Cornell Law Review

Volume 49
Issue 3 *Spring 1964*

Article 5

Involuntary Servitude or Inapposite Solicitude

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INVOLUNTARY SERVITUDE OR INAPPOSITE SOLICITUDE?

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In the most recent issue of the *Quarterly*, there appears a provocative article by one Alfred Avins[1] concerning the background and meaning of the thirteenth amendment to the Constitution of the United States. To relate his topic to a significant question of current legal policy, the author makes reference to the conflict—a conflict which has "surprisingly"[2] been observed only by himself and one particularly "perceptive jurist"[3] on the Washington State Supreme Court—between the thirteenth amendment prohibition of involuntary servitude and state laws forbidding discrimination based on race, creed, color, or national origin in "places of public accommodation."

Mr. Avins tells us first that "most states include in the definition of 'places of public accommodation' one or more forms of personal service occupations."[4] How an occupation can be a place is not made clear; however, the concept of "place" is not helpful to Mr. Avins' argument and it does not reappear. It is the "personal service occupations" to which the statutes are supposedly applied that bothers him, and "the personal service most often singled out is barbering."[5] "Typical" of the barbering cases, he says, is that of Mustachio, a barber of Nassau County.[6] Mustachio, it appears:

> [H]ad 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 [New York State] Commission [Against Discrimination] found was a "prohibitive price far in excess of respondent's usual charge for cutting a white person's hair." [The Commission] . . . 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 at the same rates."[7]

"The intent of this order," says Mr. Avins, "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 im-

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1 Avins, "Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation," 49 Cornell L.Q. 228 (1964).

2 Id. at 229.

3 Id. at 255.

4 Id. at 228.

5 Ibid.

6 State Comm'n Against Discrimination v. Mustachio, 6 Race Rel. L. Rep. 355 (1961).

7 Avins, supra note 1, at 229. [Emphasis in original.]

prisonment if he refuses to do so. 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.[8]

That said, Mr. Avins forsakes the barber shop for the slave block, and turns to the Northwest Ordinance of 1787, there to commence his inquiries into the history and meaning of the words "involuntary servitude."

Taking advantage of his field trip to the Northwest Territory, let us return to Mustachio's barber shop and see whether the State Commission noticed anything that Mr. Avins may have overlooked. Among its findings of fact were the following:

3. At all times mentioned herein, respondent, Angelo Mustachio, was and he still is the proprietor of Angelo's Barber Shop, 523 Uniondale Avenue, in the Village of Uniondale, County of Nassau, State of New York.
4. At all times mentioned herein, Angelo's Barber Shop was and it still is a place of public accommodation, resort or amusement.

. . . .

7. In mid-December 1958 or thereabouts, complainant took her son to Angelo's Barber Shop for a haircut.
8. On that occasion, one of the barbers at Angelo's Barber Shop gave complainant's son a haircut for 75 cents.
9. The barber who gave complainant's son a haircut for 75 cents at Angelo's Barber Shop is named Vincent Martinez.
10. Vincent Martinez was then and still is employed by respondent.
11. It took Vincent Martinez less than 15 minutes to give complainant's son a haircut.
12. Vincent Martinez did not indicate at that time that he found any particular difficulty in giving complainant's son a haircut.
13. Vincent Martinez made no attempt to charge complainant more than 75 cents for giving her son a haircut.
14. On May 19, 1959 complainant again took her son to Angelo's Barber Shop for a haircut.
15. On that occasion, respondent told complainant's son he would have to pay $5 for a haircut.[9]

And the principal affirmative actions enjoined upon respondent by its order were the following:

a. Extend to complainant and her son, without regard to their race or color, full, equal and unsegregated accommodations, advantages, facilities and privileges at Angelo's Barber Shop and any other barber shop operated by respondent within the State of New York, at the regular rates charged by respondent for accommodating white persons;
b. Extend to all persons, without regard to their race, creed, color or national origin full, equal and unsegregated accommodations, advan-

[8] Ibid.
[9] State Comm'n Against Discrimination v. Mustachio, supra note 6, at 356-57.

tages, facilities and privileges at Angelo's Barber Shop and any other barber shop operated by respondent within the State of New York, at the regular rates charged by respondent for accommodating white persons;

c. 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;

d. Furnish to Negro customers services of the same quality as those furnished to white customers and at the same rates;

. . . .

f. Instruct all respondent's employees, in writing, to furnish to Negro customers services of the same quality as those furnished to white customers and at the same rates . . . .[10]

It appears, therefore, that not only had one of Mustachio's employees already cut complainant's son's hair on a previous occasion but the only "involuntary service" which Mustachio was personally obliged to render consisted of writing a letter. Small wonder that the relevance of the thirteenth amendment was not apparent to the Commission or to the judge who enforced its order.

