"LIQUIDATED DAMAGES" IN GUEST WORKER CONTRACTS: INVOLUNTARY SERVITUDE, DEBT PEONAGE OR VALID CONTRACT CLAUSE?

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Non-citizen migrant workers who come to the United States on short term work visas, especially H-1B visas, often sign contracts that include a promise to work for the employer for a set period of time. These contracts may include a "liquidated damages clause" that requires the worker to pay the employer a large sum of money if they stop working for the employer, either to switch employers or to return home. Because these sums of money are so large relative to the worker's ability to pay, they prevent workers from leaving employment. This paper examines whether those liquidated damages clauses are enforceable. It suggests that there are two different ways to analyze these clauses: a contract law approach and a free labor approach. The contract law approach, found in state contract law and the statute that regulates H-1B visas, serves the dual purposes of efficiency and compensation. The free labor approach, found in a variety of statutes passed pursuant to the Thirteenth Amendment to the United States Constitution, on the other hand serves the purposes of protecting individuals and society from the ills associated with modern day slavery. This article examines two different prohibitions contained in the free labor approach—prohibitions against involuntary servitude and debt peonage. It explores and explains the differences between these variations on unfree labor, with a focus on the purpose of prohibiting each arrangement. The article then returns to the problem of liquidated damages clauses in guest worker contracts to examine the implications of these competing approaches (contract law vs. free labor) for advocates, courts and Congress.

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INTRODUCTION

In 2010, Rituraj Singh Panwar, a migrant from India, completed his education in the United States after receiving masters degrees in kinesiology and hospital management.[1] In order to stay and work in the United States, he signed an agreement to work as an H-1B "guest worker" with RN Staff/Access Technologies.[2] Under the visa statute, Access Technologies had applied for and received the right to hire an H-1B worker, and it controlled who could fill that

[1] These facts are drawn from *Panwar v. Access Therapies, Inc*., 975 F. Supp. 2d 948, 952 (S.D. Ind. 2013) (*Panwar I*) and *Panwar v. Access Therapies, Inc.*, No. 1:12-CV-00619-TWP-TAB, 2015 WL 1396599, at *1 (S.D. Ind. Mar. 25, 2015) (*Panwar II*).

[2] *Panwar I*, 975 F. Supp. at 953–54.

visa.[3] If Panwar left this employment, he would need to leave the country and Access Technologies could fill the opening with another guest worker. The parties signed a two-year employment agreement stating that Panwar would receive between $800 and $1000 a week to work as a physical therapist.[4] As part of the agreement, Access Technologies demanded that Panwar sign a $20,000 promissory note payable as "liquidated damages" if he left before the end of the contract term.[5] Panwar soon realized that Access Technologies was not providing the employment he expected.[6] In violation of the H-1B program requirements, Access Technologies required Panwar to pay for his visa, did not give him a work assignment or paycheck for eight months, and eventually placed him in a job with a substantially lower pay rate.[7] Panwar wanted to quit his employment and find other work, but he could not because he was unable to pay $20,000 (the equivalent of almost five years' salary in his native India).[8] When Panwar complained about the work arrangements, Access Technologies threatened to a fire him.[9] As a result, he was left in the position of neither being able to quit nor to advocate for better conditions. Either action would result in crushing debt, as well as deportation.[10] Access Technologies eventually discharged Panwar, revoked his visa, and sued him to recover the $20,000 in liquidated damages.[11] Panwar brought suit alleging violations of the visa statute and federal anti-trafficking laws.[12]

Panwar's situation is not unique. Many contracts signed by visa workers include a "liquidated damages clause" that requires the worker to pay the employer a large sum of money if they stop working for the employer, either to switch employers or to return home.[13] These clauses may also be triggered if the party is fired or constructively discharged.[14] Because these sums of money are so large relative to the worker's ability to pay, they prevent workers from

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[3] *See id.* at 952–53.

[4] *Id.* at 954.

[5] *Panwar II*, 2015 WL 1396599 at, *2.

[6] *Id.*

[7] *Panwar I*, 975 F. Supp. at 954.

[8] *Id.* at 958. *Currency Converter*, OANDA, https://www.oanda.com/currency/converter/ [https://perma.cc/9JQX-UZCG] (last visited Jan. 3, 2019); *Physiotherapist Salary in India*, NAUKRIHUB, http://www.naukrihub.com/salary-in-india/salary-of-physical-therapist.html [https://perma.cc/M5BL-BHXE] (last visited Jan. 3, 2019).

[9] *See Panwar I*, 975 F. Supp. at 954.

[10] *Panwar II*, 2015 WL 1396599, at *2.

[11] *Id.*

[12] *Panwar I*, 975 F. Supp. at 957.

[13] *See* Matt Smith et al., *Job Brokers Steal Wages and Entrap Indian Tech Workers in US*, GUARDIAN (Oct. 28, 2014), https://www.theguardian.com/us-news/2014/oct/28/-sp-jobs-brokers-entrap-indian-tech-workers [https://perma.cc/5393-NEZB].

[14] Constructive discharge occurs when an employee is forced to quit because of oppressive conditions. 20 C.F.R. § 655.731(c)(10)(i)(C) (2019) requires that the Department of Labor consider the actions of the employer that contributed to the employee ceasing employment.

leaving employment or, in many situations, from advocating for better conditions.[15]

This article examines whether those liquidated damages clauses are enforceable. It suggests that there are two different ways to analyze these clauses: a contract law approach and a free labor approach. The contract law approach—found in state contract law and the statute that regulates H-1B visas—serves efficiency purposes by providing for the general enforceability of contracts, while also allowing for the payment of certain compensatory remedies for breach.[16] The visa statute starts with this general orientation but modifies it to recognize the special circumstances surrounding visa contracts. On the other hand, the free labor approach—found in a variety of statutes passed pursuant to the Thirteenth Amendment to the United States Constitution—focuses on the purposes behind the prohibitions of involuntary servitude and of debt peonage.[17] Although these two arrangements are related and both fit within the ambit of modern day slavery, there are subtle differences between them that are worth exploring and making explicit. "Involuntary servitude" focuses on the harms to an individual and society when an employee is unable to quit work because the individual is unable to pay a large debt or for other reasons.[18] "Debt peonage" focuses on the harms that arise when that inability to quit is linked to a requirement that the employee work for a *specific person* in exchange for payment of a debt.[19] These harms occur even if the individual voluntarily entered into the arrangement and even if the debt is relatively small.[20] This paper argues that liquidated damages clauses in visa contracts must be analyzed under both the contract law and free labor approaches because they serve different purposes. It also offers suggestions to attorney advocates, courts, legislatures and academics to ensure that both approaches are considered in these cases.

The first section of this article describes the problem of liquidated damages clauses in guest worker contracts, including how they arise, their prevalence, and the role played by the worker's inability to challenge contract breaches committed by the employer. The second section of the article explains the two different approaches used to evaluate the validity of these clauses—the contract

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[15] In many of the cases reviewed, the employer threatens to discharge the worker for complaining. *See infra* Sections II.A, II.B.

[16] *See infra* Section II.A.

[17] *See infra* Section II.B.

[18] *See infra* Section II.B.1.b. This article will only explore involuntary servitude tied to the payment of debt. Other types of arrangements can lead to involuntary servitude. For a discussion of some other types of arrangements leading to involuntary servitude, see Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558, 1560 (2015).

[19] Other forms of peonage may exist, but this article focuses on a peonage relationship caused by debt. This paper uses the term debt peonage because it best captures the historical and contemporary language found in statutes and case law, while still focusing on debt caused by liquidated damages. *See infra* Section II.B.2.

[20] *See infra* Section II.B.2.

law approach and the free labor approach. After discussing the contract law approach, this section analyzes these arrangements as potential violations of the prohibitions against involuntary servitude and debt peonage. By exploring the definitions and harms of these prohibitions separately, this section advances the understanding of the Thirteenth Amendment because it unpacks the differences between involuntary servitude and debt peonage, while also recognizing their overlaps. The final section of the article returns to the case of Rituraj Singh Panwar, presenting and critiquing the outcome of the case under both the contract approach and the free labor approach. Building on the critique of *Panwar* the paper concludes with strategic recommendations for attorney advocates, courts, and policy makers.

I. THE PROBLEM OF LIQUIDATED DAMAGES CLAUSES IN GUEST WORKER CONTRACTS

The United States established the so-called "guest worker" visa program in order to allow non-citizen migrants to work in the U.S. for a limited period of time.[21] Visas are available for selected occupations, such as skilled, technical jobs (covered by the H-1B visa), agriculture (H-2A visa) and laborers (H-2B).[22] Under the program, once an employer obtains a visa, it can fill the visa position with a qualified worker.[23] The program is structured so that the visa is applied for, given to, held by, and controlled by the employer.[24] Once an employee is selected to fill a visa opening, he or she becomes eligible to live and work in the U.S. on that visa.[25] If the employee separates from employment with that

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[21] Some may be renewed for an additional time period, but there are generally cumulative time limits for any individual worker. At the end of this time period, the worker must either leave the country or become a naturalized citizen. *Temporary (Nonimmigrant) Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-united-states/temporary-nonimmigrant-workers [https://perma.cc/U4D4-GXD8] (last updated Sept. 7, 2011).

[22] *Id.* Other common visa holders include student workers and nannies brought in under the J-1 visa program. *Exchange Visitors*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-united-states/students-and-exchange-visitors/exchange-visitors [https://perma.cc/WK3M-XFU3] (last updated Nov. 8, 2018). Since participants in this program work through an exchange program that operates differently than a traditional employment arrangement, they are not addressed in this article.

