²⁶⁴ At the height of strikes, hundreds of agricultural workers (including H-2A) from a total of seven warehouses walked off the job, demanding better adherence to safety measures, protections for sick leave and hazard pay, and widespread testing.²⁶⁵ Eventually, the strikes ended. In the process though, five of the seven striking groups reached signed agreements with management at their respective warehouses.²⁶⁶ This is a significant achievement – especially for farmworkers whose legal status and financial security were put on the line during a global health crisis.

Another way in which COVID-19 has spurred action is in the courts. In June, FUJ, represented by CLS, filed a lawsuit against WA L&I and the DOH regarding the previously-discussed emergency rules.²⁶⁷ The lawsuit went to court in July. There, the judge upheld the emergency rules, stating that there wasn't enough evidence to rule that the State had acted 'in an arbitrary or capricious manner'.²⁶⁸ Still, though the court did not rule in favor of FUJ and CLS, the mere filing of lawsuits sends a symbolic message of resistance. This perspective is captured in a statement by the FUJ Informant:

*Having the opportunity to fight for more, we'll always do that. We won't just resign and say, oh, well, that's the best that we can do. ...And I think that's the thinking of why we had to continue suing - that if there is an opportunity to do a countersuit to the rules, then we should do it even if we lose. I think it's just on principle.*²⁶⁹

To file a lawsuit 'on principle,' regardless of the chances of winning it, demonstrates that farmworkers and their advocates are not willing to simply accept and legitimize harmful policies and practices. By raising the stakes to the level of life and death, COVID-19 has

²⁶⁴ E. Pérez de Rosa, 'During pandemic, farmworkers kept their jobs and raised risk of infection', *NPR*, 13 June 2020, <https://www.npr.org/2020/06/13/875389223/during-pandemic-farmworkers-kept-their-jobs-and-raised-risk-of-infection> (accessed 25 June 2020).

²⁶⁵ Interview with FUJ Informant, 2 Jul 2020.

²⁶⁶ *Ibid.*

²⁶⁷ Superior Court of Washington for Thurston County *Familias Unidas v. WA State L&I*, no. 20-2-01556-34, 4 June 2020.

²⁶⁸ 'SLVMS successfully assists in upholding COVID-19 rules for farm workers', *Stokes Lawrence*, 22 July 2020, <https://www.stokeslaw.com/news-and-insights/news/slvms-successfully-assists-in-upholding-covid19-rules-for-farm-workers>, (accessed 24 July 2020).

²⁶⁹ Interview with FUJ Informant, 2 Jul 2020.

provided both an impetus and a platform for significant efforts of resistance within the farmworker community.

6.3. – Bringing in the human rights lens

Having presented the H-2A farmworker concerns coded in the data and discussed the impact of COVID-19 on these concerns, we can now consider how they are related to the enjoyment of various human rights. As presented in Section 6.1, H-2A concerns can be grouped into four main themes. Each of these themes in turn consists of various sub-themes or categories of related concerns. It is at this sub-level that the relatedness of concerns to human rights becomes more evident. For example, one of the sub-themes for *poor treatment by managers and supervisors* is *threats and intimidation*. Threats and intimidation coded in the data leave H-2A farmworkers with the impression that they will face serious harm – financial, legal, or personal – if they do not comply with employer wishes. This recalls rights such the prohibitions of CIDT and of forced or compulsory labor. The human rights connections of this sub-theme do not stop there, however. Some of the threats received by H-2A laborers were directly linked to their nationality: workers at Sarbanand Farms were told repeatedly that they would be sent ‘back to Mexico’ if they complained or failed to meet production standards.²⁷⁰ This threat is related not only to the prohibition of forced labor but also to the right to freedom from discrimination – a line of argumentation taken up in the class action lawsuit filed against Sarbanand Farms, which argued that defendants ‘had a common practice of mistreating its foreign H-2A workforce’, which ‘created a hostile work environment based on national origin and violated the Plaintiffs’ right to be free from discrimination in employment.’²⁷¹ Thus, one type of concern (ex. threats and intimidation) can be related to multiple human rights. Conducting this exercise for each of the themes and sub-themes of the coded concerns yields a sort of web or matrix depicting the relationships between various human rights and H-2A worker concerns. The resulting web of human rights-related concerns for WA State H-2A workers is shown in Figure 5.

²⁷⁰ See Sect. 6.1.

²⁷¹ *Rosas vs. Sarbanand Farms LLC*, 2018, para 199.

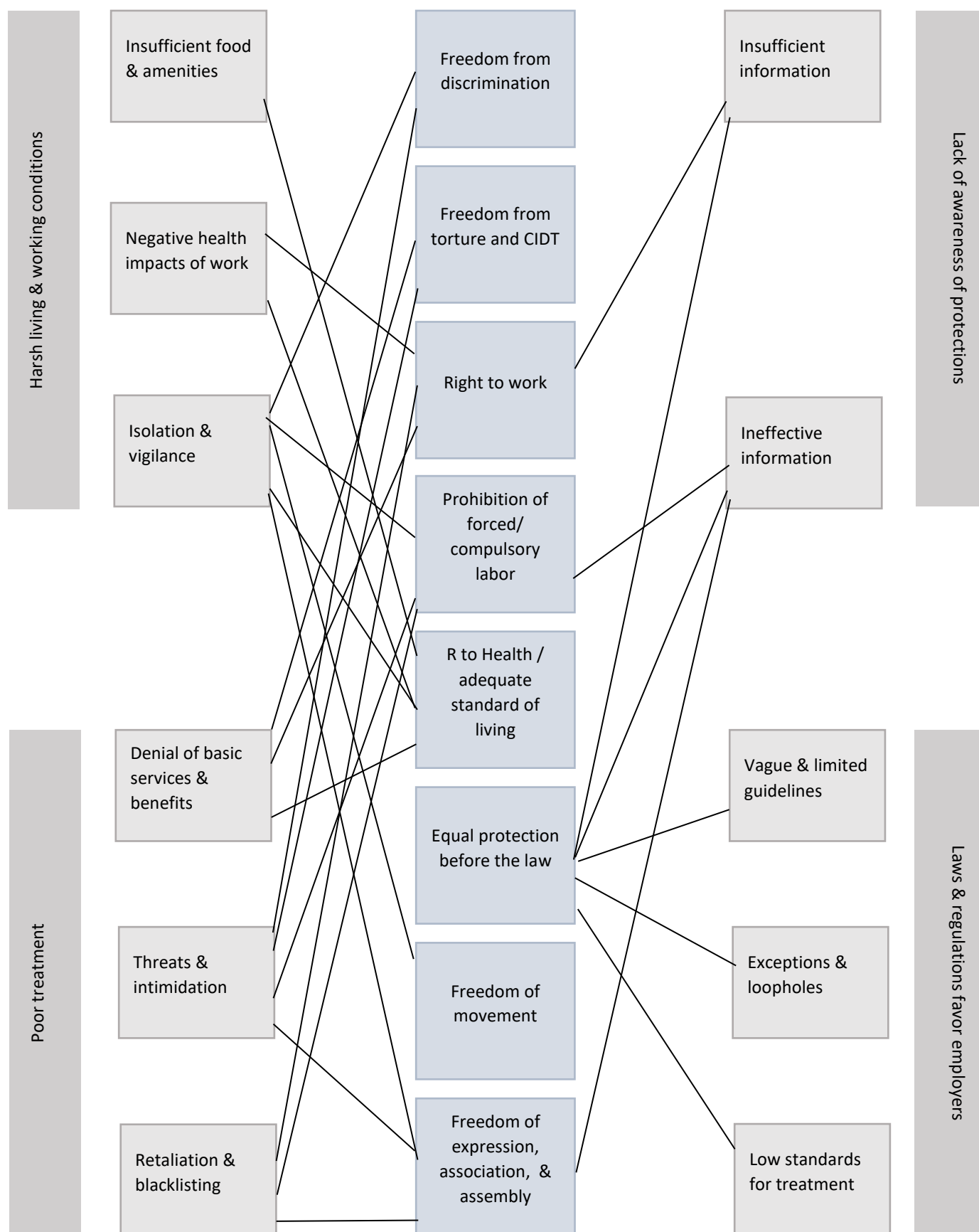


FIGURE 5: Web of human rights-related concerns for H-2A workers in Washington State. SOURCE: Adele Eslinger

This human rights web identifies eight major human rights areas that are most frequently impacted by H-2A concerns. It informs a human rights perspective on H-2A workers in several ways: First, it illustrates that the concerns of workers are related to a wide range of rights, impacting various aspects of life. Second, it provides a visual way to identify which areas of human rights are being most-strongly impacted by H-2A concerns. In this case, the rights of freedom of expression, association, and assembly, equal protection before the law, the right to health and an adequate standard of living, the prohibition of forced or compulsory labor, and the right to work are all impacted by four or more categories of concerns. Third, this web also facilitates an additional layer of analysis, in which not only the relation of H-2A concerns to various human rights is considered, but also the relation of the affected human rights to one another. For example, consider the sub-theme *isolation* of the theme *harsh living and working conditions*: The isolation of H-2A individuals, compounded by their reliance on employer-provided transportation, restricts their freedom of movement. Restricted freedom of movement in turn contributes to the troubles H-2A workers experience in receiving medical care, thus also impacting the right to health. In this way, the web demonstrates that the human rights impacts of H-2A concerns are interwoven and interdependent. This is a significant point, as it suggests that addressing just one area of human rights will not necessarily solve a concern which may, in fact, have roots in an entirely separate issue.

Of course, it is important to note here that human rights-related *concerns* do not necessarily constitute human rights *violations*. Indeed, this is one of the most troubling aspects of a human rights perspective on the situation of H-2A workers. Even though these individuals experience hardship that impacts their ability to fully enjoy numerous rights, little of this hardship can be considered violations under the current international framework. There are two main reasons for this:

- 1) The US has ratified relatively few international covenants and treaties, as discussed in Chapter 4, Section 4.2. Even in those cases where the US has ratified treaties, they have opted out of complaint mechanisms, therefore weakening the force of the agreements.²⁷²

²⁷² See Ch. 4, Sect. 4.1 for a discussion of relevant US treaty ratification.

- 2) Much of the harm experienced by H-2A workers stems most directly from the action or inaction of growers and farm labor contractors, who – as private parties – are not bound by human rights agreements in the same way as the US government.

Thus, when a grower threatens an H-2A worker that they will be sent back to Mexico if they do not pick blueberries fast enough, as was the case at Sarbanand Farms, it does *not* constitute a violation of the right to freedom from discrimination based on race or national origin. However, this also does not mean that the state is completely void of responsibility. For, while the state is not at fault for a grower's use of racial discrimination towards employees, they may be at fault if they are made aware of it and do nothing. As discussed in Section 6.1, the L&I agents who investigated working conditions after the death of Honesto Ibarra made note of not only violations of rest periods and mealtimes, but also of reported threats and insufficient medical attention, among other issues. While worker complaints on these matters were recorded, only complaints related to rest and mealtime violations were pursued further. Even if L&I is not the agency responsible for dealing with a certain allegation of employer abuse, they should alert other agencies as necessary. Failure to do so may indicate a violation of the obligation to protect the rights in question from third party interference.

