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WORKFARE AND INVOLUNTARY SERVITUDE—WHAT YOU WANTED TO KNOW BUT WERE AFRAID TO ASK

CYNTHIA A. BAILEY*

I. INTRODUCTION

President Clinton promised to “end welfare as we know it” when he was elected into office in 1992.¹ Since the Republicans gained control over Congress last November,² Clinton’s promise has taken on a new urgency. Indeed, it appears that Congressional Republicans and the Clinton Administration are trying to out-manuever each other as to who can devise and take credit for the most dramatic welfare reforms. While the Administration touts its plan,³ Republicans are calling for the near-elimination of welfare altogether.⁴ There is one aspect of

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¹ *In Their Own Words: Transcript of Speech by Clinton Accepting Democratic Nomination*, N.Y. TIMES, July 17, 1992, at A14. Clinton repeated this assertion in his State of the Union Address on January 24, 1995 when he stated: “Let this be the year we end welfare as we know it.” *State of the Union, The President’s Address: “We Heard America Shouting,”* N.Y. TIMES, Jan. 25, 1995, at A17; see also Jason DeParle, *Better Work Than Welfare, But What If There’s Neither?*, N.Y. TIMES MAG., Dec. 18, 1994, at 42, 48 [hereinafter DeParle, *Better Work Than Welfare*]; Barbara Vobejda, *Welfare Reform: Debate is Shifting to Radical Changes*, WASH. POST, Nov. 17, 1994, at A1.

² The Republicans won majority control of both the Senate and the House of Representatives in the November, 1994 election. E.g., Adam Clymer, *The 1994 Elections: Overview, G.O.P. Celebrates Its Sweep to Power; Clinton Vows to Find Common Ground*, N.Y. TIMES, Nov. 10, 1994, at A1; Robert Shogan & David Lauter, *Republicans Score a Sweeping Victory; Elections: The Party Wins Majorities in the Senate and House; Voters Shun Clinton’s Activist Government Message*, L.A. TIMES, Nov. 9, 1994, at A1.

³ The Clinton Administration first introduced its welfare reform plan on June 21, 1994 as the Work and Responsibility Act of 1994. H.R. 4605, 103rd Cong., 2d Sess. (1994); S. 224, 103rd Cong., 2d Sess. (1994) [hereinafter Work and Responsibility Act or Clinton Plan] (all references will be to the House of Representatives version of the Bill). To date, the Clinton Plan has not been reintroduced in the 104th Congress. However, on February 16, 1995, leading Democrats in the House of Representatives introduced a welfare reform plan whose main component is workfare. H.R. 982, 104th Cong., 1st Sess., §§ 102, 301–304 (1994) (Individual Responsibility Act of 1995).

⁴ To date, the welfare reform bill that has garnished the most Republican support is the Personal Responsibility Act of 1995. H.R. 4, 104th Cong., 1st Sess. (1995) [hereinafter Personal

welfare reform, however, upon which both groups agree; both liberals and conservatives have fully embraced the idea of workfare.⁵

Workfare specifically refers to the idea that welfare recipients should be required to work for their benefits.⁶ One of the main features of the Clinton Administration's Plan, for example, is a cut-off of benefits after two years unless welfare recipients accept government-provided jobs.⁷ Workfare is viewed by its proponents as a revolutionary new way to improve the welfare system.⁸ They believe that it will instill a strong work ethic among the poor, get them used to the idea of earning a paycheck, provide them with a sense of self-discipline, and enhance their self-esteem.⁹ Still others argue that workfare proposals are merely a new form of an old and tired idea.¹⁰ They contend that workfare rests on the erroneous assumption that poverty stems from

Responsibility Act or Republican Plan]. The Republican Plan proposes general caps on the growth of welfare spending and the ineligibility of aliens for public welfare. *See id.* tit. III (Capping the Aggregate Growth of Welfare Spending); tit. IV, § 401 (Ineligibility of aliens for public assistance). Specifically, the Personal Responsibility Act proposes reducing or denying Aid to Families with Dependent Children (AFDC) benefits for children whose paternity is not established, a denial of AFDC for certain children born out of wedlock, and a denial of AFDC for additional children. *See id.* tit. I, §§ 101, 105, 106.

⁵ *See* Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 456, 459 (1987-88) [hereinafter Handler, *Transformation of Aid*]; *see also* Jason DeParle, *Momentum Builds for Cutting Back Welfare System*, N.Y. TIMES, Nov. 13, 1994, at A1 [hereinafter DeParle, *Momentum Builds*] (discussing proposals of both Democrats and Republicans to increase work obligations). For other examples of proposed welfare reform legislation involving workfare components, *see* S. 246, 104th Cong., 1st Sess. (1995) (Welfare Reforms That Work Act); H.R. 315, 104th Cong., 1st Sess. (1995) (Work-First Welfare Reform Act of 1995); H.R. 161, 104th Cong., 1st Sess. (1995) (Workfare Incentive Act).

⁶ Handler, *Transformation of Aid*, *supra* note 5, at 462-63.

⁷ Work and Responsibility Act, *supra* note 3, at § 104.

⁸ *See* Michael Kelly, *Clinton Presents Hard Line to Bring in North Carolina*, N.Y. TIMES, Oct. 27, 1992, at A20 (citing then-presidential candidate Clinton's new approach to welfare reform); *But Go For the Jobs, Workfare Works Best With Placement Emphasis*, SAN DIEGO UNION-TRIB., June 17, 1994, at B10; *see also* MICHAEL B. KATZ, *THE UNDESERVING POOR* 225 (1989) (discussing the philosophies of conservatives such as Charles Murray, George Gilder, and Lawrence Mead on welfare reform).

⁹ *But Go For the Jobs, Workfare Works Best With Placement Emphasis*, *supra* note 8, at B10; *see also* KATZ, *supra* note 8, at 225.

¹⁰ *See* Handler, *Transformation of Aid*, *supra* note 5, at 459; Joel F. Handler, *Constructing the Political Spectacle: The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 906 (1990) [hereinafter Handler, *Constructing the Political Spectacle*]; *see also* KATZ, *supra* note 8, at 5-8; DAVID T. ELLWOOD, *POOR SUPPORT* 27 (1988); Patricia L. Sorenson, *Women, Work, and Welfare: A Summary of Work Incentives and Work Requirements for AFDC Recipients in Michigan*, 20 CLEARINGHOUSE REV. 110, 112 (1986); Sylvia A. Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1253 (1983).

moral depravity, and that this assumption has been at the heart of welfare policy for centuries.¹¹

Absent from any discussion of workfare, however, is the recognition that workfare is coerced labor. Indeed, one of the most important principles of the Thirteenth Amendment of the United States Constitution is that the right to one's labor is inalienable. By forcing welfare recipients to work, their right to self-determination is fundamentally compromised. The purpose of this Article is to examine workfare in the context of the Thirteenth Amendment. This Article will focus on an important line of cases from the first part of this century, known as the Peonage Cases, which illuminate the parameters of the Amendment and define what constitutes involuntary servitude.

Part II of this Article will briefly discuss the history of the Thirteenth Amendment and will provide a discussion of the Peonage and relevant cases that explore the meaning of the Thirteenth Amendment's prohibition against involuntary servitude. Part III will discuss the history and development of welfare policy, and will examine the sociological attitudes and norms which have traditionally directed this policy toward some type of coerced work or workfare. This Part will also highlight the significant features of current workfare proposals. Finally, this Article will discuss the meaning of the Thirteenth Amendment's prohibition against involuntary servitude in the context of workfare, and will analyze how current workfare proposals mirror the systems of coerced labor that were struck down by the Peonage Cases.

II. THE THIRTEENTH AMENDMENT AND THE PROHIBITION AGAINST INVOLUNTARY SERVITUDE

A. *History of the Thirteenth Amendment*

The Thirteenth Amendment was the first of three amendments added to the United States Constitution in the aftermath of the Civil War.¹² Section 1 of the Amendment bans slavery and involuntary ser-

¹¹ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 906; *see also* KATZ, *supra* note 8, at 5-8; ELLWOOD, *supra* note 10, at 27.