[23] *Temporary (Nonimmigrant) Workers*, *supra* note 21. For an example of worker qualifications, see *H1-B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models [https://perma.cc/CD4H-HUSM] (last updated Apr. 3, 2017).

[24] Maria L. Ontiveros, *H-1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers*, 38 BERKELEY J. EMP. & LAB. L. 1, 6–9 (2017).

[25] *Temporary (Nonimmigrant) Workers*, *supra* note 21.

employer, either because they quit or are fired, the worker loses legal authorization to be in the country and becomes deportable.[26]

The employment of guest workers is regulated by both common law and a variety of statutes. As employees, they are covered by state and federal employment statutes such as wage and hour regulations, anti-discrimination provisions, and labor trafficking protection laws. Guest workers who sign contracts with their employers—a practice that is particularly common for H-1B workers—are covered by state common law of contracts. In addition, the visa statute provides specific protection for the workers.[27] The validity of liquidated damages clauses in guest worker contracts are typically analyzed under state common law, the visa statute and federal labor trafficking protection laws.[28]

Cases brought by employers against visa employees to enforce liquidated damages are typically filed as breach of contract claims in state superior courts. As a result, they can be difficult to track unless they are appealed to a higher level. In order to determine the prevalence of liquidated damages clause enforcement in guest worker contracts, the Center for Investigative Reporting searched court dockets in geographic areas with high tech companies and found hundreds of cases where companies had sued H-1B workers for leaving before the end of the contract term.[29] Other examples of the problem are found in cases brought by guest workers challenging liquidated damages provisions under either the visa statute or federal laws.[30]

The possibility of having to pay $20,000 or another similarly large amount makes it very difficult for an employee to quit because the average technical college graduate in India earns between $4,500 and $6,000 per year.[31] In many situations, the workers are already in debt because they had to borrow money to pay for a visa fee—typically around $3,000.[32] The employers and recruiting companies will often pursue enforcement of these judgments in India against the employee's family as well.[33] The problem is multiplied because once the employer sues one worker, the employer can credibly threaten suit against other workers in order to prevent them from quitting.[34]

In Panwar's case and others, the employer appears to be in violation of the contract and the visa law. Thus, it seems that the employee should be able to remedy their situation (i.e. be given a placement or be paid at an appropriate

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[26] Norman Matloff, *On the Need for Reform of the H-1B Non-Immigrant Work Visa in Computer-Related Occupations*, 36 U. MICH. J.L. REFORM 815, 868 (2003); Sharmila Rudrappa, *Cyber-Coolies and Techno-Braceros: Race and Commodification of Indian Information Technology Guest Workers in the United States*, 44 U.S.F. L. REV. 353, 368 (2009).

[27] *See infra* Section II.A.2; *See generally* 20 C.F.R. §§ 655.700–760 (2019).

[28] *See infra* Sections II.A, II.B.

[29] Smith et al., *supra* note 13.

[30] *See infra* Section II.B.1.

[31] Smith et al., *supra* note 13.

[32] *Id.*

[33] *Id.*

[34] Ontiveros, *supra* note 24, at 20–21 and cases discussed below.

rate) by suing for breach of contract or prosecuting the employer under the statute. However, this is not a viable approach for several reasons.[35] First, many employees are not aware of their rights and may have limited access to the legal system, either because of lack of resources or because of restrictions placed on legal services providers in the statute.[36] More importantly, they are intimidated by the employer and fear being discharged and deported if they complain. One researcher concluded, "[v]isa holders, by the very nature of their situation as workers dependent upon employers for the right to remain in the country—either permanently or temporarily—remain less likely to protest against unfair working conditions than their counterparts with permanent resident status."[37] Finally, bringing a private cause of action is slow, difficult and perceived as ineffective,[38] while enforcement by state agencies has not been as effective as anticipated.[39]

Cases evaluating the enforceability of liquidated damages come to court in several different ways. If an individual believes the visa statute has been violated, he or she must first file a claim with an administrative agency because there is no right to bring a private cause of action in federal court.[40] An administrative law judge decides the case, which is then reviewed by the U.S. Department of Labor Administrative Review Board.[41] Parties may then appeal to a U.S. District Court.[42] Alternatively, if an employee believes that the liquidated damages clause violates an independent federal statute, such as the free labor statutes discussed below, the employee may challenge the clause directly in federal court.[43] Finally, if an employer sues an employee to recover liquidated damag-

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[35] *See id.* at 11–14.

[36] This is particularly a problem for H-2A agricultural workers and H-2B laborers. Alejandro V. Cortes, Note, *The H-2A Farmworker: The Latest Incarnation of the Judicially Handicapped and Why the Use of Mediation to Resolve Employment Disputes Will Improve Their Rights*, 21 OHIO ST. J. DISP. RESOL. 409, 415–21 (2006). *See also* Alison K. Guernsey, *Double Denial: How Both the DOL and Organized Labor Fail Domestic Agricultural Workers in the Face of H-2A*, 93 IOWA L. REV. 277, 291–99 (2007); Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 597–616 (2001); Maria L. Ontiveros, *Immigrant Workers and the Thirteenth Amendment*, *in* THE PROMISES OF LIBERTY 279, 282 (Alexander Tsesis ed., 2010).

[37] Todd H. Goodsell, Note, *On the Continued Need for H-1B Reform: A Partial, Statutory Suggestion to Protect Foreign and U.S. Workers*, 21 BYU J. PUB. L. 153, 172 (2007).

[38] Alaina M. Beach, *H-1B Visa Legislation: Legal Deficiencies and the Need for Reform*, 6 S.C. J. INT'L L. & BUS. 273, 282 (2010).

[39] Ontiveros, *supra* note 24, at 28 ("The overall lesson from these cases is that although employees and the government are bringing actual, harmful violations [of the visa laws] to courts, they face a long, slow and often ineffective road.").

[40] *Id.*

[41] *Id.*

[42] Watson v. Bank of Am., 196 F. App'x 306, 307 (5th Cir. 2006); Venkatraman v. REI Sys., Inc., 417 F.3d 418, 423–24 (4th Cir. 2005); Gupta v. Perez, 101 F. Supp. 3d 437, 460–61 (D.N.J. 2015).

[43] 28 U.S.C. § 1331 (2012).

es, the employee may argue that it is unenforceable under state law or the visa law. If the employer prevails and the employee faces a judgment requiring payment of a claim, the employee can then file a claim with the Department of Labor alleging a violation of the visa law.[44] No matter how these cases reach the courts, two different approaches have been used to examine their validity: contract law and free labor.

II. TWO APPROACHES TO EVALUATING THE VALIDITY OF LIQUIDATED DAMAGES

The validity of liquidated damages clauses are adjudicated under two different approaches: the contract law approach and the free labor approach. The former is primarily a creature of state law and is meant to serve interests of efficiency in the enforcement of contracts and fair compensation when a contract is breached. The latter is mainly a federal law concern originating in the Thirteenth Amendment to the U.S. Constitution, which eliminated slavery and involuntary servitude.[45] This section describes the two approaches—explaining how they have been applied in guest worker liquidated damages cases and analyzing their underlying purposes. Because these approaches serve such different policies, both must be considered independently in evaluating the validity of these clauses.

A. The Contract Law Approach

Courts often employ a two-step process when considering liquidated damages clause cases in the guest worker context. As a starting point, courts look to the state common law of contract which tends to allow liquidated damages clauses so long as they are compensatory and not punitive.[46] Next, in many cases, they will also evaluate the contract law provision found specifically in the visa statute, which validates the importance of the state law but also imposes additional restrictions.[47]

1. State Common Law

Most states allow liquidated damages to be assessed in limited situations. The amount of the damages must be "reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss."[48] Stipulated damages that are too large are unenforceable as a penalty that violates public policy.[49] In determining whether the amount is reasonable, courts look at

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[44] Ontiveros, *supra* note 24, at 32–35.
[45] *See infra* Section II.B.1.
[46] *See infra* Section II.A.1.
[47] *See infra* Section II.A.2.
[48] RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM LAW. INST. 1981).
[49] *Id.* at cmt. b.

whether it approximates the amount anticipated to be lost at the time the contract was made or if it approximates the amount actually lost in retrospect.[50] In addition, the party seeking to collect the damages must show that the damages are difficult to estimate.[51]

Courts have followed this approach in evaluating liquidated damages clauses in H-1B contracts. In *Tekstrom v. Savla*, for example, Sameer Savla signed an agreement to fill an H-1B position with Tekstrom that included a liquidated damages clause requiring him to pay Tekstrom $18,000 if he left employment early.[52] When Savla reported to work, he expected to complete a three-week training course and then be placed into a job.[53] Instead, he was housed in an overcrowded apartment, forced to sleep on the floor in a sleeping bag, refused the promised health insurance and not given a position for four months.[54] One of the other participants left the program, and Tekstrom told Savla that if he tried to leave, "he would make an example of him."[55] After Savla was finally placed in a short term assignment, he inquired about his visa, pay stubs, and employment contract.[56] Tekstrom threatened Savla with "a civil lawsuit, criminal charges, possible deportation and the destruction of his career" if he persisted in complaining and asking questions.[57] Savla became so stressed and physically ill over these threats that he left the assignment.[58]

Tekstrom sued Savla for $18,000, citing the liquidated damages clause in the contract and arguing that it would cover "the company's estimate of its investment in a trainee, including housing, training, software licensing fees, marketing efforts and work performed by Tekstrom's staff as well as potential lost revenues from the early termination of a prospective work assignment."[59] Savla argued that the liquidated damages clause was unenforceable and filed counterclaims for tort and contract violations.[60] The court found that the liquidated damages clause was void as a penalty because it violated both requirements for a valid clause.[61] The court said that the company could have easily estimated the actual costs of housing and training, so the costs were not difficult to estimate.[62] In addition, the fee bore no relation to the specified bases for the dam-

