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THE THIRTEENTH AMENDMENT AND FREEDOM OF CHOICE IN PERSONAL SERVICE OCCUPATIONS: A REAPPRAISAL

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A recent article by Alfred Avins argues that antidiscrimination laws affecting personal service occupations violate the thirteenth amendment by compelling involuntary servitude.¹ It is the purpose of this article to suggest that some of the historical evidence adduced by Dr. Avins is fallacious; and that at least one judicial decision, the substance of which is essential to his argument, is represented inaccurately.

The key issue concerns the intent of Congress when it incorporated into the thirteenth amendment a prohibition against involuntary servitude, together with one against slavery. Dr. Avins explains this by asserting that Congress "intended to enact the provisions of the Northwest Ordinance, familiar to so many Senators as part of the constitutions of their own states."² He argues, moreover, that judicial interpretations of the ordinance were meant to be "carried along with the language of the ordinance itself into the United States Constitution."³

This writer is in agreement that Congress was cognizant of juridical experience under the 1787 ordinance when it expressly prohibited involuntary servitude in the thirteenth amendment. However, the Avins article misinterprets that experience in the courts of states which were created from the Northwest Territory.

Article 6 of the Northwest Ordinance declared: "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" Dr. Avins cites only two cases, *Matter of Clark*⁴ and *Phoebe v. Jay*,⁵ to illustrate that:

[T]he words "involuntary servitude," as found in the Northwest Ordi-

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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) [hereinafter cited as Avins]. Of the constitutionality of antidiscrimination laws affecting public service occupations under the thirteenth amendment, Avins asserts (id. at 229) that dissent in *Browning v. Slenderella Systems*, 54 Wash. 2d 440, 341 P.2d 859 (1959) is the only case that "has ever discussed this question." However, see dissenting opinion of Harlan, J., in *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) arguing that the thirteenth amendment supported the effort in the Civil Rights Act, ch. 31, 14 Stat. 27 (1866) to eradicate the "badges and incidents" of slavery.

² Avins 236. See also id. at 230 nn.11-16.

³ Id. at 236.

⁴ 1 Blackf. 122 (Ind. Sup. Ct. 1821).

⁵ 1 Ill. (Breese) 268 (1828).

nance, and incorporated into the state constitutions of Illinois, Indiana, Michigan, and Ohio, have their ordinary and natural meaning. They mean service or labor which is not, at all times, performed voluntarily, and without any legal or other compulsion.⁶

Matter of Clark is summarized correctly as effectively banning involuntary servitude in Indiana. It is relevant to add that one year earlier, the same court, in *State v. Lasselle*,⁷ freed a Negress who was the daughter of a slave held in bondage in Indiana prior to the advent of American sovereignty in the Northwest Territory. The decision ignored the Northwest Ordinance, applying instead the express prohibition against slavery contained in the 1816 Indiana Constitution.⁸ "It is evident," the court asserted:

[T]hat the framers of our Constitution intended a total and entire prohibition of slavery in this State And it can not be presumed that the Constitution, which is the collected voice of the citizens of Indiana, declaring their united will, would guarantee to one part of the community such privileges as would totally defeat and destroy privileges and rights guaranteed to another. From these premises it follows, as an irresistible conclusion, that, under our present form of government, slavery can have no existence in the State of Indiana⁹

Lasselle and *Matter of Clark* represent two faces of the same coin. The earlier decision eliminated outright slavery dating from the time of French or British sovereignty. But it left in question the status of a second class of Negroes in Indiana: those who, obviously under duress, had indentured themselves under a territorial law of 1807.¹⁰ The law of 1807¹¹ had permitted indenture of Negroes for any term of years, and it bound the children of such servants to the masters until they had reached ages thirty (if male) or twenty-eight (if female). *Matter of Clark* rendered slavery-by-indenture illegal in Indiana by ruling that an action for habeas corpus itself "proves the service to be involuntary" and a violation of the state constitution.¹²

In *Phoebe* the Illinois Supreme Court pursued an entirely different course, and it is curious that Dr. Avins should have cited its effect as identical to that of *Matter of Clark*.¹³ In *Phoebe* the same territorial

⁶ Avins 232.

