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FREEDOM OF CHOICE IN PERSONAL SERVICE OCCUPATIONS: THIRTEENTH AMENDMENT LIMITATIONS ON ANTIDISCRIMINATION LEGISLATION

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Antidiscrimination Legislation in Personal Services

A majority of the states now has laws forbidding discrimination based on race, creed, color, or national origin in "places of public accommodation."[1] While statutory definitions vary widely, most states include in the definition of "places of public accommodation" one or more forms of personal service occupations. Probably the personal service most often singled out is barbering,[2] although a number of statutes have been broadened to include almost every service imaginable.[3]

Cases in the courts involving antidiscrimination legislation as applied to personal service occupations have been few and far between. Several cases have exempted such occupations from the scope of the statute by strict construction,[4] but others have included them within the ambit of

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1 Alaska Stat. § 11.60.230 (Supp. 1962); Cal. Civ. Code § 51; Colo. Rev. Stat. Ann. § 25-1-1 (1953); Conn. Gen. Stat. Rev. § 53-35 (1958); Idaho Code Ann. § 18-7301 (Supp. 1963); Ill. Rev. Stat. ch. 38, § 125 (1961); Ind. Ann. Stat. § 10-901 (1956); Iowa Code § 735.1 (1962); Kan. Gen. Stat. Ann. 21-2424 (Supp. 1961); Me. Rev. Stat. Ann. ch. 137, § 50 (1954); Mass. Gen. Laws Ann. ch. 272, § 92A (1956); Mich. Comp. Laws § 28.343 (Supp. 1962); Minn. Stat. § 327.09 (1961); Mont. Rev. Codes Ann. § 64-211 (1947); Neb. Rev. Stat. § 20-101 (1962); N.H. Rev. Stat. Ann. § 354:1 (1961); N.J. Rev. Stat. §§ 10:1-5, 18:25-5 (Supp. 1960); N.M. Stat. Ann. § 49-8-1 (1962); N.Y. Civ. Rights Law § 40; N.Y. Executive Law § 296; N.D. Cent. Code § 12-22-30 (Supp. 1963); Ohio Rev. Code Ann. § 2901.35 (Page 1961); Ore. Rev. Stat. § 30.670 (1961); Pa. Stat. Ann. tit. 18, § 4654 (1961); Pa. Stat. Ann. tit. 43, § 951 (Supp. 1963); R.I. Gen. Laws Ann. § 11-24-1 (1956); Vt. Stat. Ann. tit. 13, § 1451 (1959); Wash. Rev. Code § 9.91.010 (1961); Wisc. Stat. § 942.04 (1961); Wyo. Stat. Ann. § 6-83.1 (1961). In addition, Nev. Rev. Stat. § 233.010 (1961) and W. Va. Code Ann. § 265(156) (1961) have hortatory, but noncoercive, provisions.

2 Alaska, California, Colorado, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, and Wisconsin mention barbershops specifically.

3 California, Connecticut, Idaho, Massachusetts, New York, Oregon, Vermont, and Washington have very broad statutes which include almost every conceivable personal service occupation. See, for example, Burks v. Poppy Constr. Co., 57 Cal. 2d 463, 320 P.2d 313, 20 Cal. Rpt. 609 (1962). In addition, a New York State Board of Regents rule now requires the various medical and other professions licensed by it not to discriminate in serving patients on pain of loss of license to practice. N.Y. Times, Oct. 29, 1962, p. 29, col. 2; id., Oct. 27, 1962, p. 27, col. 1.

4 Coleman v. Middlestaff, 147 Cal. App. 2d 833, 305 P.2d 1020 (Super. Ct. 1957) (dentist); Faulkner v. Solazzi, 79 Conn. 541, 65 Atl. 947 (1907) (barber); Burks v. Bosso, 180 N.Y. 341, 73 N.E. 58 (1905) (bootblack); Rice v. Rinaldo, 119 N.E.2d 657 (Ohio Ct. App. 1951).

the law.[5] However, as already noted, the lengthening statutory lists of occupations or the sweeping statutory terminology no doubt includes such occupations in an increasing number of states.

State Comm'n Against Discrimination v. Mustachio[6] is a typical case involving a barber shop. There, the Commission found that respondent had attempted to discourage Negro patronage of his barber shop by posting a sign saying: "Kinky Haircut—$5," and by attempting to charge a Negro that price, which the Commission found was a "prohibitive price far in excess of respondent's usual charge for cutting a white person's hair." It ordered, *inter alia*, that the respondent barber write to the complainant "offering to cut her son's hair at the regular rate charged by respondent for cutting a white person's hair." It also ordered him to "furnish to Negro customers services of the same quality as those furnished to white customers and at the same rates."

The intent of this order is clear. It requires the respondent, a barber, to work for a person and a group of persons whom he clearly does not want to work for, upon pain of imprisonment if he refuses to do so.[7] He is thus required to serve, involuntarily, the complainant and other Negro applicants.

A statute which requires one person to render involuntary service to another immediately raises the question of its constitutionality under the thirteenth amendment. Surprisingly, with the exception of one brief discussion in a dissenting opinion,[8] no case has ever discussed this question. Although there are a number of cases which have held antidiscrimination legislation constitutional under the fourteenth amendment,[9] no decision has dealt with this matter under the far more specific provisions of the thirteenth amendment.

Yet the thirteenth amendment would seem to apply far more directly to antidiscrimination legislation in the rendition of personal services. Whatever the vague contours of the phrase "nor shall any State deprive any person of . . . liberty or property, without due process of law" as found in the fourteenth amendment may mean, the thirteenth amendment

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[5] Darius v. Apostolos, 68 Colo. 323, 190 Pac. 510 (1919) (bootblack); Messenger v. State, 25 Neb. 674, 41 N.W. 638 (1889) (barber); Browning v. Slenderella Systems, 54 Wash. 2d 440, 341 P.2d 859 (1959) (beauty salon); Washington State Bd. Against Discrimination v. Interlake Realty, Inc., 7 Race Rel. L. Rep. 555 (Wash. Super Ct. 1962) (real estate broker).

[6] 6 Race Rel. L. Rep. 355 (1961), enforced, Index No. 4552-1961, Sup. Ct. Nassau County, May 16, 1961.

[7] Note, 74 Harv. L. Rev. 526, 555 (1961); see People ex rel. N.Y. State Comm'n Against Discrimination v. Ackley-Maynes Co., 4 Race Rel. L. Rep. 358 (N.Y. Sup. Ct. Albany County 1959) where refusal to obey a court order enforcing the Commission's order was punished by fine and imprisonment.

[8] Browning v. Slenderella Systems, supra note 5; see State v. Banwari, [1951] All India Rep. All. 615 (Div. Ct.).

[9] Annot., 49 A.L.R. 505 (1927).

is quite specific: "Neither slavery nor *involuntary servitude* . . . shall exist within the United States . . . ." (Emphasis added.) This article will explore the meaning of the term "involuntary servitude," and its application to personal service occupations.

Pre-Civil War Provisions in the Northwest

The words "involuntary servitude" first appear in the Northwest Ordinance of 1787. The relevant provision is as follows:

> There shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted . . . .[10]

As each of the areas of the territory emerged into a state, it copied this provision into its state constitution in very similar language. Thus, the provision is found in the pre-Civil War constitutions of Ohio,[11] Indiana,[12] Illinois,[13] and Michigan.[14]

The Ohio Constitution of 1802 contained an additional provision immediately beneath the wording from the Northwest Ordinance. It stated:

> Nor shall any person, arrived at the age of twenty-one years, or female person arrived at the age of eighteen years, be held to serve any person as a servant, under the pretence of indenture or otherwise, unless such person shall enter into such indenture while in a state of perfect freedom, and on a condition of a bona fide consideration received or to be received for their service, except as before excepted. Nor shall any indenture of any Negro or Mulatto hereafter made and executed out of the state, or if made in the state where the term of service exceeds one year, be of the least validity, except those given in the case of apprenticeships.[15]

This provision, copied into the Illinois Constitution in almost identical language,[16] is of considerable significance. Not only does this provision contain the typical requirement that contracts of service be by indenture to bind the servant,[17] but in addition it requires that contracts of service

[10] Northwest Ordinance of 1787, art. 6. It might be noted that the common-law roots against involuntary servitude in England long antedated the Northwest Ordinance, and even Sommersett's Case, 20 How. St. Tri. 1 (Eng. K.B. 1772) which held slavery to be illegal in England. As early as Foster v. Jackson, 1 Hob. 52, 80 Eng. Rep. 201 (K.B. 1615) it was said that a free person could not contract away his liberty. See Shanley v. Harvey, 2 Eden 126, 28 Eng. Rep. 844 (Ch. 1762); Smith v. Brown, 2 Salk. 666, 91 Eng. Rep. 566 (K.B. 1705); Chamberlain v. Harvey, 1 Ld. Raym. 146, 91 Eng. Rep. 994 (K.B. 1694). But see Pearne v. Lisle, 1 Amb. 75, 27 Eng. Rep. 47 (Ch. 1749). See also King v. Inhabitants of Stowmarket, 9 East 211, 103 Eng. Rep. 553 (K.B. 1808).

[11] Ohio Const. art. VIII, § 2 (1802); Ohio Const. art. I, § 6 (1851).

[12] Ind. Const. art. 11, § 7 (1816); Ind. Const. art. 1, § 37 (1857).

[13] Ill. Const. art. VI, § 1 (1818); Ill. Const. art. XIII, § 16 (1848).