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[50] *Id.*
[51] *Id.*
[52] Tekstrom, Inc. v. Savla, C.A. No. 05A-12-006 (JTV), 2006 WL 2338050, at *2 (Del. Super. Ct. July 31, 2006).
[53] *Id.* at *1.
[54] *Id.* at *2.
[55] *Id.*
[56] *Id.* at *3.
[57] *Id.*
[58] *Id.*
[59] *Id.* at *6.
[60] *Id.* at *3.
[61] *Id.* at *6.
[62] *Id.*

ages.[63] The court concluded, "Savla would have had to pay the $18,000 in penalty whether he was working for one day or eighteen months. There is nothing in the record to show how the amount was arrived at or whether it is proportionate to whatever actual damage would result from a contract breach."[64] Therefore, the court refused to make Savla pay Tekstrom the money.[65]

An evaluation of liquidated damages clauses under contract law recognizes that the purpose of awarding damages for breach of contract is compensatory, not punitive.[66] Contract law is not concerned with ensuring that a deal is consummated or that a promise is kept.[67] A promise can be broken if the breaching party pays the other party to the contract an appropriate amount of compensation.[68] In other words, contract law does not seek to punish someone for breaking a promise or to force someone into completing a deal for its own sake. It seeks to either enforce the contract OR to make sure that there is adequate compensation. A clause that is punitive, and therefore unenforceable, is one that seeks to coerce performance rather than estimate damages. Punitive clauses are unenforceable because they serve only to punish someone for breaking a promise, do not serve the purpose of compensation, and have "no justification on either economic or other grounds."[69] Some contract scholars explain the basis for this approach under the theory of "efficient breach," which argues that sometimes it is more efficient or beneficial to the breaching party to breach the contract and pay the damage.[70] Society benefits from this view of contracts because it maximizes the efficiency of the transaction. Liquidated damages clauses which punish parties run afoul of these basic contract policies of efficiency and compensation because they do not allow for an efficient breach to occur.

2. The Visa Statute

The guest worker visa statute builds upon these basic common law contract principles when evaluating liquidated damages clauses but adds additional guidance for judges. Regulations passed pursuant to the statute specify that employers may not penalize employees for ceasing employment prior to an agreed date, but they do permit the employer to collect "bona fide liquidated damag-

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[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] RESTATEMENT (SECOND) OF CONTRACTS § 356, cmt. a (AM. LAW INST. 1981); 24 WILLISTON ON CONTRACTS § 65:1 (4th ed. 2018).

[67] *See* RESTATEMENT (SECOND) OF CONTRACTS § 356, cmt. a; 24 WILLISTON ON CONTRACTS § 65:1.

[68] RESTATEMENT (SECOND) OF CONTRACTS § 356, cmt. a; 24 WILLISTON ON CONTRACTS § 65:1.

[69] RESTATEMENT (SECOND) OF CONTRACTS § 356, cmt. a.

[70] Barry E. Adler, *Efficient Breach Theory Through the Looking Glass*, 83 N.Y.U. L. REV. 1679, 1688 (2008) (describing efficient breach theory as "a cornerstone of the economic analysis of contract law").

es."[71] In evaluating whether the required payments are allowable as liquidated damages, courts are instructed to use applicable state law and look to whether the damages are "reasonable approximations or estimates of the anticipated or actual damage caused to one party by the other party's breach of the contract."[72] In addition, the regulations explain that state law generally requires "that the relation or circumstances of the parties, and the purpose(s) of the agreement, are to be taken into account," and that "a payment would be considered to be a prohibited penalty where it is the result of fraud or where it cloaks oppression."[73] The regulations also state that "the sum stipulated must take into account whether the contract breach is total or partial (i.e., the percentage of the employment contract completed)."[74] Finally, the regulations provide that although the Administrator shall apply relevant state law, the application shall include "consideration where appropriate to actions by the employer, if any, contributing to the early cessation, such as the employer's constructive discharge of the nonimmigrant or non-compliance with its obligations under the INA and its regulations."[75]

The regulatory history of the regulations passed pursuant to the visa statute provide insight on the purpose of the language requiring these additional considerations. The Department of Labor sought input on how it should determine whether a payment required for ceasing employment is a prohibited penalty or allowable liquidated damages.[76] The Department of Labor originally took the position that the regulations should not specify any particular guidelines and should instead leave the matter to the discretion of state court judges to only apply this regulation based on state law.[77] The Department opined that state courts were better able than a federal administrative forum to address "the various legal questions posed by any agreement between an employer and an H-1B worker, and to conclusively determine whether a particular provision runs afoul of State law."[78] It also stated that the Department lacked expertise in interpret-

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[71] 20 C.F.R. § 655.731(c)(10)(i)(A)–(B) (2019).

[72] 20 C.F.R. § 655.731(c)(10)(i)(C).

[73] *Id.*

[74] *Id.*

[75] *Id.* In addition, the liquidated damages may not be used to cover or rebate the $500/$1,000 filing fee under section 214(c) of the Immigration and Nationality Act ("INA"). *Id.* Further, any payments for liquidated damages must comply with 20 C.F.R. § 655.731(c)(9). *Id.* § 655.731(c)(10)(i)(B). These require, among other things that any deductions must be agreed to voluntarily and in writing by the employee; intended to benefit the employees, not simply cover the employer's regular business expenses; not exceed the stated expenses; and not exceed the federal limits on garnishment of wages. *Id.* § 655.731(c)(9)(iii)(A)–(E).

[76] Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 64 Fed. Reg. 628, 648 (Jan. 5, 1999) (to be codified at 20 C.F.R. §§ 655–56).

[77] *Id.*

[78] *Id.*

ing state law.[79] Commenters strongly objected to this approach, arguing that it was contrary to the intent of the visa law and "inconsistent with the role intended for the Department".[80] In response, the Department changed its approach. It stated, "Notwithstanding the Department's continued reluctance to identify and interpret State law, the Department now concurs with the view that Congress intended the Department to determine whether a provision is liquidated damages or a penalty."[81]

As a result, the final regulations start with a reiteration of general state contract law, prohibiting penalties for quitting work before the end of the contract term but allowing liquidated damages that are reasonable estimates of damages.[82] It then supplements that statement with three additional guidelines. These require that the relationships and circumstances of the parties must be taken into account (including the presence of fraud or oppression); that the amount must be adjusted depending upon how much time has been worked by the employee; and that the validity may turn on whether the employee's resignation was actually a constructive discharge caused by the employer's actions.[83] Thus, the intent of the visa statute is to take a more nuanced look at liquidated damages clauses in guest worker contracts than that found under state common law, in order to take into account the special power imbalance of this situation. In addition, it recognizes that an all-or-nothing type of liquidated damages clause is usually punitive. Finally, it counsels that sometimes a voluntary quit or resignation should be treated as a discharge.

Novinvest provides an example of how courts apply the visa provision.[84] In that case, four visa workers left their work early and their employer sued in a Georgia state court to recoup the liquidated damages specified in the contract.[85] The employer secured a state court judgment requiring the employees to pay a $5,000 "investment fee" to cover the business expenses necessary to "hire, train and process" the employees.[86] The employees filed an administrative law complaint with the Department of Labor under the relevant visa law.[87] The administrative law judge ("ALJ") found that the fee violated both the state liquidated damages law, which is incorporated in the visa statute, and the visa statute pro-

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[79] *Id.*

[80] Labor Conditions Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 Fed. Reg. 80110, 80173 (Dec. 20, 2000) (to be codified at 20 C.F.R. §§ 655–66).

[81] *Id.* at 80174.

[82] 20 C.F.R. § 655.731(c)(10)(i)(C) (2019).

[83] *Id.*

[84] ALJ's Decision and Order at 19, Novinvest, LLC, Docket No. 2002-LCA-00024 (Dep't of Labor Jan. 21, 2003), *aff'd*, ARB's Final Decision and Order, Novinvest, LLC, Docket No. 02-LCA-24 (Dep't of Labor July 30, 2004).

[85] *Id.* at 2, 7.

[86] *Id.* at 7, 18.

[87] *Id.* at 2.

visions.[88] The ALJ found that the award failed under state liquidated damages law because the employer did not specify how it arrived at the amount of $5,000.[89] The employees prevailed under the visa statute, at least in part, because of the nature of the guest worker-employer relationship and the fact that their treatment violated the standards set forth in the visa law.[90] Consequently, the employer was ordered to return any money it had collected under the state judgments to the employees.[91] *Novinvest* illustrates how these cases are adjudicated using principles underlying state contract law, with the enhanced protection and nuance required by the visa statute.

B. The Free Labor Approach

The free labor approach to evaluating the validity of liquidated damages provisions originates in the Thirteenth Amendment to the United States Constitution, passed in 1789, which states "neither slavery nor involuntary servitude . . . shall exist within the United States."[92] This Amendment not only abolished chattel slavery but also prohibited involuntary servitude and set a policy of free and voluntary labor in the United States.[93] Shortly thereafter, Congress passed two laws aimed at eliminating other systems of unfree labor that continued to exist after the abolition of chattel slavery. On March 2, 1867, Congress passed a statute variously referred to as the Anti-Peonage Act and the Peonage Abolition Act.[94] Although focused on abolishing the Spanish peonage system established in the territory of New Mexico, its language and legislative history covers and prohibits a broad range of oppressive labor arrangements.[95] The statute read:

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[88] *Id.* at 21.

[89] *Id.* at 22. The Georgia liquidated damages law required a showing that damages are difficult to estimate, that the amount be intended to cover damages and not be a penalty, and that the amount be a reasonable estimate of the probable loss. *Id.* at 21–22.

