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EXPLOITATION BASED ON MIGRANT STATUS IN THE UNITED STATES: CURRENT TRENDS AND HISTORICAL ROOTS

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Exploitation Based on Migrant Status in the United States: Current Trends and Historical Roots

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Non-citizen, immigrant workers have always formed a core of the United States workforce. At the same time, they have always been among the most vulnerable and exploited workers. In antebellum times, European indentured laborers and African slaves supported the economy of the north and south, while lacking the ability to quit or control their own labor. After the turn of the 19th century, European immigrants labored in industrial sweatshops while slaves and their descendants lacked citizenship and worked in semi-free systems, including share cropping and debt bondage. Mid-century, Asian immigrants built the railroads and harvested the nation's produce, while lacking citizenship rights and eventually being subject to deportation and

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internment. The last half-century has witnessed significant immigration from Mexico and Latin America, including groups of undocumented immigrants that have been subject to low-pay and abusive working conditions. At the same time, more highly skilled immigrant workers have come to the United States from countries such as the Philippines and India to fill jobs ranging from nursing and home health care to engineering and systems analysis. These so-called "guest workers" work at pay levels below the domestic workforce, lack the ability to quit without being deported or incurring large amounts of debt, and often suffer workplace abuse and harassment.

This chapter examines the contemporary situation of noncitizen immigrant workers in the United States, grounding that examination in an understanding of its historical antecedents. The first section discusses the past and present use of non-citizen, migrant workers in the United States starting with chattel slavery and continuing to the use of visa workers in industries ranging from agriculture to computer programming. The second section examines the formal legal workplace protections for non-citizen workers, as well the ways in which the formal rules fail to adequately protect these workers. It concludes that, while these workers are formally covered by the laws guaranteeing basic workplace standards, in practice they lack effective remedies due to the structure of the law and problems in enforcement They are also deterred from filing claims due to fear of deportation. This latter phenomenon occurs, at least in part, because United States law, while prohibiting discrimination based on national origin and race, does not prohibit discrimination based on migration or citizenship status. The analytical difficulty in maintaining this distinction has recently been challenged by two separate lines of cases discussed in the chapter. Finally, the third part of this chapter steps back to draw broader lessons by connecting the current exploitation facing non-citizen workers in the United States to the historical treatment

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of non-citizen workers and to the themes of exit, voice and access to domestic labor markets found in scholarly work dealing with migrant workers in other countries.

I. Migrant (Non-Citizen) Workers in the United States: Past and Present

Before describing the contours of the current migrant workforce in the United States, this section gives a brief history of the use of non-citizen workers.

A. The History of Non-Citizen Workers in the United States: From Slavery to Braceros

Many people cite the Naturalization Act of 1790, which allowed certain free white immigrants of good character to naturalize and become citizens as the first United States immigration law. Others look to the Immigration Act of 1882, the Chinese Exclusion Act of 1882 and the Alien Contract Labor Laws of 1885 and 1887 as the first true immigration laws because they regulated who could immigrate into the United States. Recently, though, scholars have started to recognize the African slave trade and its corresponding forced migration and relocation of hundreds of thousands of laborers into the United States as that country's first true immigration system.[1] Antebellum chattel slavery was, among other things, an abusive system that exploited noncitizen, immigrant labor. In particular, three key aspects of chattel slavery made it an abusive labor system: the inability of slaves to quit or stop working for the slave owner; the inability of slaves to advocate for better workplace conditions through collective action or in the courts; and the fact that the slave owner and not the slave owned and controlled the slave's labor. These practices are critical because vestiges of them continued beyond the period of chattel slavery and remain in place even today.

[1] RV Magee, 'Slavery as Immigration?' (2009) 44 *University of San Francisco Law Review* 273; LK Buckner Inniss, 'Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness' (1999) 49 *DePaul Law Review* 85.

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Slaves were not able to quit or stop working for the slave owner. They were considered the property of their owners who could and did compel them to work through the use of physical restraint and corporeal punishment.[2] Separation from the owner occurred only through sale to another owner or manumission. Formal slavery was abolished in 1865 when the Thirteenth Amendment to the United States was ratified, stating that "neither slavery nor involuntary servitude . . . shall exist in the United States." Following the abolition of chattel slavery, however, many freed slaves still did not have the right to quit employment because laws passed by legislatures in southern states, known as "black codes" restricted their rights.[3] For example, South Carolina prohibited freed men from working in a variety of settings without the approval of a judge or payment of a large fee. Other states prohibited a new employer from "enticing" or hiring a freed man from another employer, thus eliminating the opportunity to quit and take another job. Still others passed apprenticeship laws that allowed whites to place children of freedmen deemed unfit into forced labor until they became adults.[4]

The right to quit was also severely restricted by the use of other "black codes" that created a system of debt bondage often referred to as convict leasing.[5] Southern states criminalized minor offenses, such as loitering, and prosecuted freed men for breaching these. Some convicts were required to perform work directly for the states on chain gangs, but whites could also purchase the labor of a convict from the state and hold them to a term of bondage until their sentence was served or fine paid off.

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[2] S Plass, 'Private Dispute Resolution and the Future of Institutional Workplace' (2010) 54 *Howard Law Journal* 45, 51-52.
[3] B Azmy, 'Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda' (2002) 71 *Fordham Law Review* 981, 1015.
[4] Id.
[5] Id. at 1026-27.

In the early part of the Twentieth Century, U.S. courts began to strike down these arrangements using the 1867 Antipeonage Statute which had been passed pursuant to the Thirteenth Amendment. In *Bailey v Alabama*[6], Alonzo Bailey had been convicted of fraud and sentenced to perform labor, in order to pay off his fine and costs. The US Supreme Court found the practice illegal and stated that "compulsory service to secure the payment of a debt" was prohibited by the statute. Further, it stated the state "may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay his debt."[7]

Similarly, the ability of whites to purchase convict labor was struck down in *US v Reynolds*[8]. Rivers had been convicted of petit larceny, and his labor was purchased by Reynolds through a surety bond that covered Rivers' fine and costs. He was required to work for Reynolds for ten months at the rate of $6.00 per month to pay off his debt. When he refused to work for Reynolds, he was arrested for breaching his contract and charged $90 in costs; whereupon a different surety paid his debt and bound Rivers to labor for fifteen months. The Supreme Court struck down this arrangement because it created the possibility of men "kept chained to an everturning wheel of servitude." [9] The system was found to violate the Thirteenth Amendment because the contract for labor "must be kept, under pain of re-arrest, and another similar proceeding for its violation, and perhaps another and another. Thus, under pain of recurring prosecutions, the convict may be kept at labor, to satisfy the demands of his employer."[10]

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[6] 219 US 219 (1910).
[7] Id. at 243-44.
[8] 235 US 133 (1914)
[9] Id. at 146-47.
[10] Id. at 149.