¹² *See* G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Hous. L. Rev. 331, 331-32 (1975) (pts. 1-8), 13 Hous. L. Rev. 64 (1975) (pt. 9). The Thirteenth Amendment was passed in 1865, followed by the Fourteenth Amendment in 1868, and the Fifteenth Amendment in 1870. *Id.* The text of the Thirteenth Amendment reads as follows: Section 1. 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. Section 2. Congress shall have power to enforce this article by appropriate legislation. U.S. CONST. amend. XIII.

vitute except as a punishment for duly convicted crimes.¹³ The United States Supreme Court has held this section to be self-executing.¹⁴ In contrast, Section 2 of the Amendment is an enabling provision that grants to Congress the authority to enact legislation that enforces the first section.¹⁵ Despite this two-pronged grant of power, the Thirteenth Amendment has played a minor role in United States history.¹⁶ It has never been a declaration of personal freedom for everyone within the jurisdiction of government.¹⁷ This under-utilization of the Amendment can be attributed to a Congress that was reluctant to harness the full power of the Amendment, and to a Supreme Court that for almost a century misinterpreted its meaning.¹⁸

Congress's reluctance to employ the power of the Thirteenth Amendment resulted from the passage of the Fourteenth and Fifteenth Amendments.¹⁹ After the passage of these Amendments, Congress was more attracted to the source of power they provided than to that of the Thirteenth Amendment.²⁰ The reasons behind this change in focus are not completely clear, but may be attributed to the prevailing belief that the Fourteenth and Fifteenth Amendments would be more effective than the Thirteenth Amendment in combatting the remaining vestiges or "badges" of slavery that continued to exist in the South.²¹ Furthermore, it was feared that bold enforcement of the Thirteenth Amendment would impede the reconciliation process with the South.²²

Early judicial interpretation of the Thirteenth Amendment largely eviscerated any power the Amendment was intended to have.²³ Historians of the Amendment maintain that it was passed not only to abolish slavery, but to dismantle the institutional foundations that had sup-

¹³ U.S. CONST. amend. XIII, § 1.

¹⁴ *Clyatt v. United States*, 197 U.S. 207, 216 (1905). "Self-executing" means that the Amendment has power or force without any ancillary implementing legislation. *Id.* at 216 (citing *Civil Rights Cases*, 109 U.S. 3, 20, 23 (1883)).

¹⁵ *Id.* at 216.

¹⁶ Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 171 (1951) [hereinafter tenBroek, *Thirteenth Amendment*].

¹⁷ *The Slaughter-House Cases*, 83 U.S. 36, 69 (1872).

¹⁸ See Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 71-72 (1990); Buchanan, *supra* note 12, at 334.

¹⁹ See Buchanan, *supra* note 12, at 334.

²⁰ *Id.* at 333.

²¹ *Id.* at 334.

²² *Id.*

²³ See Colbert, *supra* note 18, at 71.

ported it.²⁴ The elimination of chattel bondage was provided by the Emancipation Proclamation prior to the passage of the Amendment.²⁵ Consequently, it seems clear that supporters of the Amendment intended to accomplish something other than the elimination of chattel slavery.²⁶

The Slaughter-House Cases, decided in 1873, were the first cases in which the United States Supreme Court considered the meaning of the Thirteenth Amendment.²⁷ The case involved the constitutionality of a Louisiana statute that granted a business monopoly to a New Orleans slaughter-house corporation.²⁸ The statute was challenged by local butchers whose livelihood was effectively destroyed as a result of the granting of the exclusive monopoly.²⁹ The butchers maintained that the statute was a denial of their personal labor rights, and that it consequently violated the Thirteenth Amendment's prohibition against involuntary servitude.³⁰

The Court rejected this claim and upheld the constitutionality of the Louisiana law.³¹ The Court reasoned that the main impetus behind the Thirteenth Amendment was to eliminate the institution of African

²⁴ *Id.* at 33–34. During the legislative debates, most of the arguments in favor of the Thirteenth Amendment mirrored traditional abolitionist sentiments that slavery was a moral and social perversion. tenBroek, *Thirteenth Amendment*, *supra* note 16, at 179–80. Discussion in favor of the Amendment also centered around the needs of free blacks whose experiences were not much different from those of the newly freed slaves. *Id.* at 179. Free blacks bore all the indicia of slavery, and were only somewhat less degraded and restricted than actual slaves. *Id.* According to supporters, the Thirteenth Amendment would be a practical application of the Declaration of Independence's assertion that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights." *Id.* (citing DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

Given the absence of the Southern states at the debates, the traditional arguments in favor of slavery went unheard. *Id.* at 174. Advocates arguing for the necessity of slavery to the cultural and economic prosperity of the South, the Christianizing and humanitarian effects of slavery, and natural property rights arguments were conspicuously absent from the debate. *Id.* Instead, opponents of the Amendment focused on federalism issues. Colbert, *supra* note 17, at 33 n.145. They relied on the contention that the Amendment was a serious threat to states' rights, and, in consideration of the ensuing civil strife, the times were too tumultuous to alter the government. *Id.*

²⁵ See tenBroek, *Thirteenth Amendment*, *supra* note 16, at 179.

²⁶ See *id.*; see also Colbert, *supra* note 18, at 33–34.

²⁷ 83 U.S. 36, 67 (1873). The main holding of the case concerned the interpretation of the Privileges and Immunities Clause of the Fourteenth Amendment. *Id.* at 78–79. The Court held that the privileges and immunities protected by the Fourteenth Amendment were those of U.S. citizenship as opposed to state citizenship. *Id.* The rights of U.S. citizenship were limited to doing business with the government, traveling on the high seas, gaining access to seaports, and assembling and petitioning for redress of grievances. *Id.*

²⁸ *Id.* at 83.

²⁹ *Id.* at 60.

³⁰ See *id.* at 58.

³¹ *Id.* at 82–83.

slavery, not the alleged servitude of the local butchers.³² The Court did recognize, however, that the term “involuntary servitude” had a broader meaning and that its purpose was to forbid all forms and conditions of the institution.³³ The Court reasoned that if the word “slavery” had been used, the purpose of the Amendment might have been evaded.³⁴

Nonetheless, in the *Civil Rights Cases* of 1883, the Court interpreted the Thirteenth Amendment exclusively as a prohibition against actual slavery.³⁵ The Court rejected the idea that social or private discrimination was an incident of slavery within the purview of the Thirteenth Amendment.³⁶ The decision invalidated the Civil Rights Act of 1875,³⁷ legislation that sought to protect citizens’ rights to the full and equal enjoyment of public accommodations, and provided for civil remedies when these rights were violated.³⁸ The majority concluded that the Thirteenth Amendment was designed as a prohibition against the existence of African slavery and did not regulate private social behavior.³⁹

In a vehement dissent, Justice Harlan reiterated the viewpoint of the Thirteenth Amendment’s original sponsors, that the entire institution of slavery, with all of its attendant burdens and disabilities, was intended to be eradicated.⁴⁰ Harlan maintained that the discrimination exercised by the defendants was precisely the sort of badge of servitude that Congress was permitted to prevent under the Thirteenth Amendment.⁴¹

³² *Id.* at 68–69.

³³ *Id.* at 69.

³⁴ *Id.*

³⁵ 109 U.S. 3, 24 (1883).

³⁶ *Id.* The *Civil Rights Cases* involved five separate defendants who were each charged with violating the Civil Rights Act of 1875. *Id.* at 4. Two of the defendants were indicted for denying lodging accommodation to persons of color, two defendants refused to provide accommodations at theaters, and one defendant was indicted for denying a black woman a seat in the “ladies car” of a train. *Id.* at 5.

³⁷ *Id.* at 26.

³⁸ *Id.* at 9. The legislation was enacted to supplement the Civil Rights Act of 1866. Buchanan, *supra* note 12, at 340. The 1866 legislation was enacted in direct response to the violence directed against Southern blacks and the emergence of the “Black Codes,” both of which appeared immediately after the Civil War in the Confederate states. Colbert, *supra* note 18, at 39–41. The purpose of the “Black Codes” was to curtail the rights of blacks to such an extent that their freedom was of little value. *Id.* at 42. The statutes were characterized by restrictions on travel, vagrancy laws, and a legal system that denied blacks civil and criminal rights. *Id.* at 42 n.194. The Civil Rights Act of 1875 sought to extend the 1866 legislation by eliminating the last vestiges of slavery: racial discrimination in public places. Buchanan, *supra* note 12, at 340.

³⁹ *Civil Rights Cases*, 109 U.S. at 22–23.

⁴⁰ *Id.* at 35 (Harlan, J., dissenting).

⁴¹ *Id.* at 43. Harlan’s perspective was not embraced by the Court until almost eighty-five years

Historians conclude that the decisions in the *Slaughter-House Cases* and the *Civil Rights Cases*, as well as Congress's reluctance to employ its power, rendered the Thirteenth Amendment ineffectual for most of the current century.⁴² Indeed, perhaps the only major piece of legislation Congress enacted pursuant to its power under the Thirteenth Amendment that survived judicial scrutiny was the Anti-Peonage Act of 1867.⁴³

B. *The Anti-Peonage Act of 1867*

The Anti-Peonage Act of 1867 nullified all state laws establishing or maintaining peonage.⁴⁴ The system of peonage that developed in the Reconstruction South was in direct response to the labor crisis resulting from the freedom granted to slaves.⁴⁵ Poor, primarily black,

later. *Alfred E. Mayer v. Jones*, 392 U.S. 409, 439 (1968) (housing discrimination claim supported by the Thirteenth Amendment). See Colbert, *supra* note 18, at 71; see also Buchanan, *supra* note 12, at 497.

⁴² Colbert, *supra* note 18, at 59, 71; see also tenBroek, *Thirteenth Amendment*, *supra* note 16, at 171-72.

