

REGULATION OF THE MOVEMENT OF WORKERS: FORCED LABOR IN THE UNITED STATES*

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INTRODUCTION

Wartime mobilization of manpower included the traditional drastic process of conscription for military service, and it laid hold upon lesser expedients for civilians. Among them was the importation of foreign workers under contract to serve on the farms and in the factories. This expedient, though practiced on a smaller scale in the First World War, constituted a departure from the usual peacetime methods of obtaining additions to the labor force, and initiated a practice of importation of farm labor under contract that has persisted to the present day.

This practice of supplementing the domestic labor force with temporary employees from abroad raises questions about the labor system of the United States as it has developed since the abolition of the slave system in the South and the curtailment of massive immigration from Europe. Among these questions is: what is the extent of the freedom to migrate for employment under the law of the United States?

Free mobility of persons inheres in the political atmosphere of the United States. Not as workingmen or farmers but as Chinese or Negroes have people been condemned to a certain quarter of town or excluded from the city limits; and the victims of such aberrations from the general policy are minorities, almost by definition. Nevertheless there are, of course, many limitations upon mobility, notwithstanding the great development of transportation facilities. In addition to personal, social, or economic conditions that may hold a worker to his locality or prevent his movement to some other place, there are legal determinations that prescribe or permit the erection of barriers to his changing of location. Among these determinations, the subject of discussion is confined to regulatory norms, or those that authorize the application of physical coercion for their vindication. It does

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not extend to governmental action that takes effect upon the mobility of persons through the compulsion or influence of economic advantage or disadvantage. For example, it would be afield from this study to examine the law of public contracts, though there may be aspects of policies in force that determine shifts of laborers from one place to another. The focus of interest is the legal right to go or stay.

Migration controls of this direct order include as their subjects a variety of kinds of migrants: persons seeking to settle land, to trade, to pursue adventure or recreation, or other ends. The emphasis will here be placed upon controls designed to apply to laborers as such, so far as such controls can be distinguished from the regulation of migration in general or regulation for purposes unrelated to the size and distribution of the labor force. Migration for employment thus describes the subject of the regulatory controls to be explored. The object of the exploration is to identify the limitations upon freedom of mobility thus imposed.

Migration for employment involves a variety of interests that receive some degree of legal protection. On the one hand it is an expression of the aspiration of a worker to improve his opportunities, and a mechanism for distribution of workers where they are most needed. On the other, it may produce the disruption of stable productive relationships or the concentration of an oversupply of applicants for the available jobs under existing economic organization and resources in the locality. In general, the legal protections accorded these and related economic interests arise from a variety of constitutional, common law, and statutory principles. But the most conspicuous are the prohibition of slavery and involuntary servitude in the Thirteenth Amendment at one pole, and at the other, the power to conscript manpower to protect the safety of the republic.

The extent of freedom to migrate for employment and the legal protection accorded to it are explored as they relate to migration within the boundaries of the United States. The purpose of this essay is to describe the basic constitutional norms to which controls upon internal movement of workers must conform and to provide a measuring-rod for calculation of policy concerning supplementation of the labor force from abroad.

I. THE THIRTEENTH AMENDMENT

If it is true that most people who migrate for employment leave another employment to do so, limitations on freedom to leave are intimately related to freedom to migrate for employment. Slavery and indentured servitude are illustrations of a happily obsolete legal relationship that bound the worker to his job. As institutions their legal sanction was abolished by the Thirteenth Amendment:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Congress shall have power to enforce this article by appropriate legislation.

The influence of the Northwest Ordinance¹ was exhibited in an 1821 decision of the Supreme Court of Indiana that involuntary servitude is prohibited though it is voluntarily undertaken by the servant.² In that case the servant had voluntarily bound herself to serve her master as a housemaid for twenty years. During the term she sought release by habeas corpus. The court discharged her from custody, correcting the error of the lower court, on the ground that to enforce her contract *in specie* would produce involuntary servitude in violation of the constitution. An exception to the general principle against specific enforcement of contracts for personal service was recognized in the case of apprenticeship indentures, on the basis of the duty of the child to obey his parents or the master, regarded as *in loco parentis*. The court also recognized exceptions to the prohibition of involuntary servitude as a matter of "national policy" where soldiers and sailors are compelled to serve.

This opinion contains examples of two of the main lines of tendency in legal controversy and development following the ratification of the Thirteenth Amendment. When can service be compelled regardless of the consent of the person? What compulsions can be applied to enforce an obligation to continue service entered into voluntarily?

1. "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. . . ." Art. 6, Articles of Compact, Ordinance of Congress, Northwest Territorial Government, as quoted in 1 IND. ANN. STAT. 288, 292 (Burns 1933).

2. The case of Mary Clark, a woman of color, 1 Blackf. 1222 (Ind. 1821).

Massachusetts went further than Indiana and held that a contract for employment as a servant, though voluntarily made, was wholly void where it provided that the "customary freedom dues" would be paid at the end of the term.³ However, in addition to this provision for freedom dues, the court was moved to characterize the contract as one for involuntary servitude because its terms were so indefinite that no rate of compensation (except the initial consideration of ten dollars paid at the making of the contract) was stipulated, no description of the nature of the services was agreed, nor was it stipulated to whom the services were to be rendered. A half century later, the Georgia Court of Appeals was not so sensitive about a contract involving, but not in terms or legal effect requiring, the personal services of one Dews, not a party to the contract. Dews had been released on bond to his attorney pending a grand jury charge of murder. The attorney had furnished security for the bond. Dews had made notes to his attorney totalling \$272.00 and had agreed to work for him or at his direction. By the contract in question the attorney had sold part of the notes to another for \$112.00, and the buyer had also agreed to purchase most of the remainder for \$113.00 if the jury failed to indict or the indictment was not prosecuted. The contract also provided that Dews would work for the buyer of the notes, and he would deliver Dews in case of an indictment or pay the \$113.00 anyway. The attorney promised to remain bound for the appearance of Dews. The terms and recitals of the contract reflected the foregoing situation. Dews was killed before the grand jury convened, and the attorney sued for the balance of \$113.00. The contract was enforced.⁴ As the court interpreted it, Dews was not bound to involuntary servitude, there was no evidence that he was unwilling to work or that he should be forced to work, and the provision for the buyer to deliver Dews meant only that he would not obstruct his appearance. The Massachusetts case, however, was an action for enticing the servant from her employment and was thus more closely connected in its outcome with the freedom to leave an employment than the Georgia case.

The effect of the Thirteenth Amendment on a contract of service entered into voluntarily was reflected within two years

3. *Parsons v. Trask*, 73 Mass. (7 Gray) 473 (1856).

4. *Potts v. Riddle*, 5 Ga. App. 378, 63 S.E. 253 (1908).

after ratification, in a case that counsel asserted would affect the condition of "thousands" of Negro minors "whose term of slavery had been protracted from five to ten years by this illegal mode of apprenticing them."⁵ The mode of apprenticing them so described was put into effect November 3, 1864, two days after the new Maryland constitution, with a prohibition against slavery and involuntary servitude, had gone into effect. It consisted of a round-up of the freedmen of the county, where the younger persons were bound as apprentices to their late masters. These indentures recited that the parents entered into the agreement freely, and there was no specific evidence to the contrary. However these bonds described the child as "a property and an interest"⁶ and discriminated in their terms as compared with the forms used for white apprentices: the Negro could be transferred to any master in the county, whereas the white was bound to a single master for the entire term; and the white was entitled to instruction in the three R's.

Chief Justice Chase, on circuit in Maryland, held that the petitioner should be released from custody of her master. He relied upon the Thirteenth Amendment and a provision in the Civil Rights Act of 1866.⁷ This provision anticipated the Fourteenth Amendment in defining United States citizenship, and it employed the language of equal protection in guaranteeing to all citizens of every race and color the same right "to full and equal benefit of all laws and proceedings for security of the person and property, as is enjoyed by white citizens."⁸ In short, the apprenticeship was involuntary servitude prohibited by the Thirteenth Amendment and the legislation thereunder.