In reaching these conclusions, both *Bailey* and *Reynolds* focused on the idea that restricting the ability to quit or requiring service in payment of a debt violated the Thirteenth Amendment because a person's labor is special and distinct and protected by the anti-slavery mandate. It stated that the purpose is to ensure free labor because "there is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based."[11] It 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 obligations. . . necessarily embraces all legislation which seeks to compel the service or labor by making it a crime to refuse or fail to perform [labor.]."[12]

Despite the holding in *Reynolds*, the practice persisted. In 1944, the US Supreme Court struck down a similar system that criminalized fraud in relation to an employment contract, thus linking the requirement to pay a fine (or perform work) to compelled labor.[13] Emanuel Pollock received $5.00 from his employer in exchange for a promise to work to pay off that debt. When he quit, he was found guilty of fraud and fined $100. When he defaulted on payment of the fine, he was required to work at a rate of .09 a day to pay off the debt. In *Pollock*, the Court explained that the practice of compelled labor also violated the Thirteenth Amendment because it destroyed the floor for free labor. It reasoned:

"The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States . . . In 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

[11] Bailey, at 245.
[12] Id. at 243-44
[13] Pollock v Williams, 322 US 4 (1944).

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."[14]

This trilogy of cases creates twin purposes, then, to the prohibition of restrictions on the right to quit: the unique nature and sanctity of human labor and the effect that involuntary servitude has on participants in the free labor market.

A second, independent way in which slavery oppressed labor was the slaves' inability to improve their conditions through traditional methods, such as use of the legal system or collective action. In one of the earliest cases defining the legal definition of slavery, *State v Mann,*[15] the court emphasized that because a master must have total control over a slave, a slave lacks any legal recourse for injury inflicted upon him by his master. Having just the status as property, they were legally unable to sue to improve their conditions. Similarly, in *Dred Scott v Sandford*,[16] the US Supreme Court found that even a former slave did not have the right to sue in federal court because he was not a citizen. Since slaves lacked the status of human beings and even freed slaves lacked the status of citizens, they were unable to work through the political or civil system to improve their workplace conditions or to advocate for changes in society. As workers, free blacks and slaves were excluded from burgeoning trade union movements and were unable to effectively advocate through the use of collective action, except in ways, such as slow downs, which could be made to appear as if they were still working within the control of

[14] Id. at 17-18.
[15] 13 NC (2 Dev.) 263 (1829)
[16] 60 US 393 (1856)

their masters.[17] Thus, slaves lacked the rights of citizens or workers to try to improve their working conditions.[18]

A final way in which the system of chattel slavery oppressed labor rights was that the slave owners and not slaves owned the labor produced by slaves. During the antebellum slave period, each state had laws or "slave codes" that regulated slavery in the American South.[19] These codes gave slave owners the right to control the labor of their slaves because in addition to owning the slave, they also owned the labor of the slave. So, 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.[20] Some slaves tended a garden and sold the food at a local market, while others might work as a blacksmith on Sundays or mend and sew 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.

Although chattel slavery was the first instance of the exploitive use of non-citizen, immigrant labor in the United States, it was not the last. Throughout the nation's history, agricultural work has been performed by a series of non-citizen immigrant workers who have

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[17] J Pope, 'Why is There no Socialism in the United States? Law and the Racial Divide in the American Working Class, 1676-1964' (2016) 94 *Texas Law Review* 1555, 1563-1567.
[18] M Ontiveros, 'Immigrant Workers' Rights in a Post-*Hoffman* World - Organizing around the Thirteenth Amendment' (2004) 18 *Georgetown Immigration Law Journal* 651, 672; M Ontiveros, 'H-1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers' (2017) 38 *Berkeley Journal of Employment and Labor Law* 1, 27.
[19] For a thorough discussion of slave codes, see KM. Stampp, *The Peculiar Institution: Slavery in the Ante-bellum South* (Vintage Books 1989) (Knopf 1956).
[20] VV Palmer, 'The Customs of Slavery: The War Without Arms' (2006) 48 *American Journal of Legal History* 177 (2006).

toiled in abusive work situations and who have been deported or disposed of when they tried to assert their rights and improve their conditions.[21] When Spanish missionaries arrived in the 1700's, they brought indigenous Mexicans to work in and around the missions as chattel slaves with no labor, human, civil or citizenship rights. After they perished, the missionaries replaced them with members of indigenous California tribes who they kept in slave-like conditions, with families separated and forced to work. They were locked in their dormitories, kept under constant surveillance, and forcibly returned, beaten or killed if they tried to escape.[22] These indigenous slaves were technically freed in 1826, but a system of laws similar to the black codes allowed them to be sold into bonded labor after being convicted of committing petty crimes; required them to work; restricted their ability to change jobs; and allowed any farmer needing labor to petition a judge to indenture them. Like the indigenous Mexicans who proceeded them, the indigenous Californians perished under this system, with the indigenous population dropping from a high of 700,000 to only 15,000 at the end of the Mission era.[23]

Between approximately 1850 and 1945, noncitizen immigrant workers from Asia, first from China and then from Japan, labored in the fields with few civil or labor rights.[24] Asians were not allowed to naturalize and become citizens until 1952. In addition, family formation was discouraged, and land ownership was prohibited. Many of the Chinese immigrants arrived with debt that bound them to Chinese labor bosses, and failure to follow restrictive laws would result