[90] The court focused on the requirements under 20 C.F.R. § 655.731(c)(9)(iii). *Id.* at 19–20.

[91] *Id.* at 22.

[92] U.S. CONST. amend. XIII. This article only addresses the narrow topic of free labor prohibitions against requiring employees to pay a debt before they may quit work, but the Thirteenth Amendment prohibits a variety of other labor arrangements and governmental action, as well.

[93] Pollock v. Williams, 322 U.S. 4, 17 (1944) ("The undoubted aim of the Thirteenth Amendment . . . [was] to maintain a system of completely free and voluntary labor throughout the United States."); *see also* James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474, 1517 (2010); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438, 453, 495 (1989); Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859, 861, 877 (2016).

[94] Anti-Peonage Act of 1867, ch. 187, 14 Stat. 546 (1867) (codified at 42 U.S.C. § 1994 (2012)); 18 U.S.C. § 1581 (2012).

[95] Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1617 (2012) (explaining the legislative history and statute cover voluntary, as well as involuntary, service as a peon and service compelled by things other than debt).

> [T]he holding of any person to service or labor under the system known as peonage is hereby declared to be unlawful, and the same is hereby abolished and forever prohibited . . . any attempt . . . to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, be, and the same are hereby, declared null and void; and any person or persons who shall hold, arrest, or return, or cause to be held, arrested, or returned . . . to a condition of peonage, shall, upon conviction, be punished [with criminal sanctions].[96]

In 1874, Congress passed a statute commonly referred to as The Padrone Statute.[97] Aimed at eliminating a system where children were kidnapped in Italy and brought to the United States to work, its language was much broader.[98] It read:

> Whoever shall knowingly and willfully bring into the United States . . . any person inveigled or forcibly kidnaped in any other country, with intent to hold such person . . . to any involuntary servitude; or whoever shall knowingly and willfully sell or cause to be sold, into any condition of involuntarily servitude, any other person for any term whatever; or whoever shall knowingly and willfully hold to involuntary servitude any person so brought or sold, shall [be subject to criminal penalties].[99]

In 1948, Congress worked to revise, codify, and enact into positive law Title 18 of the U.S. Code.[100] As part of this process, most of the requirements within these two early statutes—along with other laws addressing slavery—found their way in a modern form into Chapter 77 titled "Peonage and Slavery" (covering 18 U.S.C. 1581–1588) (hereinafter "Chapter 77").[101] The anti-peonage statute was split in two. The first part of the anti-peonage statute, abolishing and prohibiting voluntary and involuntary peonage, was codified in a different section of the U.S. Code outside of Chapter 77.[102] The second part of the anti-peonage statute became 18 U.S.C. § 1581.[103] It provides that "[w]hoever holds or returns any person to a condition of peonage" shall be sub-

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[96] 14 Stat. at 546.

[97] United States v. Kozminski, 487 U.S. 931, 945 (1988).

[98] Michael H. LeRoy, *Compulsory Labor in a National Emergency: Public Service or Involuntary Servitude? The Case of Crippled Ports*, 28 BERKELEY J. EMP. & LAB. L. 331, 356 n.115 (2007).

[99] 18 U.S.C. § 446 (1925). 18 U.S.C. § 446 was derived from An Act to Protect Persons of Foreign Birth Against Forcible Constraint or Involuntary Servitude, ch. 464, 18 Stat. 251 (1874), which was repealed by Act of Mar. 4, 1909, ch. 321, § 341, 35 Stat. 1153, 1154 (1909).

[100] Act of June 25, 1948, ch. 645, 62 Stat. 683 (1948).

[101] *Id.* at 772. The group at the time was codified as 18 U.S.C. §§ 1581–88. *Id.*

[102] 42 U.S.C. § 1994 (2012) provides:

> The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all . . . usages . . . to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.

[103] 62 Stat. at 772.

ject to criminal sanctions.[104] The Padrone Statute's prohibition against involuntary servitude was later reworked and became 18 U.S.C. § 1584.[105] That section reads, "[w]hoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person" shall be subject to criminal sanctions.[106] Thus, by the end of the 21st century, one set of major free labor statutes was included in Chapter 77, with peonage covered in Section 1581 and involuntary servitude covered in Section 1584.[107]

Several cases were brought to challenge oppressive working conditions under Section 1584, with some, such as *United States v. Mussry*, succeeding in giving a broad reading to involuntary servitude.[108] However, in 1988, in *Kozminski*, the Supreme Court gave a very constrained reading to the term "involuntary servitude," focusing on the need for physical restraint instead of psychological coercion.[109] In response to and in order to overrule *Kozminski*, in 2000, Congress passed the Trafficking Victim's Protection Act ("TVPA").[110] It added sections 1589-1594 to Title 18 of the U.S. Code, and Chapter 77 became "Peonage, Slavery and Trafficking in Persons."[111] The TVPA also increased the criminal penalties associated with Section 1581 Peonage and Section 1584 In-

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104 *Id.*

105 *Id.* at 773.This section is a codification of a combination of the Padrone Statute and the Slave Trade Statute, as amended in 1909, formerly 18 U.S.C. § 423 (repealed 1948). United States v. Kozminski, 487 U.S. 931, 945–48 (1988) (discussing codification of acts into § 1584).

106 18 U.S.C. § 1584 (2012).

107 Other statutes also build on the free labor guarantee of the Thirteenth Amendment. Equal employment statutes, including Title VII of the Civil Rights Act of 1964, has its origin in the Anti-Peonage Act, as enforced by the Civil Rights Section of the Justice Department and the Fair Employment Practices Committee in the 1940's. RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 11 (2007) (chronicling the work of the Civil Rights Section, including the connection of its work to the Thirteenth Amendment and its work to amend the Anti-peonage Act); Maria L. Ontiveros, *The Fundamental Nature of Title VII*, 75 OHIO ST. L.J. 1165, 1178–94 (2014) (tracing the evolution of Title VII through the FEPC and Civil Rights Section). The National Labor Relations Act also incorporates the free labor principle of the Thirteenth Amendment. James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 39–41 (2002); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 943 (1997). The minimum wage statutes may also be seen as free labor statute connected to the Thirteenth Amendment. *See generally* Ruben J. Garcia, *The Thirteenth Amendment and Minimum Wage Laws*, 19 NEV. L.J. 479 (2018).

108 United States v. Mussry, 726 F.2d 1448, 1451–52, 1455 (9th Cir. 1984). *But see* United States v. Shackney, 333 F.2d 475, 486 (2d Cir. 1964) (limiting definition of involuntary servitude).

109 *Kozminski*, 487 U.S. at 948. This case did not address any financial restriction on the workers' ability to leave employment.

110 The Trafficking Victim's Protection Act was passed as part (Division A) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466–91 (codified as amended 22 U.S.C. §§ 2152d, 7101–12 (2012)). The TVPA, as passed in 2000, is found at 18 U.S.C. §§ 1589–94 (2012).

111 18 U.S.C. §§ 1589–94 (2012).

voluntary Servitude.[112] In 2003, Congress amended the TVPA to provide for a private, civil cause of action for any violation of Chapter 77.[113]

In the TVPA, Congress repudiated the narrow definition of "involuntary" and defined involuntary servitude as servitude induced by "any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm."[114] It also added section 1589 titled "Forced Labor" which provided criminal remedies for, among other things, obtaining labor through the use of "threats of serious harm" or by a plan intended to cause a person to believe they would suffer serious harm if they did not perform labor or services.[115]

In 2008, Congress again amended the TVPA to clarify this definition further and broaden protection. Section 1589 now reads:

> (a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means--
> . . .
> (2) by means of serious harm or threats of serious harm to that person or another person;
> . . .
> shall be punished as provided under subsection (d).[116]

The 2008 amendment also added a definition of "serious harm" to include financial harm "that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm."[117] In this way, Congress clearly articulated an expansive, inclusive definition of involuntary, and, for the purposes of examining liquidated damages clauses, one that specifically deals with threats of serious financial harm.

These two provisions—the Section 1584 prohibition on involuntary servitude and the Section 1581 prohibition on peonage—can be used to analyze whether liquidated damages provisions violate the principle of free labor. The current standard being used to determine whether liquidated damage provisions violate the Section 1584 prohibition against involuntary servitude tracks the language in Section 1589 on forced labor.[118] Although Section 1581 prohibits peonage, none of the free labor statutes define the term peonage.[119] Case law,

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[112] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464, 1486 (2000) (amending 18 U.S.C. §§1581(a), 1583–1584).

[113] 18 U.S.C. § 1595(a) (2012).

[114] 22 U.S.C. § 7102(6)(A) (2012).

[115] 18 U.S.C. § 1589(a)(2) (2012).

[116] *Id.*

[117] *Id.* § 1589(c)(2).

[118] *See supra* Section II.B.

[119] The Victims of Trafficking and Violence Prevention Act of 2000 does include a definition for debt bondage, but that term is only used in a few sections of the TVPA requiring

however, defines it as the condition of a person compelled to continue to labor for another, in payment of a debt, regardless of the size of the debt and regardless of whether the arrangement was entered into voluntarily or involuntarily.[120] This section examines each of these prohibitions in more detail, focusing on how courts have examined whether liquidated damages provisions violate these prohibitions and explicating the purposes behind the prohibitions.