⁷ 1 Blackf. 60 (Ind. Sup. Ct. 1820).

⁸ Ind. Const. art. 11, § 7 (1816). The decision also cited Ind. Const. art. 1, § 1 (1816) that "all men are born equally free," etc. and Ind. Const. art. 1, § 24 (1816). *State v. Lasselle*, supra note 7, at 61-62.

⁹ Id. at 62.

¹⁰ Ford, A History of Illinois 32 (1854); Philbrick, Laws of Indiana Territory, at cxxxviii (1930).

¹¹ Ind. Terr. Laws (1807), ch. 64, §§ 1-14; Philbrick, supra note 10, at 523. For earlier legislation of a similar nature, cf. id. at 136.

¹² *Matter of Clark*, 1 Blackf. 122, 125-26 (Ind. Sup. Ct. 1821).

¹³ Avins 231-32.

statute of 1807, permitting Negro indenture for any term of years, was at issue. A Negro woman had indentured herself in 1814 to serve Jay for forty years. Dr. Avins correctly quotes the decision as stating that the 1807 law violated article 6 of the Northwest Ordinance.¹⁴ But that statement was qualified by the court in an introductory clause which reads: "If the only question to be decided was, whether this law . . . conflicted with the ordinance, I should have no hesitation in saying that it did."¹⁵ In fact, the indentured was *not* freed, as Dr. Avins implies. The decision went further, asserting that the ordinance was irrelevant and that the 1818 Illinois constitution controlled. The Negress was kept in servitude, in accord with article VI, section 3 of the Illinois constitution, which declared:

Each and every person who has been bound to service by contract or indenture in virtue of the laws of Illinois Territory heretofore existing and in conformity with the provisions of the same, without fraud or collusion, shall be held to a specific performance of their contracts or indentures; and such negroes and mulattoes as have been registered in conformity with the aforesaid laws, shall serve out the time appointed by said laws¹⁶

This decision was consistent with the Indiana cases only in the sense that it applied the state constitution. The court declared that Congress had approved the constitution upon admitting Illinois as a state, despite the fact that in the debate thereon article VI, section 3 "was conceded to be a violation . . . of the ordinance."¹⁷ By so admitting Illinois to statehood, Congress "gave their consent to the abrogation of so much of the ordinance as was in opposition to our constitution."¹⁸ *Phoebe* became infamous in Illinois for perpetuating long-term Negro indenture under the old 1807 territorial law.¹⁹

Fifteen years later, the doctrine of *Phoebe* was still being applied. Thus the Illinois court refused to grant freedom, in *Sarah v. Borders*,²⁰ to a Negress who had indentured herself in 1815 for a period of forty years. Concerning article VI, section 3 of the state constitution, the court asserted:

¹⁴ Id. at 231.

¹⁵ *Phoebe v. Jay*, 1 Ill. (Breese) 268, 270 (1828).

¹⁶ Ill. Const. art. 6, § 3 (1818) continued: "Provided, however, that the children hereafter born of such persons, negroes or mulattoes, shall become free, the males at the age of 21 years, the females at the age of 18 years."

¹⁷ *Phoebe v. Jay*, supra note 15, at 272.

¹⁸ *Ibid.*

¹⁹ Harris, *The History of Negro Servitude in Illinois* 101 (1904). Later decisions amplifying the doctrine of *Phoebe* include *Choisser v. Hargrave*, 2 Ill. (1 Scam.) 317 (1836); *Boon v. Juliet*, 2 Ill. (1 Scam.) 258 (1836). *Kinney v. Cook*, 4 Ill. (3 Scam.) 232 (1841) placed the burden of proof upon the alleged slaveowner or master of an indentured servant, contrary to the practice in the slave states of the South.

²⁰ 5 Ill. (4 Scam.) 341 (1843).