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[21] M Ontiveros, 'Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs' (2007) 38 *University of Toledo Law Review* 923, 931-937; M Ontiveros, 'Immigrant Workers and the Thirteenth Amendment' in A Tsesis (ed), *The Promises of Liberty* (New York, Columbia University Press, 2010) 283-285.
[22] RS Street, *Beasts of the Field: A Narrative History of California Farmworkers 1769-1913* (Stanford, Stanford University Press, 2004) 25-75.
[23] GT Luna, 'Gold, Souls and Wandering Clerics: California Missions, Native Californians and LatCrit Theory (2000), 33 *U.C. Davis Law Review* 921, 941.
[24] M Ontiveros, *Noncitizen Immigrant Labor* at 933-936; M Ontiveros, *Immigrant Worker and the Thirteenth Amendment*, at 284.

in imprisonment, hard labor and deportation. The Japanese immigrants initially fared better and practiced some labor activism; however that activism was quashed through immigration control. During World War II, the US government imprisoned Japanese immigrants in internment camps and stripped them of their property. Like previous incarnations of agricultural workers, these noncitizen immigrant workers were brought to the United States to work in the fields in disempowered labor relationships and without the citizenship rights necessary to improve their situation.

During the twentieth century, immigrants from Mexico began arriving in large numbers to work the fields. Between 1920 and 1940, those who arrived outside of the formal legal process were easily exploitable because they were subject to detainment and deportation.[25] During the next three decades, noncitizen immigrant workers from Mexico arrived pursuant to a treaty establishing the Bracero Program. Under the program, the Braceros worked for low wages without the ability to leave or change employers, were not given enough hours to earn a subsistence wage, and were subject to deductions from their meager paychecks for room and board, as well as nonexistent services and retirement.[26] The abuses were so bad that the governmental official in charge of the program called it "legalized slavery."

The exploitation of non-citizen immigrants laboring in agriculture echoed many of the same abusive labor conditions as those found in chattel slavery. Their ability to quit was severely restricted by physical restraints, law and threats of deportation. Their labor and job placements were controlled by others, and they were unable to organize to improve their working conditions either because of their social isolation or because attempts to organize resulted in deportation.

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[25] MM Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America*, (Princeton, Princeton University Press, 2004) 130-135.
[26] M Ontiveros, Noncitizen Immigrant Labor, at 936-937.

This history provides the context for understanding the contemporary situation of non-citizen immigrant workers in the United States.

B. The Current Situation for Non-Citizen Workers in the United States

The United States continues to heavily rely on non-citizen workers. When studying the contemporary immigrant workforce in the United States, it is difficult to determine whether the person is a migrant worker that is coming to the United States for a limited period of time with the intention of returning home or an immigrant worker who wants to permanently relocate to the United States. On the one hand, many workers who enter the United States on "guest worker" visas will eventually seek citizenship. On the other hand, even those individuals who are categorized as "legal permanent residents" may still be deported from the United States. As a result, this chapter will discuss all non-citizen workers, regardless of whether they are technically migrants or immigrants.[27]

Approximately one out of every six workers (17.1%) in the United States is an immigrant not born in the United States. This population of 27.6 million workers includes both citizens[28] and non-citizens, and it is very difficult to ascertain how many are citizens and how many are, for our purposes, migrants. One way to divide the non-citizen work force in the United States is between authorized workers, those who have the legal right to live and work in the United States, and unauthorized workers, or those who do not have the legal right to live and work in the United States. Unauthorized workers are sometimes called undocumented workers or illegal immigrants. The two major types of authorized workers are so-called "guest workers" who have a visa to work in a specific job for a specific length of time and legal permanent residents. The

[27] In addition, this chapter will also focus just on domestic law, not international treaty obligations.

[28] In the United States, citizenship is conferred through birth right (being born in the United States) or through a naturalization process.

latter, often called "green card holders," are non-citizens who have the legal right to live and work in the United States, so long as they do not become deportable for some other reason.

1. Unauthorized Workers

In 2015, approximately 11.3 million unauthorized immigrants (or 3.4% of the total U.S. population) called the United States home. The large majority (66%) of the unauthorized adults have lived in the United States for more than a decade and a rising number (40%) live with their U.S.-born minor or adult children. About half of them are from Mexico, with growing percentages from Asia and Central America. Sixty percent of unauthorized immigrants live in five states (California, Texas, Florida, New York, New Jersey and Illinois).

Within the civilian workforce, one in twenty workers (5% or 8 million individuals) are unauthorized. Although they do not have the legal right to live and work in the United States, they make up a significant portion of drywallers (31%), agricultural workers (30%), plasterers/stucco masons (36%), sewing machine operators (23%) and housekeepers (24%). The overall percentage of unauthorized workers has remained stable for the past decade.

Employers are prohibited from hiring unauthorized workers, and the law requires that employers have each new employee complete a form verifying their legal right to work in the United States. Unauthorized workers continue to labor in the workforce, however, because such workers may use forged documents or valid documents that belong to someone else. Alternately, employers may simply ignore the requirement knowing that the likelihood of being discovered is relatively small or because they determine that the fines associated with violations are outweighed by the benefits of employing this workforce.[29]

[29] M Ontiveros, 'Migrant Labour in the United States Working Beneath the Floor for Free Labour?' in C Costello and M Freedland (eds), *Migrants at Work* (Oxford, Oxford University Press, 2014) 180, 183.

2. Authorized Workers

The government created two programs to allow non-citizens to live and work in the United States: a program designed for long term, permanent immigrants and a program designed for temporary migrants or "guest workers". The legal permanent resident program issues so-called “green cards” to certain immigrants who have the ongoing right to reside and work in the United States. These renewable cards, typically issued for ten years, can be given to relatives of U.S. citizens, certain refugees or asylees and for certain guest workers sponsored by an employer. An employer that wishes to sponsor an employee for permanent resident status must apply and state that they have an intent to permanently employ that individual. For current guest workers, this application typically takes place after several years on the job, and the process of obtaining a green card may take several years. Once an individual becomes a legal permanent resident for at least three years (but typically five years), he or she may apply for citizenship through the naturalization process. Unlike a guest worker, once a worker obtains a green card, he or she can no longer be deported simply for separating from an employer. He or she can quit or be fired and still legally remain in the United States. However, there are other grounds for deportation, including commission of a crime, becoming a public charge, leaving the country for an extended period of time, and failure to establish a permanent residence.