⁴³ See Buchanan, *supra* note 12, at 597. The anti-peonage laws now contain a civil and criminal component. Karen Gross, *Debtor as Modern Day Peon*, 65 NOTRE DAME L. REV. 165, 177 n.75 (1990). The civil provisions are contained in 42 U.S.C. § 1994 (1988), and the criminal provisions are contained in 18 U.S.C. § 1581 (1988).

⁴⁴ See The Anti-Peonage Act of 1867, ch. 188, 14 Stat. 546 (1867). The text of the statute is as follows:

Section 1990. The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico or of any other Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void. Section 5526. Every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both.

Id.

Peonage requires forcing an individual to work for a particular employer to repay indebtedness. "Peon" is derived from the Spanish word for foot soldier—the lowest rank in the Spanish army. Gross, *supra* note 43, at 178.

⁴⁵ See Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era*, 82 COLUM. L. REV. 646, 646 (1982). Although this Article and the relevant case law focuses on the system of peonage that existed in the Reconstruction Era South, the South is not the only culprit of this practice. Sydney Brodie, *The Federally-Secured Right to be Free from Bondage*, 40 GEO. L.J. 367, 377 (1952). Peonage was also widespread in the American Southwest and Mexico. 45 AM. JUR. 2D *Involuntary Servitude and Peonage* § 10 (1969). In fact, the major impetus behind the 1867 Act was to outlaw the system of involuntary servitude brought to the

laborers were forced into debt either by stiff fines assessed for phony crimes or through labor contracts for which they were paid a small sum in advance of their services.⁴⁶ Based on this indebtedness, they were compelled to continue working for their "employer" until the debt was fully paid, and they faced criminal sanctions if they refused.⁴⁷

In a series of cases decided at the turn of the twentieth century, the United States Supreme Court held that state laws supporting and imposing peonage violated both the Thirteenth Amendment and the federal statutes authorized by it.⁴⁸ The cases are noteworthy because they provided workers with a constitutional shield against forced labor.⁴⁹ Indeed, of all the cases raising challenges to the freedoms embodied in the Thirteenth, Fourteenth, and Fifteenth Amendments that came before the Supreme Court during this time, only the prohibition against involuntary servitude received unqualified support.⁵⁰

C. *The Peonage Cases*

In the 1905 case of *Clyatt v. United States*, the Supreme Court held that the Anti-Peonage Act of 1867 was constitutionally valid.⁵¹ The U.S. Government used the statute to convict a Georgia man, Samuel M. Clyatt, for retrieving by force two of his former employees whom he claimed left their jobs illegally.⁵² Although the Court overturned the

Southwest territories from Mexico, which had inherited the system from Spain. Brodie, *supra*, at 376. *See also* *United States v. Ancarola*, 1 F. 676, 683–84 (C.C.S.D.N.Y. 1880) (young Italian boy in New York City held in involuntary servitude).

⁴⁶ *See* Schmidt, *supra* note 45, at 649. Although most victims of southern peonage were black, poor European immigrants from Ellis Island and the slums of New York City were also found in the system. *Id.* at 673. In fact, one historian suggests that it was white peonage that actually prompted federal prosecution of the system at the turn of the century. *Id.* (quoting DANIEL A. NOVAK, *THE WHEEL OF SERVITUDE* (1978)).

⁴⁷ Schmidt, *supra* note 45, at 649. These criminal sanctions created even more debt for those convicted, and if they were unable to obtain a criminal surety to front the fine, they were forced to work off their punishment on the chain gangs. *Id.* at 651. The chain gangs of this period were highly profitable ventures for local government because they leased out this labor to private businesses. *Id.* This profitability created a strong local incentive for convictions. *Id.* Convicted laborers, however, were eager to enter into criminal surety contracts because the chain gangs were notorious for their brutality; the death rate was a staggering 20–50%. *Id.*

⁴⁸ *See, e.g.,* *United States v. Reynolds*, 235 U.S. 133, 150 (1914); *Bailey v. Alabama*, 219 U.S. 219, 245 (1911); *Clyatt v. United States*, 197 U.S. 207, 215–16 (1905). Furthermore, almost thirty years later, the Supreme Court was forced to reaffirm these holdings by invalidating state statutes which enforced surety contracts. *See also* *Pollock v. Williams*, 322 U.S. 4, 25 (1944); *Taylor v. Georgia*, 315 U.S. 25, 31 (1942) (invalidating state statutes that treated breach of contract as presumptive evidence of criminal fraud).

⁴⁹ Schmidt, *supra* note 45, at 648.

⁵⁰ *Id.* at 718.

⁵¹ *See* 197 U.S. at 215–16.

⁵² *See id.* at 219; *see also* Schmidt, *supra* note 45, at 660. Clyatt fully believed in the legality of

conviction on other grounds, it held that compulsory service based on indebtedness constitutes involuntary servitude, and therefore, violates both the Thirteenth Amendment and statutory prohibition against peonage.⁵³

Clyatt's attorneys argued that the Anti-Peonage statute did not apply to individuals.⁵⁴ They maintained that both the statute and the Thirteenth Amendment were designed only to prevent the states from establishing systems of peonage or involuntary servitude.⁵⁵ They argued that when peonage existed as a private wrong, the obligation to punish it rested within the powers of the state, not the Federal Government.⁵⁶ In the alternative, Clyatt's attorneys argued that laws requiring the service or labor of a person in liquidation of a debt or obligation did not constitute peonage, and thus were not prohibited by the statute.⁵⁷

The *Clyatt* Court, however, defined peonage as a status or condition of compulsory service based upon the indebtedness of the peon to the master.⁵⁸ The central feature of the system was forced servitude to satisfy debt.⁵⁹ The majority was unconcerned whether the contracted service was voluntary or involuntary.⁶⁰ They concluded that such clas-

his actions. See Schmidt, *supra* note 45, at 660. A Florida statute provided for the imprisonment of laborers if they breached employment contracts while still owing money to their employers. *Id.* Under the statute, Clyatt was able to obtain arrest warrants from the local Florida sheriff. *Id.* Despite this almost customary practice, Clyatt was convicted by a Tallahassee jury and sentenced to four years of hard labor. *Id.*

⁵³ *Clyatt*, 197 U.S. at 215–16. Clyatt's conviction rested on the charge that he returned his former employees to a condition of peonage. *Id.* at 219–20. The Court concluded that in order to show the employees were returned to peonage, the government was obligated to produce evidence that the employees labored in such conditions originally. *Id.* at 219–20. Because the government failed to produce this evidence, the Court determined that the issue was improperly sent to the jury, and accordingly overturned Clyatt's conviction, remanding the case for a new trial. *Id.* at 222.

⁵⁴ *Id.* at 210.

⁵⁵ *Id.*

⁵⁶ *Id.* at 211.

⁵⁷ *Id.* at 210. Clyatt's attorneys were two prominent Georgia lawyers. Schmidt, *supra* note 45, at 661. They were hired by the operators of turpentine stills and lumber mills in Georgia and northern Florida who had pooled their resources to assist in overturning Clyatt's conviction. *Id.* The operators believed that their businesses were in jeopardy unless they were permitted to control their labor as they saw fit. *Id.*

⁵⁸ *Clyatt*, 197 U.S. at 215.

⁵⁹ *Id.*

⁶⁰ *Id.* Whether an action is voluntary or involuntary can be difficult to define. Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 501 (1990). The philosopher Hegel argued that "if a man is a slave, his own will is responsible." *Id.* (quoting G.W.F. HEGEL, PHILOSOPHY OF RIGHT § 57A, at 239 (T.M. Knox trans., 1952) (1821)). Hegel contended that at a minimum, slaves participate in their enslavement because they choose to submit rather than to risk death by resisting. *Id.*

sifications pertained only to the mode of origin, not to the character of the servitude.⁶¹

In addition, the *Clyatt* Court concluded that regardless of how it was created, peonage constituted involuntary servitude.⁶² As such, it was prohibited by the Thirteenth Amendment—whether sanctioned by state legislation or not.⁶³ The Thirteenth Amendment denounces a status or condition, irrespective of the authority by which it is created.⁶⁴

In the 1911 case of *Bailey v. Alabama*, the United States Supreme Court extended its definition of peonage.⁶⁵ The decision centered around the conviction of an Alabama man, Alonzo Bailey, for criminal fraud.⁶⁶ He was prosecuted under an Alabama statute that created *prima facie* evidence of fraud for breach of contract for personal services.⁶⁷ The Court concluded that the purpose of the Alabama statute was to compel, under the sanction of the criminal law, the enforcement of the contract, and that the statute therefore violated both anti-peonage statutes and the Thirteenth Amendment.⁶⁸

The *Bailey* decision stands for the proposition that the Thirteenth Amendment protects the inalienability of an individual's right to his or her labor.⁶⁹ Referring to the *Clyatt* decision, the Court concluded that a contract for service is valid only if the contractor can elect at any time to break it, and if no law or force compels performance or continuation of the service.⁷⁰ It is the compulsion that is prohibited.⁷¹

Furthermore, the Court determined that a state is not permitted to enact statutes that directly or indirectly support systems of involuntary servitude.⁷² The majority stated that the constitutional mandate against involuntary servitude would be defeated if state contract law could be used to force compulsory service.⁷³ The Court maintained

⁶¹ *Clyatt*, 197 U.S. at 215.