State responsibility may also be established in situations where the government or its agencies fail to establish policies, laws, and systems which foster the realization of human rights. This is also relevant to the concerns of H-2A farmworkers. Take, for example, the drafting of COVID-19 emergency housing rules. These rules were issued by the WA DOH and L&I – both government agencies. As such, they are tasked with oversight of employer-provided housing to ensure it is free from health-endangering hazards.²⁷³ The lawsuit filed by CLS and FUJ claims that the rules issued are insufficient in this regard, thus failing to safeguard the health and – ultimately, the lives – of foreign-born agricultural workers.²⁷⁴ Not only that, but the agencies went ahead with the rules despite the expressed concern of their potential harm by farmworkers, lawyers, and medical experts. In such instances, State agencies could be in

²⁷³ *Familias Unidas v. WA State L&I*, para 18.

²⁷⁴ *Ibid.*

violation of the obligation to fulfill the rights in question – in this case, the rights to life and health.

Failure to meet the obligation to fulfill may be implicated in other areas as well. For example, as previously discussed, the dependence of H-2A workers on employers for food, housing, and transportation negatively impacts individuals' ability to enjoy various human rights. This dependence is largely generated by the laws governing the H-2A program, which place too much faith in an employer's ability and desire to ensure the wellbeing of their employees. It can thus be argued that here, too, the state is at fault for not creating laws which effectively ensure the rights of H-2A visa-ed individuals. In addition, Chapter 4 noted that H-2A workers are excluded from the provisions of the NLRA and the MSPA. This makes it more difficult for workers to claim rights such as the freedom of association, among others.²⁷⁵ Consequently, it is easier for employers to retaliate when H-2A workers organize and resist – a concern which frequently came up in the reviewed documents.²⁷⁶ Knowingly withholding protections then, is another way in which the state may be failing its obligation to fulfill regarding H-2A workers.

While it is intellectually interesting to consider the potential ways in which state responsibility may be established for H-2A suffering from a human rights perspective, little will come of it practically at this time. For one, the instances in which state responsibility may be established only encompass a fraction of the harms experienced by H-2A visa-ed individuals. Additionally, the US's current stance towards the international human rights regime and its resistance to the adoption of complaint protocols and other enforcement mechanisms leaves human rights argumentation with little practical strength.

Some relief for human rights-related harms may be achieved, not by appealing directly to human rights agreements but rather by appealing to federal laws and regulations that uphold human rights standards. This was the case in the class action lawsuit against Sarbanand Farms. The prosecution argued that the defendants violated (among others) the Trafficking Victims Protection Act (TVPA), which is closely correlated to the prohibition of forced or compulsory

²⁷⁵ See Ch. 4, Sect. 4.4.

²⁷⁶ See Sect. 6.1.

labor, and the Washington Law Against Discrimination (WALAD), which upholds aspects of the rights to work and freedom from discrimination in the workplace. However, the case never got to trial and thus, a judgement on the merits of the case – on whether the practices and statements of Sarbanand employers were in fact illegal – was never made. Instead, the H-2A workers and company owners reached a financial settlement of slightly over \$3.5 million.²⁷⁷ A \$3.5 million dollar fine was also ordered in the DOL lawsuit against Sarbanand Farms and its parent company.²⁷⁸ In this case, the state agencies did reference H-2A-specific regulations in their argumentation. As a result, Sarbanand was debarred from using the H-2A program for the maximum term of three years as outlined by US Code.²⁷⁹ They were also enjoined from violating various H-2A regulations regarding the use of FLCs, the distribution of information to employees, and record-keeping and payment withholding.²⁸⁰ While these outcomes do provide some relief for the H-2A workers involved and may help guard against future violations of a similar nature, they are also constrained by the limitations of legal avenues to address the human rights-related concerns of these individuals, as articulated in the following insights from data analysis:

- Not all human rights-related concerns may translate into viable legal arguments;
- The effectiveness of litigation may be inhibited by practical limitations of time, money, and geography, which disproportionately impact H-2A workers;
- Exceptional circumstances may provide loopholes for employer actions; and
- Legal remedies do not necessarily get at the root of H-2A human rights-related concerns.

Regarding the first of these observations, workers at Sarbanand Farms clearly expressed concerns that didn't make it into either lawsuit: concerns about insufficient medical care, the general sense of disrespect felt by H-2A workers, and the isolation of farmworker housing, to name a few. Even though these concerns impact the ability of individuals to enjoy certain

²⁷⁷ United States District Court, *Rosas v. Sarbanand Farms LLC*, no. C18-0112-JCC, 31 Dec 2019, para. 5.

²⁷⁸ *Scalia v. Munger Bros LLC*, para. 34.

²⁷⁹ *Ibid.*, intro.

²⁸⁰ See Ch. 4, Sect. 4.2 for a discussion of the relevant codes.

rights, they may not be easily addressed under current H-2A law. The second observation is clearly demonstrated by the trajectory of the class action lawsuit. According to the key informant who worked on the case, many class action members were under significant financial strain since being fired from Sarbanand Farms, as most had not been able to find new jobs to make up for the income they had lost. The prospect of carrying that economic burden for the duration of what could be a long, drawn out trial process led many to favor a settlement.²⁸¹ Temporal and financial limitations were joined by the difficulty of communicating with class action members who had returned to Mexico after losing their legal authorization to be in the states upon termination.²⁸² Such practical limitations favor employers or labor contractors by encouraging H-2A workers to not prosecute wrongdoers to the full extent of the law.

Equally important to note is the power of industry representatives in shaping both policies and legal judgements. For, if H-2A-related laws are already written in a biased way to favor employers - as the documents reviewed would suggest²⁸³ - then judgements based off those laws will also tend to favor employer interests. The COVID-19 pandemic is revealing that during a time of crisis, employer-friendly judgements may be further encouraged by industry rhetoric which frames food as a national security issue, farm owners as American heroes, and foreign laborers as the only way to ensure the maintenance of the US food supply chain.²⁸⁴ Thus, industry representatives successfully pushed back against stricter housing regulations during the pandemic, arguing that banning the use of bunk beds would cut lodging for H-2A workers in half, thereby endangering US food production and harvest.²⁸⁵ Upon issuing his decision to uphold the challenged emergency rules, the judge noted: ‘This is a difficult time and these are extremely difficult issues.’²⁸⁶ His comment reflects the sentiment that

²⁸¹ Interview with CLS Informant, 12 Jun 2020.

²⁸² Ibid.

²⁸³ See section 6.1.

²⁸⁴ F. Ordoñez.

²⁸⁵ ‘SLVMS successfully assists in upholding COVID-19 rules for farm workers’, Stokes Lawrence..

²⁸⁶ Ibid.

exceptional times may call for exceptions that ensure the continued food supply, even when those exceptions put the lives of foreign laborers at risk.

One final and crucial limitation to the impact of legal avenues is that, even rulings made in favor of H-2A workers do not address the roots of their human rights-related concerns nor the emotional impacts of their suffering. This is clearly articulated by the reflections of the CLS Informant, who noted:

[W]hen you're listening to people's stories, there's a lot of anger in there. There is a lot of disrespect. A lot of emotional harm there. And, you know, as an attorney, you're listening - you're trying to see...what is in my toolbox to help? ...But it never really captures the disrespect that people feel...It doesn't make someone feel whole again.²⁸⁷

At the end of the day, legal remedies that provide relief to H-2A workers are largely retroactive and focused on sanctioning perpetrators rather addressing the harm incurred or figuring out why that harm came about in the first place. Financial remedy does not undo the trauma of threats and discrimination, nor the hurt of being denied basic dignities like clean bathrooms, water, and shade. Simultaneously, fining an H-2A employer like Sarbanand Farms, or even barring them for a time, does not ensure their just treatment of laborers in the future. The roots of these issues lie much deeper, in the ways that H-2A workers, growers, and other actors are positioned and perceived within the various systems that govern our society. Legal responses – whether at the state level or at the level of international human rights courts - are not designed to address these issues.

Consequently, may data indicate that, while a human rights perspective is useful to help categorize and articulate the concerns of Washington State H-2A workers, it does not necessarily provide the most effective way of understanding or addressing these concerns. To be truly effective, a human rights perspective must be accompanied by a consideration of how US social, economic, and political structures influence actors in the State's agricultural

²⁸⁷ Interview with CLS Informant, 12 Jun 2020.

industry. The following section does so by exploring how the concept of structural vulnerability relates to H-2A farmworker agency and enjoyment of human rights.

6.4 - Application of a structural approach to the H-2A experience

The research findings presented in the previous sections indicate that H-2A workers in Washington State experience a wide range of concerns related to their life and work as temporary agricultural laborers. These concerns can, in turn, be linked to numerous areas of human rights which are not being fully enjoyed by H-2A workers in Washington State. What these findings have not yet articulated is what forces are giving rise to farmworker concerns in the first place. This section deals with the underlying causes of H-2A-experienced hardship, and in so doing addresses the final sub-part of the main research question: *What is the relevance of the concept of structural vulnerability to these findings?*

The answer to this sub-question is reached through the discussion of three progressive insights generated from the reviewed data sources:

1. Findings confirm that the inequalities produced by US economic, political, and social structures generate vulnerability for Washington State H-2A workers;
2. The low positionality of H-2A workers in the labor hierarchy, as predicted by structural vulnerability, shapes H-2A agency and resistance; and
3. The combination of structural vulnerability and limits on agency negatively impacts the enjoyment of human rights for WA H-2A workers.

6.4.1 – Structures that produce vulnerability for H-2A workers

It is useful here to recall the definition provided in Chapter 3 of structural vulnerability as: *'[A] positionality [...] in which the vulnerability of an individual is produced by his or her location in a hierarchical social order and its diverse networks of power relationships and effects.'*²⁸⁸ The social order being discussed in this case is the agricultural labor hierarchy occupied by actors in Washington State. According to the concept of structural vulnerability, H-2A workers should be more or less vulnerable to harm depending on the dynamics of power

²⁸⁸ See Ch. 3, Sect. 3.2.

and resource distribution that characterize the labor hierarchy as well as by how high or low they fall within it. The following sub-headings discuss how US political, economic, and social structures produce unequal distributions of power, control, respect, and trust in the agricultural labor hierarchy to the detriment of WA H-2A workers, whose low positionality makes them more vulnerable to harm than actors positioned further up the hierarchy.