The United States developed its “guest worker” or non-immigrant visa program to bring workers from abroad to fill jobs in various industries for a temporary period of time. The most common types of visas are the H-1B used for highly skilled, often technical workers such as computer professionals, engineers and nurses; the H-2A used for agricultural workers; the H-2B used for non-agricultural laborers; and the J-1 or B-1 visas for nannies or other domestic help. Although the specific terms for each visa vary somewhat, they share some broad parameters in

terms of how they work. Each year, the government establishes a set number of visas to issue in each category. For example, the government issues approximately 85,000 H-1B visas a year and 37,000 H-2A visas in 2006. These visas are in high demand by employers, who must apply for them, entering a lottery if necessary. In order to receive a visa, the employer must demonstrate that they have a need for the worker and employing the worker will not adversely affect domestic workers. Some visa categories require a showing that the employer has been unable to find a worker in the U.S. to fill the position; while others do not.

Once the employer has been issued a visa, they may hire a worker from outside the U.S. and have them begin work. The visa is typically valid for a limited period of time. For example, the H-2A visa is generally issued for one year, while the H -1B is issued for three years.[30] The visas can usually be extended by the employer for an additional time period, upon a sufficient showing of need, although typically there are cumulative time limits for any individual worker. At the conclusion of this cumulative time period, the worker must either leave the country or become a naturalized citizen. One of the most significant aspects of the program is that if the worker separates from employment with that employer, either because they quit or because they are terminated, then the worker must leave the United States. The worker becomes deportable because he or she is no longer authorized to be in the country. Just as importantly, the visa program is structured so that the visa is applied for, given to, held by and controlled by the employer, not the employee.

The structure of the guest worker program has led to a variety of problems for workers. At the lower end of the economic spectrum, farm workers on the H-2A program face problems such as low pay, wage theft, poor conditions, and the inability to complain for fear of being

[30] Ontiveros, H-1B Visas, at 9.

discharged and deported.[31] In addition, lack of knowledge of the legal system and language difficulties, as well as isolation from the community make it difficult for these workers to enforce their labor rights. Finally, both H-2A agricultural workers and H-2B laborers face extensive restrictions on their ability to access the legal system because of restrictions placed on legal service providers and limitations in the statute.[32]

Even high-skilled, technical workers on H-1B visas are subject to abusive employment situations, spanning a continuum of exploitation depending upon the worker's situation. The H-1B visa workers who are treated the best work directly for the company that applied for and holds the visa. These workers almost all work long hours for wages below those paid non-visa workers. They are unable to complain about the conditions because they fear deportation. In addition, they are often socially and culturally isolated, living in insular communities, unable to become fully integrated into mainstream society. They often come without their families because their family members are generally not given the right to work in the United States and are prohibited from accessing the social services. They also lack the political rights of citizens. Therefore, they are unable to advocate for changes in the workplace or through the political process.[33]

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[31] Ontiveros, Noncitizen Immigrant Labor, at 937-938; AV Cortes, 'The H-2A Farmworker: The Latest Incantation of the Judicially Handicapped and Why the Use of Mediation to Resolve Employment Disputes Will Improve Their Rights' (2007) 21 *Ohio State Journal of Dispute Resolution* 409, 415-421; AK Guernsey, 'Double Denial: How Both the DOL and Organized Labor Fail Domestic Agricultural Workers in the Face of H-2A' (2007) 93 *Iowa Law Review* 277, 291-299.

[32] M Holley, 'Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights' (2001) 18 *Hofstra Labor and Employee Law Journal* 575, 597-616 (H-2A limitations); Ontiveros, Immigrant Workers and the Thirteenth Amendment, at 283 (H-2B limitations)

[33] Ontiveros, H-1B Visas, Outsourcing and Body Shops, at 9-14.

Other H-1B workers face more difficulty when they do not work directly for the employer who holds their visa.[34] In these situations, the visa holder acts as a labor agency that directs where the visa worker will be assigned, and the worker is usually consigned to working in a series of short-term placements. Although it is prohibited by statute, the worker will often be required to wait, unpaid, for a work assignment. During these times, the worker may be housed in an overcrowded apartment and charged excessive rent. Since the labor agency is the official employer, it controls the worker's paycheck and may engage in wage theft. These employers may also engage in other illegal and abusive practices. For instance, they may charge the worker for the costs of the visas, often saddling the worker with a large debt that needs to be paid off upon arrival in the US.

Contracts with this type of employer also sometimes include large liquidated damages clauses requiring that the worker pay a large sum if they quit work before the end of the contract term. These fees may range from $5,000 to $30,000 and often prevent the worker from leaving an abusive work situation. For example, in the case of *Nunag-Tanedo v East Baton Rouge Parish School Board,*[35] the employer threatened to charge the workers $5,000 (an amount equal to a year and a half of salary in their home country) if they quit the contracted work. In *Panwar v Access Therapies, Inc.,*[36] a worker was forced to pay $3,000 for his visa and sign a promissory note as part of his visa contract to pay $20,000 if he left work early. This amount is roughly equivalent to five years of salary in his home country. In these situations, the financial burden often prevents a worker from leaving an abusive work situation.

II. Workplace Protections for Non-Citizen Workers

[34] Ontiveros, H-1B Visas, Outsourcing and Body Shops, at 19-23.
[35] 790 F.Supp.2d 1134 (C.D. Cal. 2011)
[36] 975 F.Supp.2d 948 (S.D.Ind. 2013)

Non-citizen immigrant workers in the United States are formally protected by a wide variety of laws, including both laws that cover all workers in the US and laws that have been passed specifically to protect them. Unfortunately, many of these laws are plagued by enforcement problems. Additionally, there is a deep theoretical problem at the core of the US legal approach to treating immigrant workers. Although federal law prohibits discrimination based on race and national origin, it does not prohibit discrimination based on citizenship or migrant status because it views these as analytically distinct from each other. Fortunately, recent developments have started to chip away at this theoretical roadblock.