⁶² *Id.*

⁶³ *See id.* at 216–17.

⁶⁴ *Id.* at 216.

⁶⁵ 219 U.S. 219, 243 (1911).

⁶⁶ *Id.* at 231.

⁶⁷ *Id.* at 227. Bailey had entered a one-year labor contract at \$12 per month. *Id.* at 235. He was advanced \$15 under the stipulation that this amount would be deducted from his monthly wage. *Id.* at 236. After about a month of service, Bailey left the job and did not repay the \$15 advance. *Id.* Under the statute, such conduct created a presumption of fraud, but because Alabama evidentiary rules precluded the accused from testifying on his own behalf, the presumption could not be effectively rebutted. *See id.* Bailey was convicted, assessed a fine of \$30, and sentenced to imprisonment at hard labor for 136 days. *Id.*

⁶⁸ *Bailey*, 219 U.S. at 237–38, 245.

⁶⁹ *See id.* at 242; *see also* Koppelman, *supra* note 60, at 491.

⁷⁰ *Bailey*, 219 U.S. at 243.

⁷¹ *Id.* at 242.

⁷² *Id.* at 241–42.

⁷³ *Id.* at 242.

that although a state may impose servitude as punishment for a crime, it may not sanction the subjugation of one person to another.⁷⁴

In the 1914 case of *United States v. Reynolds*, the Supreme Court struck down an Alabama criminal surety statute as violative of the Thirteenth Amendment.⁷⁵ The statute provided that fines assessed for criminal convictions could be paid by a third party, or surety.⁷⁶ In exchange, the convict was obligated to work for the surety for a period of time determined by the court.⁷⁷ The convict's failure to complete the contract was a criminal act separate from the original criminal violation, and would subject the convict to additional fines and imprisonment.⁷⁸

The state of Alabama argued that the statute was constitutional under the Thirteenth Amendment's exception for servitude imposed as a criminal sanction.⁷⁹ The Court, however, took exception to the constant threat of another possible arrest and prosecution that formed the basis of the agreement.⁸⁰ It reasoned that this form of constant coercion rendered the labor compulsory; the convict worked in constant fear that the surety would seek his arrest for violation of the labor contract—an action accompanied by new fines and penalties for the convict.⁸¹ The Court concluded that the practical effect of the criminal surety statute was to keep the convict chained to an "ever-turning wheel of servitude," and was thus unconstitutional.⁸² The Court noted that if a state statute either upon its face, or in the manner of its administration, has the effect of denying constitutional rights, it must fail.⁸³

D. *Exceptions to Involuntary Servitude*

The Court has created several exceptions to the Thirteenth Amendment's prohibition against involuntary servitude.⁸⁴ The most significant of these exceptions concerns duties of citizenship.⁸⁵ For example, the

⁷⁴ *Id.* at 244.

⁷⁵ 235 U.S. 133, 150 (1914).

⁷⁶ *Id.* at 142.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 138.

⁸⁰ *Id.* at 146.

⁸¹ *Id.* at 146–47.

⁸² *Id.* One of the convicts in the case was assessed approximately \$60 in fines and costs for petit larceny. *Id.* at 139, 147. Without entering into a surety contract, he would have been required to serve a maximum of 68 days at hard labor. *Id.* at 147. Under the surety contract, however, he was required to labor for nine months and twenty-four day. *Id.* If he failed to perform the service, he could be re-arrested and assessed an additional judgment. *Id.*

⁸³ *Id.* at 149.

⁸⁴ Koppelman, *supra* note 60, at 518.

⁸⁵ *Id.*

Court has upheld compulsory military service and requirements that able-bodied men help build public roads and bridges.⁸⁶ The Court has determined that however burdensome, duties of citizenship are inescapable conditions of freedom.⁸⁷ The government's ability to compel duties of citizenship, however, is not unlimited.⁸⁸ The exception grants to the government only those essential powers without which liberty could not be protected.⁸⁹

The Court has also stated that the Amendment was not intended to introduce novel doctrines.⁹⁰ Certain services have historically been treated as exceptional and have not been regarded within the purview of the Thirteenth Amendment.⁹¹ This exception for services that have traditionally been viewed as unique include the labor of sailors on the high seas,⁹² duties required of children by their parents,⁹³ and common-law duties imposed upon innkeepers to their guests.⁹⁴

In the 1988 case of *United States v. Kozminski*, the United States Supreme Court further limited the meaning of involuntary servitude to include an element of physical or legal coercion.⁹⁵ *Kozminski* involved the criminal prosecution of a Michigan couple for holding two mentally retarded farm hands in involuntary servitude.⁹⁶ The Court

⁸⁶ Selective Draft Law Cases, 245 U.S. 366, 390 (1918); *Butler v. Perry*, 240 U.S. 328, 333 (1916).

⁸⁷ See *Butler*, 240 U.S. at 330; see also Koppelman, *supra* note 60, at 519.

⁸⁸ Koppelman, *supra* note 60, at 519.

⁸⁹ *Butler*, 240 U.S. at 333.

⁹⁰ *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897).

⁹¹ *Id.* This construction, however, has been highly criticized because it does not make sense for an exception to predate the actual rule. Koppelman, *supra* note 60, at 525. Under this interpretation, black slavery itself would be exempt from the Amendment because it certainly had a long historical tradition and was well rooted in the common law. *Id.* at 525 n.197.

⁹² *Robertson*, 165 U.S. at 288. In dicta, the *Robertson* majority also maintained that the involuntary nature of the servitude existed only at the moment of inception, and not continuously. *Id.* This proposition was squarely negated after the peonage cases were decided. See *Clyatt*, 197 U.S. at 215-16.

⁹³ *Robertson*, 165 U.S. at 282.

⁹⁴ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (upholding requirement of private motel to provide accommodations to black travellers because the Thirteenth Amendment was not intended to abrogate common law duties of inn keepers).

⁹⁵ 487 U.S. 931, 952 (1988). The Court's interpretation of "involuntary servitude" specifically concerns its construction under two criminal statutes, 18 U.S.C. §§ 241 and 1584. *Id.* at 934. These statutes are the modern day progeny of the early nineteenth century Slave Trade statute (Act of Apr. 20, 1818, ch. 91, § 6, 3 Stat. 452). *Id.* at 946. Although the decision does not directly pertain to the self-executing provision of the Thirteenth Amendment, the Court specifically construed Congress's statutory intent in a way consistent with the understanding of the Thirteenth Amendment that prevailed when the statute was reenacted in 1909. *Id.* at 945.

⁹⁶ *Id.* at 934. In 1983, the victims were found laboring on the Kozminski dairy farm; both men were in poor health, living in squalid conditions, and were isolated from the rest of society. *Id.* The lower court reported that the trailer occupied by the men was filthy; it did not have

held that involuntary servitude is a condition in which the victim is forced to work by the use or threat of physical or legal coercion.⁹⁷ The Court noted that a victim's age or special vulnerability might be relevant in determining the degree of coercion sufficient to hold that person in involuntary servitude.⁹⁸

In its attempt to define involuntary servitude, the majority turned to its past interpretations of the term under the Thirteenth Amendment.⁹⁹ The Court concluded that in past decisions in which a condition of involuntary servitude was held to exist, the victim had no available choice but to work or be subjected to legal sanction.¹⁰⁰ Consequently, the Court did not include psychological coercion as within the meaning of involuntary servitude.¹⁰¹ The Court feared that including psychological coercion as a factor of involuntary servitude would depend entirely upon the victim's state of mind, and would provide no objective indication of the type of conduct prohibited by law.¹⁰²

Despite this narrow interpretation of involuntary servitude, the Court was clear that its holding did not rule out evidence of other means of coercion, of poor working conditions, or of the victim's special vulnerabilities.¹⁰³ The Court noted that these special circumstances are not irrelevant in determining whether involuntary servi-

running water, and a broken refrigerator was filled with maggot-infested food. *United States v. Kozminski*, 821 F.2d 1180, 1188 (6th Cir. 1987). Further evidence suggested that on several occasions the two men left the farm, but were brought back by either the Kozminskis or other employees. *Kozminski*, 487 U.S. at 935. The men worked on the farm seven days a week, often 17 hours a day, for virtually no pay. *Id.* Eventually, another farm employee contacted county officials about the men's condition and they were placed in an adult foster home. *Id.*

⁹⁷ *Kozminski*, 487 U.S. at 952. The Supreme Court's decision resolved a conflict in the lower courts. In 1964, the United States Court of Appeals for the Second Circuit concluded in *United States v. Shackney* that a condition of involuntary servitude was created only through the use or intended use of physical violence, physical restraint, or immediate imprisonment. 333 F.2d 475, 486-87 (2d Cir. 1964). Conversely, in 1984, a three judge panel of the Court of Appeals for the Ninth Circuit determined in *United States v. Mussry* that involuntary servitude could be coerced by a variety of methods including psychological and economic intimidation. *See* 726 F.2d 1448, 1455-56 (9th Cir. 1984), *cert. denied*, 469 U.S. 855 (1984).