1. Involuntary Servitude

Federal law prohibits involuntary servitude, including labor that is obtained by means of serious financial harm or threats of serious financial harm.[121] Thus, when a visa worker is unable to quit because of the serious financial harm he or she would suffer from having to pay a large fee for liquidated damages, the worker is laboring in a state of involuntary servitude that violates the TVPA. This section discusses two cases that reached this conclusion. It then discusses the harms associated with involuntary servitude to show why it is prohibited.

a. Involuntary Servitude and Liquidated Damages

Several cases have found that liquidated damages provisions violate the TVPA. For example, in *Nunag-Tanedo v. East Baton Rouge Paris School Board*, a group of teachers contracted to work for a school district in Louisiana.[122] Before they began work, the employer required them to pay $5,000 for their visas.[123] Subsequently, the employer insisted that the teachers pay an additional $10,000 and the cost of relocation to the United States; otherwise, the teachers would forfeit the $5,000 and not be allowed to travel to the United States and begin employment.[124] After arriving in the United States, the teachers complained about their living and working situation.[125] The employer sued one teacher for making complaints and threatened the others with discharge, legal action, and deportation if they continued to complain.[126]

The court described the situation as follows:

> Enticed by promises of lucrative and exciting employment through a work program, a foreign worker speaks with recruiters about working in the United

studies and reports. It does not appear to be directly tied to or meant to be used to define peonage as used in the TVPA or Chapter 77. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464, 1469 (2000) (codified as 22 U.S.C. § 7102).

120 Pierce v. United States 146 F.2d 84, 87 (5th Cir. 1944); Bernal v. United States, 241 F. 339, 342 (5th Cir. 1917).

121 18 USC § 1589(a)(2)–(c)(2).

122 Nuñag-Tanedo v. E. Baton Rouge Par. Sch. Bd., 790 F. Supp. 2d 1134, 1138–39 (C.D. Cal. 2011).

123 *Id.* at 1138.

124 *Id.* at 1138, 1142.

125 *Id.* at 1139.

126 *Id.*

> States. The recruiters explain the terms and costs of the work program, and the worker gets a large loan and voluntarily uses it to join the program.
>
> After the worker joins the program and begins employment, the worker becomes unhappy. But if the worker quits, awaiting is a trip home with a massive amount of debt that will be impossible to repay. Working in the program is the only way to repay the loan. Is this forced labor? Fraud? No. It is a bargained-for exchange. Despite the worker's unhappiness, the terms and costs of the program were known, and the worker voluntarily obtained the loan to join the program. The worker's eventual discontent does not transform the valid contract with the recruiters into something illegal.
>
> But what if after the worker made the payment, the recruiters alter the program terms and costs? The recruiters demand an additional payment of double what the worker has already paid. They threaten to kick the worker out of the program if additional payments aren't made, and they keep the initial payment even if the worker decides to leave to program. The worker is therefore faced with a choice of forfeiting the first payment, knowing that repayment of the debt may be impossible, or paying the additional money the recruiters now demand. Knowing that working in this program is the only way to repay the initial debt, the worker pays the additional sum and continues working in the program.
>
> Once the worker begins employment, complaints about the payments and working conditions are met with continued threats of termination and deportation. Knowing that this job is the only way to repay the debt, the worker remains silent and continues working. Is this forced labor? Fraud?[127]

The court found that the threat to forfeit a $5,000 fee already paid to the employer if the workers left constituted forced labor through threats of serious financial harm because forfeiting $5,000 would constitute an amount equal to a year and a half of salary in their home country.[128] The teachers felt that they had to continue to work for the school district in order to pay the debt.[129] They also felt compelled to accept the living and working conditions, without complaint, because if they were fired, they would be unable to pay back their debt.[130] Thus, the workers were held in involuntary servitude because of the threat of serious financial harm.

Similarly, in a default action, the court also found a violation of the TVPA. In *Macolor v. Libiran*, Mr. Macolor came to the United States and signed a contract that included a "liquidated damages" clause that required him to pay $20,000 if he left work before the end of the contract.[131] Because the employer did not have work for the plaintiff, he left their employ and sought other work in order to pay for food and housing.[132] The defendants threatened to bring a

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[127] *Id.* at 1137.

[128] *Id.* at 1144.

[129] *Id.*

[130] *Id.*

[131] Macolor v. Libiran, No. 14-CV-4555 (JMF) (RLE), 2016 WL 1488121, at *1 (S.D.N.Y. Mar. 25, 2016); Macolor v. Libiran, No. 14-CV-4555 (JMF), 2016 WL 1453039, at *1 (S.D.N.Y. Apr. 13, 2016) (explaining this was a default judgment because the defendant left the country and did not return for the proceedings).

[132] *Macolor*, 2016 WL 1488121, at *3.

lawsuit against the plaintiff and retained a collection agency.[133] The collection agency sent letters to Macolor and called him at home, demanding payment of $27,729.67 ($20,000 in principal, $6,666.66 in collection fees, and $1,063.01 in interest).[134] The Court found a violation of the TVPA because "Defendants' threats to make Macolor pay them $20,000 if he sought other employment constituted a serious threat of financial harm that would coerce a reasonable person in Macolor's circumstances to continue providing labor to Defendants to avoid the harm."[135] In both of these cases, the court easily found that the liquidated damages clause violated Section 1584.

b. The Harms of Involuntary Servitude

By its terms, the Thirteenth Amendment prohibits both slavery and involuntary servitude.[136] A trilogy of early cases brought under the Anti-Peonage Act described two major purposes behind the prohibition of involuntary servitude.[137] The first two cases, *Bailey v. Alabama* and *US v. Reynolds*, struck down convict labor statutes where Blacks were forced to work in order to pay off debts related to criminal fines and court costs.[138] These cases explained that compelled labor violates the Thirteenth Amendment because a person's labor is special and distinct and protected by the anti-slavery mandate.[139] *Bailey* stated that the purpose of the Thirteenth Amendment is to ensure free labor because "[t]here is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based."[140] The court in *Bailey* explained, "The act of Congress, nullifying all state laws by which it should be attempted to enforce the 'service or labor . . . in liquidation of any debt or obligation . . . ' necessarily embraces all legislation which seeks to compel the service or labor by making it a crime to refuse or fail to perform [labor]."[141]

The second reason involuntary servitude is prohibited is because the inability to exit employment results in worse conditions for participants in the free labor market. In *Pollock v. Williams*, the Supreme Court explained how a system of compelled labor, in order to pay a debt, destroyed the floor for free labor.[142] It explained:

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133 *Id.*

134 *Id.*

135 *Id.* at *4.

136 U.S. CONST. amend. XIII, § 1.

137 Although these cases were brought under the Anti-Peonage Statute, these cases are discussed in this section because the Court's reasoning in the cases focus more on the prohibition of involuntary servitude, in general, rather than on the harms of associated with debt peonage.

138 United States v. Reynolds, 235 U.S. 133, 150 (1914); Bailey v. Alabama, 219 U.S. 219, 237–39 (1911).

139 *Reynolds*, 235 U.S. at 150; *Bailey*, 219 U.S. at 239.

140 *Bailey*, 219 U.S. at 245.

141 *Id.* at 243.

142 Pollock v. Williams, 322 U.S. 4, 18 (1944).

> The undoubted aim of the Thirteenth Amendment . . . was . . . to maintain a system of completely free and voluntary labor throughout the United States. . . . [I]n general, the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.[143]

Professor James Gray Pope describes the "Pollock Principle" as one which focuses on preventing domination and exploitation by allowing workers to quit in order to encourage them to provide better conditions.[144]

These twin evils—harsh infringements on the sanctity of human labor and the destruction of the floor for free labor—can be seen in the treatment of visa workers in the United States. H-2 agricultural workers and laborers face problems such as low pay, wage theft, poor conditions, and racially motivated harassment and abuse.[145] In addition, their access to the legal system is severely restrained.[146] These workers are unable to complain and improve their situation.

Even highly-skilled H-1B technical workers endure poor workplace conditions, spanning a continuum of exploitation depending upon the worker's situation. These workers are routinely made to work long hours for wages below those paid to non-visa workers and below those prescribed by law.[147] A group of 800 of these workers, tagged the "Siebel Slaves" by the media, were given an impossible amount of work to do in a short period of time, which resulted in "overwork, sleep deprivation, and health problems, including miscarriages."[148] Other workers are brought to the United States and made to wait, in violation of the visa statute, without a job and without pay, for months on end.[149] During this time, they may be housed in an overcrowded apartment, charged excessive rent, and be prohibited from leaving the neighborhood of the apartment.[150] Once employed, the visa holder may engage in wage theft—taking both a percentage of the employee's wages and taking money—to pay for the cost of housing and to recoup money lent to the employees when they were not working.[151] The workers are unable to complain about these conditions because of

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143 *Id.* at 17–18.

144 Pope, *supra* note 93, at 1503.

145 *See* Etan Newman, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*, FARMWORKER JUST., 7, 23, https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20fwj.pdf [https://perma.cc/32BE-2PH3] (last visited Jan. 7, 2019).

146 *Id.* at 25.

147 Ontiveros, *supra* note 24, at 11.

148 *Id.* at 10. The group brought a class action lawsuit which they settled for 27.5 million dollars. *Id.*

149 *Id.* at 19–23.

150 *Id.* at 22.

151 *Id.*

the threat of serious financial harm. In addition, this situation has made it easier for high-tech companies to exploit non-visa workers, using the threat of replacement to reduce wages and quiet complaints.[152] These are exactly the harms discussed in the involuntary servitude cases.