[14] Mich. Const. art. XI, § 1 (1835); Mich. Const. art. XVIII, § 11 (1850); accord, Iowa Const. art. I, § 23 (1846, 1857); Minn. Const. art. I, § 2 (1857); Wis. Const. art. I, § 2 (1848) contain similar provisions.

[15] Ohio Const. art. VHI, § 2 (1802).

[16] Ill. Const. art. VI, § 1 (1818).

[17] Overseers of Poor of Hopewell Township v. Overseers of Poor of Amwell Township, 6 N.J.L. 169, 175 (Sup. Ct. 1822); Commonwealth ex rel. Ruggles v. Wilbank, 10 S. & R.

be voluntarily entered into and for a valuable consideration. As further protection for Negroes, except in the case of minors whose apprenticeship was automatically longer than one year, the maximum period permitted for contracts of personal service was a year. Thus, the provision sought to assure, by a variety of safeguards, that labor contracts were made in a perfectly voluntary fashion and without coercion or imposition of any kind.

Two decisions interpreting the foregoing provisions are of particular note. In *Phoebe v. Jay*[18] the Illinois Supreme Court had before it a statute which permitted the owner of a slave over fifteen years old to bring the slave into Illinois, upon condition that he and the slave should come before the court clerk and agree upon the term of years which the Negro or mulatto would work for him. However, the statute also provided that if the Negro or mulatto refused to agree to work for his owner, the latter may take him back into slave territory. The court held that this statute violated the Northwest Ordinance. It said:

> Nothing can be conceived farther from the truth, than the idea that there could be a voluntary contract between the negro and his master. The law authorizes his master to bring his slave here, and take him before the clerk, and if the negro will not agree to the terms proposed by the master, he is authorized to remove him to his original place of servitude. I conceive that it would be an insult to common sense to contend that the negro, under the circumstances in which he was placed, had any free agency. The only choice given him was a choice of evils. On either hand, servitude was to be his lot. The terms proposed were, slavery for a period of years, generally extending beyond the probable duration of his life, or a return to perpetual slavery in the place from whence he was brought. The indenturing was in effect an involuntary servitude for a period of years, and was void, being in violation of the ordinance . . . .[19]

Matter of Clark[20] is even stronger. In that case, it was undisputed that the petitioner had freely and voluntarily entered into a contract to serve her master as a house maid. Later, she changed her mind, and brought an action for habeas corpus to free herself from her master's service. Notwithstanding the clear fact that she had initially entered into the contract voluntarily, the Indiana Supreme Court held that "the appellant is in a state of involuntary servitude; and we are bound by the constitution, the supreme law of the land, to discharge her therefrom."[21]

First, it might be noted that the court disregarded the fact that the petitioner was colored, and decided the case on general principles. It

416-17 (Pa. Sup. Ct. 1823). This provision was designed to add solemnity to the obligation of service and thereby to protect the servant against hasty agreements to serve.

18 1 Ill. 268 (1828).

19 Id. at 270.

20 1 Blackf. 134 (Ind. Sup. Ct. 1821).

21 Id. at 126.

went on to point out that compulsion by law for the performance of personal service was degrading. It stated:

> Many covenants, the breaches of which are only remunerated in damages, might be specifically performed, either by a third person at a distance from the adversary, or in a short space of time. But a covenant for service, if performed at all, must be performed under the eye of the master; and might, as in the case before us, require a number of years. Such a performance, if enforced by law, would produce a state of servitude as degrading and demoralizing in its consequences, as a state of absolute slavery; and if enforced under a government like ours, which acknowledges a personal equality, would be productive of a state of feeling more discordant and irritating than slavery itself.[22]

Moreover, the court pointed out that whenever a court compelled a person to perform service, "the losing party feels mortified and degraded in being compelled to perform for the other what he had previously refused, and the more especially if that performance will place him frequently in the presence or under the direction of his adversary."[23] Thus, "if a man, contracting to labor for another a day, a month, a year, or a series of years, were . . . compelled to perform the labor, it would . . . produce in their performance a state of domination in the one party, and abject humiliation in the other . . . . A state of servitude thus produced, either by direct or permissive coercion, would not be considered voluntary either in fact or in law."[24]

From the above two cases, it can be seen that the words "involuntary servitude," as found in the Northwest Ordinance, and incorporated into the state constitutions of Illinois, Indiana, Michigan, and Ohio, have their ordinary and natural meaning. They mean service or labor which is not, at all times, performed voluntarily, and without any legal or other compulsion. The agreement to serve must be entered into without coercion, and must be completed without coercion. The provision, in short, banned any sanctions which compelled one person to work for another, for however short a period of time.

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[22] Id. at 124-25. In England also, specific performance cannot be obtained to compel an employee to work, although the older cases do not rely on freedom of choice concepts. See, e.g., Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416. However, Kahn-Freund, Legal Framework 46-47 in "The System of Industrial Relations in Great Britain" (Flanders & Clegg ed. 1954) declares:

> It goes without saying that this freedom of choice is often set at nought by economic facts. Even so, it is one of the essential civil liberties of this country. One secondary but important rule resulting from the principle against compulsory labour is that a contract of employment cannot be enforced by what is known as a decree of specific performance. If the employee absents himself or purports to terminate the employment without the requisite notice, the employer may from the court obtain a judgment for damages, but he cannot, through an order of the court, compel the worker to work for him. Nor can the employee compel the employer to employ him. No one has the legal power to compel another man to work for him or to employ him.

[23] Kahn-Freund, supra note 22, at 124.

[24] Id. at 125.

The Passage of the Thirteenth Amendment

The earliest bill to abolish "involuntary servitude," passed by Congress during the Civil War period, was an act relating to the District of Columbia,[25] which abolished slavery in the District.[26] This bill provided that "neither slavery nor involuntary servitude, except for crime, whereof the party shall have been duly convicted, shall hereafter exist in said District."[27] These words were substituted for "subjection to service or labor proceeding from such cause [*i.e.*, by reason of African descent] shall not hereafter exist in said District."[28]

Senator Ira Harris of New York offered the criticism that the bill provided that " 'neither slavery nor involuntary servitude' shall exist here, as though they were two distinct things. I suppose, but I am not sure about it, that up to this time the term 'slavery' has not been introduced into the legislation of the country." Senator Lot M. Morrill, the Maine Republican who drafted the substitution for the Committee on the District of Columbia, replied that "this is the exact language of the ordinance of 1787." Senator Harris renewed his objection. He argued: "I have a further suggestion to make, and that is that the term 'involuntary servitude' will embrace the condition of apprentices, unless the phrase 'by reason of African descent' in the beginning of the section shall control, as perhaps it will."[29]

Senator Jacob Collomer of Vermont replied to this: "the phrase 'slavery or involuntary servitude' has received a construction under the ordinance of 1787."[30] Aside from another comment that this bill enacted the Northwest Ordinance[31] in the Senate, and a futile plea to extend the bill to cover "white persons who are enslaved" in the territories,[32] nothing more was said which was relevant.

Section 9 of the "Confiscation Bill,"[33] as enacted into law, declared that slaves of rebels "shall be forever free of their servitude and not again held as slaves."[34] Here again, the Northwest Ordinance was considered a model. Congressman Samuel S. Blair of Pennsylvania stated: "the ordinance of 1787 was, indeed, great, for it preserved freedom;

25 Cong. Globe, 37th Cong., 2d Sess. 89 (1862).
26 Act of April 16, 1862, ch. 54, § 1, 12 Stat. 376.
27 Cong. Globe, 37th Cong., 2d Sess. 1191 (1862).
28 Ibid.
29 Ibid.
30 Ibid.
31 Senator Samuel C. Pomeroy of Kansas said: "the first section of the bill extends over this District the ordinance of 1787; and I think there is no doubt as to the effect of that." He further noted: "I think passing the ordinance of 1787 as provided in the first section of this bill will set the matter at rest . . . ." Id. at 1285.
32 Id. at 1643.
33 Id. at 3275.
34 Act of July 16, 1862, ch. 195, § 9, 12 Stat. 589.

this is greater, for it restores freedom. That kept slavery out; this put it out."[35]

The thirteenth amendment was introduced as a joint resolution (S. J. Res. 16, 38th Cong., 1st Sess. (1864)) in the Senate on January 13, 1864, by Senator John B. Henderson of Missouri,[36] and was reported back from the Committee on the Judiciary, changed in wording to its present form, by Senator Lyman Trumbull of Illinois.[37] The amendment of the Judiciary Committee was agreed to by the Senate.[38]

Senator Charles Sumner of Massachusetts, the equalitarian Radical, criticized the committee for adhering to "the Jeffersonian ordinance." He proposed to amend their draft by striking out the words of the ordinance and substituting: "All persons are equal before the law, so that no person can hold another as a slave."[39] He declared:

> I do not know that I shall have the concurrence of other Senators in the criticism which I make upon it; but I understand that it starts with the idea of reproducing the Jeffersonian ordinance. I doubt the expediency of reproducing that ordinance. It performed an excellent work in its day; but there are words in it which are entirely inapplicable to our time.[40]

Sumner's main objection was to the words "nor involuntary servitude otherwise than in the punishment of crimes whereof the party shall have been duly convicted." He commented that at one time it was the custom to doom criminals as slaves for life as a punishment, but that "slavery in our day is something distinct, perfectly well known, requiring no words of distinction outside of itself." He contended that the discussion of involuntary servitude was surplusage and would "introduce a doubt."