⁹⁸ *Kozminski*, 487 U.S. at 948.

⁹⁹ *Id.* at 941.

¹⁰⁰ *Id.* at 943. The Court briefly reviewed its holdings in the peonage cases, in which it had determined that the sanction of the criminal law to compel service was just as illegitimate as physical force. *Id.*; *see Pollock*, 322 U.S. at 23-24; *Bailey*, 219 U.S. at 244; *Clyatt*, 197 U.S. at 215-16.

¹⁰¹ *Kozminski*, 487 U.S. at 944. The majority specifically stated, however, that its holding did not affect the potential scope of the Thirteenth Amendment. *Id.*

¹⁰² *Id.* at 949. For example, an interpretation of involuntary servitude that included compulsion through psychological coercion could be used to punish a parent who forced an adult son or daughter to work in the family business by threatening withdrawal of affection. *Id.*

¹⁰³ *Id.* at 952.

tude exists.¹⁰⁴ Although the physical or legal coercion must exist, special vulnerabilities are important in determining whether the coercion compelled the victim to serve.¹⁰⁵ These other circumstances could be relevant to corroborate evidence regarding the coercion employed, the defendant's intentions, or the actual causal effect of such conduct.¹⁰⁶

These exceptions and limits on involuntary servitude, however, do not undermine the central principles of the Peonage Cases;¹⁰⁷ in fact, the Peonage Cases are still good law.¹⁰⁸ The fact that they are not often cited and are rarely taught in the standard legal curriculum attests not to their obscurity, but to their unquestioned vitality.¹⁰⁹ The United States Supreme Court clearly established that peonage—a system of coerced employment in satisfaction of a debt—was unconstitutional.¹¹⁰ The Peonage Cases embody the most important principle of the Thirteenth Amendment: the right to one's labor is inalienable.

III. THE HISTORY OF POVERTY PROGRAMS

It is impossible to discuss the coercive nature of workfare outside of its historical context.¹¹¹ Ever since the emergence of the poorhouse in medieval England, poverty policy has centered around the question of who is excused from work.¹¹² Those who are excused from work deserve benefits, and those who are capable of working do not.¹¹³ In a

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See generally Koppelman, *supra* note 60, at 526.

¹⁰⁸ See *id.* at 491 n.48.

¹⁰⁹ See *id.*

¹¹⁰ *Bailey v. Alabama*, 219 U.S. 219, 243–44 (1911).

¹¹¹ For most of this section the author relies on the research of Joel F. Handler, Professor of Law at the University of California at Los Angeles. Two of Professor Handler's articles, *Constructing the Political Spectacle: The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 *BROOK. L. REV.* 899 (1990) and *The Transformation of Aid to Families With Dependent Children: The Family Support Act in Historical Context*, 16 *N.Y.U. REV. L. & SOC. CHANGE* 456 (1987–88), were invaluable resources in the preparation of this section. For further discussion of the history of social welfare programs and legislation, see generally Mark Greenberg, *Federal Welfare Reform in Light of the California Experience: Early Lessons for State Implementation of the JOBS Program*, 27 *N.Y.U. REV. L. & SOC. CHANGE* 419 (1989–90) and KATZ, *supra* note 8, *passim*.

¹¹² Law, *supra* note 10, at 1252–53.

¹¹³ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 926. Other characteristics of the poor have also factored into this “deserving/undeserving” categorization. See, e.g., KATZ, *supra* note 8, at 215–16 (noting that the poor who do not practice chastity are considered undeserving); Johanna Brenner, *Towards a Feminist Perspective on Welfare Reform*, 2 *YALE J.L. & FEMINISM* 99, 103 (1989) (women of color are more likely than white women to be defined as “undeserving”); Sorenson, *supra* note 10, at 111 (noting that poor who live in non-traditional families are considered undeserving).

culture that has grown out of the Protestant work ethic, those who fail to support their families or who fail to find work are morally deviant and undeserving.¹¹⁴ One of the principal categories of the undeserving poor has been single mothers.¹¹⁵

A. Early Anglo-American Poverty Programs

Because work was an individual—not a social—responsibility,¹¹⁶ unemployment in medieval England was thought to be a result of personal character flaws rather than economic conditions.¹¹⁷ The poor were thought of as social deviants—the able-bodied who were unwilling to work.¹¹⁸ Consequently, conditions of relief were less desirable than conditions of the lowest paid work.¹¹⁹ The “poorhouse” was the primary form of relief during this time, and it was a harsh and brutal place.¹²⁰ Starvation, slave labor, and cruel punishment—such as mutilation and public beatings—were common features of the poorhouse.¹²¹ These hardships were considered necessary so that the deserving poor could

¹¹⁴ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 927. For example, the traditional Calvinist view maintained that work was the principal means of achieving God’s will, and that idleness was a form of human alienation. John Glowacki, *Work and Welfare in America: A Synthesis Approach*, 2 NOTRE DAME J.L. ETHICS & PUB. POL’Y 243, 246 (1985).

¹¹⁵ Handler, *Transformation of Aid*, *supra* note 5, at 460; *see also* Martha L. Fineman, *Images of Mothers in Poverty Discourse*, 1991 DUKE L.J. 274, 282–83 (1991). Even the label “single mother” suggests a deviance. Fineman, *supra*, at 291. No one speaks of a “married mother;” the “normal” state of motherhood needs no modification. *Id.* It is only the deviant form that requires qualification, and by implication, justification. *Id.*

¹¹⁶ Handler, *Transformation of Aid*, *supra* note 5, at 467.

¹¹⁷ Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 277 (1964) [hereinafter tenBroek, *California’s Dual System*].

¹¹⁸ Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1505 (1991).

¹¹⁹ Handler, *Transformation of Aid*, *supra* note 5, at 467.

¹²⁰ *See* Handler, *Constructing the Political Spectacle*, *supra* note 10, at 928. Poorhouses were erected for the poor on the “wastes and commons within the parish.” tenBroek, *California’s Dual System*, *supra* note 117, at 259 (quoting 43 Eliz. 1, ch. 2, § IV (1601) (Eng.) and 39 Eliz. 1, ch. 3, § V (1597) (Eng.)). Poorhouses were tax-supported in amounts determined by the local authorities. *Id.* Poorhouse relief was deliberately stigmatized to discourage people from seeking aid. Handler, *Constructing the Political Spectacle*, *supra* note 10, at 929. Assignment to the poorhouse involved a loss of liberty, a separation from one’s family, and horrific living conditions. Handler, *Transformation of Aid*, *supra* note 5, at 468.

Despite this deliberate stigma and harshness of the poorhouse, other forms of relief, such as direct hand-outs, were discouraged. These direct hand-outs were thought to increase poverty because they failed to distinguish between the worthy and the unworthy. *Id.* For example, during the reign of England’s King Henry VIII, able-bodied beggars were required to work, and serious penalties were imposed on anyone who gave these individuals alms. tenBroek, *California’s Dual System*, *supra* note 117, at 259.

¹²¹ *Id.* at 277–78.

be separated from the undeserving poor.¹²² If the poor were willing to subject themselves to the burdens and horrors of the poorhouse, then they were truly destitute.¹²³

Colonial America transported from England these attitudes about the poor.¹²⁴ As in England, the early American colonists were clear about the limits of social obligation.¹²⁵ Families were responsible to each other, community members had certain mutual obligations, but the public owed nothing to strangers.¹²⁶

B. *Women and Poverty Programs*

Poor women were never morally excused from the paid labor force.¹²⁷ In fact, prior to the nineteenth century, women from all social classes were encouraged to seek paid labor.¹²⁸ Around the 1830s, however, forces of the Industrial Revolution gave rise to a new domestic code that defined men as wage-earners and women as providers for the home.¹²⁹

The new domestic code had a particularly harsh effect on poor women: they were still expected to work, but they were also accused of neglecting their families.¹³⁰ This neglect was considered to be at the root of crime and delinquency; social reformers during this time ad-

¹²² *Id.*

¹²³ Handler, *Transformation of Aid*, *supra* note 5, at 468.

¹²⁴ See tenBroek, *California's Dual System*, *supra* note 117, at 291. For example, in 1834 the Reverend Charles Burroughs described pauperism as follows: "[It] is consequence of willful error, shameful indolence—vicious habits—consequences of bad principles and morals." KATZ, *supra* note 8, at 13.

¹²⁵ *Id.* at 6.