It is not the province of the Court to determine whether it was politic, just, or humane, but simply whether the people in Convention had the power to fix the condition of people of color, thus situated [*i.e.*, indentured under the 1807 law] at the adoption of our Constitution. This question came directly in judgment in the case of *Phoebe v. Jay* [W]e must affirm the correctness of that judgment.²¹

The court therefore rejected the contention of Lyman Trumbull, counsel for the appellant, that the indenture was void because the 1807 law was in conflict with the Northwest Ordinance.²² Not until *Jarrot v. Jarrot*²³ in 1845 did the Illinois court rule that outright slavery, deriving from the period antedating American sovereignty, was illegal. This had been done in Indiana in *State v. Lasselle*²⁴ a quarter century earlier. And not until 1847 was the legality of Negro indentures under the 1807 territorial law finally cast in doubt in Illinois.²⁵

These facts place the congressional debate of the thirteenth amendment in an entirely different context from that suggested by Dr. Avins. The amendment as enacted was drafted by Lyman Trumbull, then United States Senator from Illinois. The amendment provides: "Neither slavery nor involuntary servitude . . . shall exist within the United States." As Dr. Avins notes at page 234, Senator Charles Sumner wished to exclude reference to involuntary servitude, asserting that "slavery in our own day is something distinct, perfectly well known, requiring no words of distinction outside of itself." Sumner offered as a substitute for Trumbull's language: "All persons are equal before the law, so that no person can hold another as a slave."²⁶ Trumbull responded that the wording adopted from the Northwest Ordinance would "accomplish the purpose." Senator Jacob Howard of Michigan supported Trumbull, declaring that the sixth article of the 1787 ordinance was "an expression which has been adjudicated upon repeatedly, which is perfectly well understood both by the public and by judicial tribunals"²⁷

Dr. Avins deems this exchange sufficient proof that "Senator Sum-

²¹ *Id.* at 345.

²² *Id.* at 346 (concurring opinion).

²³ 7 Ill. (2 Gilm.) 1 (1845) holding that the Northwest Ordinance, art. 6 had abrogated slaveholders' rights to slaves antedating American sovereignty. The same doctrine had been propounded in *Harry v. Decker*, 1 Miss. (Walker) 36 (1818).

²⁴ 1 Blackf. 60 (Ind. Sup. Ct. 1820).

²⁵ Cf. Harris, *supra* note 19, at 119.

²⁶ Cong. Globe, 38th Cong., 1st Sess. 1483 (1864) quoted in Avins 234.

²⁷ Cong. Globe, 38th Cong., 1st Sess. 1489 (1864) quoted in Avins 235. Howard no doubt referred to *Merry v. Chexnaider*, 8 Mar. N.S. 699 (La. 1830); *Forsyth v. Nash*, 2 Mar. 385 (La. 1816); *Harry v. Decker*, *supra* note 23 for the proposition that a slave born in the Northwest Territory was entitled to his freedom since according to art. 6 of the ordinance "there could be therein neither slavery nor involuntary servitude." Cf. *Merry v. Tiffin*, 1 Mo. 725 (1827); *Winnay v. Whitesides*, 1 Mo. 472 (1824).

ner proposed to declare all men equal, but Congress rejected this. Instead of enacting equality, it enacted liberty."²⁸ It appears more reasonable to contend that Trumbull and others wished to incorporate the prohibition against involuntary servitude, not to avoid "enacting equality" but rather to assure that no state court might mistake the intent of Congress and perpetuate effective Negro slavery under the guise of indentures permitted under a state constitution. There is no question either that advocates of the amendment were much concerned about equality; to pretend otherwise is to ignore the substance of the debates. An opponent, Joseph Edgerton, asserted that the amendment would accomplish "the abolition of slavery in the United States, and the political and social elevation of Negroes to all the rights of white men."²⁹ Lyman Trumbull himself was author of the 1865 civil rights bill, which was designed, as he said, to implement the thirteenth amendment and to "abolish slavery, not only in name but in fact."³⁰ Trumbull declared: "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."³¹

I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited.³²

It is impossible to accept the view that Trumbull, who throughout his career in the Illinois bar assaulted repeatedly the doctrine of *Phoebe*, conceived the thirteenth amendment as designed to do otherwise than "enact equality."³³ It is doubly ironic that Dr. Avins should make this argument by way of a misunderstanding of the import of *Phoebe* in the history of Negro servitude in the old Northwest. Rejection by the western Senators of Sumner's effort to omit reference to involuntary servitude is readily understood in light of their experience with the *Phoebe* doctrine in the courts of Illinois.