The so-called Civil Rights Acts have not yet shed the odium of their origin. It is said to be "familiar history that much of this legislation was born of that vengeful spirit which to no small degree envenomed the Reconstruction era."⁹ Even at the time, doubt about the extent of legislative power granted Congress under the Thirteenth Amendment contributed to the pro-

5. *In re Turner*, 24 Fed. Cas. 337, 339, No. 14,247 (C.C.D. Md. 1867).

6. *Ibid.*

7. Approved April 9, (1866), 14 STAT. 27. The purpose of the Act was to outlaw the "Black Codes," though here it was applied to action of a private or at least semi-private character. In its present abbreviated form it appears as a provision for equality with white citizens in the ownership and right to acquire property. See 8 U.S.C. § 42 (1946).

8. *Ibid.*

9. *Screws v. United States*, 325 U.S. 91, 140 (1945).

posal of the Fourteenth.¹⁰ Subsequent legislation in terms very similar to the Act of 1866 was struck down as unconstitutional.¹¹ The Negro workmen involved in the case so deciding were not being held to service; on the contrary, the defendants were indicted for conspiring to prevent them from performing their contracts to work in a lumber camp. The court held that the statute exceeded the authority of Congress. As to the Thirteenth Amendment, interference with employment does not impose involuntary servitude; and as to the Fourteenth, only private conduct and not state action was involved. A similar fate had earlier met other acts of Congress designed to wipe out the residues of slavery. Senator Trumbull, chairman of the Judiciary Committee said: "It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights."¹² But Congress acted unconstitutionally when it provided a remedy in federal courts against barring persons from hotels, theaters, or railway accommodations because of their color.¹³ The act was not directed exclusively against state action, so was outside the authority of the Fourteenth Amendment. The conduct forbidden by the act does not, in spite of senatorial rhetoric, amount to slavery under the Thirteenth Amendment.

2. THE ANTI-PEONAGE ACT

Early Interpretations

But what was to prove the most important legislation for the prevention of involuntary servitude escaped the force of the

10. A history of this doubt as reflected in Congressional debates is argumentatively presented in TEN BROEK, *THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* c. 10 (1951). In FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 95 (1908), it is said:

It cannot fairly be said, however, as was charged by some of the debate, that the men who supported the first section of the Fourteenth Amendment thereby acknowledged the unconstitutionality of the Civil Rights Bill, thus stultifying themselves, for it is quite possible that a man may be practically certain in his own mind that a measure is constitutional and yet may fear that the Courts will take a different view of it.

11. *Hodges v. United States*, 203 U.S. 1 (1906). The invalid section provided that "all persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens. . . ."
Act of May 31, 1870, § 16, 16 STAT. 140, 144.

12. CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865).

13. *Civil Rights Cases*, 109 U.S. 3 (1883).

restrictive interpretation of powers of Congress under the Civil War Amendments, though it was a part of Reconstruction. The Anti-Peonage Act of March 2, 1867, punishes as a felony holding, arresting or returning any person "to a condition of peonage."¹⁴

This statute was at first narrowly construed by a trial judge. It was held to apply only to cases where the contract to labor was made voluntarily and not to extend to any state where no system of peonage was in effect.¹⁵ A technical holding the other way on the question of a system of peonage said that the indictment need only follow the statutory language, without alleging a system of peonage.¹⁶ One trial judge, after denying that a system had to be shown, in his opinion sustaining an indictment, paid his respects to the contention in acid terms. He observed that the defendants, a sheriff and a lawyer, had the active support during the proceedings of the chairman of the state senate penitentiary committee, a member of the House Judiciary Committee in Congress from their district, and the state's attorney. He found this phenomenon "somewhat persuasive of the conclusion that if there is no system of peonage *de jure*, to which the statute applies, there is yet a *de facto* system of some equivalent sort, which has evoked the liveliest apprehension of those who participate in its operations and emoluments, and of others whose sentiments toward it are not wholly antipathetic."¹⁷

The basis for the position that would require a system of peonage was the fact that the statute singled out New Mexico, though it added "any other Territory or State of the United States," and the first sentence made unlawful "the holding of any person to service or labor under the system known as peonage."¹⁸

It seems clear that Mexican peonage was the particular mischief the act was intended to reach. Although peons were being released on habeas corpus by the federal courts in New

14. The Act now appears as 18 U.S.C. § 1581 (Supp. III, 1950).

15. The district judge, apparently by judicial notice, found that no system of peonage had ever existed in Georgia and sustained the demurrer to the indictment. *United States v. Eberhart*, 127 Fed. 252 (C.C.N.D. Ga. 1899).

16. *In re Lewis*, 114 Fed. 963 (C.C.N.D. Fla. 1902).

17. *United States v. McClellan*, 127 Fed. 971, 973 (S.D. Ga. 1904).

18. 14 STAT. 546, § 2 (1867). This statute now appears without the provision which singled out New Mexico, at REV. STAT. § 1990 (1875), 8 U.S.C. § 56 (1946).

Mexico, few were applying for release, and officers of the United States Army were assisting the masters to "arrest" and "return" fleeing peons to servitude. This condition is reflected in the provisions of the original act that any officer or other person in the military service in the Territory of New Mexico who should in any way interfere with its enforcement should be dishonorably discharged.¹⁹

At least two grand jury charges described the situation in New Mexico. One of them explained that peonage presents political problems that slavery does not, because peons may be voters. That means, it was explained, that men of large wealth could gradually obtain control of hosts of voters, either through their ignorance or their poverty.²⁰ The other charge took up a natural rights explanation: "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."²¹ This charge was in the form of responses to questions which the judge said the grand jury had been asking for some time about peonage and involuntary servitude laws. Two years later, in 1905, questions about the Anti-Peonage Law first received an answer from the Supreme Court.

The Basic Construction

The case was *Clyatt v. United States*.²² First, the act was "appropriate legislation" under the Thirteenth Amendment. Second: "Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. . . . But peonage, however created, is compulsory service, involuntary servitude."²³ So far, the opinion by Mr. Justice Brewer takes the act over the hurdle of federalism and interprets the act to cover service entered voluntarily as well as involuntarily. Moreover, there is no requirement that the condition of peonage be part of a system. The evidence was simply that the defendant pursued

19. 14 STAT. 546, § 2 (1867).

20. Peonage Cases, 136 Fed. 707 (E.D. Ark. 1905).

21. Peonage Cases, 123 Fed. 671, 686 (M.D. Ala. 1903).

22. 197 U.S. 207 (1905).

23. *Id.* at 215.

his employee to Florida, where he procured his arrest on a charge of larceny and returned him to Georgia to work out a debt.

The first limitation upon the use of the act as a protection against involuntary servitude did not operate in this case. That limitation arises from an interpretation of "peonage" in the light of history. It is "a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness."²⁴ Another limitation resulted in a remand for a new trial on the ground that there was no evidence of a condition of peonage prior to the arrest. To arrest or return one to a condition of peonage, said the court, there must be evidence of a pre-existing condition in which the employee is compelled to serve, no matter that he is by compulsion held for return to service. While the meaning of a criminal statute should not be too much enlarged against the accused, so limited an interpretation as this does violence to the term "peonage." It in effect holds that the requisite condition of peonage must be even more closely related to compulsory service than is involuntary confinement for the purpose of returning one to service. Mr. Justice Harlan dissented from the order granting a new trial on the ground that this point had not been raised by the defendant at the trial and for the further reason that the evidence showed that the conduct of defendant was within the fair meaning of the statute.