Browning v. Slenderella Systems,[11] the Washington case which brought forth the dissent of that "perceptive jurist" to whose words Mr. Avins gives over the final page of his article, indicates even more strongly the irrelevance of the thirteenth amendment to the typical cases arising under these statutes. A Negro woman, who had made an appointment by telephone for a courtesy demonstration of the Slenderella treatments, was kept waiting in the reception room for approximately two hours and was told by the manager: "We have never served anybody but Caucasians and I just know you won't be happy here."[12] She sued for damages, alleging "embarrassment, humiliation, mental anguish and emotional shock" resulting from this act of discrimination.[13] Defendant conceded that its salon was a "place of public resort, accommodation, assemblage, or amusement."[14] The Washington Supreme Court affirmed a verdict for the plaintiff, but reduced the award of damages from $750 to the "nominal" sum of one hundred dollars.[15]

The only defendant in this case was a corporation. Mr. Avins does not enlighten us as to whether corporations can be held in involuntary servitude, having somehow resisted the intellectual temptations that subject seems to offer. Furthermore, it appears that "a representative of the defendant called the plaintiff the next day [after her rebuff] to

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10 Id. at 359.
11 54 Wash. 2d 440, 341 P.2d 859 (1959).
12 Id. at 442, 341 P.2d at 861.
13 Id. at 443, 341 P.2d at 862.
14 Id. at 445, 341 P.2d at 863.
15 Id. at 451, 341 P.2d at 866.

apologize for what had happened, and to offer the plaintiff an appointment . . . ."[16] Such a record hardly seems to call forth the observation of the "perceptive" dissenting judge that "when a white woman is compelled against her will to give a negress a Swedish massage, that . . . is involuntary servitude."[17] Indeed, the thirteenth amendment argument appeared only at the conclusion of the dissenter's two-page farrago against the statute as an unconstitutional abrogation of the right of an operator of a business, allegedly guaranteed by the ninth amendment, "to discriminate in [his] private affairs upon any conceivable basis."[18]

The reality, of course, is that the statutes with which Mr. Avins is concerned are not regulations of "personal service occupations" but, as they state on their face, of "places of public accommodation." The cases arising under those statutes bear no resemblance to the cases of slavery, peonage, military service, conscientious objectors, seamen leaving their ships, and the miscellany of other thirteenth amendment problems that Mr. Avins has collected.[19] The distinction is that in these "typical" anti-discrimination cases, the respondent is not required to render personal services at all; as a condition to his operating a place of public accommodation, he is merely required to insure that the facilities of his place are available to people regardless of their race, creed, color, or national origin.

It is also noteworthy that in neither of the two cases emphasized by Mr. Avins does it appear that respondent's regular employees were unwilling to render the personal services required to make the facilities of the place available to the complainant. In *Mustachio* one employee had already done so on a previous occasion, and in *Slenderella* the respondent was able to assure the complainant of an appointment the next day. What does appear is that the respondent, for personal or business reasons, did not want the complainant to enjoy the facilities of his place of public accommodation, regardless of the willingness or unwillinguess of his employees to render the personal services incidental to that enjoyment.

The frustration of such a purpose does not subject the respondent to involuntary servitude. Mr. Avins himself recognizes that "the 'involuntary servitude' forbidden by the thirteenth amendment applies only to the rendition of personal labor" and that "the performance of imper-

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[16] Id. at 449, 341 P.2d at 865.
[17] Id. at 456, 341 P.2d at 869.
[18] Id. at 455, 341 P.2d at 869.
[19] On April 30, 1964, the Supreme Court of New Hampshire rejected the argument that a State statute prohibiting racial discrimination in places of public accomodation, as applied to barber shops, subjected the defendant to involuntary servitude within the meaning of the thirteenth amendment. State v. Sprague, 200 A.2d 206 (N.H. 1964).

sonal acts, such as giving instructions to a subordinate agent to take certain action, does not fall within the ambit of the amendment."[20] Unfortunately, he does not trouble to note the applicability of this exception to the cases which he believes typify the problem.