A final objection relates to Dr. Avins' conclusion. Here he asserts, at page 255, that the thirteenth amendment "confers on every person the absolute and unfettered right to refuse, for any reason or none at all, to serve any other person." He claims that in the 1860's Negroes had a virtual monopoly of the very service occupations which are af-

²⁸ Avins 236.

²⁹ Cong. Globe, 38th Cong., 1st Sess. 2987 (1864); cf. id., 38th Cong., 2d Sess. 142-43 (1865) (remarks of Godlove S. Orth). A perceptive review of the debates is in tenBroek, *Antislavery Origins of the Fourteenth Amendment* 137-224 (1951).

³⁰ Cong. Globe, 39th Cong., 1st Sess. 43 (1865) quoted in tenBroek, *supra* note 29, at 159.

³¹ *Ibid.*

³² Quoted in *id.* at 168.

³³ Cf. Harris, *supra* note 19, at 123.

fects today by various state antidiscrimination laws. It is paradoxical, he declares, that the present civil rights movement seeks to force white barbers, bootblacks, waiters, etc., to serve Negroes, whereas a century ago Negroes were freed from some compulsion (never clearly defined) to serve white customers.³⁴

This argument contains two fallacies. In the first place, the alleged Negro monopoly of service occupations was hardly complete, if indeed even significant, in 1861. In a few localities, such as Baltimore, free Negroes had predominated in certain service trades at an earlier period; but their position had eroded seriously as early as the 1840's under pressure of competition from whites.³⁵ The problems faced by free Negroes in service occupations did not derive from any compulsion to serve whites, but rather from disabilities imposed upon Negroes in the courts, from lack of educational opportunities equivalent to those available to their white competitors, and from racial prejudice against them.³⁶ Moreover, the actual magnitude of free-Negro employment in service trades should not be over-emphasized. In North Carolina, for example, the 1860 census listed only twenty-five free Negroes as barbers, three as bartenders, twenty-four as hack drivers, and six as waiters; compared with 1,048 as farmers, 1,587 as common laborers, and 1,716 as farmhands.³⁷ Similarly, in Indiana the 1850 census listed 2,150 free Negroes, of whom 976 were farmers and 720 were laborers.³⁸

Where free Negroes did achieve a local monopoly in one of the service trades, as in barbering in South Carolina, by the 1880's "colored barbers were gradually being relegated to serving only Negro customers"³⁹ By the late 1890's segregation and disfranchisement legislation, together with emergent *de facto* segregationist practices, had become a monument to cynical evasion of constitutional guarantees of equal rights. It is this tragic development which antidiscrimination laws, fully consistent with the spirit and intent of the thirteenth amendment, are intended to correct.⁴⁰

Finally, in view of the fact that about ninety per cent of American Negroes were slaves in 1860, it is absurd to construe the thirteenth amendment as designed somehow to "free" the remaining ten per cent

³⁴ Avins 252-55. The issue is clouded by introduction of the Emancipation Proclamation, *id.* at 252, yet the entire thrust of the argument makes the thirteenth amendment the chief point of reference. Cf. *id.* at 255 n.143.

³⁵ Cf. Wright, *The Free Negro in Maryland* 149 (1921).

³⁶ Franklin, *The Free Negro in North Carolina* 136 (1943); Wright, *supra* note 35, at 165-73.

³⁷ Franklin, *supra* note 36, at 134-35.

³⁸ Thornbrough, *The Negro in Indiana Before 1900*, at 133 (1957).

³⁹ Tindall, *South Carolina Negroes, 1877-1900*, at 129 (1952).

⁴⁰ Cf. Woodward, *Strange Career of Jim Crow* ch. 2 (1957).

from compulsion to "serve whites." The concept of involuntary servitude, in the context of experience in Illinois and elsewhere, centered upon long-term indenture of Negroes as an evasion of prohibitions against slavery. Dr. Avins cites no single line in the congressional debates that related involuntary servitude to the question of personal service occupations, and there is no sound evidence that Lyman Trumbull and others had such a relationship in mind when they advocated the thirteenth amendment.