Legal and Political Structures

Chapters 2 and 4 have already conducted a thorough exploration of the ways in which US law and politics disadvantage H-2A workers. The observations here are focused on the relevance of these dynamics to the positionality of H-2A workers within the labor hierarchy and their resulting vulnerability. Perhaps the most relevant issue in this area is the imbalance of power generated by the precarity of H-2A legal status, which awards employers with almost exclusive control over the fate of their employees. Indeed, the dependence that H-2A status generates of workers on their employers for housing, food, and transportation strips H-2A workers of control over their working and living conditions, as strikingly illustrated by the isolation and vigilance under which many Washington State H-2A workers live and work.²⁸⁹ Lack of control over physical conditions is compounded by limited control over the temporal aspects of life and work. As noted by the CLS Informant:

The H-2A program is set up so that the owner of the farm or the grower is in complete control of when people eat, when people go to bed, when the work starts, when the work stops, and where and how people pass their time. Because they're not working 24 hours a day, seven days a week. There's going to be some gaps in between where people can take a break and ...try and relax. And it's up to whatever the grower decided to provide.²⁹⁰

This observation highlights the all-encompassing effects of H-2A dependence, which restricts even the most basic aspects of individual autonomy. This power imbalance is often used to manipulate workers, as demonstrated by the experiences of laborers at Sarbanand Farms, who were denied rest periods and forced to work at rates not approved in their employer's contract

²⁸⁹ See Sect. 6.1.

²⁹⁰ Interview with CLS Informant, 12 Jun 2020.

application.²⁹¹ Another recently-filed class action lawsuit by H-2A farmworkers in Eastern Washington also claims that employers forced unapproved production standards on contracted employees.²⁹² Whether in regard to the conditions they live in, the speed at which they are expected to work, the number of breaks they receive, or even how they spend their free time, H-2A workers have limited control over the structure and pace of their own lives on the farm, making it easier for them to be coerced into labor.

As noted by the same informant, the combination of legal precarity and employer dependence leaves H-2A workers with even less alternatives than many undocumented laborers – a group frequently considered to be the most vulnerable in US agriculture.²⁹³ He noted:

*If someone lives here, there's just a lot of inherent support. And, of course, every single person's situation is going to be somewhat different. But generally, they can decide how their living situation is. They can generally bring their own food. They can generally bring their own water. Like they, as individuals, can take care of their basic necessities.*²⁹⁴

In contrast to H-2A workers, many undocumented individuals who have chosen to remain for longer periods of time in Washington may have cars, rent their own apartments, and buy their own food. They thus have a significantly higher level of control over their working and living conditions. And if undocumented workers are unsatisfied with work conditions, they may more easily switch employers than H-2A workers, who are contract-bound to one grower. This dynamic suggests that WA H-2A workers may occupy a positionality in the labor hierarchy equally low to – or lower than – even undocumented domestic laborers.

It is worth noting here an interesting counter-theme to this point, which occurred several times in the data; namely, the narrative put forward by domestic farmworkers, growers, and industry representatives that those with H-2A status actually receive *more* benefits and protections than other workers. If true, this could mean that H-2A workers are positioned further up in the labor

²⁹¹ *Rosas v. Sarbanand Farms LLC*, 2019, para. 3.

²⁹² United States District Court, *Garcia et al. v. Stemilt Ag Services LLC*, no.2:20-cv-00254, 20 Jul 2020, para. 3.

²⁹³ Interview with CLS Informant, 12 Jun 2020.

²⁹⁴ Interview with CLS Informant, 12 Jun 2020.

hierarchy than previously thought. For example, the executive director of the WA-based farm labor contractor WAFLA boldly stated in a news interview: ‘H-2A is a fantastic program that workers love. Period, end of story...It gives them high wages, excellent working conditions, and the dignity of legal presence.’²⁹⁵ This perspective is antithesis to that expressed by the discussion of concerns in Section 6.1. Of course, it is in the interest of FLCs to portray H-2A as a beneficial program, as it is their source of income. But growers and domestic farmworkers also express the feeling that H-2A workers receive preferential treatment. They cite benefits such as housing and amenities, transportation, and a pay-rate which is higher than that often provided to domestic laborers.²⁹⁶ However, previous discussions of these same ‘benefits’ bring into question how much they actually improve the wellbeing of H-2A individuals. Legal status produces opportunities for manipulation, housing generates isolation, and higher wages are offset by the debt with which many H-2A enter the country. Each of these in some way increase power imbalances and decrease the control H-2A workers have over their own situations. Thus, while H-2A workers may be *perceived* as higher up the labor hierarchy than some of their domestic counterparts, they may in fact experience equal - or even greater - vulnerability.

Other aspects of US legal and political structures also influence the distribution of power and resources for H-2A workers. For example, multiple data sources mentioned the fact that H-2A workers are not afforded a ‘place at the table’ of politics in Washington State. As noted by the CLS Informant:

I’ve been in rooms where like, you have an entire industry in the room...arguing their side, you know, why the law should change. And then it was me and another CLS person pushing back against this tidal wave of industry...And I go back and I ask, ‘Is this how things are?’ ...And they’re like,

²⁹⁵ W. James, ‘Does a Foreign Worker Program Verge on ‘Indentured Servitude’? A Debate Simmers in Washington State’, KNKX News, 28 Feb 2018, <https://www.knkx.org/post/does-foreign-worker-program-verge-indentured-servitude-debate-simmers-washington-state> (accessed 27 Apr 2020).

²⁹⁶ P. Lewison, ‘Despite shortages, farm labor is under attack again’, *Washington Policy Center*, 21 Jan 2019, <https://www.washingtonpolicy.org/publications/detail/despise-shortages-farm-labor-is-under-attack-again> (accessed 21 May 2020).

*'Well, if it's not us, the list is short on who has the ability to be in those rooms.'*²⁹⁷

The imbalanced representation of interests highlighted by this quote minimizes H-2A workers' ability to influence the laws and policies which affect them most. Additionally, sources highlight the complexity of the H-2A program and the confusion of overlapping agency responsibilities as factors that inhibit worker access to information. This is a critical component of H-2A vulnerability, as decreased access to information, intentional or otherwise, makes it easier for H-2A workers' rights to be suppressed in favor of the interests of those in power. The aspects of the legal and political structures addressed here place H-2A individuals low in the agricultural labor hierarchy. As a result, they have less power, less control over their time and labor conditions, and fewer informational resources than both their domestic counterparts and their employers. These inequalities increase their vulnerability to intimidation, coercion, and exploitation.

Economic Structures

At an economic level, H-2A workers are disadvantaged by the prevalence of neoliberal ideologies in the labor hierarchy which, as noted by scholar Ted Schrecker, 'view the market as the normal and natural basis for organizing almost all areas of human activity.'²⁹⁸ The results of this profit-centered approach increase H-2A vulnerability in several ways. Prominent among these is the downward pressure they place on all actors in WA State agriculture. Critical here is the fact that many H-2A workers are already deep in debt by the time they start work in Washington, having taken out loans to pay for their travel to the US and, in many cases, to cover illegal recruitment fees charged by labor contractors.²⁹⁹ The financial precarity of these individuals aggravates the power imbalances they experience due to the tenuous nature of their legal status. For them, contract termination could mean not only losing work authorization and being deported; it could also mean losing their ability to support loved ones back home and

²⁹⁷ Interview with CLS Informant, 12 Jun 2020.

²⁹⁸ T. Schrecker, 'The Health Case for Economic and Social Rights against the Global Marketplace', *Journal of Human Rights*, , vol. 10, no. 2, 2011 p. 154.

²⁹⁹ W. James, 'Does a Foreign Worker Program Verge on 'Indentured Servitude? A Debate Simmers in Washington State'.

work their way out of crippling debt. Concerns related to this dual precarity surfaced frequently across data sources and were grouped under the category ‘so much on the line’. From a structural perspective, this magnified inequality can be connected to the concept of conjugated oppression introduced in Chapter 3, as the combination of legal and financial precarity produce a situation of vulnerability greater than either could produce on their own. Thus, downward economic pressure clearly contributes to the low positionality of H-2A workers in the labor hierarchy and their consequent vulnerability.

Downward economic pressure is also central to the way H-2A employers treat their workers. The profit-driven market economy means that growers increasingly struggle to compete with the large-scale operation and increased mechanization of mass-produced food in America as it drives down prices. This pressure leads many employers to do just the bare minimum to meet H-2A labor standards while maximizing profit. Mentions of such behavior are common in the data sources reviewed for this research: recall the poor quality of food services at Sarbanand Farms for example, which fell victim to a ‘*game of finances*’³⁰⁰ where both the employer and contracted food provider were trying to save as much money as possible. Tight profit margins also lead to what might be called a commodification of H-2A farmworkers. As noted by one interviewee:

*Companies invest thousands of dollars per worker to have them here. So, I think there's an extra input for H-2A workers to do as the company wants, because of supposedly the investment that they're putting into the worker.*³⁰¹

According to this perspective, H-2A workers are likened to objects or machines: employers have laid money down to secure H-2A services and, in return, they expect to get their money’s worth out of them. This is reflected in the experiences of H-2A workers discussed in Section 6.1. For example, H-2A laborers submitting the class action against Sarbanand Farms recall being told that they were expected to go to work unless they were ‘on their death beds.’³⁰² In addition, redacted interviews from L&I investigations after Honesto’s death record that

³⁰⁰ See Section 6.1.

³⁰¹ Interview with FUJ Informant, 2 Jul 2020.

³⁰² *Rosas v. Sarbanand Farms LLC*, 2018, para. 76.

multiple workers who got injured or sick on the job had to pay their own medical expenses or were dismissed.³⁰³ These instances suggest workers are valued only for their efficiency and income generation. Like a machine, once they are ‘broken’, they are disregarded or discarded. At the same time that commodification puts H-2A workers at great risk for abuse, it also sends the message that they are less worthy of the value and respect which is normally afforded to fellow humans.

Using a structural lens to look at economic aspects of the H-2A experience not only provides a more nuanced analysis of the inequalities they face; it also helps clarify why, even if farm owners have the best intentions, they often engage in practices which perpetuate inequality and suffering amongst their H-2A employees. The challenges of these dynamics were clearly articulated by one interviewee who owns a small- to medium-scale farm in Western Washington. He noted: *‘Food is too cheap...Farmers don’t have the cash flow to give workers a good quality of life.’*³⁰⁴ Such comments contradict the assumption that growers are all rich, greedy, and looking to exploit their workers. Rather, their ability to follow through on the desire to do the best for their employees is restricted by the realities of their own financial vulnerability. Holmes had similar findings in his research. He concluded that, ‘when the continuum is seen from furthest away, it becomes clear that the local family farm owners are relatively low on the global corporate agribusiness hierarchy.’³⁰⁵ Being low in the hierarchy means that farmers, too, experience structural vulnerability at the economic level. Zooming out to consider the situation of WA State farmers within the broader hierarchies of US agriculture is critical, as it allows the analysis to move beyond blaming solely the farm and farmer for this injustice.

Social Structures

The hierarchy and inequality evident on WA farms is firmly rooted in cultural narratives and stereotypes that determine how actors such as growers and H-2A workers perceive each other

³⁰³ S. Robson, ‘Seeking Truth in the Case of Sarbanand Farms’.

³⁰⁴ Interview with Grower Informant, 18 Jul 2020.