2. Debt Peonage

Currently, there are no reported liquidated damages guest worker visa cases where the worker alleged that the liquidated damages clause violated 14 USC § 1994 prohibiting peonage (hereinafter "Section 1994"); 18 USC § 1581 providing criminal penalties for peonage (hereinafter "Section 1581"); or 18 USC § 1594 providing for a private cause of action under 1581 (hereinafter "Section 1594"). However, cases arising under these statutes, as well as Section 1584 on involuntary servitude, do examine the types of arrangements that are prohibited as debt peonage in other factual situations. This section discusses those cases, how Sections 1994, 1581 and 1595 would fit the case of liquidated damages clauses in guest worker contracts, and the unique harms associated with debt peonage.

a. Debt Peonage and Liquidated Damages

In the modern era, most peonage cases have been brought as criminal cases under Section 1581.[153] A typical Section 1581 case involves an employee or group of employees incurring a debt to come to the United States to work for a particular employer.[154] Once in the U.S. the employer uses threats of physical force, arrest, and deportation, as well as psychological coercion, to compel a person to continue to work and pay off a debt owed to the employer.[155] In analyzing these cases, courts start with the recognition that compulsory service in payment of a debt is a form of involuntary servitude.[156] These cases emphasize that peonage includes voluntary arrangements, even if they are not covered by a prohibition against involuntary servitude. *United States v. Kyongja Kang* explained the distinction between peonage and involuntary servitude by defining peonage as:

> [A] status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. . . . Peonage is sometimes classified as voluntary or involuntary; but this implies simply a difference in the mode or origin, but none in the character of the servitude. . . . But peonage,

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[152] *Id.* at 24.

[153] 18 U.S.C. § 1581 (2012); Anti-Peonage Act of 1867, ch. 187, 14 Stat. 546 (1867); Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1247, 1273–75 (2011).

[154] *See* Mattar, *supra* note 153, at 1273–74.

[155] *Id.* at 1273–74.

[156] United States v. Farrell, 563 F.3d 364, 372 (8th Cir. 2009); United States v. Booker, 655 F.2d 562, 565 (4th Cir. 1981).

> however created, is compulsory service,—involuntary servitude. . . . That which is contemplated by the statute is compulsory service to secure the payment of a debt.[157]

These cases emphasize that the prohibited relationship is one where the employee is compelled to labor under the control of the employer by virtue of debt, no matter how small the debt or whether the employee voluntarily entered into the relationship.

Another line of cases that examines the concept of involuntary servitude, in the context of debt peonage, are cases dealing with the requirement that certain individuals work in order to avoid incarceration—either to pay off debts to the court, as a condition of probation or parole, or to make legally mandated child support payments.[158] These cases provide a very narrow view of debt peonage, focusing on the requirement that the debt be tied to a particular employer rather than debt in general. In this regard, *Moss v. Superior Court* provides one of the most extensive discussions of involuntary servitude in the context of debt peonage.[159] The court considered whether the requirement that a father work in order to pay child support or go to jail constituted involuntary servitude/peonage.[160] The court focused on the historical roots of the free labor statutes meant to attack systems such as apprenticeships, plantation serfs and Spanish peonage, which involved involuntary servitude in payment of a debt and a close relationship between the employer and employee.[161] It also focused on those cases where the state has the power to "return the servant to the master . . . or indirectly by subjecting persons who left the employer's service to criminal penalties . . . ."[162] Based on these and other cases dealing with involuntary servitude, the court concluded:

> When, as here, however, the person claiming involuntary servitude is simply expected to seek and accept employment, if available, and is free to choose the type of employment and the employer, and is also free to resign that employment if the conditions are unsatisfactory or to accept other employment, none of

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[157] United States v. Kyongja Kang, No. 04 CR 87(ILG), 2006 WL 208882, at *2 (E.D.N.Y. Jan. 25, 2006); *see also* Dolla v. UniCast Co., 930 F. Supp. 202, 205 (E.D. Pa. 1996) ("Peonage is a 'condition of compulsory service, based upon indebtedness of the peon to the master.' . . . [T]he critical elements of a peonage claim are indebtedness and compulsion.") (citation omitted).

[158] Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 948–49 (2016) (examining the requirement that child support payment orders can be enforced through arrest and imprisonment).

[159] Moss v. Superior Court, 950 P.2d 59, 66–73 (Cal. 1998).

[160] *Id.* at 61, 74.

[161] *Id.* at 70–71 (arguing that the purpose of the statute was to invalidate "the involuntary or involuntary service of labor of any persons as peons in liquidation of any debt or obligation") (citing 1 BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, 171 (1970) and Sydney Brodie, *The Federally Secured Right to be Free from Bondage*, 40 GEO. L.J. 367, 376–77 (1952)).

[162] *Id.* at 71.

> the aspects of "involuntary servitude" which invoke the need to apply a contextual approach to Thirteenth Amendment analysis are present. *There is no "servitude" since the worker is not bound to any particular employer* and has no restrictions on his freedom other than the need to comply with a lawful order to support a child.[163]

Although the *Moss* decision is somewhat obfuscating because it blends together issues of peonage and involuntary servitude, it does provide one way to distinguish debt peonage from other types of involuntary servitude. It presents the argument for a very restrictive definition of debt peonage—the obligation to work for a particular person in order to pay off a debt.

Liquidated damages clauses in guest worker visa contracts fall within even this narrow definition of debt peonage. Since a visa is granted for a specific job for a specific company, the immigrant must work exclusively for that employer and may not change jobs or even accept outside work because any other employer would not have a visa allowing the immigrant to work in the United States. When the visa holder is a subcontracting company or labor agency, the agency determines when, where, and for whom the immigrant works.[164] These agencies also control the amount of money earned by the immigrant, as well as whether a company may reassign or sublease the employee.[165] When the visa contract includes a large liquidated damages clause, the employee is compelled to continue to work for that particular employer in order to avoid having to pay a large debt. As such, contracts with liquidated damages clauses constitute prohibited debt peonage and violates the statute.

b. The Harms of Debt Peonage

Under the most restrictive definition of debt peonage found in cases like *Moss*, the harm of debt peonage is that a worker is tied to one *particular* person.[166] In this context, the harm is because the labor of the employee is essentially owned by a particular person until the debt is extinguished. The notion that one person has exclusive ownership of someone else's labor runs afoul of the ideal of free labor. Both the Spanish peonage system and the Padrone system, which were addressed in the early statutes, had this characteristic.[167]

This characteristic was also integral to the system of antebellum chattel slavery. A slave's owner had exclusive ownership of the slave's labor, even beyond the work directly performed for the owner. Slave codes, the laws that regulated slavery in the American South, gave slave owners the right to control the labor of their slaves because, in addition to owning the slave, they also owned

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[163] *Id.* at 72 (emphasis added).

[164] Ontiveros, *supra* note 24, at 26.

[165] *Id.*

[166] *Id.*

[167] Other 19th century systems with similar exclusive ownership include apprenticeships and plantation serf systems.

the labor of the slave.[168] For example, the slave owner could assign a slave to work for someone else and collect payment in exchange for their labor. In addition, the codes gave slave owners the right to control, forbid, or profit from any independent entrepreneurial work done by slaves.[169] Some slaves tended a garden and sold the food at a local market, while others might have worked as a blacksmith on Sundays or mended and sewed clothes for others, at night, in exchange for money. The slave owner could dictate whether this work could be done, where it could be done, and could demand a percentage of the money earned. The slave owner, then, owned and controlled not only the slave but also the labor of the slave and dictated every aspect of when, where, and how they could work, as well as for how much money.

The guest worker visa system operates in a similar way because the employer that holds the visa controls—essentially owns—the labor of the guest worker hired to fill the visa. It *exclusively* controls when, where, for whom, and for how much the immigrant can work. If the immigrant refuses that work, he or she must leave the country. In this way, the employee does not control his or her own labor—it is owned by the visa holder in a manner that parallels slave ownership.[170]

In the United States, this arrangement is unique to the visa system. Although an employer may direct its workforce and tell an employee where and when to work, there are significant differences for visa workers. A non-visa employee is always free to quit without having to pay a large liquidated damages fee and without having to leave the country. More importantly, free non-visa employees are allowed to take additional jobs without interference from their employer. There may be some limits on outside work if there is a valid noncompetition clause, but these are limited to situations where an employee working for a competitor could damage the employer.[171] Perhaps the closest situation are temporary agencies that assign workers to different job sites and employers for short term assignments. In that situation, the temporary agency controls when, where, and for whom the employee works, as well as the wage. However, the employee is always free to decline an assignment and, most significantly, can look for and accept work with other employers at the same time. Neither an employer nor a temporary agency owns or controls the labor of the employee outside of the immediate work relationship.

The key distinction, then, is whether and to what extent the employee has access to enter the labor market and participate freely in it. Visa workers do not

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[168] For a thorough discussion of slave codes, see KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (Vintage Books ed. 1989); *see also* Ontiveros, *supra* note 24, at 25–26, 28, 86.

[169] Vernon Valentine Palmer, *The Customs of Slavery: The War Without Arms*, 48 AM. J. LEGAL HIST. 177, 180 (2006).

[170] Ontiveros, *supra* note 24, at 26.

[171] RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. LAW INST. 1981) (describing when a restraint on trade is unconscionable).

have access because the visa holder owns and controls their labor. Other workers in the United States, however, have full access to the labor market without the control of any other employer. Even the narrow definition of debt peonage applies to visa workers because the employee is bound to work for a single employer.