Sumner also had some grammatical quibbles which he argued were not to be found in the Northwest Ordinance. These did not appeal to the other members.[41] Trumbull showed his irritation at Sumner's rejection of the committee language, saying:

> I do not know that I should have adopted these precise words, but a majority of the committee thought they were the best words; they accomplish the object; and I cannot see why the Senator from Massachusetts should be so pertinacious about particular words. The words that we have adopted will accomplish the object. If every member of the Senate is to select the precise words in which a law shall be clothed, and will be satisfied with none other, we shall have very little legislation.[42]

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35 Cong. Globe, 37th Cong., 2d Sess. 2298 (1862).
36 Cong. Globe, 38th Cong., 1st Sess. 145 (1864).
37 Id. at 553.
38 Id. at 1447.
39 Id. at 1483, 1487.
40 Id. at 1488.
41 At one point Senator James R. Doolittle of Wisconsin contradicted him and declared: "they are both in the Jeffersonian ordinance." Ibid.
42 Ibid.

Trumbull sneered at Sumner's attempt to copy language from the French Revolution, and declined to alter the committee's version which it had agreed on. Senator Jacob M. Howard of Michigan joined the barrage against Sumner by declaring that the language was legally meaningless, and inapplicable as well. After noting that the French Constitution was meant only to equalize political rights, he declared:

> Now, sir, I wish as much as the Senator from Massachusetts in making this amendment to use significant language, language that cannot be mistaken or misunderstood; but I prefer to dismiss all reference to French constitutions or French codes, and go back to the good old Anglo-Saxon language employed by our fathers in the ordinance of 1787, an expression which has been adjudicated upon repeatedly, which is perfectly well understood both by the public and by judicial tribunals, a phrase, I may say further, which is peculiarly near and dear to the people of the Northwestern Territory, from whose soil slavery was excluded by it. I think it is well understood, well comprehended by the people of the United States, and that no court of justice, no magistrate, no person, old or young, can misapprehend the meaning and effect of that clear, brief, and comprehensive clause. I hope we shall stand by the report of the committee.[43]

Upon this, Sumner withdrew his amendment, and the joint resolution passed the Senate on April 8, 1864.[44]

The joint resolution had a more difficult time in the House. There it was introduced by Congressman James F. Wilson of Iowa, Chairman of the House Judiciary Committee, on December 14, 1863.[45] When it came to a final vote on June 15, 1864, it received only ninety-three yeas to sixty-five nays, and failed for want of a two-thirds majority.[46] However, after the November elections in which Lincoln was reelected and the Republicans were victorious, the second session of the Thirty-Eighth Congress met in the winter of that year. At that time, Congressman James M. Ashley of Ohio, who had originally voted in the negative, moved to reconsider the vote.[47] On January 31, 1865, almost at the close of the war, the measure passed the House by 119 yea to fifty-six nay.[48]

Debates in the House were largely confined to generalities on the evils of slavery by those who proposed to abolish it, and states' rights by those who opposed the amendment. There were only passing references to the word "servitude."[49] One opponent of the amendment declared that there

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[43] Id. at 1489.
[44] Id. at 1490.
[45] Id. at 21.
[46] Id. at 2995.
[47] Cong. Globe, 38th Cong., 2d Sess. 53 (1864).
[48] Id. at 531.
[49] For example, Congressman Thomas T. Davis of New York declared that "this war sprang from the aristocracy of the South in an effort to maintain a system of servitude on which alone that aristocracy could be perpetuated." Id. at 154. Congressman George H. Yeaman of Kentucky stated that "slavery is the idea of the right of one to claim, and the duty of another to render, involuntary service." Id. at 171; see id. at 190, 200.

could be property in the service of others, if state law so provided, a position rejected by a proponent.[50] Another declared that "in any form of civilization resembling our own, servitude will always exist." He stated that servitudes merely differed in degree, and that the poor English factory workers were in "bondage" and had "little to boast of [their] freedom." Stating that the "freedom of a British working man consists in a limited liberty to change his employer," he went on to proclaim that such a condition was little better than slavery.[51] However, no one seems to have paid much attention to this line of argument on the other side.

It is clear from the foregoing materials that Congress intended to enact the provisions of the Northwest Ordinance, familiar to so many Senators as part of the constitutions of their own states, into the thirteenth amendment. It is equally clear that the judicial interpretations of that ordinance, discussed above, were intended to be carried along with the language of the ordinance itself into the United States Constitution. Senator Sumner proposed to declare all men equal, but Congress rejected this. Instead of enacting equality, it enacted liberty.

The Right To Refrain From Work

The "involuntary servitude" forbidden by the thirteenth amendment applies only to the rendition of personal labor.[52] The performance of impersonal acts, such as giving instructions to a subordinate agent to take certain action, does not fall within the ambit of the amendment.[53] While labor enforced as a punishment "is in the strongest sense of the words, 'involuntary servitude,' "[54] the term includes enforced labor which is not intended for punitive purposes,[55] and which may even be intended as a benefit.[56]

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[50] Id. at 214-15 (exchange between Congressman Chilton A. White of Ohio and Congressman John F. Farnsworth of Illinois).

[51] Id. at 177-78 (Congressman Elijah Ward of New York).

[52] Slaughter House Cases, 83 U.S. (16 Wall.) 36, 69 (1873).

[53] In Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 199 (1921) Mr. Justice Holmes said:

> It is objected finally that c. 951, above stated, in so far as it required active services to be rendered to the tenants, is void on the rather singular ground that it infringes the Thirteenth Amendment. It is true that the traditions of our law are opposed to compelling a man to perform strictly personal services against his will even when he has contracted to render them. But the services in question although involving some activities are so far from personal that they constitute the universal and necessary incidents of modern apartment houses. They are analogous to the services that in the old law might issue out of or be attached to land. We perceive no additional difficulties in this statute, if applicable as assumed.

[54] Ex parte Wilson, 114 U.S. 417, 429 (1885); accord, Flannagan v. Jopson, 177 Iowa 393, 158 N.W. 641 (1916); Smolcyzk v. Gaston, 147 Neb. 681, 24 N.W.2d 862 (1946); see Thompson v. Bunton, 117 Mo. 83, 22 S.W. 863 (1893) where a person's services were sold to the highest bidder.

[55] United States v. McClellan, 127 Fed. 971 (S.D. Ga. 1904); Matter of Chung Fat, 96 Fed. 202 (D. Wash. 1899).

[56] Matter of Turner, 24 Fed. Cas. 337 (No. 14247) (C.C. Md. 1867).

Nor does it matter whether a person is compensated for his labor. One case held:

> Whether appellant was to be paid much, or little or nothing, is not the question. It is not uncompensated service, but involuntary servitude which is prohibited by the Thirteenth Amendment. Compensation for service may cause consent, but unless it does it is no justification for forced labor.[57]

Thus, the term "involuntary servitude" has been defined as "the condition of one who is compelled by force, coercion or imprisonment and against his will to labor for another whether he is paid or not."[58] The constitutional provision accordingly gives every person the right to refrain from performing services for every other person.

To the right to refrain from work there is one well-recognized exception. Government may command the services of everyone in the performance of its essential tasks. In *Butler v. Perry*[59] the United States Supreme Court said the following about the thirteenth amendment:

> It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as service in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential services.[60]

The most common example of involuntary service for the Government is military service[61] in all of its aspects.[62] In lieu of actual military service, Congress has required that conscientious objectors do work of national importance, and the courts have found this to be constitutionally unobjectionable.[63] Often, such work of national importance includes activities not directly beneficial to any particular individual, and under the direct jurisdiction of the federal government, such as soil conservation, forestry, tree planting, construction of fire towers and roads, and similar public activities.[64] Such work, however, may fall under the jurisdiction

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[57] Heflin v. Sanford, 142 F.2d 798, 799 (5th Cir. 1944); accord, [1953] All India Rep. H.P. 18.

[58] Crews v. Lundquist, 361 Ill. 193, 200, 197 N.E. 768, 772 (1935).

[59] 240 U.S. 328 (1916).

[60] Id. at 333. India followed this view in drafting Article 23(2) of the 1949 constitution. See Budhia v. State of Bihar, [1952] All Indian Rep. Pat. 359, 31 Indian L.R. Pat. Ser. 493.

[61] Selective Draft Law Cases, 245 U.S. 366 (1918); United States v. Sugar, 243 Fed. 423 (E.D. Mich. 1917).

[62] Bertelsen v. Cooney, 213 F.2d 275 (5th Cir. 1954).

[63] Reese v. United States, 225 F.2d 766 (9th Cir. 1955); Atherton v. United States, 176 F.2d 835 (9th Cir. 1949); Hopper v. United States, 142 F.2d 181 (9th Cir. 1943); United States v. Brooks, 54 F. Supp. 995 (S.D.N.Y. 1944), aff'd, 147 F.2d 134 (2d Cir.), cert. denied, 324 U.S. 878 (1945); United States ex rel. Zucker v. Oshorne, 54 F. Supp. 984 (W.D.N.Y. 1944), aff'd, 147 F.2d 135 (2d Cir.), cert. denied, 325 U.S. 881 (1945).

[64] Wolfe v. United States, 149 F.2d 391 (6th Cir. 1945); United States v. Smith, 124 F. Supp. 406 (E.D. Ill. 1954).

of a state or local government agency, on the theory that they also perform activities of national concern.[65]

One activity, which may be questioned, is work in hospitals, which the courts have upheld for conscientious objectors in lieu of military service.[66] This has even been extended as far as work in private, nonsectarian university hospitals ministering to the public.[67] Here, some of the work might be said to confer some direct benefits on individuals, as distinguished from the community as a whole. If a person were required to work for the benefit of particular individuals, as distinguished from the community, then such work would constitute involuntary servitude.