³⁰⁵ S. Holmes, p. 85.

and how they are perceived by the rest of society. One of the most pervasive of these is the ever-present ‘agrarian philosophy’ popularized by Thomas Jefferson. This vision of agriculture claims that ‘those who labor in the earth are the chosen people of God’ and that the ‘cultivators of the earth are the most virtuous and independent citizens’.³⁰⁶ At the issuing of these words, however, the true ‘cultivators’ of Jefferson’s lands were slaves – as was true across much of the nation at that time. Jefferson’s ‘philosophy’ is now often called a ‘myth’. It set up an idea of who the farmer was, put him on a pedestal of great worth, and turned a blind eye to the reality in the fields. Sadly, the situation is not altogether different today: Modern (white) farm owners and operators are praised as the humble heroes that bring food to America’s tables while, at the same time, a majority-Latinx (brown) population bears the brunt of the backbreaking labor that goes into producing this food³⁰⁷ - some in conditions that have been criticized as bordering on indentured servitude.³⁰⁸ These farm laborers are not viewed with the same honor and regard as their employers. As noted by A. Shea in her study on immigration law and labor rights:

*There is an interesting contradiction between representations of growers' labour and the labour of the farm workers...The growers' labour, read through the filter of American national identity construction...enriches himself and the nation. We might ask why, then, does the labour of the farmworker not ennoble the labourer? The conflicting constructions of the farmer and the farm labourer starkly reveal the manner in which bourgeois ideology constructs identity in relation to ownership. That is, selfhood is accorded to the one that owns rather than works the land, even if they both labour in the field.*³⁰⁹

In this reading of social hierarchy, if you already have, you are given an identity of worth and respect, and if you do not have, you are demeaned. Thus, farm owners earn respect due to their already existing position of privilege, while farmworkers lose respect due to their lack of privilege.

³⁰⁶ M.J., Sifuentez, p. 584-597.

³⁰⁷ See Ch. 2, Sect. 2.1 for information on farmworker demographics in the US.

³⁰⁸ W. James, ‘Does a Foreign Worker Program Verge on ‘Indentured Servitude? A Debate Simmers in Washington State’.

³⁰⁹ A. Shea, ‘“Don’t Let Them Make You Feel You Did a Crime’: Immigration Law, Labour Rights, and Farmworker Testimony’, *Multi-Ethnic Literatures and the Idea of Social Justice*, vol. 28, no. 1, 2003, p. 131.

The coding of concerns across data for this research indicates that the unequal distribution of respect and recognition echoes true for WA H-2A workers. Reflecting on the food-related issues at Sarbanand Farms, for example, the CLIS informant noted:

*...you have people coming in eager to work, working as hard as they possibly can. And then it's like a slap in the face when all you're given is a hot dog. Or if all you're given is a handful of chips and some macaroni. And it's like, how do you expect me to come and work as hard as possible and exist off of this nominal amount of food?*³¹⁰

This quote indicates that, to H-2A workers, the denial of basic dignities such as sufficient food comes across as a blatant lack of respect. It represents the breakage of an unspoken contract regarding how those in positions of authority on the farm should use their power for the wellbeing of those who are dependent upon them. The failure to meet these basic expectations for humane treatment demonstrates just how little value is placed on the labor and lives of H-2A visa-ed individuals in Washington State. The continued pervasiveness of a cultural narrative which glorifies farm owners and demeans farmworkers is also evident in the economic policies being adopted during the COVID-19 pandemic. At the same time that the White House is promising to do everything in its power ‘to ensure our great farmers are protected,’³¹¹ they are also considering significant wage cuts for H-2A workers.³¹² True to the agrarian philosophy, the labor of farm owners is rewarded and respected, while the labor of H-2A workers places them in positions of vulnerability.

The lack of respect awarded to H-2A workers is aggravated by entrenched cultural stereotypes about the nature and character of these individuals. As discussed in Chapter 2, H-2A workers are majority Mexican males. Thus, the perception of H-2A workers is closely tied to racialized representations of the Mexican male as lazy and taking advantage of the system. These stereotypes lead authorities, both on and off the farm, to assume the goodwill of the employer

³¹⁰ Interview with CLS Informant, 12 Jun 2020.

³¹¹ F. Ordoñez. ‘White House Seeks to Lower Farmworker Pay to Help Agriculture Industry’.

³¹² See Section 6.2.

while doubting the honesty and intentions of the H-2A worker. The organizer with FUJ noted the harmful impacts of this distrust:

*I think that's been one of the ...main complaints is just that ...[u]sually, the complaint stops at the supervisors or the managers. That's because there could be something in that complaint that puts blame on the supervisor. And obviously, they don't want to get that information out to the to their boss or whatever. Most of the time when that information does reach the boss, the boss prefers to take the word of the supervisor over the workers, and it creates frustration.*³¹³

These reflections clearly highlight the ramifications of the labor hierarchy for H-2A workers. On the one hand, the desire of managers and supervisors to maintain their positions of middling authority on the farm discourages them from forwarding complaints that might negatively impact how they are perceived by those above them. At the same time, the correlation between positionality and trustworthiness in the American consciousness leads those on top to give more credit to the words of supervisors and managers even when they do report issues. The consequences of this for H-2A workers can be devastating, as tragically illustrated by the story of Honesto's illness and subsequent death. The harmful impacts of this lack of trust are also illustrated by the housing conditions in which many H-2A workers live. The same interviewee noted that, as an H-2A worker, the 'heightened security' and 'constant monitoring of your actions and your movement...creates the feeling of being in a prison, even though you're not in a prison. You're treated like you're going to do something bad if we're not looking after you.'³¹⁴ Thus, distrust not only impedes H-2A access to remedy for harm they experience, but also produces a restrictive environment that reduces their exercise of agency and autonomy.

Together, the cultural narratives and stereotypes discussed here result in the treatment of H-2A workers as a 'disposable' workforce in Washington State.³¹⁵ Activist and organizer Rosalinda Guillen, commenting on the COVID-19 emergency farmworker housing rules, noted the harmful legacy of these dynamics:

³¹³ Interview with FUJ Informant, 2 Jul 2020.

³¹⁴ Ibid.

³¹⁵ See Ch. 2, Sect. 2.3.

*The racial undertones of this situation are stark. Farmworkers are overwhelmingly non-white, are non-English speakers, and have historically been excluded from basic labor protections. It is impossible not to conclude that these rules were adopted because they benefit an agricultural industry that is almost exclusively owned and operated by politically powerful white individuals, while the rules' effects fall squarely on impoverished people of color.*³¹⁶

As she notes, the treatment of those in positions of least power on the farm reveals a perpetuation of racialized inequalities whose roots reach far back into American history.³¹⁷ These inequalities work to the advantage of those in power by enabling the maintenance of a vulnerable workforce. Thus, US social structures play a critical role in the structural vulnerability and resulting hardship experienced by Washington State H-2A workers.

6.4.2 – Structural Vulnerability, Agency, and the Human Rights of H-2A Workers

As discussed in Chapter 3, vulnerability and agency are inextricably linked. Individuals who experience the most structural vulnerability also tend to have the least control over resources and power - dynamics which limit their ability to organize, resist, and lay claim to rights and protections. This section explores the ties between vulnerability and expressions of agency for H-2A workers based on the data sources reviewed in this research.

Several recurring themes regarding H-2A agency and resistance were coded and categorized in the data. They lead to the following insights:

- Structural vulnerability limits the meaningfulness of H-2A agency
- Active efforts by H-2A employers limit resistance to maintain the status quo
- Worker organization amplifies H-2A agency and enables resistance

The previous sections of this chapter have demonstrated that economic, political, and social structures distribute resources, control, and respect unequally within the labor hierarchy, to the detriment of WA State H-2A workers. Numerous sources noted the ways in which the resulting vulnerability limits expressions of agency for H-2A workers. One informant noted:

³¹⁶ 'Request for repeal of emergency temporary worker housing provisions', *Columbia Legal Services*.

³¹⁷ See the discussion of the Bracero Program and the roots of migrant agricultural labor in Ch. 2, Sect.2.2.

*Going back to what I was saying, like, these are gigantic opportunities for H-2A workers. They've seen the benefits this kind of job can bring for their families. And so, they're going to be the last ones to make any complaint just because there is a gigantic fear of retaliation...So, when a complaint is made, that's like a heroic hurdle to get over. And...that's not something that you can blame someone for, right? There's just there's so much riding on this.*³¹⁸

This comment highlights the high stakes that H-2A workers face when deciding whether to make a complaint against their employer. Worker testimonies confirm that, in many cases, the potential benefits do not outweigh the risks: one Sarbanand Farms worker told an L&I employee that their coworker ‘would often get nosebleeds while working here...but he was afraid to report it,’ while another individual mentioned that their colleague ‘twisted his leg while working,’ but ‘refused to bring it up due to fear.’³¹⁹ The import of these observations is articulated by an organizer with FUJ who, commenting on the strikes at Sarbanand Farms in a news report, pointed out: ‘It took someone dying for them to take a stand...They know if they get deported it’s unlikely they’ll ever come back.’³²⁰ Seen from the perspective of individuals who are intimately aware of the situation of H-2A workers, any expression of discontent or resistance is both a great risk and an impressive show of courage.

In some ways, these dynamics turn H-2A agency into a meaningless façade rather than a practical possibility. As noted by CLS’s letter to Governor Inslee on the COVID-19 emergency rules for example, an H-2A workers’ only ‘choice’ if they want to leave what have become abusive or unsafe conditions is to self-deport.³²¹ This concept of agency as a façade is magnified by the situation of warehouse workers during the COVID-19 pandemic. One individual, explaining the impossibility of their situation to a reporter, reflected: ‘The company said that if we had worked for five weeks we could stay home, but they wouldn’t pay us. We’re only making minimum wage, so how could we do that? And we have no guarantee we would

³¹⁸ Interview with CLS Informant, 12 Jun 2020.

³¹⁹ S. Robson, ‘Seeking Truth in the Case of Sarbanand Farms’.

³²⁰ C. Sieh, ‘Death Sparks Labor Dispute at Sumas Berry Farm’.

³²¹ ‘Request for repeal of emergency temporary worker housing provisions’, *Columbia Legal Services*.

even have our jobs back if we don't come in to work now.'³²² In both these situations, 'choices' are made meaningless because they ignore the legal and financial precarity of workers.

The second insight – *Active efforts by H-2A employers limit resistance to maintain the status quo* – is based on the understanding that the limits of H-2A agency produced by structural vulnerability work to the advantage of employers. This perception is voiced by Andrea Schmitt, an attorney with CLS, in a news report discussing the lawsuits against Sarbanand Farms. Schmitt notes that, 'H-2A workers are good for employers precisely because they're compliant, because they don't have the ability to leave and look for other work.'³²³ From this point of view, it follows that the organization of H-2A workers poses a threat to the power of employers who – as discussed in the previous section – themselves occupy a somewhat precarious position in the labor hierarchy. As a result, employers may take concrete action to impede H-2A expressions of agency. One most basic way this can be achieved is by keeping H-2A workers from interacting with the outside world. To this effect, one individual interviewed at Sarbanand Farms told an L&I official: '[n]o one can come to the camp. We were told to not talk to anyone outside the camp.'³²⁴ While the isolation of H-2A workers is certainly not always intentional, this commentary suggests that – at least in some cases – it is part of a concerted attempt to keep H-2A individuals disconnected from information and resources. The FUJ organizer interviewed for this research made a particularly interesting observation on the nexus between agency, resistance, and the use of the H-2A program. Commenting on the increasing practice of displacing local workers with H-2A visa-ed individuals, he noted:

Our thinking was that the H-2A program is being used as a tool to break up the organizing of farm workers into unionizing or just gaining basic rights at work. We had a kind of first [experience in] 2013 of that happening at ...Sakuma Brothers Farms, where Sakuma tried to displace...hundreds of workers that were on strike by telling them that they were not going to be

³²² D. Bacon, 'COVID-Related Strikes Hit Washington Apple Sheds'.