A. The Formal Legal Framework and Limitations on Enforcement

1. Generally Applicable Workplace Protections

The United States has a variety of statutes protecting workplace standards. The major statutes include a requirement of a minimum wage and a premium wage rate for overtime hours. Employees are entitled to a safe workplace and must be provided unpaid family and medical leave. Federal statutes also protect the rights of employees to engage in concerted activity for mutual aid and protection and to bargain collectively through an appropriate union representative. Finally, under federal law, employers may not discriminate in hiring, firing or the terms and conditions of employment or allow harassment on the basis of race, color, sex, religion, national origin, age or disability. It is generally accepted that these protections formally apply to all workers, whether they are authorized or unauthorized. These rights and protections accrue from the status of being an employee or worker and are not affected by the immigration status of the worker.

Although all workers are formally protected by these statutes, differences emerge between groups when looking at issues of enforcement and remedies. With respect to

enforcement, unauthorized workers are much less like to seek protection because they fear being discovered and deported.[37] Under-enforcement also occurs because of language and cultural barriers. These barriers include lack of knowledge of their legal rights; inability to complain because the employer is in a race-privileged position; and the hesitancy of complaining about co-workers or supervisors with whom the worker may have a kinship relationship or strong community tie in the home country.[38] Finally, many administrative agencies charged with enforcing these laws lack bilingual staff and bicultural training.[39]

In addition, the agricultural and domestic service industries, which employ many unauthorized immigrants, are excluded from some of these protections.[40] Neither of these occupations are covered by the National Labor Relations Act, so those types of workers do not have a protected right to engage in collective action and may be fired if they try to form a union. The agricultural industry is also exempt from the standard wage and overtime laws. The domestic services industry escapes enforcement of many of the protections because the employers are so small that they fall below the statutory minimums or because they categorize their workers as independent contractors instead of employees.

With respect to remedies, those available to unauthorized workers vary depending upon the statute being violated and the harms being claimed. In the seminal US Supreme Court case, *Hoffman Plastic Compounds, Inc. v National Labor Relations Board*[41], the plaintiff was fired for participating in a union organizing campaign. The administrative agency charged with enforcing

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[37] ML Ontiveros, 'Female Immigrant Workers and the Law' in DS Cobble (ed), *The Sex of Class* (Ithaca, ILR Press, 2007) 235, 240-241.
[38] Id. at 243.
[39] Id. at 244.
[40] ML Ontiveros, 'Female Immigrant Workers and the Law' in DS Cobble (ed), *The Sex of Class* (Ithaca, ILR Press, 2007) 235, 238-240.
[41] 535 US 137 (2002)

the statute, the National Labor Relations Board, ordered the plaintiff to be reinstated and to be paid backpay (the amount that the employee would have earned had he not been illegally discharged for the time period following the discharge until the decision in the case). These two remedies are typically awarded to an employee for violations of the right to engage in collective activity. The Supreme Court overturned the finding of the NLRB and found that unauthorized workers could not be reinstated because they do not have the legal right to work in the United States. In addition, the Court said that the NLRB overstepped their authority when they awarded backpay. It reasoned that, since the employee did not have the right to working during the backpay period under immigration law, the Board's order interfered with immigration policy by implying that such work would have been allowable and should be compensated.

Since *Hoffman*, most courts have taken a similar approach to violations of the antidiscrimination statutes. Unauthorized plaintiffs who are successful in these cases are generally not eligible to be reinstated or to receive backpay. On the other hand, courts have taken a different approach in cases where unauthorized plaintiffs have proved violations of wage and hour laws. In these cases, employers have either under paid workers (paying them below the minimum hourly wage) or failed to pay them a premium rate for overtime hours. In the most egregious cases, some employers have refused to pay workers at all the hours worked. In these cases, most courts have generally awarded the unpaid wages, as well as statutory penalties, to unauthorized plaintiffs. Courts view these cases as analytically distinct because the employees actually worked these hours and the employers benefited from the labor.

2. Laws Specific to Non-Citizen Workers

In addition to the laws of general applicability, three important laws apply specifically to immigrant workers: the rules in the statutes establishing guest work visas; the Immigration Reform and Control Act of 1986; and the Trafficking Victim Protection Act.

a. Visa rules

The statute that established the guest worker visa program provides specific protections for visa workers. The statute provides that visa workers must not be required to pay for a visa; must be paid a prevailing wage; must be paid for all time that they are in the United States, even if the assignment has not yet started; and must not be penalized for leaving the assignment before the end of the visa period.

Unfortunately, in practice, employers have developed ways to circumvent some of these protections while still technically complying with the law. The prevailing wage systems can be manipulated to pay the least possible by the way the job classification and geographic location of the job are defined, as well as by the choice of wage survey used by the employer.[42] In addition, since the statute allows for an employer to charge liquidated damages to cover actual costs incurred when an employee leaves work before the end of the visa's term, it may be very difficult for employees to prove that that amount charged is an illegal penalty, so they may still be unable to leave before the end of a contract term. For example, in *Panwar v. Access Therapies, Inc.,*[43] the court upheld a liquidated damages charge of $20,000 because the employer put forward some evidence of the costs incurred when an employee quit and the employee could not prove that the charges were "greatly disproportionate" to the losses. Even though this amount is equivalent to five years of salary in Mr. Panwar's home country, making it very difficult for Panwar to quit his

[42] Ontiveros, H-1B Visas, Outsourcing and Body Shops, at 11-13.
[43] Panwar v. Access Therapies, Inc., No. 1:12-CV-00619-TWP, 2015 WL 1396599, at *4 (S.D. INd. Mar. 25, 2015), appeal dismissed (Nov. 24, 2015).

employment, the court found the contract term to be legal and enforceable. When other employees see these contract terms being enforced, they become very fearful about leaving their employment even if it is an abusive or exploitive situation.