¹²⁶ *Id.* The settlement provisions of this period were enacted so that communities were only required to assist their permanent members. See Colonial Laws of N.Y., 1721, ch. 410; see also KATZ, *supra* note 8, at 11. The poor were literally carted from one town to another—each town denying any claim to the "paupers." KATZ, *supra* note 8, at 11–12. Valuable resources were consumed not only in transportation costs but in the ensuing litigation between towns. *Id.* By the nineteenth century, agrarian society was replaced by industrialized urban centers. R.R. PALMER & JOEL COLTON, *A HISTORY OF THE MODERN WORLD TO 1815* 248 (6th ed. 1984). As the peasant classes migrated in search of work, it became impossible to determine the towns to which the poor belonged. See KATZ, *supra* note 8, at 11–12. Eventually, these settlement provisions were altogether abandoned. tenBroek, *California's Dual System*, *supra* note 117, at 296.

¹²⁷ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 907.

¹²⁸ *Id.*

¹²⁹ *Id.* The reasons for this cultural change can be attributed to a variety of factors. *Id.* Technological advances displaced a large segment of workers, and the resulting competition for wages pushed many women into the home. *Id.* Furthermore, because factory work necessarily took men out of the home (unlike agrarian labor), social reformers feared that the family unit would be destroyed. *Id.*

¹³⁰ *Id.*

vocated the removal of children from these homes.¹³¹ These reformers focused on what they perceived to be deviant behavior and the transmission of immoral family values.¹³² By the end of the nineteenth century, juvenile courts were created and imbued with the authority to save children from delinquency by removing them from their allegedly bad environments.¹³³

As the harsh realities of reformatories, state institutions, and the placement of children in Midwestern farms set in, the social reformers began advocating a policy of family preservation.¹³⁴ Between 1911 and 1921, forty states enacted legislation programs that provided poor single women with income support so that they could maintain their homes.¹³⁵ These programs, commonly known as "Mothers' Pensions," were met with fierce opposition.¹³⁶ It was feared that this type of income support would encourage single motherhood and decrease the responsibilities of fathers.¹³⁷ Mothers' Pension programs were also opposed by feminists and working-class women because they were thought to reinforce the domestic code and to further institutionalize women's dependence on men.¹³⁸ These women argued for higher wages and unionization so that women could adequately care for their families.¹³⁹

As a result of this criticism, the programs that developed were highly restrictive.¹⁴⁰ Eligibility hinged on whether the women were considered "deserving."¹⁴¹ This determination was based on prevailing attitudes about accepted gender roles and sexual codes.¹⁴² Women who were single, other than by widowhood, were generally denied relief, and program participants were overwhelmingly white.¹⁴³ Once

¹³¹ Handler, *Transformation of Aid*, *supra* note 5, at 471.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Brenner, *supra* note 113, at 107.

¹³⁶ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 910.

¹³⁷ *Id.* One well-known social reformer commented that funds would not only be used to support deserving widows, but "to the families of those who have deserted and are going to desert!" Handler, *Transformation of Aid*, *supra* note 5, at 474 & n.72 (citing W. BELL, AID TO DEPENDENT CHILDREN 4 (1965) (quoting PROCEEDINGS OF THE CONFERENCE ON THE CARE OF DEPENDENT CHILDREN, S. Doc. No. 721, 60th Cong., 2d Sess. 8 (1909))).

¹³⁸ Brenner, *supra* note 113, at 107-08.

¹³⁹ *Id.*

¹⁴⁰ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 910.

¹⁴¹ See *King v. Smith*, 392 U.S. 309, 320-21 (1968); see also Handler, *Constructing the Political Spectacle*, *supra* note 10, at 910 (noting that only a small number of white widows were enrolled in the programs).

¹⁴² Brenner, *supra* note 113, at 108.

¹⁴³ Handler, *Transformation of Aid*, *supra* note 5, at 475 n.76; see also Handler, *Constructing the Political Spectacle*, *supra* note 10, at 910. State legislation provided for women who were

enrolled, mothers were often supervised by caseworkers to verify that they provided a suitable home.¹⁴⁴

The effect of these restrictions placed administrative burdens on the programs.¹⁴⁵ Local administrators complained about the difficulties of defining the vague test of unworthiness; they ultimately had to rely on gossip and personal judgment.¹⁴⁶ Limited state resources constrained the ability to manage the programs effectively, and as a result, the programs were limited in scope.¹⁴⁷

C. *Women and the New Deal*

At the height of the Depression, the Roosevelt Administration faced massive unemployment and threats to social order at all levels of government.¹⁴⁸ In response to this growing crisis, the New Deal targeted three basic categories of the poor: (1) the unemployed, (2) the elderly, and (3) women and children, when it enacted the Social Security Act of 1935.¹⁴⁹

1. Programs for the Unemployed

Despite the catastrophic economic conditions that existed during the Depression, the idea prevailed that there was something morally wrong with able-bodied men who required assistance.¹⁵⁰ In addition, the organized business community was reluctant to fully embrace un-

abandoned, divorced, or never-married, but in practice, these women were usually defined as "unfit" and were deemed ineligible for support. Brenner, *supra* note 113, at 109. In a 1931 survey, over 82% of the participants nationwide were widows, and 96% of the participating families were white. Handler, *Transformation of Aid*, *supra* note 5, at 475 n.76. In North Carolina, only one black family was enrolled, and in Houston, Texas, there were no blacks in the program despite the fact that 21% of the city's population was black. *Id.*

¹⁴⁴ Brenner, *supra* note 113, at 109. Caseworkers were supposed to supervise home management, diet, cleanliness, school attendance, delinquency, and moral behavior. Handler, *Transformation of Aid*, *supra* note 5, at 475 n.77.

¹⁴⁵ *Id.* at 475.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* In 1930, there were 3,792,902 female headed households, and in a 1931 survey, the Children's Bureau reported that only 93,620 families were assisted by Mothers' Pension programs that year, or less than 3% of the pool. *Id.* at 475 n.78.

¹⁴⁸ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 912.

¹⁴⁹ Social Security Act, ch. 531, tits. I-IV, 49 Stat. 620, 620-29 (1935) (codified as amended in scattered sections of 42 U.S.C.); see also ELLWOOD, *supra* note 10, at 27; Handler, *Constructing the Political Spectacle*, *supra* note 10, at 912; Handler, *Transformation of Aid*, *supra* note 5, at 479. The New Deal also provided assistance to the blind. However, public aid to this category of the poor was not controversial or criticized because the blind historically have been considered to be morally excused from work. See Handler, *Transformation of Aid*, *supra* note 5, at 478.

¹⁵⁰ Ross, *supra* note 118, at 1506.

employment relief efforts because such efforts undermined industrial discipline.¹⁵¹ These attitudes significantly affected two programs designed to relieve the massive unemployment—work relief and unemployment insurance.¹⁵²

Within a year of its implementation, work relief employed between 1.4 million and 2.4 million people per month, at wages higher than both direct relief and market wages.¹⁵³ The work was voluntary, there was no means test, and benefits were given in cash rather than in kind.¹⁵⁴ Nonetheless, direct work relief efforts were attacked, and despite their success, the programs were soon significantly scaled back.¹⁵⁵

The Roosevelt Administration preferred a system of unemployment insurance over work relief.¹⁵⁶ Such a system would not be accompanied by the usual stigma of relief; it was for “deserving” workers who normally maintained steady, reliable employment.¹⁵⁷ The program would also be actuarially sound because it would be financed by employee contributions and taxes.¹⁵⁸ Southern Congressmen, however, afraid of programs that intruded into regional labor markets, vetoed proposals that did not give primary control of the program to the states.¹⁵⁹ Consequently, the federal government participated financially and established general guidelines, but the states administered the funds and determined eligibility requirements.¹⁶⁰ Many states denied eligibility to

¹⁵¹ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 913. The need to preserve labor markets has historically been a primary argument against poverty relief. Handler, *Transformation of Aid*, *supra* note 5, at 467.

¹⁵² See generally Handler, *Constructing the Political Spectacle*, *supra* note 10, at 912–16.

¹⁵³ *Id.* at 913 (citing MICHAEL B. KATZ, *IN THE SHADOW OF THE POOR HOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 219 (1986)).

¹⁵⁴ *Id.* at 913 n.47.

¹⁵⁵ *Id.* at 913. Southern legislators exerted pressure to discontinue the program because it threatened to upset what was still primarily a plantation economy. *Id.* Black tenant farmers were at the center of this system, and Southern politicians refused to tolerate any federal interference in their labor or racial relations. *Id.* at 913–14. Furthermore, President Roosevelt himself was opposed to the work relief programs. *Id.* at 914. He was concerned about work incentives and feared the creation of a large permanent bureaucracy. *Id.*

¹⁵⁶ ELLWOOD, *supra* note 10, at 28. The preference was a conscious one. President Roosevelt commented that by tying benefits to payroll contributions, workers had a “legal, moral and political right to collect their pensions.” *Id.* (quoting ARTHUR M. SCHELSINGER, JR., *THE COMING OF THE NEW DEAL* 308 (1959)).