Mr. Justice Harlan's dissent gained acceptance in 1944, when Mr. Justice Roberts, writing for a majority of the Supreme Court, held that it is unnecessary for the indictment to allege that the victim was in a condition of peonage.²⁵ The statute condemns holding, arresting, or returning to a condition of peonage. The Court admitted that because of use of the preposition "to" the statute was ungrammatically and too compactly phrased. It is not necessary, however, that the condition of peonage be actually achieved if there is the compulsion applied with intent to bring it about. Each of three separate acts is condemned: holding a person in a condition of peonage; arresting a person for the purpose of placing him in such condition; and returning him to such a condition. The *Clyatt* case may still stand for the proposition that if the accusation is returning one to a condition

24. *Ibid.*

25. *United States v. Gaskin*, 320 U.S. 527 (1944).

of peonage, it must be proved that the victim had formerly been so held; but no condition of peonage has to be shown to exist if the indictment charges an arrest.²⁶

Methods of Peonage

Private force and abuse of process. The means by which the master holds the servant to work out his indebtedness has not been closely examined in cases where the constitutionality of a state statute was not involved. In most of the cases of this kind selected for prosecution the means were undoubtedly the use of force such as locking men up, whipping them, or threatening to kill or maim them.²⁷ The *Clyatt* case illustrates another method used, the abuse of process for arrest on a criminal charge such as vagrancy. A combination of these methods was exhibited in a case arising in Florida in 1926. The defendant was an operator of turpentine farms. The victims voluntarily went to work for him, from all that appears. Two weeks later they obtained permission to leave the camp and bring back the family of one of the victims, but they did not return. Defendant employer obtained their arrest on a charge of larceny of \$8.50. When they were taken before the magistrate, the defendant told them with the apparent approval of the magistrate that they would be imprisoned for eight months unless they pleaded guilty. They did. Their release was ordered on payment of costs, which defendant furnished. He then took them back to his camp by fear of physical punishment and further criminal prosecution. They escaped seven weeks later, but were forcibly recaptured,

26. Mr. Justice Murphy was of opinion that the language of the statute failed to give a fair warning that arrest with intention to make another a peon would be penalized, apparently overlooking the general doctrine that action beyond "mere preparation" with intent to commit a substantive offense is a criminal attempt. The general revision and enactment of Title 18 into positive law in 1948 straightened out the language by penalizing whoever "holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage." 18 U.S.C. § 1581 (Supp. 1951).

27. Brutality is not essential, but force or intimidation, not mere persuasion to stay and get the debt paid, must be used. *United States v. Clement*, 171 Fed. 974 (D.S.C. 1909). In a charge to the grand jury it was stated that cases of "woods riders" and forcible and illegal arrest without color of law were obvious cases. The judge was especially concerned that the peonage in the district had included a "respectable white man and his wife in one instance, and in another a white boy of good parentage." *In re Peonage Charge*, 138 Fed. 686 (C.C.N.D. Fla. 1905).

whipped, and kept under guard at their work. Defendant was convicted under all three phases of the statute.²⁸

A Mexican alien was kept as a maid-of-all-work in a San Antonio bawdy house by threats to turn her over to immigration officers who (she was told) would put her in jail for five years. The court held that the means of coercion was sufficient, so long as it held her against her will and made her work to satisfy an asserted claim of indebtedness.²⁹

Compulsory service statutes. The pressure to keep men in an employment may produce legislation which combined with private action brings about peonage. In 1910 the Supreme Court had upheld a statute that, in punishing embezzlement, provided for remission of part of the sentence upon restoration of the funds taken.³⁰ Four years later, an Alabama statute more directly related to the problem came before the Court. That statute prescribed a procedure by which a convict who was sentenced to pay a fine could avoid imprisonment though he was unable to pay the fine. The procedure was for him to obtain a surety who with him would "confess judgment" for the amount of the fine and costs. He and the surety would then enter into a separate contract under which the convict would agree to work for the surety to satisfy the amount paid the state by the surety. The statute gave the surety a remedy for breach of this contract, as follows: the violator of the contract could be arrested, brought before the court, and fined again, not to exceed \$500.00, but within that amount, not less than the damages suffered by the surety, and those damages as assessed by a jury were to be paid to the surety.

*United States v. Reynolds*³¹ shows the operation of the procedure under the state statute. One Rivers was convicted of larceny and fined \$15.00 plus \$43.75 costs. Reynolds appeared as surety for Rivers and judgment by confession was entered against them for the total of \$58.75, which Reynolds paid.

28. *Davis v. United States*, 12 F.2d 253 (5th Cir. 1926), *cert. denied*, 271 U.S. 688 (1926). A sordid episode of compulsory prostitution was revealed in a case where a roadhouse operator had obtained two of the girls from the penitentiary by paying their fines. With four others they were kept incommunicado and held by threats of violence. *Pierce v. United States*, 146 F.2d 84 (5th Cir. 1944), *cert. denied*, 324 U.S. 873 (1945).

29. *Bernal v. United States*, 241 Fed. 339 (5th Cir. 1917).

30. *Freeman v. United States*, 217 U.S. 539 (1910). No contention was based on the Thirteenth Amendment.

31. 235 U.S. 133 (1914).

Rivers agreed to work for Reynolds as a farm hand for nine months and twenty-four days at the rate of six dollars a month, or a total wage for the term of approximately \$58.75. He worked a month and two days when, though threatened with arrest and imprisonment, he quit. So Reynolds had him arrested and he was convicted of violating the contract of service. The fine was one cent plus \$87.05 costs. Apparently he was deeper in the hole by about \$36.00, which seems to have been the damage suffered by Reynolds from the breach of contract. Broughton became a new surety for Rivers and "hired" him for fourteen months and fifteen days (a rate of six dollars a month). Broughton also became employer of Fields, by paying his fine for selling mortgaged property. In that instance the fine was \$50.00 plus \$69.70 costs, which made a term of one day less than twenty months.

The Supreme Court, through Mr. Justice Day, held that coercion by criminal penalties that produce constant fear of imprisonment renders service compulsory, as much so as if the employer were himself directly given authority to arrest and hold the person of the laborer. The statutory scheme was held unconstitutional, and the defendants were put to trial.

Mr. Justice Holmes wrote a concurring opinion in which he said:

There seems to me nothing in the Thirteenth Amendment or the Revised Statutes that prevents a State from making a breach of contract, as well a reasonable contract for labor as for other matters, a crime and punishing it as such. . . . The successive contracts, each for a longer term than the last, are the inevitable, and must be taken to have been the contemplated outcome of the Alabama laws. On this ground I am inclined to agree that the statutes in question disclose the attempt to maintain service that the Revised Statutes forbid.³²

The case in effect draws a line between a system under which the convict is theoretically free to work out his fine under a private employer, instead of serving a jail sentence, and the notorious convict leasing system. It may be surmised that the choice of making a contract to work for a private employer was almost illusory, with the convict being "invited" to sign a confession of judgment with a "helpful" offer of suretyship, and with the rate of service in the lock-up much lower than under

32. 235 U.S. 133, 150 (1914).

the "contract." However, the Court concentrated upon the fact that leaving the service of the private employer was a crime. By comparison, under the convict leasing system the convict was in fact a prisoner,³³ rather than merely under threat of criminal punishment, and in addition was criminally liable for escaping. On the other hand, perhaps the leasing of convicts does not so lend itself to maintaining service beyond the term set in the sentence as the scheme condemned in the *Reynolds* case.

Although Mr. Justice Holmes joined the majority on what he saw as the contemplated outcome of the Alabama laws, he had earlier dissented from condemnation of a statute that could conceivably be used to keep a laborer on the job under threat of criminal prosecution. Joined by Mr. Justice Lurton, he wrote a minority opinion asserting the proposition that the performance of a contract for personal service can lawfully be sanctioned by criminal liability. He saw no relation between enforcement of a fair and proper contract even by imprisonment and giving authority to a private master to use private force to keep a laborer from quitting.³⁴

False pretense statutes. The nearest approximation to a statute enforcing performance of a contract for labor by criminal sanctions found in this study is an enactment of South Carolina in 1897.³⁵ The statute made it a misdemeanor to fail to perform a contract to do farm labor or work a crop "on shares" after obtaining advances of money or supplies from the farmer or lessor. The failure had to be wilful and without just cause. This statute was at first sustained against an attack on the grounds of arbitrary discrimination against sharecroppers and farm laborers and denial of equal protection, with the dour explanation that laborers never make advances to landholders.³⁶ Seven years later, however, it was held to violate the Thirteenth and

33. See CUMMINGS AND MCFARLAND, FEDERAL JUSTICE 354-355 (1937); 2 ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION, SEN. DOC. NO. 747, 61st Cong., 3d Sess. 444 (1910). A convict is not a slave, and contracting between the state and private persons for the labor of convicts has been held to be lawfully authorized, notwithstanding the Thirteenth Amendment. *Anderson v. Salant*, 38 R.I. 463, 96 Atl. 425 (1916). Richard B. Morris describes historical antecedents of "the county jail as an employment bureau for cheap labor" in an article on Delaware bondage. Morris, *The Course of Peonage in a Slave State*, 65 POL. SCI. Q. 238 (1950).