The cases, however, carefully limit such work to service for community benefit only. As one case held:

> It is of no moment under whose direction the work is done. If it aids in our preparedness, civilian service is not open to challenge as involuntary servitude. We need only state the analogy sought to be drawn between the work to which these defendants were assigned and assignment to Macy's basement to demonstrate that the analogy in fact does not exist.[68]

Moreover, civilian service by conscientious objectors is designed to free others for military service, and to protect morale and preserve discipline in the armed forces.[69] If persons could escape any form of service by claiming conscientious objection, many would be found to do

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[65] Klubnikin v. United States, 227 F.2d 87 (9th Cir. 1955); see United State v. Niles, 122 F. Supp. 382, 384 (N.D. Calif. 1954), aff'd, 220 F.2d 278 (9th Cir.), cert. denied, 349 U.S. 939 (1955) where the lower court said:

> A health program conducted by any political subdivision of this nation contributes to the general welfare of the nation as a whole. The mere fact that such activities are carried out in the name of a political subdivision of the state or county rather than in the name of the United States itself, does not diminish the importance of the work, or cause it to lose its contributory relationship to the national health.
>
> . . . .
>
> . . . . Certainly national defense and preparedness is accomplished by more than the strength of arms alone.

[66] Klubnikin v. United States, supra note 65; see United States v. Lebherz, 129 F. Supp. 444 (D.N.J. 1955); United States v. Sutter, 127 F. Supp. 109 (S.D. Calif. 1954).

[67] United States v. Hoepker, 223 F.2d 921, 922-23 (7th Cir.), cert. denied, 350 U.S. 841 (1955) where the court said:

> Congress has declared that maintenance of the mental and physical health of our population is a subject of vital federal concern in times of emergency. . . . The protection of the public health is no less work of national importance whether it is done in an institution controlled by federal or by state authorities or by a private charitable corporation.
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> The evidence is conclusive that the University of Chicago is a nonsectarian, nonprofit corporation, and that its clinics, to which Thomas was ordered to report for work, minister, on a charitable basis, indiscriminately, to alleviate the physical ills of the general public. In addition to that activity, these clinics, aided by grants of federal funds, carry on extensive research in cancer and other diseases. We hold that this is work of "national" importance which the Act authorized.

[68] United States v. Hoepker, supra note 67, at 923.

[69] Howze v. United States, 272 F.2d 146 (9th Cir. 1959); United States v. Smith, supra note 64.

so who in fact had no such scruples. As a result, dissatisfaction among military personnel would become rife. However, even such service must be designed to benefit the community as a whole or it will constitute involuntary servitude.

Certain other civilian work for the Government has been upheld, even in time of peace. Labor on the public highways is not "involuntary servitude,"[70] nor is jury duty, nor the requirement that abutting owners remove snow and ice from sidewalks and gutters.[71] Government may impose the duty of making reports to public authorities,[72] including tax reporting.[73] It may require individuals to collect taxes for it,[74] and to perform other occasional duties.[75]

Nongovernmental duties may be imposed only in the most exceptional circumstances. One case held that involuntary servitude was not imposed by the requirement that a man work to support his family.[76] Noting that these were "services always treated as exceptional," the court held that "the obligation of a husband and father to maintain his family, if in any way able to do so, is one of the primary responsibilities established by human nature and by civilized society."[77]

Of course, this case does not hold that the husband is required to perform any particular kind of work to support his family. He may choose any work and any employer, if able. But if nothing else presents itself, he must work at what he can get. This requirement is based on two special circumstances. Firstly, he has voluntarily undertaken the obligation of raising a family. Secondly, no one else exists who can support his family. Thus, there is a special condition and obligation which imposes on him the duty of working.

In *Ule v. State*[78] the Indiana Supreme Court held that a state may require a motorist who has struck and injured another person on the highway with his automobile to stop and render assistance to the injured party. The court declared that this was not involuntary servitude because it is a duty owed to the state and because an automobile is a

[70] Butler v. Perry, 240 U.S. 328 (1916); Matter of Dassler, 35 Kan. 684, 12 Pac. 130 (1886).

[71] State ex rel. Curtis v. City of Topeka, 36 Kan. 76, 12 Pac. 310 (1886).

[72] Schick v. City of New Orleans, 49 F.2d 870 (5th Cir.), cert. denied, 284 U.S. 656 (1931).

[73] Porth v. Broderick, 214 F.2d 925 (10th Cir. 1954).

[74] State ex rel. Arn v. State Comm'n of Revenue & Taxation, 163 Kan. 240, 181 P.2d 532 (1947); see Budhia v. State of Bihar, [1952] All India Rep. Pat. 359, 31 Indian L.R. Pat. Ser. 493.

[75] Crews v. Lundquist, 361 Ill. 193, 197 N.E. 768 (1935).

[76] Commonwealth v. Pouliot, 292 Mass. 229, 198 N.E. 256 (1935).

[77] Id. at 231-32, 198 N.E. at 257.

[78] 208 Ind. 255, 194 N.E. 140 (1935).

dangerous instrumentality, and since a state may prohibit it, it may annex reasonable conditions to its use.

The first reason is unsatisfactory, since every duty imposed by a state does not become a duty owed to the state. The duty is clearly owed to the injured motorist or pedestrian. The second reason is more persuasive since a state may undertake to lessen the hazards of driving by imposing upon the driver the duty to assist one injured by his actions.

In terms of the constitutional prohibition against involuntary servitude, the most persuasive rationale for this exception is the special connection between the injured party and the one who has injured him. In an isolated area, no other assistance may be available. The state may reasonably act to save the lives and protect the health of its citizens, and where it cannot otherwise do so, it may impose this duty on one who, by his voluntary act in driving, has been the cause of the injury. Involuntary servitude is not imposed by requiring one to repair a wrong he has inflicted. He is the most appropriate person for the duty, performance of which is vital to life or health. While his service may not be willing, he is simply required to preserve that which he has jeopardized.

Two other cases are worthy of note. A lower Delaware court has held that a state may, as a war measure, mobilize its entire population to raise food and produce supplies.[79] However, the authority of this case is somewhat doubtful in the light of a decision of the Supreme Court of West Virginia holding that a statute which provided that anyone who did not work for thirty-six hours a week at a recognized occupation during World War I and for six months thereafter was guilty of a misdemeanor, was violative of the thirteenth amendment and hence unconstitutional.[80]

Making and serving someone else a hamburger is not work for the government, for one's family, or for a party one has injured. Nor is cutting another's hair, carrying his luggage, shining his shoes, or performing other personal services for him. The thirteenth amendment gives every person the right to refrain from working for any other person. It protects barbers, hotel clerks, shoe-shine men, sales clerks, waiters, and waitresses, just as much as it protects cotton-pickers, field hands, or farm laborers. A waitress can no more be required to wait on all persons who come into her shop without discrimination than can a cotton-picker be required to pick cotton for all who want to hire him, without discrimination. The thirteenth amendment guarantees the right to refrain from work, from all work, from some work, or from work for some people. To coerce personal service is to impose involuntary servitude.

[79] State v. McClure, 30 Del. (7 Boyce) 265, 105 Atl. 712 (Gen. Sess. 1919).
[80] Ex parte Hudgins, 86 W. Va. 526, 103 S.E. 327 (1920).

The Right To Discontinue Work

The compulsory fulfillment of a contract for personal service, once voluntarily made, would not necessarily seem, on principle, to constitute involuntary servitude. This was, in fact, the rule in the Kingdom of Hawaii, and later the Republic of Hawaii, before joining the Union.[81] The performance of labor contracts, especially on agricultural plantations, was enforced by fine and imprisonment, notwithstanding the prohibition in the Hawaiian Constitution against "involuntary servitude." The rationale of this position was stated as follows:

> A fair and honest contract to work for another, willingly and freely made with a knowledge of the circumstances, cannot be said to have created a condition of involuntary servitude. The contract which creates the state or condition of service, if it is voluntary when made and the conditions and circumstances remain unchanged, except that the mind of the one who serves is now unwilling to fulfill it, is not by that fact changed into a contract of involuntary servitude forbidden by law. If the contract is lawful and constitutional in its inception, it does not become illegal or unconstitutional at the option of one of the parties to it.[82]

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[81] J. Nott & Co. v. Kanahele, 4 Hawaii 14 (1877). This was also the rule in Scotland, a civil law country. The view there was that "the contract [to serve] must he willingly entered into; otherwise it is slavery." Fraser, Master and Servant 3 (3d ed. 1882). Under Roman civil law, which prevails in Scotland, it was generally considered "inconsistent with civil liberty that they [personal service contracts] should be specifically enforced" when not actually begun. Id. at 102. An exception was made, however, in the case of certain workers. In Clerk v. Murchison, Sess. Cas. 9186 (Scot. Sess. Ct. 3d Ser. 1799) it was held that "if a servant enlist after being hired, but before entering to his service, the contract remain in nudis finibus; and being a personal one, the rule prior tempore potior jure will not apply. The master's only remedy is an action of damages against the servant. But after the servant has entered into his employment, the master can enforce the completion of his engagement, remediis pretoriis." In the leading case of Raeburn v. Reid, 3 Sess. Cas. 69 (Scot. Sess. Ct. 1st Ser. 1824) a coal miner deserted, and his employer had him imprisoned. A divided Court of Session held this legal. Lord Gillies, however, dissented, saying that a contract to serve was like any other civil contract, which would only be enforced by damages, and that if a defaulting servant could be imprisoned; so could a defaulting tenant, landlord, or other party to a contract.