Although liquidated damages clauses for guest workers can succeed under this narrow definition, limiting the definition of debt peonage to debt owed a particular employer, is too constrained for several reasons. First, it is so narrow that it is inconsistent with the language of the statute originally prohibiting peonage. Section 1994 prohibits peonage "in liquidation of any debt or obligation, or otherwise".[172] After examining the legislative history of the Peonage Abolition Act of 1867, Dean Aviam Soifer explains the breadth of the Act.[173] By its terms, the Act "did not restrict the definition of the peonage; it forbade compelled labor due to 'debt.' Yet the 1867 Act also recognized that the treatment it sought to prohibit, whether involuntary or voluntary, could be compelled in many different ways."[174] He argues that this expansion of the definition of peonage, beyond the traditional definition anchored in debt, was necessary because of the varying contexts in which employers and society in the reconstruction South might enforce a system of peonage. These included contracts for indentured servitude and the custom and usage of private violence sponsored by groups such as the Ku Klux Klan.[175] Prohibiting voluntary as well as involuntary peonage was necessary to overcome arguments in favor of freedom of contract that might be used to challenge these systems.[176] Based on further analysis of the legislative history, Soifer argues that the purpose of the Peonage Prohibition Act is intentionally broad to protect the most vulnerable populations, and urges advocates to explore using Section 1994 in private causes of action.[177] This understanding of the free labor statutes addressing peonage call for a broad definition of peonage—limiting it to debt-based requirements tied to one employer does not match the legislative history or purpose of the statutes.

In addition, Professor Noah Zatz criticizes this narrow definition of debt peonage because the difference between requiring work for one employer versus requiring work in general is illusory.[178] He argues:

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[172] 42 U.S.C. § 1994 (2012) (emphasis added).

[173] Soifer, *supra* note 95, at 1617.

[174] *Id.*

[175] *Id.* at 1617–18. He also argues that the broad reading is consistent with the expanded powers of the reconstruction congress. *See id.* at 1637–38.

[176] *Id.* at 1632.

[177] Aviam Soifer, *Old Lines in New Battles: An Overlooked Yet Useful Statute to Confront Exploitation of Undocumented Workers by Employers and by ICE*, 19 NEV. L.J. 397, 398–99 (2018).

[178] Zatz, *supra* note 158, at 950.

> If an obligation to Person A can be satisfied only by working, and failure to work triggers prosecution and imprisonment, the Thirteenth Amendment problems are scarcely affected by whether the work is for Person A or some other Person B. The core difficulty would remain: the worker would be bound to Person B by the carceral threat, eliminating the leverage that comes with the right to quit and subjecting him to the risk of "a harsh overlordship."[179]

In addition, he argues that the ability to work for a variety of employers is insufficient when the alternative is to go to jail.[180] In his opinion, mere freedom to circulate in the labor market is not the same as free labor, so long as incarceration is the alternative.[181] The harm to a system of free labor, in his view, arises when a person is unable to withdraw from the labor market, under threat of incarceration.[182] Finally, he explains that free labor requires an unfettered right to quit employment; however, all the employee has in the narrow definition of debt peonage is an unfettered right to switch employers.[183] In this situation, an employee may only quit IF he or she has secured another job already.[184] He concludes "criminalizing unemployment among debtors cannot easily be distinguished from criminalizing debtors' labor mobility between employers—the latter being the evil attacked directly in the peonage cases."[185] Since the same harms associated with involuntary servitude would exist in peonage cases that do not require work for a specific employer, the definition should be broader.

III. THE *PANWAR* CASE REVISITED

This section returns to the *Panwar* case discussed briefly at the outset of the article, and presents and critiques the outcome.[186] *Panwar* is used as a paradigm example because its two opinions embody the contract and free labor approaches to evaluating liquidated damages. These opinions also reveal important implications and recommendations for advocates, courts, and Congress.

A. Panwar

RS Panwar attended graduate school in the United States and took a placement with Access Technology as an H-1B worker.[187] Before starting

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[179] *Id.* (making arguments based upon involuntary servitude cases discussed *supra* and quoting Pollock v. Williams, 322 U.S. 4, 18 (1944)).

[180] *Id.* at 951.

[181] *Id.* (distinguishing this from the typical situation faced by all workers where they must work or be unable to provide for their material subsistence).

[182] *Id.* at 952.

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *See* Panwar I, 975 F. Supp. 2d 948 (S.D. Ind. 2013); Panwar II, No. 1:12-CV-00619-TWP-TAB, 2015 WL 1396599 (S.D. Ind. Mar. 25, 2015).

[187] *Panwar I*, 975 F. Supp. 2d at 953–54.

work, Access Technology required him to execute a promissory note promising to pay $20,000 if he left before the end of the contract term.[188] When the employer did not provide the type of job or compensation promised, Panwar complained and tried to get information about his future.[189] Access Therapies threatened to terminate his employment if he did not stop trying to improve his circumstances.[190] Panwar wanted to quit, but he could not leave employment because of the threat of having to pay the $20,000—especially since the employer had a practice of filing lawsuits against former employees who terminated their contracts early.[191]

1. Outcome

After being terminated, Panwar sued Access Technology for a variety of causes of action, including a violation of Section 1589 of the TVPA.[192] In *Panwar I*, the U.S. district court in Indiana considered a motion to dismiss.[193] It found that Panwar stated a claim for a violation of the TVPA because the threat of being in debt from having to pay $20,000 constituted a threat of serious financial harm that prevented Panwar from voluntarily terminating his employment.[194]

Two years later, in *Panwar II*, the same district court ruled on the merits of the case, and found in favor of the defendant on the TVPA claim.[195] According to the court, the TVPA claim failed for several reasons.[196] First, it found that there was not a "forced labor scheme."[197] It stated that because plaintiffs "voluntarily entered into the employment contracts," it could not be a forced labor scheme.[198] Similarly, it stated that plaintiffs were not coerced or deceived into signing the agreements.[199] The court emphasized that "There was nothing that compelled Mr. Panwar . . . to sign the agreements with RN Staff and Access Therapies, or even enter into the H-1B visa program, besides [his] own

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188 *Id.* at 957.
189 *Id.* at 954.
190 *Id.*
191 *Panwar II*, 2015 WL 1396599, at *3.
192 *Panwar I*, 975 F. Supp. 2d at 957.
193 *See id.* at 958.
194 *Id.*
195 *Panwar II*, 2015 WL 1396599, at *5.
196 *Id.* at *3–4.
197 *Id.* at *3.
198 *Id.* ("While Plaintiffs continually refer to their employment with Access Therapies and RN Staff as a 'forced labor scheme,' the fact that they voluntarily entered into the employment contracts belies this characterization.").
199 *Id.* ("The contract terms were plainly written, and the liquidated damages provision was made conspicuous, particularly with the use of the corresponding promissory note. Both Mr. Panwar and Mr. Agustin understood the agreements and their obligations under the agreements, including the consequences of early termination.").

choice."[200] In evaluating the forced labor claim, the court focused on the initial decision to enter into the contract, rather than the subsequent points in time when Panwar wanted to complain about potentially illegal conduct of the employer and wanted to quit but could not because of the financial threat.[201] In addition, the court used its own definition of voluntariness and force to analyze this claim, rather than referring to specific language of the TVPA.[202]

Second, the court said that the TVPA claim failed because the liquidated damages would be allowable under state law and the visa statute.[203] It explained that while the visa statute prohibits employers from penalizing employees for ceasing employment, it allows for bona fide liquidated damages and the validity of liquidated damage clauses must be based on Indiana law.[204] According to the court, "Under Indiana law, '[w]here the sum stipulated in the agreement is not greatly disproportionate to the loss likely to occur, the provision will be accepted as a liquidated damages clause and not as a penalty.' "[205] The court found that Panwar did not present evidence that the amount of liquidated damages was grossly disproportionate to the losses incurred by the employer and credited evidence by the employer that it "must expend thousands of dollars to bring H-1B employees into the United States, including visa filing fees, lawyer fees, administrative costs, and local agency fees. Additionally, Access Therapies and RN Staff would lose out on potential profits earned from placing employees with paying clients."[206] As a result, it found the liquidated damages provisions valid under both the H-1B regulations and state law.[207] It then concluded, "The Court will not penalize Defendants under the TVPA for practices which they are explicitly permitted to utilize under the relevant laws."[208] The court essentially performed a contract law analysis on the validity of the liquidated damages provision. It then concluded that any liquidated damages provision that is permitted by contract law could not violate the TVPA.[209]

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200 *Id.*

201 *See id.* at *4–5.

202 *Id.* at *3.

203 *Id.* at *4.

204 *Id.* ("The claim that the liquidated damages provision and the promissory note constituted a threat of financial harm sufficient for a finding of liability under the TVPA is not supported by the evidence or the applicable legal principles. An H-1B employer is not permitted to require an employee to pay a 'penalty' for ceasing employment. *See* 20 C.F.R. 655.731(c)(10)(i)(A). However, '[t]he employer is permitted to receive bona fide liquidated damages from the H-1B nonimmigrant who ceases employment with the employer prior to the agreed date.' ") (citing 20 C.F.R. § 655.731(c)(10)(i)(B)).

205 *Id.* at *4 (quoting Gershin v. Demming, 685 N.E.2d 1125, 1128 (Ind. Ct. App. 1997)).

206 *Id.*

207 *See id.*

208 *Id.*

209 *Id.*

2. Critique of Outcome

A critique of *Panwar* highlights the different policies served by the contract and free labor approaches and the problem that results when judges do not understand these differences or analyze the claims separately. The decision is problematic under both the contract and free labor approaches. The decision grounds its analysis in the contract law perspective. From this perspective, the court focuses on the evidence presented by the employer that the liquidated damages clause reasonably approximates the thousands of dollars that an employer could expend in bringing an H-1B worker to the United States and profits lost from potential clients. Although this satisfies one requirement of a valid liquidated damages clause, this argument potentially fails under state law because there is no showing that these costs would be difficult to quantify. Most states require a showing of both of these.[210] If the amount can be easily quantified, there is no need for a liquidated damages clause and the clause can look more like a punitive clause than a compensatory one.