In other cases, employers, especially labor agencies, do not comply with these rules. Common violations of the laws include failure to provide work for the time stated in the visa application and refusal to pay for time while the employee waits for a work assignment; charging employees for a visa; charging employees an excessive amount for housing and other expenses; and underpaying employees.[44] Employers are able to evade enforcement of the statute because employees do not know their rights; employee claims must go through an elaborate administrative process before they can go to court; and administrative agencies have been limited in their ability to bring civil and criminal cases.[45]

b. The Immigration Reform and Control Act of 1986

The Immigration Reform and Control Act of 1986 (IRCA) established the basic framework for regulation of undocumented workers in the United States. The law prohibits employers from knowingly employing unauthorized workers. In order to accomplish the goal, the law requires employers to have every new employee verify that he or she has the legal authorization to work in the United States. Employees typically provide proof of citizenship (i.e. a U.S. passport) or a document proving identification (i.e. a driver's license) and a document proving work authorization (i.e. a green card). When the law was enacted, workers' advocates feared that this requirement would result in discrimination against those who looked like they might not be citizens. So, the law provided that employers must accept any documents that look reasonably genuine and cannot request specific types of documents. This allows employers to

[44] Ontiveros, H-1B Visas, Outsourcing and Body Shops, at 20-23.
[45] Id. at 28-35.

show compliance with the law, even if they are hiring people that they know are providing false documents.

IRCA also included a provision that prohibited discrimination based on citizenship. However, this protection has significant limitation. First, it only applies to discrimination in hiring and discharge. It does not include discrimination in other terms and conditions of employment, such that harassment based on migrant status is not covered. More importantly, it only protects those who are currently citizens or those who are "intending citizens." In order to be an intending citizen, an individual must be in the process of applying for citizenship and must have applied for citizenship at the earliest possible opportunity. If an individual is not within this window or is not a U.S. citizen, then discrimination based on citizenship is not prohibited. IRCA also included a prohibition against discrimination based on national origin that applied to more employers than covered by other non-discrimination laws (smaller employers).

c. Anti-Trafficking Laws: Forced Labor and Involuntary Servitude

The United States also has a set of laws designed to prohibit workers from being brought into the United States in coercive labor relationships. The Trafficking Victim's Protective Act (TVPA)[46] was passed pursuant to the Thirteenth Amendment and the Anti Peonage Statue of 1867. The statute prohibits obtaining labor through the use of force for purposes of involuntary servitude, peonage, debt bondage or slavery. For purposes of the statute, forced labor or involuntary servitude includes labor obtained through "serious harm" or "threats of serious harm," as well as "abuse or threatened abuse of law or legal process." "Serious harm" has been found to include serious financial harm and abuse of the legal process has been found to include abuse of the immigration process.

[46] Victims of Trafficking and Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466-91 (codified as amended at 22 USC Sections 2152d, 7101-7112 (2012)).

Visa workers have used the TVPA to show forced labor through both abuse of the legal process and threats of serious financial harm. For example, in *Nunag-Tanedo v East Baton Rouge Parish School Board,*[47] the court found that threats of deportation and confiscation of travel documents used by the employer to coerce employees to continue working for them constituted abuse of legal process for purposes of the TVPA. The employer also charged the employees a $5,000 fee for a visa and told the workers that they would forfeit the fee, unless they either continued to work in an abusive situation or paid an additional $10,000 plus the costs to travel. The court found that the employees "felt that they had to comply with [the] Recruiter Defendants' demands since they needed to work in the United States to repay their debt[s]" and that this constituted a threat of serious harm under the statute. Although the TVPA can be used to protect non-citizen immigrant workers, some decisions, such as *Panwar*, have found that a charge which can be justified as a reasonable liquidated damages charge cannot be found to violate the TVPA.[48]

B. The Theoretical Problem: The Relationship between Discrimination based on Citizenship Status and Discrimination Based on National Origin

Non-citizen immigrant workers seek protection in the patchwork of laws described above because of a problem at the core of US employment law. Although federal law prohibits discrimination on the basis of national origin, it does not prohibit discrimination on the basis of immigration status or migration status. If the law did prohibit discrimination on the basis of migrant status or immigration status, the employees could challenge the abusive practices directly. However, in a case decided almost fifty years ago, the US Supreme Court held that

[47] 790 F.Supp.2d 1134, 1144-47 (C.D.Cal. 2011).
[48] *Panwar v. Access Therapies, Inc*., No. 1:12-CV-00619-TWP, 2015 WL 1396599 (S.D. Ind. Mar. 25, 2015), appeal dismissed (Nov. 25, 2015).

discrimination based on citizenship status is analytically distinct from discrimination based on national origin and so not prohibited under federal nondiscrimination law. This analytical distinction, which has always been suspect, has recently begun to unravel in two separate lines of cases.

In *Espinoza v. Farah Mfg.,*[49] the employer refused to hire Cecilia Espinoza (a Mexican immigrant with the legal right to work in the US, who was married to a US citizen and who was in the process of becoming a citizen) as a seamstress because she was not a US citizen. She sued under Title VII, the statute prohibiting discrimination based on national origin. Under US law, a plaintiff can prevail under Title VII either by showing that the employer intentionally discriminated on a prohibited basis or that the employer used a neutral practice that has a disparate impact on a protected group and that cannot be justified as a business necessity. The employee argued that a citizens-only policy intentionally discriminated against her on the basis of national origin because, on its face, it favors those born in the United States who have birth-right citizenship. The Court did not agree because people not born in the US could become citizens through naturalization. The employee also argued that the policy would always have a disparate impact on those not born in the United States and would therefore have a disparate impact based on national origin. The Court said that citizenship was not a protected category under that statute and could not be the basis for a disparate impact claim in this case because of the large number of workers of Mexican origin that were employed by Farah Mfg. Instead of looking at whether the neutral practice had a disparate impact on people from a different national origin (which it would), the Court looked at the composition of the workforce of the particular employer. Although this approach was contrary to established law at the time, it created a bright

[49] 414 US 86 (1973).

line rule that discrimination based on citizenship status or immigration status was allowable because it does not violate Title VII.