³²³ W. James, 'Does a Foreign Worker Program Verge on 'Indentured Servitude'? A Debate Simmers in Washington State'.

³²⁴ S. Robson, 'Seeking Truth in the Case of Sarbanand Farms'.

*welcome back the next year because they were already bringing in H-2A workers.*³²⁵

This quote indicates a) that employers are aware of the reduced agency of H-2A workers and b) that employers are purposefully using the H-2A program to curtail farmworker organizing and resistance by reducing the number of domestic workers they hire.

The third agency-related insight is: *Worker organization amplifies H-2A agency and enables resistance.* This insight departs from the recognition that, though structural vulnerability limits agency, it does not obliterate it. Indeed, expressions of agency – both subtle and overt – were woven throughout the data. The more subtle forms of agency often occurred at the individual level or between just a few people. References to the ability of H-2A workers to adapt and put up with difficult situations, for example, were frequent across data sources. As noted by one interviewee, *‘workers don’t want to stir things up. I think they’ll try to put up with as much as they can because...they don’t want to be seen as the problematic one.’*³²⁶ The attitude of ‘putting up with it’ is a coping mechanism that allows workers to make the best of their situation. Another type of coping is displayed by mutual assistance between farmworkers. One worker at Sarbanand Farms related how coworkers of an injured individual ‘gave him some eye drops and something to put on his legs’³²⁷ when he was too afraid to report the injury to management. Rather than alerting authority figures on the farm, a move which could have jeopardized both his job and theirs, they used their limited resources to help their colleague as best they could. The use of such coping mechanisms does not indicate that H-2A workers are in agreement with these circumstances. It rather demonstrates how these individuals exercise their limited agency in ways to maximize their wellbeing while minimizing the risk of retaliation, thus ensuring their continued ability to participate in the H-2A program.

More overt expressions of agency emerged in moments when H-2A workers joined forces. Recall, for example, the strike which occurred at Sarbanand Farms after Honesto’s collapse, as well as in the strikes over coronavirus protections in the Yakima Valley. Commenting on

³²⁵ Interview with FUJ Informant, 2 Jul 2020.

³²⁶ Ibid.

³²⁷ S. Robson, ‘Seeking Truth in the Case of Sarbanand Farms’.

the former, the FUJ Informant noted that, *‘rather than self-deporting, they walked out into the middle of the streets, to rural streets or rural roads...and one of them found the number to Familias Unidas por la Justicia and called us to see how we could support.’*³²⁸ This action, taken by H-2A workers in unison, was a blatant challenge to the structures of power and authority in operation on the farm. By mobilizing in a group, strikers were able to amplify their statement of resistance and challenge the legal categorization of H-2A workers as individuals whose ‘belonging’ in US society does not extend beyond their work authorization. Both at Sarbanand Farms and in the Yakima Valley, resistance was further bolstered by the involvement of farmworker organizations such as FUJ, pointing to the role they play in connecting H-2A workers to resources and protections. Interesting too is that both instances of significant organizing occurred in situations of crisis or tragedy. This corresponds with the analysis of J. Scott who notes that, ‘at times of crisis or momentous political change,’ the more subtle, ‘everyday’ forms of resistance ‘may be complemented by other forms of struggle that are more opportune.’³²⁹ There may be something in the way crisis peaks public awareness and raises the stakes that drives greater forms of resistance in the H-2A community. In between these resistance highs, Scott’s analysis would predict the presence of the more subtle, everyday forms of resistance that undermine the symbolic authority of growers over H-2A workers. Interestingly, these forms of resistance did not come up in the data reviewed for this research. This does not mean, however, that such forms of resistance are not occurring. For, as Scott notes, such resistance is often carried out behind the scenes or in ways which can be easily covered up.³³⁰ Capturing resistance in its more subtle forms would require field-based research over an extended period of time – a design beyond the scope and timeline of this research.

Still, this third insight provides a much more hopeful view of H-2A agency than that put forward by dark anthropology. Simultaneously, it pushes back against the claims of symbolic violence, which suggest that those who are ranked low in the social order internalize and

³²⁸ Interview with FUJ Informant, 2 Jul 2020.

³²⁹ J. Scott, p. 273.

³³⁰ Ibid., p. 281.

normalize their own suffering.³³¹ Whether subtly, through the use of adaptation and mutual assistance, or overtly, in the forms of unionization, strikes, and protests, the H-2A workers in this research demonstrate that the limits which structural vulnerability places on their agency does not wholly straight-jacket their ability to organize and advocate for the rights and protections they deserve.

Relevance of Structural Vulnerability to findings

This section has demonstrated that, true to the predictions of a structural approach, the agricultural labor hierarchy is shaped by political, economic, and social structures which produce inequalities in the distribution of power, respect, control, and trust among actors. A consideration of these structures helps clarify/explain the low positionality of Washington State H-2A workers within this hierarchy. The result for these individuals is a situation of significant vulnerability and reduced agency. Those in power are pressured to maximize and maintain their hierarchal ‘edge’ through whatever means necessary while, at the same time, the limited resources and power of H-2A workers makes it more difficult to resist abusive conditions.

These insights are relevant to the findings of human rights-related concerns discussed in Section 6.1 in a number of ways: Firstly, considering the role of structural vulnerability in the experience of H-2A workers pulls back the curtain on the reasons behind why certain human rights are not being fully enjoyed by these individuals. It suggests that H-2A suffering and hardship do not stem from the avarice of employers alone. In so doing, it enriches the human rights perspective by shifting the gaze beyond the individual level to the level – or immediate source of harm – to the systemic and structural levels – the how and why of why this harm came about in the first place. From this perspective, threats that H-2A workers who complain will be sent back to Mexico are not merely seen as the actions of racist, greedy employers, but also as those of individuals under great pressure to stay afloat in a profit-driven economy.

³³¹ See Ch. 3, Section 3.2.

The consideration of structural vulnerability is also useful because it provides a unifying lens through which to analyze multiple types of human rights concerns experienced by H-2A farmworkers. It thus bridges disciplines and research areas – such as public health and racial and ethnic studies - which have often remained siloed in their discussions. Finally, the implications of structural vulnerability encourage human rights practitioners, academics, and activists alike to re-think the approaches being taken to address H-2A concerns. Efforts that target isolated events and punish individual perpetrators may not, on their own, be the most successful means of effecting long-term change. Farmworker organizer Rosalinda Guillen takes a similar tone. Commenting on what is necessary to improve the situation of H-2A and other foreign-born farmworkers, she notes: ‘It’s a cultural change...in how you see workers, how workers see the employer, how the worker and the employer see the farm, and how the community interacts with the whole process.’³³² Guillen highlights that the ill-treatment of migrant farmworkers is closely tied to the network of social relationships and perceptions that shape human action. By recognizing these dynamics, the incorporation of structural vulnerability helps capture the complex nature of suffering and suggests that a greater enjoyment of human rights for H-2A farmworkers will require the targeting not only of individuals, but also of the systems and structures within which these individuals operate.

³³² A. Wise, ‘Finding a Home for Farmworkers’.

CHAPTER 7 – CONCLUSION

Three main goals guided the development of this thesis. These were: (1) to address gaps in the existing research on the H-2A experience in Washington State; (2) to determine how these concerns are related to the enjoyment of various human rights; and (3) to explore the usefulness of applying a structural approach to the analysis of these human rights-related concerns. These goals were operationalized through the development of one central research question and four sub-questions and answered through the subsequent collection, processing, and analysis of primary and secondary data on the H-2A experience. Here I give a brief summary of the answers to these research questions, beginning with the four sub-questions and ending with the overarching, central research question.

Sub-question 1: ***What human rights are protected by law for H-2A farmworkers at the international, national, and state levels?*** At the international level, a wide range of human rights are theoretically protected for H-2A farmworkers. However, various issues impede the meaningfulness of these protections at the national and State levels. These impediments include the low ratification rate of international human rights treaties by the US, biased laws and contracts that favor employers over workers, and the poor enforcement of those protections that do exist. As a result, even those human rights which should be protected based on the national and State legal frameworks become more difficult to claim and defend.

Sub-question 2: ***What types of human rights-related concerns are being raised by H-2A farmworkers in Washington State?*** Concerns being raised regarding the H-2A experience in Washington can be grouped into four main themes: *harsh living and working conditions, poor treatment by those in authority, laws and regulations that favor employers, and a lack of awareness of rights and protections*. Each of these themes is in turn composed of various sub-themes, or categories of concerns, such as isolation and vigilance, denial of basic services, and threats and intimidation. These categories of concerns impede the enjoyment of a wide variety of human rights, from the freedom of movement to the prohibition of forced or compulsory

labor. They do so by restricting access to information on rights and protection, by making it more challenging and risky for H-2A workers to seek help, and by reducing the effectiveness of remedies for harm.

Sub-question 3: ***In what ways is the current situation generated by the COVID-19 pandemic impacting these human rights-related concerns?*** COVID-19 is acting as a magnifying glass for H-2A concerns. The existing vulnerabilities generated by H-2A status – especially in regards to working and living conditions – have been accentuated by the dangers of the virus. In addition, the action and rhetoric of industry and government actors during the pandemic has demonstrated a tendency to favor the economic survival of farm owners over the physical survival of foreign-born farmworkers such as H-2A workers. At the same time, however, COVID-19 has also revealed the potential of crisis situations to spur farmworker organizing and resistance, as demonstrated by the strikes in Yakima Valley, WA.

Sub-question 4: ***What is the relevance of structural vulnerability to these findings?*** Viewing findings through the lens of structural vulnerability led to several additional insights. It prompted me to look beyond the direct sources of human rights-related concerns of H-2A farmworkers to the structures that produce inequality, shape perception, and thus drive the actions leading to H-2A suffering. The concept of structural vulnerability also brought new understanding to the limits of agency and resistance for WA H-2A farmworkers.

Central research question: ***In what ways does structural vulnerability influence the realization of human rights for H-2A farmworkers in Washington State agriculture?*** Structural vulnerability plays a critical role in the enjoyment of human rights for Washington State H-2A workers. It is produced by the low positionality of H-2A farmworkers in the agricultural labor hierarchy, due to which these individuals are awarded less respect, trust, power, and control over their own life situations. This vulnerability undermines the meaningfulness of H-2A agency and restricts the avenues of action available to them for claiming their human rights. In addition the structural vulnerability of H-2A workers benefits employers and leads to instances of intentional suppression of H-2A resistance in order to maintain the status quo.