¹⁵⁷ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 916. Eligibility was denied workers who quit without good cause, were fired for misconduct, unavailable for work, refused “suitable” work, or were unemployed due to a labor dispute. Handler, *Transformation of Aid*, *supra* note 5, at 485.

¹⁵⁸ *Id.* at 915.

¹⁵⁹ *Id.* at 914–15.

¹⁶⁰ Handler, *Transformation of Aid*, *supra* note 5, at 484.

agricultural and domestic workers, thereby effectively eliminating women and blacks from the program.¹⁶¹

2. The Elderly

The primary program designed to relieve poverty among the elderly, Old Age Insurance (OAI), shared many aspects of the unemployment insurance program.¹⁶² Again, President Roosevelt was opposed to a program that resembled “the dole.”¹⁶³ He believed that the program would be legitimate only if it were financed by contributions; therefore, benefits were tied to earnings.¹⁶⁴ The Administration was able to sell the program to Congress and the public based on its insurance features.¹⁶⁵

Unlike unemployment insurance, however, the program was administered by the federal government.¹⁶⁶ Eligibility requirements were established nationally, so the program was not vulnerable to local political prejudices.¹⁶⁷ The reason for this difference rests primarily in the nature of the OAI which was to *remove* workers from the labor force.¹⁶⁸ Local control was not considered important where the effects of a program did not directly influence existing labor markets.¹⁶⁹

¹⁶¹ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 915.

¹⁶² Social Security Act, ch. 531, tit. 1, § 1–6, 49 Stat. 620, 620–22 (1935) (codified as amended at 42 U.S.C. §§ 301–306) (1988 & Supp. V 1993)). OAI was the precursor to Supplemental Security Income (SSI), Pub. L. No. 92–603, tit. III, § 301, 86 Stat. 1465 (1972) (codified as amended at 42 U.S.C. §§ 1381–1383(c) (1988 & Supp. V 1993)), which was enacted by Congress in 1972 as a comprehensive national program to care for the country’s elderly poor and disabled. Handler, *Transformation of Aid*, *supra* note 5, at 480. While SSI significantly raised benefit levels for the elderly poor and the disabled, increases were exclusively limited to people who fell within the elderly poor and disabled categories. ELLWOOD, *supra* note 10, at 37; *see also infra* note 208.

¹⁶³ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 916.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 917. Initially, OAI was viewed with tremendous suspicion. Handler, *Transformation of Aid*, *supra* note 5, at 478. Most people believed that if one worked hard and saved, one would not be destitute in one’s old age; relief only assisted the shifty and lazy. *Id.* Other factors, however, contributed to the enactment of OAI: the elderly organized as a political force, young workers hoped to move older workers out of the labor market, and young people were reluctant to have their parents move back in. Handler, *Constructing the Political Spectacle*, *supra* note 10, at 916–17.

¹⁶⁶ *Id.* at 917.

¹⁶⁷ *Id.* For example, the program was not means-tested and was available to all laborers once they reached the prescribed retirement age. *Id.* at 916. These features contrasted markedly to the state old age assistance programs that existed prior to the enactment of OAI. Handler, *Transformation of Aid*, *supra* note 5, at 478. The state programs had long residency requirements and strict financial eligibility requirements, placed liens on the recipient’s estate, and excluded the “morally unfit”—tramps, beggars, convicts, and spouse deserters. *Id.*

¹⁶⁸ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 917.

¹⁶⁹ *See id.* Another aspect of the elderly relief program was Old Age Assistance (OAA). *Id.* at

3. Programs for Women and Children

The last component of the New Deal programs was Aid to Dependent Children (ADC).¹⁷⁰ For the first time federal funds were established to provide financial assistance for needy children in female-headed homes.¹⁷¹ Neither the Administration nor Congress was enthusiastic about this relief effort.¹⁷² This type of assistance was still accompanied by historical stigma; it was the program for the undeserving poor.¹⁷³

Although women reformers had been instrumental in drafting ADC legislation and ensuring that it was included in the Social Security Act of 1935, the lack of an organized lobbying effort failed to produce a program that was significantly different from the state operated "Mothers' Pension" programs.¹⁷⁴ The programs remained in the control of local authorities,¹⁷⁵ and benefit levels for ADC were lower than for other programs.¹⁷⁶ Eligibility requirements were highly restrictive and imposed a variety of moral standards.¹⁷⁷ In general, the states did not support the program and Congress did not encourage them to do so.¹⁷⁸

917–19. This program provided direct cash grants to the elderly. *Id.* It was popular because substantial numbers of retirees were not scheduled under OAI to receive benefits until 1942. *Id.* at 918. Once again, however, the South exerted its Congressional power and required local administration of programs. *Id.* The original national standards would have allowed assistance to go to aged blacks. *Id.* Southern politicians thought that as a family subsidy, the OAA grant had the potential to disrupt the mostly black tenant farmer labor system. *Id.*

¹⁷⁰ Social Security Act, ch. 531, tit. IV, §§ 401–406, 49 Stat. 620, 627–29 (1935) (codified as amended at 42 U.S.C. §§ 601–682 (1988 & Supp. V 1993)); see also Brenner, *supra* note 113, at 110; Handler, *Transformation of Aid*, *supra* note 5, at 472–77, 480–83. ADC was the forerunner to Aid to Families with Dependent Children (AFDC), which was enacted in 1962. Pub. L. No. 87–543, tit. I, § 104(a)(1), 76 Stat. 185 (1962) (codified as amended at 42 U.S.C. §§601–682 (1988 & Supp. V. 1993)). Today, AFDC is considered the primary component of welfare. See Brenner, *supra* note 113, at 111; see also *infra* notes 186–94 and accompanying text.

¹⁷¹ Brenner, *supra* note 113, at 110.

¹⁷² Handler, *Constructing the Political Spectacle*, *supra* note 10, at 918.

¹⁷³ See KATZ, *supra* note 8, at 231.

¹⁷⁴ See Brenner, *supra* note 113, at 110.

¹⁷⁵ See Handler, *Constructing the Political Spectacle*, *supra* note 10, at 919. In 1939, amendments to the Social Security Act effectively removed widows from ADC by tying their benefit levels to the insurance programs that once protected their now deceased husbands. See Brenner, *supra* note 113, at 110–11. As such, benefit levels and eligibility determinations for these women were set by the federal government. *Id.*

¹⁷⁶ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 919.

¹⁷⁷ *Id.* Surprise raids were made on welfare mothers to search for "a man in the house." Brenner, *supra* note 113, at 111. The presence of a man would automatically disqualify the recipient. *Id.* In addition, caseworkers could terminate benefits if they discovered such luxuries as telephones during these surprise visits. ELLWOOD, *supra* note 10, at 30.

¹⁷⁸ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 919.

D. *The Rise and Decline of the "War on Poverty" Programs*

During the Post-New Deal period, poverty relief for female-headed households was primarily a state and local matter, and workfare was a common feature of many of these programs.¹⁷⁹ For example, it was common practice in many states to close down welfare offices when crops had to be harvested.¹⁸⁰ A concerted federal effort to implement workfare, however, did not occur until the late 1960s.¹⁸¹

By the late 1950s the state stronghold on ADC had somewhat loosened, and Southern congressional power had declined dramatically.¹⁸² In addition, Michael Harrington's pivotal book, *The Other America*, chronicling the plight of the poor, had a profound effect on both the Kennedy Administration and the public.¹⁸³ For the first time since the Great Depression, the nation's conscience was troubled about the depth and breadth of poverty.¹⁸⁴ Benefits were increased and many of the severe eligibility requirements were eliminated.¹⁸⁵ In 1962, ADC was changed to Aid to Families with Dependent Children (AFDC),¹⁸⁶ the primary component of current welfare programs. For the first time, two-parent families became eligible for assistance.¹⁸⁷ The "War on Poverty" implemented expansive new social service programs including

¹⁷⁹ *Id.* In 1967, twenty states had explicit work requirements, and several states had presumptive work requirements. Law, *supra* note 10, at 1258 n.27.

¹⁸⁰ Handler, *Transformation of Aid*, *supra* note 5, at 488.

¹⁸¹ Law, *supra* note 10, at 1261; *see also* Handler, *Transformation of Aid*, *supra* note 5, at 489.

¹⁸² Handler, *Constructing the Political Spectacle*, *supra* note 10, at 920. As agriculture became more mechanized, the South no longer relied on black labor. *Id.* The political forces of the Civil Rights movement and the massive migration of blacks to the North diminished the control historically exerted by the South over its black population. *Id.*

¹⁸³ KATZ, *supra* note 8, at 20. Harrington's book described in vivid detail the realities of some 40 to 50 million poor people in America. MICHAEL HARRINGTON, *THE OTHER AMERICA* 1 (1962). He described a "culture of poverty"—the poor were different from the rich in ways more profound than a lack of money. *Id.* at 17. The poor had a separate language, psychology, and world view; they were "internal aliens" within the dominant culture. *Id.* at 18.