34. *Bailey v. Alabama*, 219 U.S. 219 (1911).

35. S.C. LAWS 1897, p. 457.

36. *State v. Chapman*, 56 S.C. 420, 34 S.E. 961 (1900).

Fourteenth Amendments,³⁷ and in the following year the Supreme Court of South Carolina held it unconstitutional.³⁸ The court read the statute as applicable to obtaining advances honestly and ruled out the possibility that it was intended only to punish fraud. The court observed that the main purpose of the Thirteenth Amendment was to prohibit any form of involuntary service by agricultural laborers, especially Negro laborers in the South. The court asserted that there is no significant distinction between compelling service by making it a crime to leave it and authorizing an employer to station guards to prevent his workmen from walking off. The statute goes further than mere peonage in that it fails to give the laborer the alternatives of continuing work or paying the debt.³⁹ This court also found a denial of equal protection in two aspects, one, of burdening one party to a contract with heavier sanctions upon performance than the other, and the second, of making an arbitrary distinction between the liabilities of employees who obtain or receive advances and those who do not.

Alabama employers had at their disposal a statute in addition to the statutory scheme of "confession of judgment" for a fine that was outlawed in the *Reynolds* case. It differed from the South Carolina statute in that the advances had to be fraudulently obtained with intent to injure the employer, *but* leaving the job without repaying the advances was *prima facie* evidence of intention to defraud and injure.⁴⁰ By court-made rule the laborer's testimony of his uncommunicated motive, that is, that he did not intend to defraud, was inadmissible. The fine to be imposed was measured by the amount of damage to the employer, which was doubled, up to a maximum of \$300.00, and half of that amount was paid to the employer. This statute was chal-

37. *Ex parte* Drayton, 153 Fed. 986 (D.S.C. 1907).

38. *Ex parte* Hollman, 79 S.C. 9, 60 S.E. 19 (1908).

39. A statute that gave the worker such an alternative was first sustained, then held invalid. La. Laws 1906, No. 54. In the first case it was construed as permitting the laborer to escape liability by showing that he obtained the advances in good faith. *State v. Murray*, 116 La. 655, 40 So. 930 (1906). The opinion in the case that invalidated the statute went squarely on the proposition that if service is enforceable by criminal prosecution it is peonage, though entered into by contract. *State v. Oliva*, 144 La. 51, 80 So. 195 (1918).

40. *Cf.* the construction given to the Louisiana statute in *State v. Murray*, note 39, *supra*. The Alabama statutory presumption was upheld against the contention that it usurped the powers of the courts. *State v. Thomas*, 144 Ala. 77, 40 So. 271 (1906).

lenged in *Bailey v. Alabama*.⁴¹ The United States as *amicus curiae* argued:

. . . The statute hits especially, as was intended, Negro laborers on farms and plantations. Every reported case under the statute is that of a farm laborer. The maximum penalty fixed by the statute, \$300.00, also makes it peculiarly applicable to this class of laborers. . . .⁴²

Mr. Justice Hughes, for the Court, went to some pains to make clear that the case had to be approached in the same way, whether it arose in Alabama or Maine. But the state cannot use the criminal law to compel the performance of contracts for labor any more than it can authorize the use of physical force for that purpose. This prohibition is transgressed by the presumption of intention to defraud, which makes the act a convenient instrument of coercion by threat of criminal prosecution. As indicated above,⁴³ the two dissenters did not agree with the initial premise that the criminal law cannot be used to compel labor in accordance with a contractual obligation. But they went further and defended this statute as one merely for the punishment of fraud. With such a characterization the conclusion followed easily that it can be made a crime to obtain money or goods by false pretenses, just as larceny or murder is criminal.

The dissenting opinion said that the statutory presumption did not go much further than the common law. That is, one who obtains goods on the faith that he will work until his wages amount to their price, but fails to work, intends to get the goods without working or paying for them. But in the case at bar the laborer was convicted because after working a month or a little more on a one-year contract he quit, leaving a debt of about thirteen dollars. The agreed rate of pay was twelve dollars a month, but he received a fifteen dollar advance, with the agreement that his pay would then be \$10.75 a month. (His fine was

41. 219 U.S. 219 (1911).

42. *Id.* at 222, 223. As an argument based on the equal protection clause of the Fourteenth Amendment, it may be supposed that one South Carolina judge might have been inclined to meet it with an answer that the classification was reasonable. In *United States v. Clement*, 171 Fed. 974 (D.S.C. 1909), Brawley, J., stated, with reference to the opinion "that the negro will not work unless he is forced to work . . .," that "[t]here is something to be said in favor of that view." *Id.* at 979. But the same judge instructed the jury that character testimony from a witness who felt no sense of abhorrence at the crime of peonage would not tend to any presumption of the defendant's innocence.

43. Text cited to note 34 *supra*.

thirty dollars, to be worked out by a jail sentence at the rate of about twenty-two cents a day.) It does not seem by any means clear that a presumption arises that he never intended to repay the advance and intended to quit before the end of the year when he obtained the fifteen dollars.

The opinion in the *Bailey* case seems to make it clear that the employer cannot by statute be given an advantage in enforcing his contract of employment by becoming at the same time the creditor of his employee, not even to the extent of a presumption that the debt was fraudulently contracted, if the debt is not paid and the work is not done. It is as though the employer and the creditor were different persons. A statute was, however, held valid in Georgia that punished as cheating and swindling the obtaining of goods or money by contracting with another to perform services for him with no intention to perform the services. This statute went further and, like the Alabama statute, made refusal to perform the services prima facie evidence of the intent not to perform them when the contract was made or the advances obtained. But the Georgia court had held that the statute punished fraud, not mere breach of contract.⁴⁴ After the decision in the *Bailey* case this position was no longer tenable, but in the same year the Georgia court held the first part of the statute separable from the presumption section, as an act merely punishing the obtaining of money or goods by deceit.⁴⁵ The court, however, did not hold the presumption section invalid because the case did not involve its application.

The court showed an inclination to distinguish the *Bailey* case and uphold the Georgia statute in its entirety, on the ground that the Alabama judge-made rule withheld from the laborer any practicable means of rebutting the presumption. That is, since he could not testify that he had no intention to defraud, the presumption in practical effect was conclusive, and the statute really punished breach of contract. Not until 1942 was this somewhat factitious doubt about the scope of the *Bailey* holding resolved. In *Taylor v. Georgia*,⁴⁶ defendant agreed to work at manual labor for \$1.25 a day until he had earned \$19.50. His employer loaned him \$19.50, whereupon the "would-not-be" employee failed either to pay his debt or to do the work. The

44. *Townsend v. State*, 124 Ga. 69, 52 S.E. 293 (1905).

45. *Latson v. Wells*, 136 Ga. 681, 71 S.E. 1052 (1911).