7.1 Implications of findings for the proposed conceptual framework

The research findings of this thesis have several implications for the conceptual framework introduced in Chapter 3. For convenience of reference, the diagram representing this framework is reproduced below:

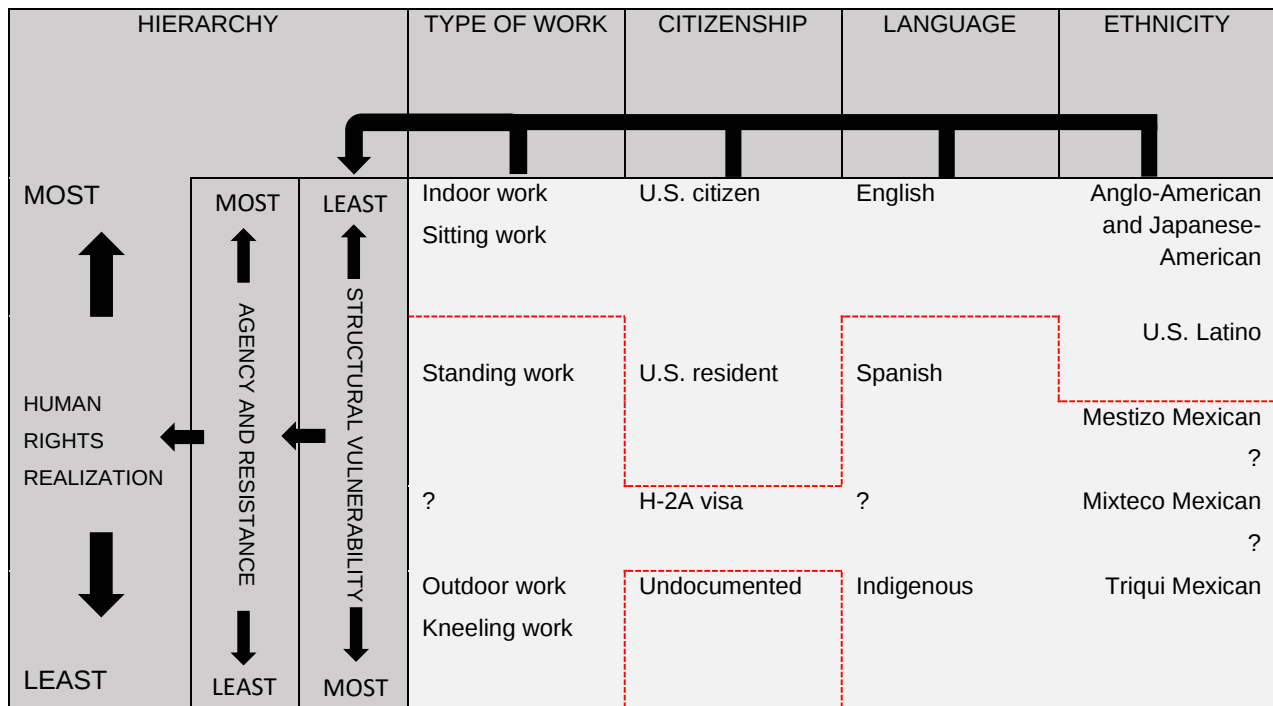


FIGURE 6: Conceptual framework as proposed in chapter 3.

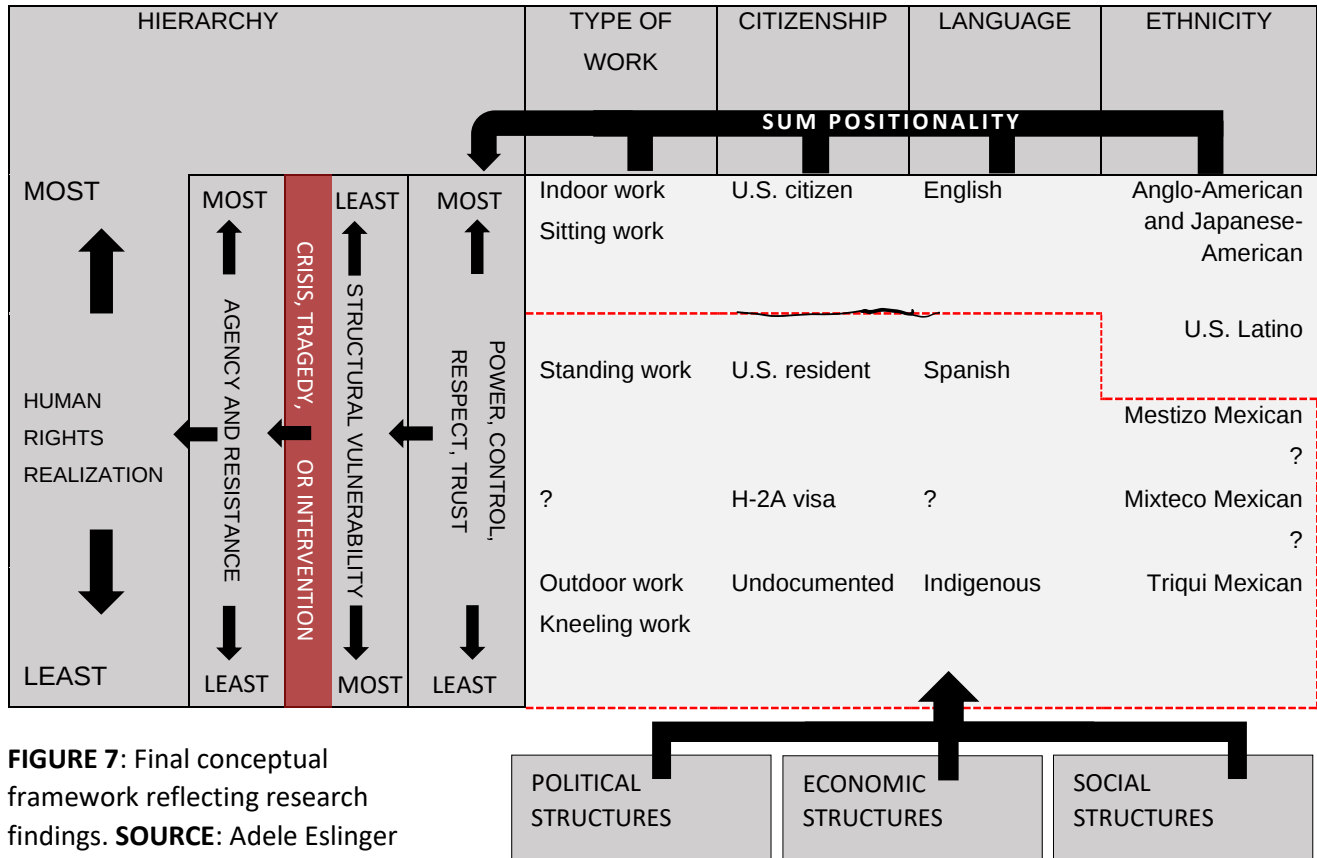
As predicted, research findings confirm the low positionality of H-2A individuals in the agricultural labor hierarchy. Just *how* low, however, is not entirely clear. This is in part due to the fact that other categories determining positionality in this framework could not be fully clarified by research findings. Regarding Type of Work, data sources discussed the presence of H-2A workers as pickers in berry fields and on apple orchards, as well as employees in fruit packing warehouses. This would suggest that H-2A farmworkers are occupied in a mixture of outdoor and indoor work, as well as a mixture of standing and bending work. Regarding Language and Ethnicity, limited demographics that point to a majority Mexican, majority Spanish-speaking H-2A population were supported by comments and observations across data

sources.³³³ However, this information is incomplete and inconclusive. The other reason it is difficult to fully fix H-2A positionality in the labor hierarchy is because, as noted in Section 6.4, while some aspects of H-2A status would seem to give these individuals an edge over domestic farmworkers, other aspects of H-2A status place them at or even below the level of undocumented laborers. The mixed nature of findings regarding the location of H-2A workers in the labor hierarchy indicates that perhaps positionality is not as linear as it is portrayed in the previously proposed framework. Positionality may rather be more of a sum of the various determining factors. This could be represented in the framework simply by the addition of the words ‘SUM POSITIONALITY’ above the arrows leading from the determining categories to the structural vulnerability column. The range of possibilities for H-2A positionality will be represented by maintaining the red dotted line and expanding it to encompass both the ‘US resident’ and ‘Undocumented’ Citizenship categories.

Another modification that should be made to the framework due to research findings is the re-insertion of the column in Holmes’ original framework representing the amount of control or resources awarded to actors of different positionalities. This impact of distributional inequality on structural vulnerability turned out to be a central finding and an important logical step between positionality and structural vulnerability. Consequently, it should be reflected in the framework. A third modification to the framework should be made to reflect the role of political, economic, and social structures in shaping and governing the labor hierarchy. These structures can be represented as columns below the current framework model, with arrows feeding up into the categories which determine positionality. Finally, findings indicated that the limits of farmworker agency and resistance may be altered in moments of crisis or extreme tragedy, or by the intervention of support systems such as farmworker unions. This is important to represent within the framework, as it recognizes that the extent to which human rights are enjoyed by H-2A workers is not fixed in stone. This can be represented with the addition of a small column labeled ‘crisis, tragedy, or intervention’ between the column representing structural vulnerability and that representing agency and resistance. The resulting

³³³ See, for example: Interview with FUJ Informant, 2 Jul 2020.

conceptual framework, which takes into accounts the findings of this thesis, is displayed in Figure 6 below:



This conceptual framework depicts the relationships between structures, the agricultural labor hierarchy, the distribution of power and resources, structural vulnerability, agency, and finally, the realization or enjoyment of human rights. It is predictive, suggesting that the enjoyment of human rights increases as structural vulnerability decreases, and that structural vulnerability decreases as one moves up the labor hierarchy. This conceptual framework is also productive because it raises areas for future research. First, it is a comparative framework, which presents positionality in the labor hierarchy relative to other actors. While a comparative study was determined to be out of the scope of this thesis, future research that looks at the vulnerability and human rights of H-2A workers in comparison to other laborers – especially undocumented migrant and domestic laborers – could prove especially fruitful. The understanding of where

H-2A individuals fit within the labor hierarchy could additionally be enriched by research focusing on the other aspects of positionality, such as ‘type of work’ and ‘ethnicity’. In-depth, field-based research alongside H-2A workers would be helpful here. The incorporation of additional categories, such as ‘gender’, would also help capture the diversity of H-2A and other farmworker experiences to better understand the extent to which human rights realization can vary between farmworkers of the same legal status. Though this framework was used to study the situation of H-2A workers in Washington State, it should be predictive for H-2A workers in other States as well. Case studies comparing WA State and other H-2A workers would thus be a profitable future avenue of research. Finally, the coding of data indicates that certain factors – such as the involvement of farmworker unions - may counteract structural vulnerability or enable resistance. This is an area of research which has received little attention in the literature on structural vulnerability so far. Future investigations in this area could provide insight on how to combat vulnerabilities that expose H-2A workers to harm.