The authority of Raeburn v. Reid was reinforced by statute, 4 Geo. 4, c. 34 (1823) (repealed), which was passed while this case was pending and which was enacted as a consequence of discussions arising out of the case. Fraser, supra at 382. The rationale of this rule was that "this, though sometimes a harsh proceeding, is sanctioned [because] . . . a workman, hy deserting, may do great injury to his master, and such as he has not the means of repairing." Anderson v. Moon, 15 Sess. Cas. 412, 414 (Scot. Sess. Ct., 1st Ser. 1837); see Paterson v. Edington, Fac. Coll. 757, 761 (Scot. Sess. Ct. 1830). This rule was followed for a number of ycars. See Cameron v. Murray, 4 Sess. Cas. 547 (Scot. Sess. Ct., 3d Ser. 1866); Hamilton v. Outram, 17 Sess. Cas. 798 (Scot. Sess. Ct., 2d Ser. 1855); Lees v. Grangemouth Coal Co., 18 Jur. 273 (Scot. Sess. Ct. 1846); Anderson v. Moon, supra; Bookless v. Normand, 11 Sess. Cas. 50 (Scot. Sess. Ct., 1st Ser. 1832); Stewart v. Stewart, 10 Sess. Cas. 674 (Scot. Sess. Ct., 1st Ser. 1832); Paterson v. Edington, supra; Campbell v. Anderson, 4 Sess. Cas. 476 (Scot. Sess. Ct., 1st Ser. 1826); Gentle v. M'Lellan, 4 Sess. Cas. 165 (Scot. Sess. Ct., 1st Ser. 1825). Even so, the rule was questioned by Lord Fullerton in Tulkley & Co. v. Anderson, 5 Sess. Cas. 1096 (Scot. Sess. Ct., 2d Ser. 1843) and by Lord Jeffrey in Lees v. Grangemouth Coal Co., supra. Moreover, it was never applied by the Sheriff Courts to professional men or domestic servants. Fraser, supra at 107. The remedy of imprisonment was grcatly modified by the Master & Servant Act of 1867, 30 & 31 Vict., c. 141, § 9 (repealed) and abolished by the Employers & Workmen Act of 1875, 38 & 39 Vict., c. 90, § 9.

[82] Hilo Sugar Co. v. Mioshi, 8 Hawaii 201, 205 (1891); see Madan Mohan Biswas v. Queen-Empress, 19 Indian L.R. Cal. Ser. 572 (1892).

Even in Hawaii, however, it was held than an employer could not assign a labor contract without the consent of the worker,[83] on the theory that the new employer might have a less agreeable personality.[84] Considering the fact that the employer might change his ways during the term of the contract, this reasoning would also support the right of the employee to quit at any time.

This is, in fact, the rule in the United States. Federal statutes have abolished involuntary servitude in liquidation of any debt or obligation, or for any other reason,[85] and have made keeping a person in peonage a crime.[86]

The hallmark of peonage was compulsory service in the payment of a debt.[87] Under this system, "the citizen could sell his own services, and could contract with another for the exercise of dominion thereafter over his person and liberty, so that he could be held or subjected, against his will, to the performance of his 'obligation.'"[88] This practice was most prevalent in the South during the turn of the 20th century, where several state cases held that farm laborers could not be forced to work out advances.[89]

Since the thirteenth amendment, unlike the fourteenth amendment, is not directed exclusively at state action, but applies as well to private action, compulsory labor is unconstitutional even when exacted without benefit of state law.[90] In *Clyatt v. United States*[91] the Supreme Court pointed out why compulsory service was unconstitutional. It stated:

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83 Dreier v. Kuaa, 4 Hawaii 534 (1882); Owners of the Waihee Plantation v. Kalapu, 3 Hawaii 760 (1877). See King v. Inhabitants of Stowmarket, 9 East 211, 103 Eng. Rep. 553 (Eng. K.B. 1808). And in Nokes v. Doncaster Amalgamated Collieries, Ltd., [1940] A.C. 1014, 1020 (Eng.) Viscount Simon, Lord High Chancellor, said: "It will be readily conceded that the result contended for by the respondents in this case would be at complete variance with a fundamental principle of our common law — the principle, namely, that a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve . . . ."

84 See Judd, J., dissenting in J. Nott & Co. v. Kanahele, supra note 81, at 21-22:

> It is no answer to say that one master is as good as another for the laborer, providing he fulfill all the written conditions of his contract, and observe whatever the law commands, doing nothing that is forbidden by it. Men are not cast in the same mold, and so long as differences of disposition and character exist, just so long some masters will be preferred to others, and the laborer, if he is a free man, ought to be allowed to exercise his right of choice.

85 14 Stat. 546 (1867), 42 U.S.C. § 1994 (1958).

86 18 U.S.C. § 1581 (1958).

87 Jaremillo v. Romero, 1 N.M. 190, 194 (1857) stated as follows: "One fact existed universally: all were indebted to their masters. This was the cord by which they seemed bound to their masters' service . . . . He could not abandon the service; and if he did, his master pursued, reclaimed, and reduced him to obedience and labor again . . . ."

88 Peonage Cases, 123 Fed. 671, 679 (M.D. Ala. 1903).

89 Holland v. State, 29 Ala. App. 181, 194 So. 412 (1940); Goode v. Nelson, 73 Fla. 29, 74 So. 17 (1917) (statute making refusal to perform a labor contract a crime held to impose involuntary servitude); Ex parte Hollman, 79 S.C. 9, 60 S.E. 19 (1908) (same). See State ex rel. Hobbs v. Murrell, 170 Tenn. 152, 93 S.W.2d 628 (1936) holding that a person cannot be confined to work out costs even if he had agreed to do so.

90 United States v. Gaskin, 320 U.S. 527 (1944). See Taylor v. Georgia, 315 U.S. 25 (1942).

91 197 U.S. 207 (1905).

> But peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service.[92]

The sweeping scope of the right to cease work is apparent even in labor dispute cases, where the courts frequently enjoin strikes when they are illegal. The theory here is that the cessation of work itself is not being enjoined, but that the illegal combination or conspiracy is the object of the injunction.[93] Thus, the courts enjoin the strike as the means by which the unlawful plan is carried into execution.[94]

Even in labor dispute cases, however, the courts have been careful to refrain from preventing any employee from quitting work of his own volition for any reason. Indeed, the United States Supreme Court appears to have sanctioned the constitutional right of employees to leave work in concert. Thus, in one case in which the Wisconsin Supreme Court proceeded on the "conspiracy theory,"[95] the United States Supreme

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92 Id. at 215-16. See Bailey v. Alabama, 219 U.S. 219, 242 (1911) where the court added:

> The fact that the debtor contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute. . . . It is the compulsion of the service that the statute inhibits, for when that occurs the condition of servitude is created, which would not be less involuntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor.

93 In State v. Local 8-6, Oil Workers Union, 317 S.W.2d 309, 325 (Mo. 1958) the court said: "the section under attack is directed against a strike or concerted refusal to work and has nothing to do with one or more quitting work of their own volition. The section does not have the purpose or effect of imposing involuntary servitude in violation of the Thirteenth Amendment." See Loeal 134, International Bhd. of Elec. Workers v. Western Union Tel. Co., 46 F.2d 736 (7th Cir. 1931).

94 This was clearly pointed out in Western Union Tel. Co. v. Local 134, International Bhd. of Elec. Workers, 2 F.2d 993, 994-95 (N.D. Ill. 1924) where the court said:

> As to clause 1 of the prayer for a temporary injunction it is said that it prevents employees from ceasing to work, and therefore imposes involuntary servitude upon them. The right to cease work is no more an absolute right than is any other right protected by the Constitution. Broadly speaking, of course, one has the right to work for whom he will, to cease work when he wishes, and to be answerable to no one unless he has been guilty of a breach of contract. But the cessation of work may be an affirmative step in an unlawful plan. One may not accept employment intending thereby to quit work when that act will enable him to perform one step in a criminal conspiracy. The real wrong is the acceptance of the employment, with intent to make use of it for a criminal purpose.
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> . . . . That no excuse for misrepresenting the true scope of this injunction may remain, the following should be added: "Nothing herein shall be construed to prohibit any employee from voluntarily ceasing work unless said act is in furtherance of the conspiracy charged in the bill herein to prevent plaintiff from performing its contracts with its customers and to compel plaintiff to discharge employees who are not members of labor unions which are affiliated with said defendants."

95 Local 232, UAW v. Wisconsin Employment Relations Bd., 250 Wis. 550, 562-63, 27 N.W.2d 875, 881 (1947), aff'd, 336 U.S. 245 (1949) said:

Court, in affirming its decree, narrowed the basis for the injunction still further. It said:

> The Union contends that the statute as thus applied violates the Thirteenth Amendment in that it imposes a form of compulsory service or involuntary servitude. However, nothing in the statute or the order makes it a crime to abandon work individually . . . or collectively. Nor does either undertake to prohibit or restrict any employee from leaving the service of the employer, either for reason or without reason, either with or without notice. The facts afford no foundation for the contention that any action of the State has the purpose or effect of imposing any form of involuntary servitude.[96]

From this case, it can be seen that employees have a constitutional right to leave work in concert, as long as such concerted action is not in furtherance of an illegal plan, and in any case, a right to leave work singly. As one court put it: "It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude . . . ."[97]

The right to leave the employ of another does not include the right to engage in action which is likely to result in injury to persons or property damage. When once an employee undertakes a job, he cannot leave at such a point that injury or damage is a natural consequence of his cessation of work. Where there is no such threat, he may leave at any time, but where such a possibility exists, he must either give such notice as will enable the employer to avert the danger, or delay his departure until the danger has passed. One case illustrated this point quite well, as follows:

> It is not contended that leaving the service cannot under any circumstances be made a criminal offense. Doubtless it is competent for legislation to make it a criminal offense for an employé, without giving reasonable notice, to suddenly quit duties the continued performance of which, for the time being, under the conditions of the particular calling, is necessary to prevent the endangering of life, health, or limb, or inflicting other grievous inconvenience and sacrifice upon the public. Surely a train dispatcher, indicted for suddenly leaving the service without giving orders necessary to prevent the clash of opposing trains upon a railroad, could not successfully plead, when destruction of life and property were brought about by his sudden leaving, that he could not be punished, because he

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The quitting and remaining from work in the instant cases was done pursuant to a conspiracy to carry out an unlawful plan. There are many cases to the point that a conspiracy to commit a criminal act may be enjoined . . . .