46. 315 U.S. 25 (1942).

statute in its entirety was applied in his case and resulted in a conviction. Mr. Justice Byrnes, for the Court, held that so far as the Thirteenth Amendment and legislation thereunder are concerned, no distinction can be made between punishment for breach of a contract to labor and punishment for fraud in making the contract, when that fraud is established by a presumption that is based upon the subsequent breach. Both would be invalid impositions of involuntary servitude.⁴⁷

Pollock v. Williams,⁴⁸ decided two years later, recites the history of even greater reluctance in Florida than in Georgia to abandon the presumption. Three times after courts had held the presumption to be unconstitutional the legislature had re-enacted statutes that contained it. In the case that finally reached the Supreme Court, the laborer had pleaded guilty; hence the presumption was not invoked against him. Mr. Justice Jackson, writing the opinion of the Court, was unimpressed. Although the presumption section is severable and the punishment-for-fraud section alone would be valid, the statute laid its undivided weight on the laborer. The scruples of Mr. Justice Hughes to avoid sectionalism in the *Bailey* case were not carried so far in this case as to prevent judicial knowledge of the uses to which such a statute, though partially invalid, was put. The cleanest case, the Court said, was one where the Negro would borrow but would not work and nothing more was involved. But the issue of freedom is at stake:

The undoubted aim of the Thirteenth Amendment as supplemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. Forced labor in some special circumstances may be consistent with the general basic system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways which society may compel. But in general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the

47. The Alabama court had earlier grasped the significance of the *Bailey* case. In a prosecution for enticing a farm laborer from his employment, it was error to admit evidence that the employee owed money when he left, because it was irrelevant; to force him to stay and work out the balance claimed to be due would be involuntary servitude. *Holland v. State*, 29 Ala. App. 181, 194 So. 412 (1940).

48. 322 U.S. 4 (1944). The problem continues. *United States v. Casa Lonzo Walker*, S.D. Miss., Dec. 7, 1949, REP. ATT'Y GEN. 239 (1950)

laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition. . . . Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service. This congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor.⁴⁹

There was a dissent written by Mr. Justice Reed, in which Mr. Chief Justice Stone joined. Its basis was the need for proof that the presumption section coerced labor by the fear of conviction under the substantive section. They would not indulge in judicial knowledge of how the statute-book would actually operate in Florida, following the same idea of disregard for geography as that expressed in the *Bailey* case.

The federal power to protect against peonage operates in two ways. The simile of the shield and the sword is apposite. As a shield the federal power can be invoked to protect the individual against legislation or executive action by a state that enforces or contributes to peonage. The cases outlined above show how in this century the Supreme Court has broadened the area into which a state is forbidden to step in response to the demands of employers for leverage against idleness or, say, a preference for an eight-hour day over the vicissitudes of farm work. To summarize, a state may not confer upon an employer the power to keep a laborer on his job by making it a crime to leave the employment. This prohibition extends to cases in which the employee has obtained advances whether in the form of payment of a fine or otherwise, on the promise of working for the

49. *Pollock v. Williams*, 322 U.S. 4, 17, 18 (1944). However the method of carrying out the course of employment may be controlled by mandatory injunction or agency order so long as the employment continues. *International Union, U.A.W.A. v. Wis. Employment Relations Board*, 336 U.S. 245 (1949); *Delorme v. Int. Bartenders' Union*, 18 Wash. 2d 444, 139 P.2d 619 (1943). A provision has been held invalid that made it a misdemeanor for an employee to refuse to handle material because produced, processed, or delivered by non-union workers. It was held to infringe "closely" on the Thirteenth Amendment. *Ala. State Federation of Labor v. McAdory*, 246 Ala. 21, 18 So.2d 826 (1944), *cert. dismissed*, 325 U.S. 450 (1945). See, on the question of the power of a state to forbid a strike, *Lincoln Fed. Labor Union v. Northwestern Iron Co.*, 335 U.S. 525, 528, 529 (1948).

employer. Nor may the fact of leaving employment be made presumptive evidence of intention to defraud in obtaining such advances, where obtaining them deceitfully is a crime. And finally, the mere existence of provision for such a presumption on the statute books, though regarded as separable and not formally enforced, renders unconstitutional the other provisions that purport to make it a crime to obtain money or goods by fraudulently promising to work for another.

Statutes subject to abuse. The obvious next step in demarking freedom to leave an employment has not yet been taken. That would be to hold that it cannot be made a crime, though it is a civil wrong, to obtain advances deceitfully by a promise to work without intention to do so. Such a statute could be an instrument of abuse in the hands of employers, but so is the general law against theft. Certainly the more specific the class of persons subject to such a statute, the closer its connection with peonage. Even aside from abusive application to produce peonage in a particular instance, a statute drawn to cover a particular class of laborers should be considered (in addition to any question about the reasonableness of the classification under the Fourteenth Amendment) as intended to be used for peonage.⁵⁰ Even if a fraudulent promise to work, made to obtain advances against future pay, can under a system of free labor be made criminal, it seems contrary to the Thirteenth Amendment to furnish employers with the advantage of a statute directed at a particular kind of labor, when the persons charged under such a statute are unlikely to be able to prevent its oppressive use through proper legal representation.⁵¹ It must be conceded, however, that the *Pollock* case does not quite go so far as to cast substantial doubt

50. In addition to the statutes applicable only to share croppers and farm laborers, a former Maine statute provided an example in that it covered only agreements to labor for another in lumbering operations and driving logs. Me. Laws 1907, c. 7, repealed in Me. Laws 1917, c. 231. It appears as § 12, c. 128, in ME. REV. STAT. (1916). "Soon after its passage prosecutions were commenced in the lumber regions, and the jail at Dover, the county seat of one of the large lumber counties of Maine, was crowded with laborers. . . . [I]t soon became known throughout the lumber region of Maine that any laborer was liable to imprisonment who refused to work according to the provisions of his contract until he had settled for all advances, no matter what misrepresentations may have been made to induce him to enter the agreement." IMMIGRATION COMMISSION REPORTS, *op. cit. supra* note 33, at 448, 449.

51. A significant provision of the Maine statute purportedly directed against fraud in lumber labor was the vesting of jurisdiction in justices of the peace, rather than the general trial court. Me. Laws 1907, c. 7.

upon the validity of statutes making a fraudulent promise to work an element of a crime, even when the statutes are directed at particular kinds of labor. If an invalid provision on the statute book can, however, render such a statute void, a showing that this type of legislation is likely to be abused, even without the invalid presumption, would perhaps have the same effect.

A system of free labor nevertheless contemplates some legal pressures not to violate a contract of employment. Apart from the economic pressures generated by the property system, state law can enforce contracts for personal service by civil liability in damages and in exceptional instances by injunction against performing the same kind of work for another.⁵² Accordingly, the Thirteenth Amendment is a shield against state action that enforces labor for another by means of liability to imprisonment or the stigma of criminality but not against liability to civil process operating against interests in property, or economic assets.

As a sword, the Thirteenth Amendment, through habeas corpus, entitles the petitioner to freedom as against a custodian who unlawfully holds him in slavery or involuntarily servitude. It also empowers Congress to legislate to bring about such freedom. Thus Congress assumed federal initiative in the Anti-peonage Act to strike out against one form of involuntary servitude. The absence of state action is immaterial; any private person is subject to its liabilities, because the Thirteenth Amendment constitutes a source of federal power to regulate. The outlines of what will be held to be peonage are fairly clear by now: the government must establish that the defendant at least asserted a claim of indebtedness by the victim and that he coerced the victim to work for him to liquidate that debt. The nature of the coercion depends upon its effect; if it succeeds in overcoming the victim against his will, it is within the statute. It may be the abuse of process of arrest, by a trumped-up criminal charge, or the use of actual private force. Or it may be the fear of criminal prosecution or deportation, or the fear of violence. A condition of peonage results from such methods if the victim

52. See HALE, *FREEDOM THROUGH LAW* (1952); especially pp. 190-196, but also pp. 5, 30-37, 98-99.

goes to work under their compulsion. Even if he does not, the defendant may be liable for arresting a person with the intention of placing him in or returning him to a condition of peonage.