7.1 Final Statement

This research opened with the story of Honesto Ibarra’s collapse in the fields at Sarbanand Farms, the subsequent strike led by over 60 of his H-2A coworkers, and their swift termination and eviction. However, the story of what happened at Sarbanand Farms is not simply the story of an abusive employer exploiting helpless migrants. Portraying it as such would be an injustice to both parties. As discussed in this thesis, the causes of ill treatment towards H-2A workers go beyond the individual level, being deeply rooted in the structures that organize our society. At the same time, the story of Sarbanand Farms did not end with the tragedy of Honesto’s death and the termination of his coworkers. It was followed by public outrage, the involvement of support organizations, and litigation on behalf of the wronged workers. This points to the fact that, while structural vulnerability does limit agency and decrease the enjoyment of human rights, it does not obliterate them. Nor does it preclude the possibility that interventions may be able to counteract or reduce structural vulnerability. These findings are useful to those who would work to improve the conditions of H-2A farmworkers because they suggest that change will not come by targeting rogue employers or isolated instances of

ill treatment alone. Such measures must also be accompanied by efforts to shift the ways in which our laws, economy, and society evaluate worth and distribute power. An optimist might say that a crisis like COVID-19 has the potential to begin just such a process. As noted by the farm owner interviewed for this research:

*'We have a problem in the United States, and the problem is that people think money is what makes the world go round. But it's not money that makes the world go round, it's people... There's no connection between net worth and self-worth. The United States has this backwards. Everything's for sale, from political offices to anything else you wanna buy... I don't think people in the United States realize it yet, but this has just shifted. And it's not gonna be about money anymore; it's gonna be about quality of life for the majority of people.'*³³⁴

Perhaps, as this grower suggests, we are on the edge of a societal shift in how we define success at the individual and communal level. Whether or not such a shift is precipitated by the events of COVID-19, the findings of this research illustrate that a collective reexamination of how the structures in which we live and operate will be central, not only to eradicating the suffering of H-2A workers, but also to ensuring that, should they disappear, they are not simply replaced by the next vulnerable group to come on the agricultural scene.

In closing, I would like to highlight that the incorporation of concepts from a structural approach generated significant and useful insights to the analysis of H-2A suffering and human rights in this research. Using the reasoning of J. Galtung, this may be articulated as a sort of *conjugated perception*, in which the layering of concepts from structural approaches and human rights produces a depth of analysis that neither of these could yield on their own. The interdisciplinary approach taken in this thesis thus provides a promising avenue for future human rights research and advocacy – whether in regard to the situation of migrant farmworkers or of other groups that occupy positions of particular vulnerability in our society.

³³⁴ Interview with Grower Informant, 18 Jul 2020.

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APPENDIX A: DEFINITIONS AND CATEGORIES OF AGRICULTURAL LABORERS

As noted in Chapter 2, terms used to refer to various sub-groups of the farmworker population are often ill-defined and overlapping. It is important to be cognizant of how we are referring to these groups for several reasons: labeling and categorizing carries great symbolic meaning. Assigning an individual to a certain category ascribes them with certain characteristics and worth, depending on how society perceives the associated with that label. This has the potential to mask differences and inequalities that occur within a group. Being clear with the use of terminology is only one aspect of this issue; but an important one nonetheless.

For the purposes of this research, I use the term ‘migrant farmworker’ in the manner defined by 42 CFR Sect. 56 as ‘an individual whose principal employment is in agriculture, who has been so employed within the last 24 months, and who establishes for the purposes of such employment a temporary abode.’³³⁵ Noteworthy about this definition is the fact that it does not mention authorization or country of origin. Thus, both authorized and unauthorized, as well as both domestic and foreign laborers are lumped into the term ‘migrant farmworker’. In contrast to migrant farmworkers, ‘seasonal’ farmworkers are generally understood to be those farmworkers who work only part of the year but do not establish temporary abodes.³³⁶ The term ‘immigrant’ differs from ‘migrant’ in that an immigrant is understood to be an individual who travels to a new country with the intention of staying there long term. Like migrant farmworkers, immigrant farmworkers comprise many nationalities and legal statuses. The same may be said of ‘Latinx’ farmworkers. Latinx is a fairly-recent and ever-evolving term used to refer to individuals of Latin American descent which, according to research by C. Salinas and A. Lozano, was ‘born out of the LGBTQIA community in the U.S. as a way to resist the gender binary’.³³⁷ As defined by Haddock-Lazala, Latinx is ‘a social identifier that aims to neutralize the sex-gender binary inherent in the Spanish language and thus, the ethnic category formally known as Latino’.³³⁸ One should keep in mind that not all persons who are commonly labelled as ‘Latinx’ necessarily identify as such. Many indigenous individuals, for example, do not identify with the term Latinx.³³⁹

Recognizing the complexities of farmworker terminology and being intentional in the way that these terminologies are used can help avoid problematic assumptions and over-generalizations that could otherwise lead to false portrayals of the farmworker experience. This should be practiced with more care by researchers and academics, whose influence shapes the way these individuals are perceived by society.

³³⁵ 42 CFR Sect. 56.102 (h).

³³⁶ 42 CFR Sect. 56.102 (m).

³³⁷ C. Salinas and A. Lozano, ‘Mapping and recontextualizing the evolution of the term Latinx: An environmental scanning in higher education’, *Journal of Latinos and Education*, vol. 18, no. 4, 2019, p. 304.

³³⁸ C. M. Haddock-Lazala, *Life and breasts at the borderlands: The breast reconstruction decision-making experiences of Dominican and Puerto Rican Latinxs*. Doctoral dissertation, The New School for Social Research, 2016, p. 1.

³³⁹ CITE Holmes

APPENDIX B: A NOTE ON MIGRATION STUDIES

The overview provided in Chapter 2, Section 2.2 clearly demonstrates the problematic nature of the H-2A program's roots and development. It also hints that this history has various implications for migration studies. A consideration of these implications is relevant to the situation of H-2A workers as theories of migration shape the way we think about why and how H-2A workers come to the United States in the first place. Questioning these theories thus forces us to re-examine who or what is responsible for the suffering experienced by these individuals.

One of the most widespread theories in migration studies is the push-pull model. This theory, first developed by E. Lee in 1966,³⁴⁰ conceptualizes immigration as a choice made by individuals based on the calculation of negative factors in the country of origin ('push' factors) and positive factors in the destination country ('pull' factors). Under this theory, migrant laborers are usually categorized as voluntary migrants, who – in contrast to refugees and asylum seekers who flee for political reasons - travel to another country of their own free will to take advantage of the economic opportunities it provides. Some scholars, however, criticize the assumption that labour migration entails a rational, controlled decision making process.³⁴¹ These criticisms are validated when one considers the history of capitalist-driven relations between Mexico and the US – relations which have induced widespread economic vulnerability south of the US border. The role of land annexation in these relations is no coincidence. Scholars such as Sandy Smith-Nonini, have put forward the argument that the 'displacement of rural workers [is] a long-term strategy of capitalist economy',³⁴² By taking away their source of self-sustenance and economic stability, land annexation essentially induced forced migration for many individuals.

The process of economic marginalization and forced migration carries on today through the imposition of neoliberal policies such as the North American Free Trade Agreement (NAFTA). As of 2012, the poverty rate in Mexico (approximately 52%) was almost identical to the poverty rate in 1994. Far from being a positive sign, the maintenance of these statistics means that over 14 million more Mexicans were living below the poverty line.³⁴³ This increased incidence of poverty reflects the devastating impacts of NAFTA on farmers and rural and indigenous populations. Power differentials between Mexico and the US meant that the US benefitted disproportionately from tariff-free trade and investment opportunities.³⁴⁴ The influx of US subsidized corn crops crushed the ability of many small farmers to subsist, creating massive rural joblessness and pushing many to seek employment elsewhere in Mexico

³⁴⁰ H. Duan, p. 7.

³⁴¹ Ibid., p. 12.

³⁴² S. Smith-Nonini, 'The Illegal and the Dead: Are Mexicans Renewable Energy?', *Medical Anthropology*, vol. 30, no. 5, 2011, p. 464.

³⁴³ R. Stavenhagen, 'Ruta Mixteca: Indigenous Rights and Mexico's Plunge into Globalization', *Latin American Perspectives*, 2003, vol. 42, no. 4, p. 94.

³⁴⁴ A. Jaggar, 'Vulnerable women and neo-liberal globalization: Debt burdens undermine women's health in the global South', *Theoretical Medicine*, 2002, vol. 23, p. 425.

or over the border.³⁴⁵ Comparing numbers of unauthorized immigrants before and after NAFTA corroborates the argument that current migration is largely a result of neoliberal economic policies: while there were just under 4 million undocumented Mexican immigrants in the US the year before NAFTA went into effect (1993), a mere 16 years later in 2009, there were over 11 million – an almost threefold increase.³⁴⁶ Clearly, as articulated by Smith-Noni, neoliberal policies such as NAFTA generate a ‘creative destruction...of rural life’ that works to the benefit of the US economy, including the agricultural companies employing the individuals these policies displace.³⁴⁷ These considerations not only challenge the separation of economic and political drivers of migration, but also question the voluntary nature of labour migration assumed in the push-pull framework.

At the same time, it is important to avoid generalizations that victimize migrant farmworkers. While in some ways, traditional theories of migration ascribe too *much* agency to migrant laborers, in other ways they restrict the understanding of what this agency entails. This is evident in the push-pull model, which reduces choice to a pure cost-benefit calculation. It is also a weakness of the human capital model of migration, as conceptualized by Sjaastad.³⁴⁸ In this model, individuals decide to migrate if doing so results in a greater value of their total human capital (ex. if the economic benefits outweigh the costs). The experience of H-2A farmworkers contradicts this in several ways. First, both the push-pull model as well as the human capital model assumes that migrants know what is waiting for them in the receiving country, and that they can factor this knowledge into their decision-making process. However, scholars have criticized this assumption, demonstrating that migrants often possess little knowledge about their job and destination before leaving.³⁴⁹ Second, scholars have raised concerns that both models assume a rationality in which migrants act out of self-interest.³⁵⁰ In reality, however, many migrants cross the border – authorized or unauthorized – even when rationality would argue that the dangers to their own health and wellness outweigh the potential economic benefits. Seth Holmes documents this complex reality in his thick anthropological description of the migration of indigenous Triqui individuals from Mexico to Washington and California for agricultural work. For many of these migrants, the only alternative is to watch the slow suffering and death of their families and loved ones due to oppressive economic policies and violence.³⁵¹ The action of migration in this context highlights the fact that migrant farmworkers wield agency in a way not predicted by the push-pull or human capital models. This demonstrates the need for a different conceptualization of agency in theories of migration as well as in the migrant experience more generally.

³⁴⁵ S. Smith-Nonini, ‘The Illegal and the Dead: Are Mexicans Renewable Energy?’, *Medical Anthropology*, 2011, vol. 30, no. 5, p. 463.

³⁴⁶ R. Stavenhagen, p. 94.

³⁴⁷ S. Smith-Nonini, p. 464.

³⁴⁸ H. Duan, p. 12.

³⁴⁹ B. Wang, X. Li, B. Stanton, et al., ‘The Influence of Social Stigma and Discriminatory Experience on Psychological Distress and Quality of Life Among Rural-to-urban Migrants in China’, *Social Science & Medicine*, vol. 71, no. 1, 2010, p. 91.

³⁵⁰ H. Duan, p. 12.