Recently, two lines of cases have started to challenge this bright line rule. In the first line of cases, courts have upheld both disparate treatment and disparate impact cases brought by US employees displaced by H-1B workers. In the disparate treatment case, the court said that the employer could not establish that the use of visa programs are "non-discriminatory by definition" or that plaintiffs could never show they had been discriminated against as a result of this business practice.[50] In the disparate impact case, the court found that the defendant's practice of 'growing their U.S. offices by setting visa quotas for additional South Asian workers, budgeting for the associated expenses of securing the visas, and filling employment vacancies by assisting persons of the South Asian race to enter this country to work in the defendants' U.S. offices' constituted a specific and particular employment practice for purposes of Title VII that resulted in a disparate impact on Caucasian Americans."[51] These cases are important because they allow plaintiffs to use the immigration system as a focus for defining "national origin" discrimination. In the disparate treatment cases, the courts could have easily said that the basis for discrimination was the visa or immigration status of the employees, rather than their race or national origin. In the disparate impact cases, the court explicitly says that an immigration practice can be the cause of disparate impact leading to discrimination based on national origin. These are significant steps away from the bright line rule established in *Espinosa.*

Another promising line of cases are those being brought by the US Equal Employment Opportunity Commission (EEOC) to protect trafficked workers. The EEOC only has jurisdiction to bring cases involving national origin discrimination, not discrimination based on immigration

[50] *Heldt v. Tata Consultancy Services*, 132 F.Supp.3d 1185, 1189 (N.D.Cal.2015).
[51] *Koehler v. Infosys Techs., Ltd*., 107 F.Supp.3d 940, 944 (E.D.Wis.2015).

status. In their literature, they explain and justify the cases being brought on behalf of trafficked workers by stating:

> The EEOC enforces the law against treating workers differently based on their **national origin**. (Human trafficking thrives on exploiting the vulnerability of **immigrant workers** and often targets specific national origins, based on stereotypes about who best performs certain jobs or is less likely or able to complain about exploitation.)
>
> There are forms of labor exploitation that do not fall within the statutory definition of human trafficking, but which are every bit as severe and which often involve elements of **employment discrimination**. In those "less than trafficking" cases, the EEOC"s role becomes particularly important, as it may be the only federal agency with jurisdiction over the employers' exploitation of workers.[52]

In one recent EEOC case, the allegations focused on trafficking and exploitation as a result of immigrant status, rather than just the national origin of the employees. The EEOC sought to protect Thai H-2B workers who had been held against their will; had their passports confiscated; were forced to work without pay and were confined to cramped apartments without any electricity, water, or gas. In addition, the employer told the workers that they would call the police and arrest them if they tried to leave and that they were not allowed to leave until they repaid huge fees owed to the recruiting company. The EEOC characterized the treatment as involuntary servitude and identified human trafficking and slavery as enforcement priorities for the EEOC.[53]

The EEOC linked these conditions to national origin discrimination by stating "Trafficking cases often involve discrimination on the basis of national origin or race. Even when employees are legally brought into this country, employers may discriminate on the basis of national origin or race through the use of force, fraud, or coercion. This discrimination may

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[52] https://www.eeoc.gov/eeoc/publications/brochure-human_trafficking.cfm (emphasis in original).

[53] U.S. Equal Employment Opportunity Commission, EEOC Resolves Slavery and Human Trafficking Suit Against Trans Bay Steel for an Estimated $1 million, 2006 WL 3587411 (E.E.O.C.) December 8, 2006.

include harassment and setting different terms and conditions of employment."[54] In these cases, the underlying cause of the exploitation is the immigration system, coupled with the national origin of the plaintiffs.

Significantly, in these cases, the EEOC does not bring causes of action for human trafficking per se. However, they clearly exist at the intersection of trafficking violations and discrimination based on national origin. In one case, the judge explained the connection like this:

> the EEOC's claims in this lawsuit allege that Defendants discriminated against the Claimants on the basis of their race and national origin. However, the underlying premise is that the Defendants intentionally hired Thai guest workers believing that they could subject them to undesirable and unfair working practices, as compared to the Mexican workers, and the Thai guest workers would be too fearful to complain about their working and living conditions.[55]

In essence, they finesse the definition of "national origin" and link it to immigrant status or the use of the immigration system as a way to chip away at the bright line rule of *Espinosa.* If the bright line rule is abandoned, non-citizen immigrant workers could more directly challenge abusive workplace conditions caused by their migrant status.

III. Connecting the Current Treatment of Non-Citizen Labor in the United States to History and Themes in International Labor Migration Law

The current treatment of non-citizen workers in the United States must not be studied in isolation. Put in historical perspective, the treatment of contemporary workers can be understood to echo the exploitation found in the systems of unfree labor practiced in the United States. The treatment can also be studied in a comparative manner and connected to major themes discussed by scholars in the field of labor migration in other parts of the world. This section draws these connections to show how certain types of labor migration policies create systems that contain

[54] https://www.eeoc.gov/eeoc/interagency/trafficking.cfm
[55] EEOC v. Global Horizons, Inc., 2013 WL 3940674 *5 (E.D. Wash. 2013)

vestiges of unfree labor and discusses their relationship to issues raised by scholars studying labor migration programs across the globe.

A. Involuntary Servitude, Debt Bondage and Exit

As discussed in section one of this chapter, chattel slaves did not have the right to quit employment and were clearly held in a state of involuntary servitude. Even following emancipation, many freed slaves and their descendents remained in a form of involuntary servitude categorized as debt bondage that was eventually struck down as being in violation of the Thirteenth Amendment to the United States Constitution and the Anti-Peonage Act. Agricultural workers also labored in a variety of abusive situations, including slavery and involuntary servitude.

Unfortunately, vestiges of this practice remain when visa workers may not quit their employment because they have to pay off large sums of money to the employers that hold their visas. Although these sums may sometimes be legally categorized and upheld as liquidated damages, that characterization does not alter the fact that workers must continue to labor because they have no practical way to pay off the debt. One United States court defined 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, however created, is compulsory service, --involuntary servitude...That which is contemplated by the statute is compulsory service to secure the payment of a debt."[56]

[56] United States v. Kyongja Kang, No. 04 CR87(ILG), 2006 @L 108882 (E.D.N.Y. Jan.25, 2006)

Just like the workers held in debt bondage, the visa workers are tied to an employer, cannot quit, and must pay off the debt through their labor. As such, the practice is reminiscent of debt bondage and creates a system of unfree labor, as understood in *Bailey* and *Reynolds*.