3. SLAVERY

The basest form of servitude is thus not reached by the Anti-peonage Act. If there is no claim of indebtedness, there is no peonage. Hence primitive slavery is not forbidden under its terms. On March 2, 1807, the permission given to Congress to prohibit the importation of slaves was exercised, effective January 1, 1808, making violators subject to a forfeiture and in some instances to imprisonment.⁵³ The substance of this legislation was combined with a prohibition enacted in June 23, 1874, against bringing into this country a person kidnaped abroad with intent to sell him, or selling such a person, or holding a person so brought or sold in involuntary servitude.⁵⁴ The combination now appears as Section 1584 of the Criminal Code.⁵⁵ This section, unlike its predecessors, prohibits holding any person to involuntary servitude, whereas its immediate predecessors required that the person be one who had been kidnaped abroad or sold⁵⁶ or that the person be one who had been brought in from abroad as a slave or to be held to service or labor.⁵⁷ The re-enactment of these two sections consolidated into one may have increased the scope of the federal anti-slavery statutes.⁵⁸ In the meantime, the Department of Justice through its Civil Rights Section had discovered a "Slave Kidnaping Act," which was part of Reconstruction.⁵⁹ In case of doubt about whether assertion of a claim of indebtedness can be established,⁶⁰ this section may be

53. U.S. CONST. ART. I, § 9, cl. 1; 2 STAT. 426 (1807).

54. 18 STAT. 251 (1874).

55. "Whoever knowingly and wilfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined not more than \$5,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1584 (Supp. III, 1950). The 1874 antecedent of the section was used to punish an arrangement to use immigrant children from Italy as beggars in Chicago. *United States v. Ancarola*, 1 Fed. 676 (C.C.S.D.N.Y. 1880).

56. 35 STAT. 1142 (1909).

57. 35 STAT. 1139 (1909).

58. 62 STAT. 773 (1948).

59. 14 STAT. 50 (1866). Its present form is in 18 U.S.C. § 1583 (Supp. III, 1950). The Civil Rights Section of the Department of Justice was created in 1939. Its early development is recorded in CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD* (1947).

60. In a recent case a circuit judge dissented from affirmance of a conviction in four of the six counts of peonage, because he saw no evidence of

used. It penalizes kidnaping or carrying another away with intent to sell him into involuntary servitude or hold him as a slave, or enticing or inducing another to board a vessel or to go to any other place with intent that he may be made or held as a slave or that he may be sent out of the country to be so made or held. Two unreported cases were discovered in which the section had been used to obtain convictions,⁶¹ and in *United States v. Ingalls*,⁶² the first reported case under the section, a conviction was obtained. Defendant had compelled a woman to accompany her from Berkeley to Coronado, California. The coercion consisted of threats to have the woman committed to prison for having submitted to abortion of a pregnancy incurred as a result of adultery with defendant's first husband. Defendant also told her that she was so mentally inferior that she could not make her way in competitive society and would be committed to an institution. The judge defined a slave as one who is "wholly subject to the will of another, one who has no freedom of action and whose person and services are wholly under the control of another, and who is in a state of enforced compulsory service to another."⁶³

These statutes constitute the major part of sources of federal enforcement of the Thirteenth Amendment.⁶⁴ The Judicial Code provides jurisdiction of the district courts for civil actions authorized by law to recover damages for violations of civil rights and to redress deprivations of constitutional rights under color

indebtedness. *Pierce v. United States*, 146 F.2d 84, 86 (5th Cir. 1944) *cert. denied*, 324 U.S. 873 (1945).

61. *United States v. Sabbia* (C.C.S.D.N.Y. 1907) and *United States v. Peacher* (E.D. Ark. 1937). CARR, *op. cit. supra* note 59, at 82. See also note 58 *supra*. The cases are discussed in Folsom, *A Slave Trade Law in a Contemporary Setting*, 29 CORNELL L. Q. 203, 208, 209 (1943).

62. 73 F. Supp. 76 (S.D. Cal. 1947).

63. *Id.* at 78. Other convictions reported by the Attorney General include a Minnesota case involving a Texan of Mexican descent. REP. ATTY GEN. 405 (1949). See also REP. ATTY GEN. 175 (1946) and Brodie, *The Federally-Secured Right to be Free from Bondage*, 40 GEO. L. J. 367 (1952).

64. Additional examples are cases where the federal courts release persons held in slavery. This jurisdiction operates under the Thirteenth Amendment and the habeas corpus powers of the court. An Alaska Indian was so freed against the contention that Indian slavery constituted an exception under the Thirteenth Amendment. *In re Sah Quah*, 31 Fed. 327 (D. Alaska, 1886). In this connection it may be noted that Captain Richard P. Leary, U.S.N., proclaimed prohibition of "human slavery or peonage" in Guam, effective February 22, 1900. Proclamation of the Naval Governor of Guam, January 1, 1900.

of state law,⁶⁵ and the Criminal Code contains similar provisions.⁶⁶ Authoritative interpretation of these statutes in relation to the Thirteenth Amendment lies in the future, however. The scope of the Amendment has been limited by the holding that "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery."⁶⁷ And the Court called attention to the fact that the certificate alien Chinese were formerly required to carry in order to establish their right to remain in the United States had not been contended to be a badge of slavery prohibited by the Thirteenth Amendment.⁶⁸

4. STATE INTERPRETATION OF THE THIRTEENTH AMENDMENT

Notice Statutes

The state courts have contributed in two directions to the content of the Thirteenth Amendment. One of them involves the determination of the validity of a criminal statute requiring farm laborers or sharecroppers to notify a new employer of the fact, if such was the case, that they had left the employment or the leased premises of another before the term had expired. This statute was in tandem with another statute in Alabama making it an offense to employ or lease to another after being given such notice.⁶⁹ After the excoriation of these laws by a federal judge in his address to the grand jury,⁷⁰ the Alabama Supreme Court in the following year held that the notice statute placed unconstitutional restrictions upon the right to make employment contracts and the right to use and cultivate land.⁷¹ The court emphasized the fact that arbitrary powers was vested in the employer or landlord to consent to termination of a contract, that whether the tenant or employee had a good excuse for leaving could be tested

65. 28 U.S.C. § 1343 (Supp. III, 1950). REV. STAT. §§ 1979, 1980 (1875), 8 U.S.C. §§ 43, 47 (1946) provide for civil liability.

66. 18 U.S.C. §§ 241, 242 (Supp. 1951).

67. *Hodges v. United States*, 203 U.S. 1, 18 (1906).

68. *Id.* at 19.

69. Ala. Acts 1900-1901, p. 1208. Its predecessor (Ala. Acts 1880-1881, p. 42) was sustained on the ground that because the interruption of contractual relations between master and servant is tortious if done with knowledge of their existence, it may be made criminal. *Tarpley v. State*, 79 Ala. 271 (1885).

70. *Peonage Cases*, 123 Fed. 671 (M.D. Ala. 1903).

71. *Toney v. State*, 141 Ala. 120, 37 So. 332, (1904). The criminal prohibition against hiring a laborer or servant away from another remained valid. *State v. Nix*, 165 Ala. 126, 51 So. 754 (1910).

only by risking a criminal prosecution after the fact, and that if such notice were given the prospect of obtaining a new employment or lease would be extremely remote. The Mississippi analogue⁷² was also held invalid.⁷³ The Mississippi Supreme Court relied on the Fourteenth Amendment, as did the Alabama court, but it also mustered the Thirteenth and its equivalent in the Mississippi Constitution. The "reserve" clause in American baseball does not require the assistance of such a statute to be effective, but although it has been said to result in "something resembling peonage of the baseball player" and because of the combination that maintains it that "if possible [the contracts] should be deemed within the prohibitions of the Sherman Act," nevertheless it "constitutes no violation of the Thirteenth Amendment or statutes pursuant thereto."⁷⁴

Criminal Enticement

The second contribution by state courts to the content of the Thirteenth Amendment has been equivocal. On the one hand, Alabama⁷⁵ and Arkansas⁷⁶ have held that it may be made a crime to entice a workman away from another employer with knowledge that the workman has agreed to work for a specified time. Under Alabama law, however, no evidence of indebtedness to the first employer can be admitted,⁷⁷ whereas the Arkansas statute makes the second employer liable for such debts.⁷⁸ On the other hand, the South Carolina Supreme Court has held

72. In Miss. Laws 1900, c. 101 it is provided:

Any laborer, renter or share cropper who has contracted with another person for a specified time in writing, not exceeding one year, who shall leave his employer or leased premises before the expiration of his contract, without the consent of the employer or landlord, and makes a second contract with a second party without giving notice of the first contract to the second party, shall be guilty of a misdemeanor, and on conviction shall be fined not exceeding fifty dollars.