Even if the court is correct in applying state contract law, the decision is still faulty under the contract law approach because it fails to correctly analyze the contract law approach language found in the visa regulations. First, the court did not take into account the coercive nature of the relationship that developed between the parties after the initial agreement. The statute specifically requires this analysis, both in determining whether the agreement is valid and whether the employer's actions contributed to the early cessation of the employment.[211] By focusing only on the relationship at the outset of contract, the court fails to apply the regulations. In addition, the court does not recognize the all-or-nothing nature of the liquidated damages clause. Since Panwar would be required to pay the entire $20,000 regardless of how long he worked for the defendant, it runs afoul of the visa statute requirement that a proper liquidated damages clause should take into account whether the breach is total or partial. Without a variable liquidated damages clause, the penalty for leaving no longer tracks the actual harm caused to the employer by the breach because some percentage of the sunk costs have already been recovered. In addition, when the time period is shortened, the employer faces fewer potential lost profits earned from placing employees with paying clients. Thus, the two reasons given by the employer as the basis for the compensatory damages decline when the employee works for a longer period of time. As a result, the clause appears to be more of a penalty for stopping work near the end of the contract term instead of a valid compensatory clause. This court's failure to correctly apply the visa statute is particularly important because the court grounds its denial of the TVPA claim on its assertion that it would be allowable under the visa statute.

More importantly, the court did not correctly analyze the case under the free labor concerns articulated in the TVPA's prohibition on involuntary servi-

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[210] *See supra* Section II.A.1.

[211] *See supra* Section II.A.2.

tude. The court ignored the definition of forced labor found in the statute and focused instead on general ideas of voluntariness, force and coercion. Unlike *Nunag-Tanedo* and *Macalor*, the *Panwar* court inexplicably never mentions the language of the TVPA that defines forced labor as labor obtained through the threat of serious financial harm. In amending the TVPA to overturn *Kozminski* and then add additional clarification, Congress has explicitly defined and redefined forced labor and involuntary servitude to provide precise and specific definitions, rejecting general, restrictive definitions of what constitutes involuntary labor. These precise and specific definitions of involuntariness and force were ignored by the *Panwar* court.

Since it ignored this language, the court also failed to discuss the contextual nature of the definition of severe financial harm.[212] The TVPA states that the coercive nature of the amount must be judged using the standard of a reasonable person in the plaintiff's situation and whether it would compel them to keep working.[213] This is a critical requirement because even if the amount charged in liquidated damage is reasonably related to the loss, it may still be so large that it prevents a worker from being able to voluntarily end his employment. In this way, it violates the TVPA. Clearly, a liquidated damages provision may not be large relative to the damages incurred by an employer but still be large enough to constitute a serious threat of financial harm to an employee. Such a sum would violate the TVPA because there is no exception made in the forced labor statute for reasonable liquidated damages. The prohibition is clear and must be made independently of any contract law determination.

The inability to analyze the claims separately is at the heart of the problem with *Panwar II*. The court explicitly conflated the contract law and free labor approaches when it said "The Court will not penalize Defendants under the TVPA for practices which they are explicitly permitted to utilize under the relevant laws."[214] This statement illustrates the twin problems with the decision. As discussed above, the practices were not allowable under the visa law. More importantly, the TVPA serves different policies and must be analyzed separately. Neither state contract law nor the visa law preempt the free labor mandate found in the TVPA.

B. Implications and Strategic Recommendations

This examination of the *Panwar* case generates implications and recommendations for action to be taken in the courtroom and in Congress. Advocates need to start bringing a wider variety of claims in these cases, and judges must

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[212] The contextual nature of coercion is found both in the statute and in the case law developing under the TVPA. *See generally* Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 416 (2011) (analyzing the development of the "situational coercion" approach to coercion under the TVPA).

[213] *Id.* at 451.

[214] Panwar v. Access Therapies, Inc., No. 1:12–CV–00619–TWP–TAB, 2015 WL 1396599, at *4 (S.D. Ind. Mar. 25, 2015).

recognize the independent nature of the claims. In addition, Congress should amend Chapter 77 to include a definition for peonage. These actions can lead to better protection of workers.

1. Courtroom Recommendations for Advocates and Judges

Advocates challenging liquidated damage clauses in guest worker contracts should bring a wide variety of claims, depending upon the specific facts of the case. Advocates should continue to file involuntary servitude/forced labor claims under Section 1584. In these cases, the definition of forced labor as found in the TVPA must be utilized by judges when deciding the claims. When a person in similar circumstances to the plaintiff would find the sum of money owed to the employer is so large that they are unable to quit, the clause violates the prohibitions on involuntary servitude and forced labor. This is true, even if the amount required is a reasonable approximation of costs incurred by the employer when the employee quits or otherwise seems reasonable.

Advocates should also begin to bring claims alleging debt peonage under Section 1582. These claims should be made any time an employee must either continue to work for a specific employer or incur a significant debt. Advocates should argue that these arrangements constitute peonage, even if the arrangement was entered into voluntarily and even if the amount is fairly small. If Panwar had brought a claim, the analysis would have shown that, even though he voluntarily entered into the agreement, he was forced to continue to work for Access Technologies in order to extinguish his debt. He did not have the freedom to work for any other employer as a way to pay the debt because his only work authorization was with Access Technologies. Thus, his labor was compelled by debt to a specific employer in violation of Section 1582.

Finally, advocates should bring claims for violations of the visa statute arguing that the liquidated damages clauses violate the visa statute when there is evidence of fraud or coercion; where the clause is not variable so it does not take into account whether the breach is total or partial; and where a quit is actually a discharge caused by the employer's illegal actions. Employees who are sued for enforcement of liquidated damages provisions must be ready to argue that the liquidated damages clauses are unenforceable under state contract law. The best arguments are likely to be that the employer has not explained the compensatory bases for the costs or that the costs are not difficult to quantify.

When confronted with both free labor claims and contract law claims, judges must recognize that these are independent claims and the policies behind these two types of claims are vastly different from each other. As a result, they should consider each claim independently and not suggest that compliance with one set of laws means that the defendant cannot be found liable under the other set of laws. The policies behind contract law focus on efficiency and compensation. In this way, liquidated damages that are really coercive penalties used to prevent workers from quitting employment do not serve those policies. The

policies behind the free labor approach focus on the moral harm to individuals and society when people are forced to give their human labor, their human essence, without the ability to terminate the labor arrangement.[215] In any system of involuntary servitude, whether caused by a financial threat or otherwise, there is also a harm to individual employees who suffer from poor work conditions and are unable to escape those conditions by quitting. Other workers also suffer because they are forced to compete against workers with no bargaining power, so the floor for free labor is destroyed. Finally, there is a moral harm when one particular employer essentially owns the labor of a particular person who is unable break that bondage and work for someone else. Liquidated damages clauses in visa contracts can violate these principles in a myriad of ways. Courts must understand the two different policies being served and must not conflate these two claims because they serve such distinct policies.

2. Congressional Recommendation for Amendment of Chapter 77

The free labor statutes dealing with peonage should be amended and clarified. Currently, no definition of peonage is found in Section 1581 or any other part of Chapter 77.[216]

Section 1994 abolishes and prohibits peonage, which it says includes "voluntary or involuntary service" of labor as a peon in liquidation of debt or otherwise.[217] Case law from Section 1581 focuses on prohibiting the continued compelled labor of another person, in payment of a debt, regardless of the size of debt and regardless of whether the arrangement was entered into voluntarily or involuntarily.[218] Other cases focus on the prohibition of compelled labor when the debt is owed to one particular employer.[219]

Chapter 77 should be amended to include a broad definition of peonage that addresses all these situations. A good starting point for discussion of this definition would be:

> 1. The following arrangements are per se violations of the prohibition against peonage: any arrangement, whether entered into voluntarily or involuntarily, whereby an individual must work for one specific employer or remain in debt to that employer is prohibited.
> 2. In addition, arrangements, whether entered into voluntarily or involuntarily, that compel the service of labor in liquidation of debt, may violate the prohibition against peonage, even if the amount is relatively small.

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[215] *See supra* Section II.B.

[216] *See supra* notes 101–07, 119 and accompanying text. As mentioned previously, the TVPA included a definition of debt bondage; however, that term is not found in the free labor provisions of Chapter 77. It is utilized in other parts of the TVPA that require monitoring and reporting of certain activities.

[217] 42 U.S.C. § 1994 (2012).

[218] *See* Pierce v. United States, 146 F.2d 84, 87–88 (5th Cir. 1944). *See also supra* Section II.B.2.

[219] *See supra* Section II.B.2.a.

3. Nothing in this definition shall be used to limit claims made that fit within the definition of peonage found in Section 1994.

In this definition, part one makes it clear that arrangements that violate the most narrow definition of debt peonage, are explicitly prohibited. Most liquidated damages clauses found in guest worker contracts would fall under this prohibition. In addition, part two incorporates the broad language from existing case law and statutes. Finally, the third part preserves the ability of advocates to creatively reach new situations that might fit under the purpose and language of the Anti-Peonage Act.

CONCLUSION

Non-immigrant workers who come to the United States to work on temporary guest worker visas may find themselves in a situation of involuntary servitude or debt peonage. The use of liquidated damages clauses in their employment contracts creates this situation when the employee cannot quit because of the threat of serious financial harm or when they find themselves compelled to work for a single employer in order to pay off the debt. Either of these situations violate the free labor principle established in the Thirteenth Amendment and statutes passed pursuant thereto. Unfortunately, some courts only review these clauses under a contract law model and fail to free the workers from servitude or peonage. Although a legislative amendment to clarify the definition of peonage would be helpful, advocates can still successfully attack these arrangements using the existing statutes so long as judges understand and validate the important policies found in the free labor statutes.

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