³⁵¹ S. Holmes, p. 17.

APPENDIX C: INFORMED CONSENT DOCUMENT

Information Sheet for Interview Participants

Purpose of the Research: To understand how aspects of US legal, economic, and social structures impact the vulnerability and agency of H-2A farmworkers, and to identify links between these structural issues and the types of human rights-related concerns being raised by individuals on H-2A visas in Washington State.

Participant's Role in Research: You will answer questions regarding the situation of H-2A farmworkers in Washington State, drawing on your area of expertise and experience. If you give permission, your answers will be recorded to supplement notes taken during the interview.

Risks: No risks have been identified in connection with this research.

Duration: This interview is expected to last between 30-60min.

Tools for conducting interview: This interview will be conducted via video call (ex. Skype), over the telephone, or in person, based on interviewee preference.

Participation: Your participation in the interview is completely voluntary. You have the right to withdraw your participation at any time during the interview. You may also choose to not answer any question(s) at will.

Confidentiality: Your interview data will be anonymized to maintain your privacy. With your consent, you may be referred to by your general position within your organization. Your interview recording will be transcribed and saved in a password-protected document. Direct quotes from your interview data may be used in this thesis, the final version of which will be submitted to the University of Vienna.

Contact for Further Information:

If you have questions or concerns about this research, please contact: Adele Eslinger, +1 (206) 445-9722, adele.r.eslinger@gmail.com. You may also contact the faculty member supervising this work: Dr. Brigitte Holzner, brigitte.holzner@chello.at.

This study has been approved by the Scientific Director of the Vienna Master of Arts in Human Rights, Dr. Manfred Nowak, who may be reached with questions at manfred.nowak@univie.ac.at.

Participant Consent Form

Title of Project: Structural Vulnerability and the Human Rights of H-2A Farmworkers in Washington State Agriculture

Name of Researcher: Adele Eslinger

Please initial on each line.

1. I confirm that I have read and understood the information sheet for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily.

2. I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reason and without any consequences for me.

3. I have been informed that the interview will be tape recorded and I give my consent for this recording to be made.

4. I understand that all information I provide will be anonymized and will only be used for the purpose of this research.

5. I agree to the use of anonymized direct quotes from my interview in publications and presentations arising from this study.

6. I agree to take part in the above study.

Participant name printed: _____

Signature and date: _____

APPENDIX D: Interview Question Elaboration

RQ SUB-QUESTIONS	SAMPLE SUBGROUPS		
	COMMUNITY ORGS	EMPLOYERS	EXPERTS
<i>Basic/General Questions</i>	What are the main ways in which you interact with the H-2A farmworker community?	Demographics Qs: What do you produce?; How long have you been farming?; How many people to you employ?; How many (if any) of these are H-2A workers? What other types of workers do you employ?	In what capacity do you have contact with the H-2A community?
	How has the use of H-2A workers in WA changed over the years, based on your experience/knowledge?	Why have you chosen to employ (or not employ) H-2A workers?	How has the use of H-2A workers in WA changed over the years, based on your experience/knowledge?
	What sorts of issues/barriers do you come up against when trying to serve H-2A workers?	What sorts of jobs do H-2A workers do? Is this the same or different from the jobs done by workers with other legal statuses? How?	
		What sorts of challenges do you face most workforce/employment? How do you deal with these concerns?	
<i>What human rights-related concerns are being raised regarding the experience of H-2A farmworkers?</i>	How would you describe the conditions in which H-2A farmworkers live and work?	(if applicable) How would you describe your overall level of satisfaction with the H-2A program?	What concerns come up for you(ex. as a lawyer) when considering the H-2A program? How do you respond to these concerns?
	How would you characterize the treatment of H-2A workers on the farm? How is this sim. to/diff. from treatment of other local ag. workers?	How would you describe your relationship to (im)migrant/H-2A employees on the farm?	What sorts of concerns have you heard most frequently from H-2A clients/the H-2A community?
	What sorts of concerns do you hear most frequently from H-2A workers? To what extent do these concerns get voiced and in what forums?	What challenges/issues come up for you in the use of the H-2A program? If you don't employ H-2A workers, what sorts of challenges do you hear being voiced by other growers?	To what extent are these concerns/harms experienced by H-2A workers protected under the US/WA legal framework? (for lawyers)
	To what extent do these concerns get voiced and in what forums?	What sorts of concerns/dissatisfaction (if any) do you hear most frequently from (H-2A)workers? Why do you think workers have these concerns?	How does the use of FLCs/labor contractors impact the H-2A experience? Does it increase/decrease the protections for H-2A workers? Why/how?
	How does the use of FLCs/labor contractors impact the H-2A experience? Does it increase/decrease the protections for H-2A workers? Why/how?	How do you respond to worker concerns? what sorts of processes are in place (if any) for workers to voice concerns?	SARBANAND: How did the case come to your attention? What made it strong enough to take on?
		What sorts of concerns/dissatisfaction (if any) do you hear most frequently from workers? How do you respond/what sorts of processes are in place (if any) for workers to voice concerns?	Could you briefly describe the trajectory of the case as well as its outcome? How do you feel about the outcome? How did clients feel about the outcome?

<i>How is COVID-19 impacting these concerns?</i>	In what ways has COVID-19 impacted the experience of H-2A farmworkers in WA?	In what ways is COVID-19 impacting the farm? What challenges/issues have come up as a result? What do you foresee?	In what ways is COVID-19 impacting the H-2A community?
	Is COVID-19 giving rise to new concerns? Aggravating existing concerns? Both? In what ways?	How has COVID-19 impacted your workforce?	Is COVID-19 giving rise to new concerns? Aggravating existing concerns? Both? In what ways?
	How are concerns being addressed so far? By employers? Comm. Orgs like yourself? State/fed govt?	What sorts of support are you receiving (state? Fed? Other?) as a result of COVID? What sort of support would be most helpful?	How are concerns being addressed so far? By employers? Comm. Orgs like yourself? State/fed govt?
	What is most needed by the H-2A community at this time to address COVID-related concerns?	What sorts of measures have you taken due to COVID-19 on the farm?	What is most needed by the H-2A community at this time to address COVID-related concerns?
<i>What is the relevance of structural vulnerability to these findings?</i>	What sorts of factors most-strongly influence the treatment and conditions experienced by H-2A workers? (ex. legal status? Gender? Ethnicity? Etc)	Who or what do you think is to blame for the reported suffering of migrant/H-2A workers?	What sorts of factors most-strongly influence the treatment and conditions experienced by H-2A workers? (ex. legal status? Gender? Ethnicity? Etc)
	In what ways are H-2A workers vulnerable to exploitation/ill-treatment? What factors contribute to this vulnerability?	What (if anything) do you think is needed to improve the situation of migrant/H-2A farmworkers generally? On your farm?	In what ways are H-2A workers vulnerable to exploitation/ill-treatment? What factors contribute to this vulnerability?
	What gaps exist in the current protections for H-2A workers in WA?		What gaps exist in the current protections for H-2A workers in WA?
	According to your experience, how aware are H-2A workers of their rights? What influences this awareness?		What do you think is needed to address H-2A vulnerability?
	What do you think is needed to address H-2A vulnerability?		

FIGURE 8: Table showing elaboration of interview questions based on research question sub-questions. SOURCE: Adele Eslinger

APPENDIX E: ABSTRACT

Use of the H-2A program - which brings temporary foreign laborers onto US farms – has grown dramatically in Washington State over the past few years, with a 60% increase in certified positions between 2016 and 2019. Concerns over this rapid increase are highlighted by recent lawsuits and protests, suggesting that the very structure of the H-2A program exposes individuals to exploitation. However, while the issues experienced by migrant workers more generally have been well documented, limited research exists on the situation of H-2A workers in particular. What research does exist is narrow in focus and tends to direct attention to the manifestations of H-2A suffering, rather than asking how and why that suffering comes about. This thesis addresses these gaps in research, combining a human rights perspective with a structural approach rooted in the social sciences to analyze the experiences of H-2A workers in Washington State. Coding of key informant interviews and secondary sources provided insight on the types of concerns being raised. The relationship of these concerns to various human rights was then explored and analyzed through the lens of structural vulnerability. Findings indicate that H-2A enjoyment of human rights is negatively impacted by structural level inequalities that pervade the agricultural labor hierarchy. This research is significant for conceptualizations of migrant farmworker vulnerability and agency. Finally, this thesis indicates that a structural perspective enriches traditional human rights analyses by shifting the analytical gaze beyond the individual level, where suffering manifests, to the structural level, where it is produced.

Key words: H-2A, migrant agricultural laborers, structural vulnerability, labor hierarchies, agency, human rights realization

Die Nutzung des H-2A-Programms, mit dem ausländische Zeitarbeiter auf US-Bauernhöfe gebracht werden, hat in den letzten Jahren im US-Bundesstaat Washington dramatisch zugenommen. Die Zahl der zertifizierten Stellen stieg zwischen 2016 und 2019 um 60%. Die Besorgnis über diesen raschen Anstieg wird durch jüngsten Klagen und Proteste hervorgehoben, was darauf hindeutet, dass die Struktur des H-2A-Programms Arbeitnehmer der Ausbeutung aussetzt. Obwohl die Probleme von Gastarbeitern im Allgemeinen gut dokumentiert sind, gibt es nur begrenzte Forschungsergebnisse zur Situation von H-2A-Arbeitnehmern. Bestehende Forschung ist eng fokussiert und lenkt die Aufmerksamkeit eher auf die Manifestationen des H-2A-Leidens, anstatt zu fragen, wie und warum dieses Leiden zustande kommt. Diese Masterarbeit befasst sich mit diesen Forschungslücken. Sie kombiniert eine Menschenrechtsperspektive mit einem sozialwissenschaftlichen Strukturansatz, um die Erfahrungen von H-2A-Arbeitnehmern im US-Bundesstaat Washington zu analysieren. Die Kodierung der Interviews mit Schlüsselpersonen und Sekundärquellen lieferte Einblicke in die Art der angesprochenen Bedenken. Das Verhältnis dieser Bedenken zu verschiedenen Menschenrechten wurde dann untersucht und unter dem Gesichtspunkt der strukturellen Verwundbarkeit analysiert. Die Ergebnisse zeigen, dass die Ausübung der Menschenrechte von H-2A-Arbeitnehmern durch strukturelle Ungleichheiten, die der landwirtschaftliche Arbeitshierarchie durchdringen, negativ beeinflusst wird. Diese Forschung ist für die Konzeptualisierung der Verwundbarkeit und Handlungsmächtigkeit von landwirtschaftlichen Gastarbeitern von Bedeutung. Schließlich zeigt dieser Masterarbeit, dass eine strukturelle Perspektive traditionelle Menschenrechtsanalysen bereichert, indem sie den analytischen Blick über die individuelle Ebene, auf der Leiden manifestiert, auf die strukturelle Ebene, auf der es produziert wird, verlagert.

Schlüsselwörter: H-2A, landwirtschaftliche Arbeitsmigranten, strukturellen Verwundbarkeit, Arbeitshierarchien, Handlungsmächtigkeit, Ausübung der Menschenrechte