73. *State v. Armstead*, 103 Miss. 790, 799, 60 So. 773, 780 (1913): "We can understand how this statute might be very helpful to the successful operation of a planting enterprise."

74. Apparently, this is because the player is subject only to contractual liability and loss of employment opportunity "privately" denied without the aid of legal machinery. "I may add that, if the players be regarded as quasi-peons, it is of no moment that they are well paid . . ." Judge Frank, concurring, in *Gardella v. Chandler*, 172 F.2d 402, 409, 410 (2d Cir. 1949).

75. *State v. Nix*, 165 Ala. 126, 51 So. 754 (1910); *Tarpley v. State*, 79 Ala. 271 (1885); *Holland v. State*, 29 Ala. App. 181, 194 So. 412 (1940).

76. *Johns v. Patterson*, 138 Ark. 420, 211 S.W. 387 (1919).

77. *Holland v. State*, 29 Ala. App. 181, 194 So. 412 (1940).

78. Ark. Acts 1905, p. 726.

that even civil liability for enticing a servant away or "harboring him" with knowledge of his contract to work for another is an infringement of freedom of contract guaranteed by the Fourteenth Amendment. While liability of a worker to pay damages for breach of his employment contract does not alone amount to such compulsion as to make his service involuntary, it is involuntary if no one else can employ him. He would be coerced by the threat of starvation scarcely less than if he were under threat of criminal punishment.⁷⁹ The dissent complained that this position is in advance of federal law and in regulating the relations between employers it goes too far.

5. EXCEPTIONS TO THE THIRTEENTH AMENDMENT

The Thirteenth Amendment in general provides protection against statutes that coerce labor for private persons by threat of imprisonment or criminal liability and authorizes the federal legislation that punishes peonage and slavery, whether with or without the aid of the action or legislation of the states. In addition, state courts by authority of the Thirteenth Amendment, in some instances supplemented by the Fourteenth, have struck down statutes having the effect of holding the worker to his job, either by requiring him to tell a prospective new employer of his contract for previous employment or by prohibiting a new employer from inducing or contributing to the breach of such contract. There are, however, exceptions to the prohibition of the Thirteenth Amendment against involuntary servitude.

Convicts

One of the express exceptions to the prohibition against involuntary servitude is punishment for crime. It has been held that the exception extends to violation of police regulations of a municipality, when the convict was required to work out a hundred dollar fine by imprisonment of six months.⁸⁰ Chain gang labor can be imposed for violation of a city ordinance, even without a jury trial, but it was held a violation of due process to commit the prisoner to work with felons under punishment of the

79. *Shaw v. Fisher*, 113 S.C. 287, 102 S.E. 325 (1920). See the prohibition in the Federal Criminal Code that makes it a misdemeanor to entice a workman to violate his contract to work in an armory or arsenal. 18 U.S.C. § 1232 (Supp. III, 1950).

80. *Chicago v. Williams*, 254 Ill. 360, 98 N.E. 666 (1912). (The rate was fifty cents a day, but there was a six months maximum.)

same grade of severity.⁸¹ The Nebraska constitutional prohibition of slavery and involuntary servitude was held to render invalid the imposition of hard labor as punishment for contempt of an injunction, though imprisonment was allowed to stand.⁸²

Military Service

An unwritten exception is compulsory military and naval service. The authority for this exception contains by way of explanation only the unilluminating observation of Mr. Chief Justice White, addressed to the contention that such service is involuntary servitude prohibited by the Thirteenth Amendment, "the contention to that effect is refuted by its mere statement."⁸³

Road Work

The basis for this kind of exception was outlined with some care by Mr. Justice McReynolds in *Butler v. Perry*.⁸⁴ The Thirteenth Amendment introduced no novel doctrine with respect to services always treated as exceptional. It certainly did not interdict the enforcement of duties owed to the state, such as service in the army, the militia, or on the jury.⁸⁵ The point at issue was whether able-bodied males between 21 and 45 years of age could be required to work on the road for a week (of sixty hours) during the year, under a Florida statute making failure to comply a crime. The Court sustained the statute on the basis of ancient usage and unanimous judicial opinion,⁸⁶ pointing to the existence of similar statutes requiring work on the roads under the Northwest Ordinance, from which the Thirteenth Amendment was taken, and referring to Blackstone's *trinoda necessitas*.⁸⁷

81. *Pearsons v. Wimbish*, 124 Ga. 701, 52 S.E. 751 (1906).

82. *Smolczyk v. Gaston*, 147 Neb. 681, 24 N.W.2d 862 (1946).

83. *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918). In connection with camps for conscientious objectors in lieu of military duty it was explained that the Thirteenth Amendment does not apply to a call for service made by the government according to law to meet a public need. Incidentally, the rate of allowances is immaterial, because involuntary, not uncompensated service is forbidden. *Heflin v. Sanford*, 142 F.2d 798 (5th Cir. 1944).

84. 240 U.S. 328 (1916).

85. Compulsory service for the public in various capacities has been sustained. *State v. Henley*, 98 Tenn. 665, 41 S.W. 352 (1897) (witnesses and certain officers in criminal cases); *Crews v. Lundquist*, 361 Ill. 193, 197 N.E. 768 (1935) (service as administrator for estates of war veterans).

86. *E.g.*, *Short v. State*, 80 Md. 392, 31 Atl. 322 (1895) (road work statute does not infringe the privileges and immunities of citizens of the state); *Dennis v. Simon*, 51 Ohio St. 233, 36 N.E. 832 (1894).

87. 1 BL. COMM. 263, 357.

Seamen

Ancient wont was employed to justify compulsion to serve in an earlier case which listed as traditional exceptions military and naval enlistments and the custody of minor children and wards. In *Robertson v. Baldwin*⁸⁸ the validity of federal statutes⁸⁹ providing for the arrest of seamen and their return to their ships to serve out the period for which they had signed to sail was challenged. Mr. Justice Brown, for the Court, sustained the statutes as falling within unwritten traditional exceptions. He suggested that the Thirteenth Amendment is to be read as are the first ten amendments to the Constitution, which have always been subject to the exceptions understood to exist at their adoption though not expressed. This approach, however, was only in the alternative; the opinion of the majority first holds that the Thirteenth Amendment does not apply to any compulsion to remain in service entered into voluntarily. Contracts for personal servitude, it was said, may be void as against public policy, but they do not violate the prohibition against involuntary servitude!

That this view of the law was not to stand was shown eight years later in *Clyatt v. United States*,⁹⁰ which upheld the Anti-Peonage Act as a valid exercise of Congressional power under the Thirteenth Amendment and held that it embraces involuntary service whether entered into voluntarily or involuntarily. Mr. Justice Harlan's dissent in *Robertson v. Baldwin*⁹¹ was thus vindicated. He considered that the ancient laws referred to by the majority were no longer apposite, in view of subsequent constitutional development. He emphasized the facts that the vessel was engaged in a purely private business and that the Thirteenth Amendment plainly provides only for one exception, punishment for crime. He also dissented from the reasoning that service voluntarily entered could not become involuntary servitude during the term of the agreement. He conceded, however, that there are unwritten exceptions for public service, as in the case of soldiers and sailors, and even in private service, but only in the instance of apprentices of tender years. Though

88. 165 U.S. 275 (1897).

89. REV. STAT. §§ 4598, 4599 (1875). This statute was repealed a year after the decision in favor of a milder seamen's code. 30 STAT. 764 (1898).

90. 197 U.S. 207 (1905).