. . . . For two or more persons to conspire to do an act to the injury of another which one person acting alone might lawfully do constitutes in this state a legal wrong. . . . If a conspiracy to do a criminal act may be enjoined so may conspiracy to do an illegal act not criminal.

[96] Local 232, UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245, 251 (1949).

[97] Arthur v. Oakes, 63 Fed. 310, 317-18 (7th Cir. 1894).

did no more than breach a contract of service. In these and like cases, the criminal law would be exerted not to compel performance, or to prevent quitting the service in a reasonable way, but because, by abandoning it in an unreasonable way, the employé has created a condition of affairs, the natural, direct, and known result of which is to endanger life, health, or limb, or to inflict grievous public injury.[98]

Robertson v. Baldwin[99] can best be explained on this rationale. In that case, a majority of the United States Supreme Court held that a sailor was bound to fulfill his contract of service even though, during his term, he desired to quit. After pointing out the danger to be anticipated to the ship, its passengers, crew, and cargo, from indiscriminate quitting by seamen, the Court held that the service was exceptional, and hence that restrictions on cessation of work did not constitute "involuntary servitude."[100]

Mr. Justice Harlan dissented. He took an absolutist position on the other side. He said that "the condition of one who contracts to render personal services in connection with the private business of another becomes a condition of involuntary servitude *from the moment he is compelled against his will* to continue in such service."[101] Thus, the majority of the court declared that a seaman could be forced to serve his full term; the dissent declared that he could not be required to serve any of it.[102]

Between these two extremes there is a middle ground. A sailor might be required to serve until he could be conveniently replaced. To compel him not to abandon ship in the middle of the ocean or even in a strange port seems like a logical method of assuring the safe return of the vessel.

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98 Peonage Cases, 123 Fed. 671, 685-86 (M.D. Ala. 1903). The rule is the same in England. See Electricity (Supply) Act, 1919, 9 & 10 Geo. 5, c. 100, § 31; Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict., c. 86, § 4. Section 5 of the latter statute makes it a criminal offense wilfully and maliciously to break a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequence will be "to endanger human life, or cause serious bodily injury, or to expose valuable property . . . to destruction or serious injury."

99 165 U.S. 275 (1897).

100 Id. at 282 where the Court said:

It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview.

The rule is the same in England. See Merchant Shipping Act, 1894, 57 & 58 Vict., c. 60, §§ 221-24.

101 Robertson v. Baldwin, supra note 99, at 301. [Emphasis by the court.]

102 See Elman v. Moller, 11 F.2d 55 (4th Cir. 1926) holding that it would be involuntary servitude to require a sailor to fulfill his contract to serve on board ship but, curiously enough, not citing or discussing Robertson v. Baldwin, supra note 99.

To require him to continue serving after the vessel has reached an American port and a replacement can be secured is to nullify the freedom of a sailor to change jobs by an exception to the general rule not warranted by the actual facts of the case. Insofar as *Robertson v. Baldwin* extends to such service, it stands on a very shaky foundation.

The implications of the right to cease work for antidiscrimination legislation are clear. Since personal service is compelled in the first place, it is obvious that to permit the cessation of work before completion would frustrate the purposes of the law. It would hardly do to permit the unwilling barber to cut one side of his customer's head of hair or shave one side of his face, and then announce that he was unwilling to go any further. Obviously, antidiscrimination legislation in personal services infringes on the right to cease work as well as the right not to start it.

Voluntariness of Service

That antidiscrimination legislation in personal services requires "servitude" has already been demonstrated beyond doubt. A question may be raised, however, as to whether such service to a Negro would be "involuntary." An argument may be made that the barber, for example, is free to cease barbering at any time. Hence, it may be contended, that as long as he voluntarily continues to be a barber, he is not subjected to involuntary servitude if he is forced to serve all who apply.

Preliminarily, such an argument overlooks the right to work. The "liberty" mentioned in the fourteenth amendment includes the right to "work . . . to earn his livelihood by any lawful calling; to pursue any livelihood or avocation . . . . [And] the right to follow any of the common occupations of life is an inalienable right."[103] The Supreme Court has held that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth amendment] . . . to secure."[104] Indeed, the Court pointed out that to deny persons the right to work to earn a living is tantamount to excluding them from the state, since "in ordinary cases they cannot live where they cannot work."[105]

To say that a person must either work for everyone involuntarily or not work at all is to require him to choose between his thirteenth amendment rights and his fourteenth amendment rights. Such a rule conditions

[103] Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897). See the statement of Representative John A. Bingham of Ohio, who drafted the first section of the fourteenth amendment, that liberty "is the liberty . . . to work in an honest calling and contribute by your toil in some sort to the support of yourself . . . ." Cong. Globe, 42d Cong., 1st Sess. app. 86 (1871).

[104] Truax v. Raich, 239 U.S. 33, 41 (1915).

[105] Id. at 42.

the exercise of his fourteenth amendment rights to work at his chosen occupation with an unconstitutional condition, the surrender of his right to be free from involuntary servitude. Unconstitutional conditions may not even be annexed to the exercise of a privilege.[106] It is all the more certain that they cannot be used to limit the exercise of a constitutional right.

Even leaving aside the fourteenth amendment right to work, antidiscrimination laws which provide in effect that a person must serve another on pain of leaving his chosen occupation is involuntary servitude since the alternative to the servitude is punishment. It is well settled that the thirteenth amendment encompasses more than physical compulsion to labor. Punishment for refusal to work is also within its scope.[107]

The Supreme Court has several times pointed out that exclusion from one's occupation is punishment. In *Cummings v. Missouri*[108] the Court held that deprivation of the right to engage in a lawful occupation is punishment,[109] and further stated: "Disqualification from the pursuits of a lawful avocation . . . may also, and often has been, imposed as punishment."[110] When this disqualification stems "not from any notion that the several acts designated unfitness for the callings, but because it was thought that the several acts deserved punishment,"[111] then the punitive nature of the disqualification is clear.

Ex parte Garland[112] is to the same effect. The court there held that "an exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."[113] Likewise, the court said:

> The legislature may . . . prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution . . . this result cannot be effected indirectly by a State under the form of creating qualifications . . . .[114]

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106 Speiser v. Randall, 357 U.S. 513 (1958); Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1910).

107 United States v. Clement, 171 Fed. 974 (D.S.C. 1909). See United States v. Reynolds, 235 U.S. 133, 146 (1914) where the Court said:

> This labor is performed under the constant coercion and threat of another possible arrest and prosecution in case he violates the labor contract which he has made with the surety, and this form of coercion is as potent as it would have been had the law provided for the seizure and compulsory service of the convict. Compulsion of such service by the constant fear of imprisonment under criminal laws renders the work compulsory, as much so as authority to arrest and hold this person would be if the law authorized that to be done.

108 71 U.S. (4 Wall.) 277 (1866).

109 Id. at 321-22.

110 Id. at 320.

111 Ibid.

112 71 U.S. (4 Wall.) 333 (1866).

113 Id. at 377.

114 Id. at 379-80.

Finally, in the more recent case of *United States v. Lovett*[115] the Court was concerned with " 'a legislative decree of perpetual exclusion' from a chosen vocation." Mr. Justice Black held that "this permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type."[116]

Where a barber or waiter is permanently barred from earning a living in his occupation unless he serves all who apply, the reality of the situation is that he is being punished for refusing service. The exclusion from his calling is a particularly severe sort of punishment. To force him to serve on pain of such exclusion constitutes involuntary servitude.

Even, however, were the alternative to serving everyone without discrimination of going out of business or leaving one's occupation not deemed, strictly speaking, punishment, nevertheless, this alternative constitutes such a degree of coercion as to make the service involuntary. It is well settled that the method of coercion which compels the labor is immaterial,[117] and that coercion is equally forbidden although exercised under the forms of law.[118]

That the loss of the right to serve others, and thereby earn one's living, is coercion of the most potent sort for all but the wealthy few, can hardly be gainsaid. It has been held that a statute which tends to prevent a worker who has broken a contract of service from making a second contract of service with a new employer during the term of the first contract is unconstitutional under the thirteenth amendment as imposing involuntary servitude.[119] One court said:

> If no one else could have employed Carver during the term of his contract with plaintiff, after he had elected to break that contract, without incurring liability to plaintiff for damages, the result would have been to coerce him to perform the labor required by the contract; for he had to work or starve. The compulsion would have been scarcely less effectual than if it had been induced by the fear of punishment under a criminal statute for breach of his contract . . . . The prohibition is as effective against indirect as it is against direct actions and laws—statutes or decisions —which, in operation and effect, produce the condition prohibited. The validity of the law is determined by its operation and effect.[120]

However, the opinion most closely on point is that in the *Peonage Cases*.[121] The court there first noted:

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115 328 U.S. 303 (1946).