A softer form of involuntary servitude is experienced by visa workers who cannot quit because they fear being deported. The negative consequences of deportation are especially severe for H-1A and H-1B workers that are deported to Mexico. These workers may have to spend time in a deportation processing center on the way out of the country, and, if they choose to return illegally, they face dangers ranging from financial exploitation to sexual abuse or even death.[57] When workers cannot quit either because of large liquidated damages or because of the fear of being deported, they are forced to continue to work. This compulsion has many of the same negative effects of involuntary servitude. In particular, the inability to quit pulls down the working conditions of free, non-visa workers which was identified by the US Supreme Court in *Pollock* as one of the major policy reasons for eliminating slavery and involuntary servitude.[58]

In the international comparative literature on labor migration policies, many scholars highlight the ability of workers to "exit" as a key indicator of whether the policy can be defended. Exit is the freedom to change jobs in order to find better work opportunities, wages and conditions.[59] In this way, it parallels the discussion of involuntary servitude and the ability to quit in the United States. Zou explains that temporary migrant work programs limit the ability to exit when they include visas that are tied to specific employers, when a migrant must repay large amounts of debt incurred in the visa process before they can leave, and even when the work

[57] Ontiveros, Noncitizen Immigrant Labor, at 928.
[58] M Ontiveros, 'Migrant Labour in the United States Working Beneath the Floor for Free Labour?' in C Costello and M Freedland (eds), *Migrants at Work* (Oxford, Oxford University Press, 2014) 180, 191.
[59]AO Hirschman, *Exit, Voice and Loyalty* (Harvard University Press 1970).

alternatives available in the migrant's home country are severely limited.[60] She argues that the provision of exit (as well as voice) provide a normative platform to address the most problematic features of temporary migrant work programs. This approach to exit can be applied to critique the programs in the United States.

B. Deprivation of Citizenship, Limitations on Workplace Protest and Voice

Since slaves were not considered human beings or citizens, they were unable to advocate for better workplace conditions through the courts or the political process. They were also excluded from collective action and were unable to participate in workplace protests, out of fear of physical punishment. As noncitizen immigrant workers, agricultural workers were also unable to participate in the political process. Efforts to organize or improve their workplace conditions were restricted by law and often led to their deportation.

Vestiges of these limitations exist today in the experiences of current authorized and unauthorized workers. As non-citizens without the legal right to be in the US, the ability of unauthorized workers to protest in court or at the workplace is severely constrained because they fear deportation. Further, they have limited incentives to protest because their remedies are limited by the *Hoffman* decision. Authorized visa workers are also constrained in their willingness to complain because, as one commentator explained, H-1B "visa 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."[61] Since both these types of

[60] M Zou, 'Beyond 'Numbers and Rights': Expanding Exit and Voice in Temporary Migrant Workers Programmes' in B Ryan (Complete citation).

[61] TH Goodsell, 'On the Continued Need for H-1B Reform: A Partial, Statutory Suggestion to Protect Foreign and US Workers' (2007) 21 *Brigham Young University Journal of Public Law*, 153, 172.

workers lack citizenship rights, they cannot influence society through the political process and end up vulnerable to the political process and the power exercised by other interest groups that can and do influence the political agenda and public policy.[62]

In the international comparative literature, the concept of voice represents the ability to speak up in order to try to make change in an organization.[63] Within the workplace, voice takes the form of using individual and collective, formal and informal channels including collective bargaining and internal grievance procedures.[64] It may also take the form of filing lawsuits or being a whistle blower.[65] Voice is most effective when it is exercised collectively and may only be effective when effective enforcement mechanisms exist to react to the complaints. Zou argues that provision of an effective voice mechanism, coupled with exit opportunities, can ensure that temporary migrant work programs adequately protect migrant workers. In the United States, the requirement for voice can only be met if non-citizen immigrant workers are given the ability to influence the political process, the ability to fully participate in workplace protests including the ability to file lawsuits, and the ability to have these protections effectively enforced.

C. Ownership of Labour and Access to Labour Markets

The guest worker visa rules also echo the type of ownership and control of a another person's labor that was found in the antebellum slave codes. The company that applies for and is awarded a visa owns and controls the labor of the person that it hires to fill the visa. It *exclusively* controls when, where, for who and for how much the immigrant can work. If the immigrant

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[62] S Underwood, 'Achieving the American Daydream: The Social, Economic, and Political Inequalities Experienced by Temporary Workers Under the H-1B Visa Program' (2001) 15 *Georgetown Immigration Law Journal* 727, 740.
[63] Hirschman at 30.
[64] Zou
[65] I Solanke, 'Black Women Workers and Discrimination' in C Costello and M Freedland (eds), *Migrants at Work* (Oxford, Oxford University Press, 2014) 306-309.

refuses that work, he or she must leave the country. 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. The company also controls the amount of money earned by the immigrant, as well as whether a company may reassign or sublease the employee. 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.[66]

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. 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. 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 at other employers at the same time. Neither an employer nor a temporary agency owns or controls the labor of the employee outside of immediate work relationship.

[66] Maria L. Ontiveros, H-1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers, 14 Berk. J. Emp. Lab. Law 1, 26 (2017).

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 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.

Other countries must also address the extent to which international migrants have free access to the labor market. Within the EU, free mobility of labor should assure that workers have full access to labor markets. On the other hand, posted workers may not have access to labor markets in other countries outside of their work assignment. Similarly, service providers who bring a workforce to another country might limit the ability of workers to access the labor market. So-called ghost enterprises and staffing agencies present similar problems. The issue that must be explored in these situations is the extent to which access to the free labor market can be limited before the situations becomes oppressive or a system of unfree, slavery-like labor.

Conclusion

Compared to many other countries, the United States has a very large non-citizen immigrant workforce that includes both authorized and unauthorized workers. This large number is not surprising because the US has a long history of using non-citizen immigrant workers. Starting with chattel slavery and continuing with a series of other immigration programs, the non-citizen workers have labored in a disadvantaged and exploitive conditions. This chapter has shown how the current limitations and exploitive conditions faced by non-citizen immigrant workers in the US echo the very same limitations that defined the unfree labor situations of chattel slaves, blacks workers in the American south and agricultural workers. A comparison with the theories of exit, voice and access to labor markets show that the issues raised in this

chapter that apply to the non-citizen workers in the US also apply to temporary migrant worker programs studied throughout the world.