But it might be argued that these were merely fortuitous circumstances. Mustachio might have had a one-man barber shop, and Slenderella might have been an individual masseuse or slenderizer. Would there then be any reality to the distinction between requiring the facilities of the place to be made available and requiring the respondent himself (or herself) to perform personally distasteful services? I think there would. If the state required that a barber shop maintain certain sanitary standards, it could not be argued that a barber was forced into involuntary servitude by being forced to wash out the sink at the pain of losing his right to barber. He may hire someone else to do it if he finds the work distasteful; the state requires only that the work be done. Similarly, if he finds it personally distasteful to cut the hair of a Negro, then he may hire someone else to do the cutting.

The case of *Thompson v. Commonwealth*[21] offers a useful analogy. Defendants had entered into a contract to "prepare, build, construct and deliver" certain electrical units. Plaintiff obtained a decree ordering specific performance of the contract on the ground that the equipment "was not readily available on the open market," even though "the manufacture [thereof] did not require any extraordinary or unique skill or knowledge." On appeal, defendants contended that "the decree . . . would require the personal attention and labor of two of your defendants for many months and therefore would place them in a position tantamount to involuntary servitude." The appellate court modified the decree to require the defendants "to prepare, build, construct and deliver *or cause to be prepared, built, constructed and delivered*" the equipment in issue. Noting defendants' argument in opposition to specific performance that "any first class machine shop" could build the equipment, the court pointed out that defendants, "if they be so advised . . . may avoid personal services by contracting with one of [such] shops" to do so.[22]

But what if there is no other qualified person who can make the facilities of the place available to the complainant, either because everyone in the area shares the distaste of the respondent for members of the group to which the complainant belongs, or because the services, to be effective, require the specialized skill or training of the respondent?

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[20] Avins, supra note 1, at 236.
[21] 197 Va. 208, 89 S.E.2d 64 (1955).
[22] Id. at 215, 89 S.E.2d at 68. [Emphasis added.]

In the first situation, the state has still not commanded that the respondent do anything; it has only commanded that the thing be done. If a barber is unwilling to clean the sink and unable to hire anyone to clean it, then he must close his barber shop. The fact that he is unable to hire another to perform a service which by law attaches to the maintenance of a place of public accommodation may place him in a difficult position, but it is not analogous to cases of involuntary servitude, in which the respondent himself must perform without any *right* to substitute the performance of another.

The second situation poses a more difficult question, but it is not a question which would ordinarily arise under antidiscrimination laws relating to "places of public accommodation." The "typical" case here would be that of a professional man, perhaps a doctor or a dentist, uniquely qualified to perform a certain operation or other procedure. It is hard to see how his refusal personally to perform the procedure on a certain person because of his race, creed, color, or national origin would constitute denial of the facilities of a *place* of public accommodation. Mr. Avins cites no case to show that the type of antidiscrimination laws to which he objects has ever been applied to situations of this nature. Indeed, in one case from California, a state which he lists among those having "very broad statutes which include almost every conceivable personal service occupation,"[23] it was held that a dentist was a member of a "learned profession," that his office was not a place of public accommodation, and that he was not required by the statute to render service to Negroes.[24]

It is of course possible that some court or administrative agency might issue an order under a state antidiscrimination law requiring someone to perform personally services which he would not render voluntarily. Regardless of the constitutionality of any such order, a strong argument can be made that it would be bad policy and bad law. But the cases that Mr. Avins views with such alarm are not that case.

The problems of law and public policy involved in application of antidiscrimination laws—laws which evoke strong passions and raise difficult practical questions—deserve and require the earnest study and analysis of legal scholars as well as of judges and administrators. However, no constructive purpose is served by invoking a constitutional bogeyman to divert attention from real issues, foreclose legitimate areas of argument, and give a new veneer of plausibility to discarded social and constitutional theories.

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[23] Avins, supra note 1, at 228 n.3.
[24] Coleman v. Middlestaff, 147 Cal. App. 2d 833, 305 P.2d 1020 (Super. Ct. 1957).