116 Id. at 316.

117 Pierce v. United States, 146 F.2d 84 (5th Cir. 1944), cert. denied, 324 U.S. 873 (1945). See Bernal v. United States, 241 Fed. 339 (5th Cir. 1917).

118 Matter of Peonage Charge, 138 Fed. 686 (N.D. Fla. 1905).

119 Hill v. Duckworth, 155 Miss. 484, 124 So. 641 (1929); State v. Armstead, 103 Miss. 790, 60 So. 778 (1913). In Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416 (Eng.) it was held that an employee may not be enjoined from going to work for another after he breaches his contract of employment without express agreement.

120 Shaw v. Fisher, 113 S.C. 287, 292, 102 S.E. 325, 327 (1920).

121 123 Fed. 671 (M.D. Ala. 1903).

> What is this but declaring, if a man breaks his contract with his creditor without just excuse, he shall not work at his accustomed vocation for others without permission of the creditor? What is this but a coercive weapon placed by the law in the hands of the employer to compel the debtor to pay a debt, to perform the contract?[122]

The court then spoke of the right to work. It said:

> This statute practically attaints the debtor and makes him a legal pariah if he attempts to exercise his right to labor without another man's consent, and that man his creditor. One of the most valuable liberties of man is to work where he pleases, and to quit one employment and go to another, subject, of course, to civil liability for breach of contract obligations. These laws attempt to take this right away and destroy this liberty.[123]

The coercion inherent in limiting the right to work was then set forth. The opinion states:

> The leaving of the service, whether with or without just excuse, puts insuperable obstacles in the way of earning a livelihood, by the sweat of his brow, elsewhere than with the first employer or on the rented premises. He must stay there, or else, leaving, must starve, or go to work elsewhere, which in most instances he cannot do except by violating this statute and running the risk of conviction for crime, by not informing the new employer. Practically, the law places the laborer or renter at the mercy of his first employer, because of the broken civil contract. An employer with such power over the sustenance and liberty of another is master of his destiny and liberty, and the laborer or renter in such a condition is a serf in all but name.[124]

It concludes:

> The whole scheme and purpose and the inevitable effect of these statutes are to coerce the laborer or renter to pay a debt, return to a personal service, by stress of penal enactments leveled at his person in the one instance, and against his right to work in the other. . . . The debtor cannot be compelled to put himself upon the blacklist that he may be prevented from getting work without an employer's consent, in order to coerce him to the performance of a contract of personal service . . . .[125]

The coercion inherent in barring a person from any other employment is quite different in degree or kind from an action for breach of contract, which may lie if an employee breaches an agreement to render personal

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122 Id. at 685.

123 Id. at 686.

124 Id. at 687.

125 Ibid. See id. at 691 where the court declared:
When the statutes declare that no one shall give croppers or laborers employment, if they break, without sufficient excuse, contracts of personal service with former employers, without their consent, what is this but declaring, because a person in a certain calling or occupation has broken a contract, that he shall not avail himself, no matter what his necessities, of the usual means, open to all other men, to obtain food or raiment, except by consent of a former employer?

services. In such cases, the employee may become liable for actual damages sustained by his employer, if any. This is true of any contractor. He is not, however, disabled from earning money entirely. The extraordinary compulsion inherent in such a disability is far different from a requirement that the aggrieved employer be compensated for his actual loss.[126]

Even less is the compulsion, if it can be called that, inherent in the withdrawal of wages or other benefits from an individual who will not work. Such individual is free to substitute other work. He can work for whomever he pleases. The pay he receives is a benefit which he may take or not by working or not, but if he declines one job he may still earn his living at another. Hence, his decision to work at a particular job is voluntary even if he is motivated by the desire for the compensation it offers.[127] This is a far cry from the case of an individual who loses all right to work for anyone by declining one job or type of service.

It must be remembered that, however compelling the need may seem that individuals serve others in particular situations, such a requirement flies in the face of the strong and clear policy of the thirteenth amendment. It has been truly observed that "to compel one person to labor

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126 In Shaw v. Fisher, 113 S.C. 287, 292-93, 102 S.E. 325, 327 (1920) the court declared:

> Of course, the sanction of the obligation of the contract, and the liability to pay damages for breach thereof, inhere in every contract, and those alone do not amount to that compulsion which is prohibited so long as the employee has the liberty at any time to elect to break the contract, subject only to the legal consequences—an action for damages—just like any other contractor. But if the law should penalize all who give him employment, after he has breached his contract, the effect would be to deny to him the same freedom that every other contractor enjoys, to wit, that of electing at any time to break his contract, subject only to his liability for damages. To that extent, liberty of action and freedom of contract is guaranteed by the fourteenth amendment.

127 In Tyler v. Heidorn, 46 Barb. 439, 458-59 (N.Y. Sup. Ct. Albany County 1866) the court made this distinction, saying:

> The term involuntary servitude, in my opinion [embraces] . . . everything under the name of servitude, though not denominated slavery, which gives to one person the control and ownership of the involuntary and compulsory services of another against his will and consent.
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> 3. The amendment in question was never intended to, and in my opinion does not, embrace contract service of any description, or such as flows from contracts made by a party, or grows out of a contract made by another person in regard to property and connected with its enjoyment, which property such party derives from such other person and personally enjoys. Such service is never involuntary. The party may at any time renounce it. It is connected with the enjoyment of property, and by refusing to accept or to enjoy the property, the party may at all times escape the personal servitude. These contracts are always either voluntarily entered into by the party himself, or else they embrace a subject, or property, by relinquishing which the party always relieves himself from the obligation attached to it . . . . "By taking the benefit of the grant he voluntarily assumed the liabilities of the original grantee, in respect to the subject of the grant." The servitude, therefore . . . was not involuntary.

See Dubar Goala v. Union of India, [1952] All India Rep. Cal. 496. See also Sreenwasa Iyer v. Govinda Kandiyar, [1945] All India Rep. Mad. 50, [1945] Indian L.R. Mad. Ser. 319, not following Ram Sarup Bhagat v. Bansi Mandar, 42 Indian L.R. Cal. Ser. 742 (1915).

for another against his will is legalized thraldom."[128] And the Supreme Court has declared that "the undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States."[129] The clear words of this amendment cannot be frittered away by subtle subterfuge or refined legal language.

Nor does the fact that the worker's refusal to work for a particular patron or client may be based on arbitrary grounds alter the legal effect of the amendment. Indeed, even peons could leave their masters for adequate cause.[130] The worker's right to discriminate on arbitrary grounds against serving particular clients or customers is perhaps most strongly illustrated by *Delorme v. Local 624, International Bartenders' Union.*[131]

In this case, the plaintiff tavern owner found himself caught in a jurisdictional dispute between the Teamsters Union and the Brewery Workers Union. Because he bought beer brewed by the brewery workers, teamsters picketed his tavern and collectively refused to deliver supplies purchased by plaintiff from their employers. The plaintiff sued for an injunction, and the trial court found that the drivers were part of a conspiracy to drive the plaintiff out of business by withholding supplies and refusing to deliver them. The trial court then enjoined the teamsters from interfering with the plaintiff's business. Later, upon a proceeding for contempt, the trial court further found that with knowledge of the decree and with intent to violate it, the Teamsters Union and drivers conspired not to deliver supplies to the plaintiff. The court thereupon decreed that:

> [The drivers] be and they are hereby directed in the future while employed as drivers delivering products and commodities [to refraiu] from making any discrimination against plaintiff, Leo Delorme, until further order of the court or until such time as this order may be modified.
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> It is further ordered that respondents be and they are hereby directed to forthwith purge themselves of said contempt by refraining in the future from refusing to make deliveries of products and commodities to Leo Delorme on the same terms and conditions as to any other person and

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128 Ex parte Drayton, 153 Fed. 986, 991 (D.S.C. 1907). And in Nokes v. Doncaster Amalgamated Collieries, Ltd., [1940] A.C. 1014, 1026 (Eng.) Lord Atkin said: "ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve; and that this right of choice constituted the main difference between a servant and a serf."

129 Pollock v. Williams, 322 U.S. 4, 17 (1944).

130 Peonage Cases, 123 Fed. 671, 674 (M.D. Ala. 1903) where the court stated that the peon could abandon his status "'by some sufficient motive given by one party to another, such as having greviously injured him, or where the master kept the accounts in an ambiguous manner, so that the servant could not understand them.'"

131 18 Wash. 2d 444, 139 P.2d 619 (1943).

when directed by their employer to do so until such time as this order is modified or reversed.[132]

The drivers appealed to the Washington State Supreme Court, contending that the order requiring them to deliver products to plaintiff and not to discriminate against him constituted involuntary servitude. That court held that while a mandatory injunction in a proper case did not violate the thirteenth amendment, "the portion of the decree entered by the trial court containing a mandatory injunction requiring appellants to deliver products and commodities from their respective employers' establishments to the respondent, Leo Delorme, appears to be subject to valid objection."[133] The state supreme court thereupon modified the decree to make it permissive for the drivers to purge themselves of contempt by delivering products to plaintiff instead of mandatory, as the trial court had done, and further provided that if the drivers failed to so purge themselves of their prior contempt, the court might punish them in an appropriate fashion.

This case is, of course, highly significant, and a strong one indeed for a mandatory injunction. The drivers have conspired to ruin the plaintiff by not delivering the products he needs. As previously noted, such a conspiracy is illegal, even though the individual drivers could, on their own, refuse to deliver products to the plaintiff. The trial court has ordered the drivers to repair the damage from their unlawful conspiracy by ceasing the object of the conspiracy, and by engaging in the deliveries. Even in such a case, however, the state supreme court is unwilling to require the drivers to refrain from discrimination. Not even a contempt of a prior decree whose validity is unchallenged can result in an affirmative mandate not to discriminate to alleviate the effects of the conspiracy. So strong is the policy of the law against involuntary servitude that not even a conspiracy not to serve can result in a decree requiring service. Antidiscrimination legislation can hardly justify a different result.