91. 165 U.S. 275, 288 (1897).

the *Clyatt* case cut from under the holding in the *Robertson* case a substantial line of reasoning, the *Robertson* case has not been overruled and presumably still stands on the ground that seamen, by unwritten exception based on tradition, can be compelled to continue a voyage once begun.⁹²

Children

One clear-cut exception, in addition to whatever remains of the seaman exception, exists in favor of compulsory service in behalf of a private master, although its importance as a source of forced labor is slight. That is the exception in favor of apprenticeship of minors. The principle is that the state as *parens patriae* safeguards the welfare of children who are neglected by their parents and as an incident of assuming custody of them may require them to perform services appropriate to their age and condition, or may authorize a private person to do so.⁹³

Vagrants

This principle would extend to mental defectives of mature chronological age if they are without means of subsistence, or if they have to be restrained as a measure of public safety. But difficulties arise when the state undertakes to compel private service solely because of destitution or idleness. A procedure for hiring vagrants out to the highest bidder for a half-year term was held to be a violation of the state and federal prohibi-

92. *Cf.* Southern S.S. Co. v. N.L.R.B., 316 U.S. 31 (1942). When Chinese seamen were not permitted to land in the United States, the court on habeas corpus was compelled to dispense a kind of natural equity. The captain, while the ship was in Tacoma, Washington, was threatening to violate the terms of the shipping articles of the crew by returning to Manila with a load of military supplies instead of going directly to Hong Kong. Since Hong Kong is on the route from Tacoma, and the expense of shipping the men on another vessel would be very heavy, the court ordered the seamen remanded to the custody of the captain and accepted the bond of the captain either to arrange for their return from Manila to Hong Kong or to return immediately from Manila on his own ship. This doom of Solomon doubtless left the Chinese with a bitter taste, because they clearly desired to avoid the hazards of service in the war zone. *In re Chung Fat*, 96 Fed. 202 (N.D. Wash. 1899). A more recent case awarded damages for false imprisonment, when the master, by contesting a petition for habeas corpus, prolonged his custody of seamen after they obtained permission of the immigration authorities to land. *Elman v. Moller*, 11 F.2d 55 (4th Cir. 1926), *cert. denied*, 271 U.S. 675 (1926).

93. *Garner v. Wood*, 188 Ga. 463, 4 S.E.2d 137 (1939); *Kennedy v. Meara*, 127 Ga. 68, 56 S.E. 243 (1906); *Bryant v. Brown*, 151 Miss. 398, 118 So. 184 (1928).

tions against involuntary servitude.⁹⁴ A vagrant was not denominated a criminal by the statute, which defined vagrants as able-bodied persons who have no visible means of support, or who do not work and are found loitering about, or who leave their wives and children without means of subsistence, or who are found begging.

A less archaic method of compelling men to work was used during the First World War. Such statutes required all male persons within designated ages to be engaged in some lawful occupation. Under the Delaware plan, if the person was not so engaged he was obliged, on pain of being held guilty of a crime, to accept assignment by the State Council of Defense to a private employer. The statute was sustained as a reasonable means of preventing an increase in crime and increasing production.⁹⁵

After war, depression of business activity left its mark on the use of coercion by the criminal law to obtain labor. In *Commonwealth v. Pouliot*⁹⁶ the defendant was convicted of unreasonable neglect to provide for the support of his family. He was able-bodied but unable to find private employment. He could have, however, made his family eligible for benefits dispensed by the welfare department of the city by working for the city public works department as required. The court denied his contention that he was entitled to decline to work unless the city would assign a definite rate of compensation for his services. Officers of the city may be required to perform their duties lawfully and without oppression. The duty of family support may be enforced by criminal sanctions. Their use in connection with this means of obtaining support is analogous to jury duty, or duty in the militia, so far as the Thirteenth Amendment is concerned. This last assertion of the court is unsound, since the duty to serve here reflects family obligations rather than civil obligations to organized society. Nevertheless, so long as the family head is constrained by economic need, rather than by absolute legal compulsion, to perform the service in question, and so long as he is legally free to employ whatever resources he may be able to muster, it seems that giving him an opportunity to satisfy his obligations is not an invasion of constitu-

94. *Thompson v. Bunton*, 117 Mo. 83, 22 S.W. 863 (1893).

95. *State v. McClure*, 7 Boyce 265, 105 Atl. 712 (Del. 1919). *Contra: Ex parte Hudgins*, 86 W. Va 526, 103 S.E. 327 (1920).

96. 292 Mass. 229, 198 N.E. 256 (1935).

tional rights. Like the property system, family-support statutes may bring about the necessity to labor, and even to labor in a particular employment (whether public or private); but the economic circumstances that contribute to this necessity do not afford a justification for exemption from a duty applicable alike in all economic circumstances, the duty to use from whatever resources there are an amount sufficient to care for the family.

On the other hand, it may be doubted whether a general duty to engage in an occupation, at least without a general draft for public service under the justification of wartime necessity or other disaster emergency,⁹⁷ is consistent with traditional notions of liberty. Certainly a general compulsion to work for a particular private employer under criminal sanctions, or perhaps a tax on changing employers, would be offensive to the Thirteenth Amendment. No less offensive to the Fourteenth, it seems to me, would be the general deprivation by direct compulsion of a criminal statute of the liberty not to work based upon economic status. Yet vagrancy statutes are frequently so vaguely phrased as to be susceptible of application through a means test. Temptation of officers to make such use of the ordinances against vagrancy is ever-present, because of the disproportionate amount of pains required to apprehend petty criminals on lawful evidence. When labor is in great demand this temptation is intensified. It is not uncommon for the streets in town to be empty of idlers during harvest season or in levee towns in the flood season as a result of police department drives on "vagrancy."

6. SUMMARY

The promise of the Thirteenth Amendment, that neither slavery nor involuntary servitude shall exist within the United States, is a national pledge that has been one of the minor objects of legislative and judicial concern. Nevertheless, after 1900 an obscure statute enacted primarily to curb abuses of military authority in a remote province became a lever against bondage, and has served as the primary national force against involuntary servitude to the present day. It removes the barrier against migration of a worker that keeps him by unlawful means in his current service to satisfy an asserted indebtedness

97. See Hoague, Brown, and Marcus, *Wartime Conscription and Control of Labor*, 54 HARV. L. REV. 50 (1940).

to his employer. It opposes to that unlawful means a liability to punishment as a felon. Further, that statute, in conjunction with the Thirteenth Amendment, has contributed to the invalidation of legislation that enables an employer to hold over the head of his employee the risk of criminal liability for leaving an employment. A few decisions of state courts have removed additional clogs on freedom to leave an employment.

It has become clear that criminal liability cannot be directly imposed upon failure to carry out a contract of employment, nor can a state expose an employee to the risk of such liability by a rule of presumption based upon leaving an employment. Statutes that readily lend themselves to abuse for the purpose of maintaining service under threat of criminal prosecution are suspect.

If service may not be maintained without the consent of the employee, neither can it be so imposed. But here it has been necessary to note the exceptions for criminal punishment, the public services such as military and naval obligations, shipboard discipline, and the custody of children. Subject to these exceptions, any obligation to go to work for a particular employer or to remain in his service can only be a resultant of the coincidence of limited economic opportunity with duties such as support of the family that are properly enforceable by the criminal law or with duties that are sanctioned only by liability to respond in damages.

The enforcement of a duty backed up by criminal liability either to work for some employer or to be self-employed in a remunerative occupation could produce involuntary servitude and trench upon the freedom to migrate for employment. The nearest approximation to the enforcement of such a duty is the manner in which vagrancy ordinances are from time to time enforced. This problem is the more acute because the abusive enforcement of vagrancy ordinances, like the use of laws against fraudulently obtaining advances from an employer, bears most heavily upon persons who lack the resources to resist their erroneous or oppressive administration.

The social interest in stability of employment cannot be enforced by direct regulation freezing men to their jobs, short of dire emergency or conversion to a quasi-military mobilization of resources and manpower. So long as workers have the means

of transportation they are generally free to migrate for employment, and counterpressures must be found in the superior attractions of remaining at the chosen employment, since ignorance of better opportunity elsewhere cannot be depended upon to prevail. Prevention and correction of misinformation about employment opportunity, and, to the extent consistent with other policies, equalization of employment conditions over the country, are, however, examples of spheres of action outside the area where direct measures to hold a worker to his job are forbidden.