Conclusion

It is one of the most compelling ironies of history to find that in 1964, Negroes are demanding laws to compel whites to serve them in the very same occupations which they themselves were freed from serving whites in 1863, and demanding this under the name of "freedom." For the fact is that a century ago, Negroes had a near monopoly of the service oc-

132 Id. at 448, 139 P.2d at 621.
133 Id. at 455-56, 139 P.2d at 625.

cupations now engaged in by employees of so-called "places of public accommodation."[134]

For example, New York has one of the most stringent set of anti-discrimination laws. Yet these laws cover the occupations in which Negroes were compelled to serve a century ago. Thus, we are told:

> For generations the New York Negroes had had an almost uncontested field in many of the gainful occupations. They were . . . boot-blacks . . . barbers, hotel waiters . . . ladies' hairdressers . . . caterers, coachmen. (At that time a black coachman was almost as sure a guarantee of aristocracy for a Northern white family as a black mammy for a family of the South.) The United States Census of 1850 lists New York Negroes in fourteen trades . . . . [A]s caterers—a number of individuals actually grew wealthy.[135]

In a number of northern localities, it was not until the great wave of European immigration during the 1840s and 1850s that the Negro monopoly on these service occupations was terminated. In 1853, Frederick Douglass complained:

> Every hour sees the black man [in the North] elbowed out of employment by some newly arrived immigrant whose hunger and whose color are thought to give him a better title to the place; and so we believe it will continue to be until the last prop is leveled beneath us—white men are becoming house servants, cooks, and stewards on vessels; at hotels, they are becoming porters . . . and barbers—a few years ago a white barber would have been a curiosity. Now their poles stand on every street . . . .[136]

In the South, Negroes predominated in the service occupations well into the 20th century. As late as 1930, forty per cent of the workers in southern hotels, restaurants, and similar establishments were Negro; in 1940, thirty-two per cent were Negro. Myrdal observed that the "loss of the Negro male waiters was largely the gain of the white waitresses." He further noted that "travelers in the South often have occasion to observe that, nowadays, the most modern and busiest hotels and restaurants tend to have white bell-boys and white waitresses, whereas the old-fashioned places tend to have Negro servants."[137] Thus, a century ago, the Emancipation Proclamation decreed that Negro waiters and waitresses would no longer have to serve white college students; now, a hundred years later, Negro college students are demanding laws to compel white waiters and waitresses to serve them.

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134 Myrdal, An American Dilemma 293 (1944) notes that up to 1910, Negroes in the North were concentrated in service occupations, especially as waiters and barbers.

135 Id. at 1256.

136 Id. at 291-92.

137 Id. at 1088. He also notes, at 282, that "in . . . a few old cities on the Atlantic Coast the observer meets an old Negro barber, catering to a passing generation of Southern gentlemen. Negro waiters are still common, but not so common as even ten years ago. White waitresses are gradually being substituted for them."

Negro barbers in the South likewise had a monopoly of this form of involuntary servitude before the Civil War. Myrdal notes:

> In the old South, after the passing of wigs and elaborate hair dressing for men, the barber business fell largely into the hands of blacks. An old Southern gentleman once told me that on his first visit to the North he experienced a kind of shame for the white man who cut his hair and the white girls who waited on him at table.[138]

Thus, we now find, a century after Negroes were freed from the involuntary servitude of cutting the hair of whites, a demand from their descendants that whites be forced by law to cut their hair. Perhaps Negroes who say that the Emancipation Proclamation's first century is being celebrated a hundred years too soon are right. Perhaps the problem with that document is that it discriminated on racial grounds, and included only Negroes within its terms.

The thirteenth amendment, however, contained no such limitation. Instead, "the generality of its language makes its prohibition apply to slavery of white men as well as that of black men; and also to . . . every other form of compulsory labor to minister to the pleasure, caprice, vanity, or power of others."[139] The thirteenth amendment makes no distinction as to who enforces the labor;[140] nor does it distinguish from whom compulsory service is extracted. Rather the amendment "reaches every race and every individual . . . . Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African."[141] As the Supreme Court has so eloquently declared:

> The language of the Thirteenth Amendment was not new. It reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory and gave them unrestricted application within the United States and all places subject to their jurisdiction. While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal freedom for all persons, of whatever race, color or estate, under the flag . . . .
>
> The plain intention was . . . to make labor free, by prohibiting that control by which the personal service of one man is disposed or of coerced for another's benefit which is the essence of involuntary servitude.[142]

The fact that Negroes, or those who sympathize with their aspirations,

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138 Id. at 1255 quoting Wertenbaker, The Old South 229-32 (1942). See Myrdal's remarks at 1088-89 where he declares: "The Negro barber has lost most of his white business in the South. His gains have been restricted to the segregated Negro neighborhoods . . . ."

139 Railroad Tax Cases, 13 Fed. 722, 740 (C.C.D. Cal., 1882).

140 See, for example, United States v. Choctaw Nation, 38 Ct. Cl. 558 (1903), aff'd, 193 U.S. 115 (1904) holding that the slaves of Indian tribes within the United States were freed by the amendment.

141 Hodges v. United States, 203 U.S. 1, 17 (1906).

142 Bailey v. Alabama, 219 U.S. 219, 240-41 (1911).

may believe that white persons who refuse to serve them are being arbitrary or capricious, does not alter in any way the legal effect of the thirteenth amendment. This provision bans absolutely, and in the most express terms, the claim of any person to force any other person to serve him, for any reason whatsoever. Correspondingly, it confers on every person the absolute and unfettered right to refuse, for any reason or none at all, to serve any other person. The constitutionally protected right cannot be abridged or fettered on any pretext or for any reason whatever, as it is the cornerstone of personal freedom and liberty in the United States. Those Negro college students and their white sympathizers who so loudly chant a demand for "freedom" and their "constitutional rights," and who so vociferously demand that whites serve them,[143] would do well to first examine the Constitution themselves, and find out where their freedom and constitutional rights end, and those of others they would in fact violate, begin. As one case unequivocally stated:

> We are not advised of any rule of law under which any man in this country will be forced to serve with his labor any other man whom he does not wish to serve.
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> . . . .
>
> If the injunctive order be construed to mean that the officers and members of the Longshoremen Association Local No. 1416 were thereby required to load or unload the trucks of "Collins" although there was no contractual relation between the local and Collins, then such construction would violate the constitutional provision above referred to. We think it will not be contended that any member of the local could be committed to jail for refusing to load or unload the "Collins" trucks. That service required the performance of manual labor and it is beyond the power of courts to punish one by imprisonment for failure to engage in involuntary servitude.[144]

That antidiscrimination laws which compel one person to serve another are unconstitutional seems to be open to little doubt. However, most judges before whom such cases have come have acted as if they never heard of the thirteenth amendment. But one perceptive jurist, Judge Joseph H. Mallery of the Washington State Supreme Court, recently recognized the conflict between such legislation and the United States Constitution. To this author, his dissenting opinion in *Browning v. Slenderella Systems*[145] "hits the nail on the head" and should be required reading for all sit-ins claiming "constitutional rights." The opinion is well worth quoting. As Judge Mallery declared:

> All persons familiar with the rights of English speaking peoples know that their liberty inheres in the scope of the individual's right to make un-

143 See N.Y. Times, July 7, 1963, p. 1, col. 2.
144 Henderson v. Coleman, 150 Fla. 185, 196-97, 7 So. 2d 117, 121 (1942).
145 54 Wash. 2d 440, 341 P.2d 859 (1959).

coerced choices as to what he will think and say; to what religion he will adhere; what occupation he will choose; where, when, how, and for whom he will work, and generally to be free to make his own decisions and choose his courses of action in his private civil affairs. These constitutional rights of law-abiding citizens are the very essence of American liberties . . . .

. . . .

. . . [D]iscrimination is but another word for free choice. Indeed, he would not be free himself if he had no right so to do. In dealings between men, both cannot be free unless each acts *voluntarily*, otherwise one is subjected to the other's will.

Cash registers ring for a Negro's as well as for a white man's money. Practically all American businesses, excepting a few having social overtones or involving personal services, actively seek Negro patronage for that reason. The few that do not serve Negroes adopt that policy either because their clientele insist upon exclusiveness, or because of the reluctance of employees to render intimate personal service to Negroes. Both the clientele and the business operator have a constitutional right to discriminate in their private affairs upon any conceivable basis. The right to exclusiveness, like the right to privacy, is essential to freedom. No one is legally aggrieved by its exercise.

. . . .

The majority opinion violates the thirteenth amendment to the United States constitution. It provides, *inter alia:* "Neither slavery nor *involuntary servitude* . . . shall exist within the United States . . . ."

Negroes should be familiar with this amendment. Since its passage, they have not been compelled to serve any man against their will. When a white woman is compelled against her will to give a Negress a Swedish massage, that too is involuntary servitude . . . .

Through what an arc the pendulum of Negro rights has swung since the extreme position of the Dred Scott decision! Those rights reached dead center when the thirteenth amendment to the United States constitution abolished the ancient wrong of Negro slavery. This court has now swnng to the opposite extreme in its opinion subjecting white people to "involuntary servitude" to Negroes. [Emphasis by the court.][146]

[146] Id. at 454-57, 341 P.2d at 868-69.