¹⁸⁴ *See* KATZ, *supra* note 8, at 20.

¹⁸⁵ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 922–23. Between 1965 and 1970, AFDC levels had increased by 36%. Brenner, *supra* note 113, at 113 (citing IRWIN GARFINKEL & SARA S. McLANAHAN, *SINGLE MOTHERS AND THEIR CHILDREN: AN AMERICAN DILEMMA* 110–14 (1986)). In addition, the Supreme Court invalidated a variety of state imposed welfare restrictions. *E.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (striking down denial of hearings prior to termination of benefits); *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (striking down one-year residency requirement prior to any award of welfare benefits); *King v. Smith*, 392 U.S. 309, 333 (1968) (striking down denial of benefits to families where mother was sexually involved with able-bodied man); *see also* KATZ, *supra* note 8, at 107.

¹⁸⁶ *See supra* note 170.

¹⁸⁷ Brenner, *supra* note 113, at 111.

counseling and rehabilitative services, as well as early education and nutrition intervention.¹⁸⁸

The effect of these changes caused the welfare rolls to expand significantly.¹⁸⁹ Black and never-married women, who historically had been denied access to poverty relief programs, comprised an increasing proportion of the welfare programs.¹⁹⁰ As the number of recipients increased, so did the cost, and public and political support for the new AFDC program began to disappear.¹⁹¹ Congress believed that the market could support all those who wanted to work and thought the new face of welfare undermined family stability and destroyed incentives to work.¹⁹² Congress also believed that welfare recipients had inappropriately high standards for what constituted acceptable work.¹⁹³ In an effort to reduce the burgeoning welfare rolls by putting welfare recipients to work, Congress enacted the Work Incentives Programs (WIN) in 1967.¹⁹⁴

The program required AFDC recipients to participate in employment or job training programs.¹⁹⁵ At first, WIN was voluntary for women.¹⁹⁶ Job training assessment was conducted by local employment service agencies after appropriate referrals were made from the welfare department.¹⁹⁷ This assessment categorized recipients into three main categories: (1) the immediately employable, (2) the potentially employable (those who could benefit from training), and (3) the unem-

¹⁸⁸ See *id.* In this author's opinion and experience, Operation Headstart and Women, Infants and Children (WIC) were among the most successful of these programs.

¹⁸⁹ ELLWOOD, *supra* note 10, tbl. 2.1, at 32 (showing an expenditure increase of \$14 billion in AFDC from 1960-1976); Handler, *Transformation of Aid*, *supra* note 5, at 489.

¹⁹⁰ Handler, *Transformation of Aid*, *supra* note 5, at 489. Between 1950 and 1965, the number of AFDC recipients had increased about 6% per year, but between 1965 and 1970, the annual rate of growth rose to 18%. Brenner, *supra* note 113, at 112 (citing Y. HASENFELD, WELFARE AND WORK: THE INSTITUTIONALIZATION OF MORAL AMBIGUITY 28 (U. of Cal. Institute of Industrial Relations Working Paper No. 147 (1987))).

¹⁹¹ See Handler, *Transformation of Aid*, *supra* note 5, at 489. Real expenditures for public benefits increased by 69% between 1965 and 1970. Brenner, *supra* note 113, at 113 (citing IRWIN GARFINKEL & SARA S. MCLANAHAN, SINGLE MOTHERS AND THEIR CHILDREN: AN AMERICAN DILEMMA 110-14 (1986)). Support also waned because welfare recipients possessed traditionally deviant and morally suspect features: they were non-working, non-married, and non-white. See Handler, *Transformation of Aid*, *supra* note 5, at 489.

¹⁹² Handler, *Constructing the Political Spectacle*, *supra* note 10, at 924.

¹⁹³ *Id.*

¹⁹⁴ Handler, *Transformation of Aid*, *supra* note 5, at 489.

¹⁹⁵ Michyle A. LaPedis, Note, *California Workfare Legislation and the Right to Privacy*, 13 HASTINGS CONST. L.Q. 761, 762 (1986).

¹⁹⁶ Handler, *Transformation of Aid*, *supra* note 5, at 490.

¹⁹⁷ *Id.* at 489.

ployable.¹⁹⁸ Because resources were very limited, local administrators allocated resources to those who were most likely to succeed.¹⁹⁹

In an effort to toughen the work requirements, Congress passed the Talmadge Amendments in 1971 (WIN II).²⁰⁰ The focus of WIN II was changed from education and training to actual job placement.²⁰¹ It was no longer a voluntary program, and mothers with children above the age of six were required to participate.²⁰² Although Congress provided over \$300 million for this program, resources were scarce, and few participants were actually placed in good paying jobs.²⁰³

At about this same time, the federal agency managing the AFDC introduced Quality Control.²⁰⁴ The purpose of Quality Control was to reduce overpayments and eliminate the ineligible from welfare rolls.²⁰⁵ The new regulations threatened states with substantial penalties for erroneous payments but not for denials to eligible applicants.²⁰⁶ The result was that extreme verification requirements developed.²⁰⁷ Programs became computerized, clerical workers replaced social workers, there was close supervision, and AFDC became markedly more bureaucratic and rule-bound.²⁰⁸

¹⁹⁸ *Id.*

¹⁹⁹ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 924. This practice—known as “creaming”—is perhaps responsible for the modest gains in earnings reported for participants who were placed in the work force, and for the modest decrease in grant levels. See Handler, *Transformation of Aid*, *supra* note 5, at 490; Handler, *Constructing the Political Spectacle*, *supra* note 10, at 924.

Another important feature of WIN designed to provide work incentives was “income disregard.” Sorenson, *supra* note 10, at 112. This feature permitted AFDC recipients to keep the first \$30 and the remaining one-third of any earned income without a corresponding decrease in their welfare grant. *Id.* It also allowed deductions for actual and verifiable work expenses such as child care and transportation. *Id.*

²⁰⁰ Handler, *Transformation of Aid*, *supra* note 5, at 490.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 491. The average amount of funding available per recipient was only \$250. *Id.* Overall, only about 20% of the total welfare caseload was able to actively participate in the program, and of these, only about 2% were placed in jobs, one-third at less than the minimum wage. *Id.*

²⁰⁴ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 923. Quality Control was a regulatory scheme developed in response to the growth of AFDC. See Timothy J. Casey & Mary R. Mannix, *Quality Control in Public Assistance: Victimizing the Poor Through One-Sided Accountability*, 22 CLEARINGHOUSE REV. 1381, 1382 (1989).

²⁰⁵ See Handler, *Transformation of Aid*, *supra* note 5, at 493. At first, the agency required states to audit both overpayments and denials to measure error and evaluate their causes. See Casey & Mannix, *supra* note 204, at 1382. In April 1973, however, the agency eliminated denial review from its Quality Control system. *Id.* (citing 38 Fed. Reg. 8743–44 (1973)).

²⁰⁶ Timothy J. Casey, *The Family Support Act of 1988: Molehill or Mountain, Retreat or Reform*, 23 CLEARINGHOUSE REV. 930, 934–35 (1989).

²⁰⁷ *Id.* at 934.

²⁰⁸ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 923. Activity was also occur-

E. *The Reagan Years—State Experiments with Workfare*

Shortly after taking office in 1981, the Reagan Administration sought to further reduce welfare rolls by toughening work requirements.²⁰⁹ The Omnibus Budget Reconciliation Act of 1981 (OBRA) changed significant elements of the AFDC grant calculation for working recipients.²¹⁰ Although it did not impose mandated workfare, it did allow several states to experiment with a variety of workfare models.²¹¹ One aspect of OBRA was Community Work Experience (CWEP), which gave states explicit authority to require recipients to participate in workfare jobs, and allowed states to divert a portion of the welfare grant to subsidize employment.²¹²

A typical example of these state experiments was California's Greater Avenues for Independence (GAIN) program.²¹³ GAIN required that all able-bodied welfare recipients who did not care for a child under six enter into a formal contract with the state.²¹⁴ These contracts detailed

ring in other poverty relief programs during this time. *See id.* at 921. In 1972, Old Age Assistance, Aid to the Blind, and Aid to the Totally and Permanently Disabled (which had been established in 1954) were combined into Supplemental Security Income (SSI). *See supra* note 162. The program was completely federally funded, and was administered nationally, with federal eligibility requirements and uniform grant levels. Handler, *Constructing the Political Spectacle*, *supra* note 10, at 921.

In 1968 and 1974, numerous changes were also made to the former Old Age Insurance program (OAI). *Id.* Benefits were raised substantially and indexed to the cost of living. *Id.* Today, Social Security is a major source of income for most elderly Americans, and, according to one scholar, it has significantly reduced poverty among the elderly and is comparable to the most advanced support systems in Western Europe. *Id.*

²⁰⁹ Handler, *Transformation of Aid*, *supra* note 5, at 491. The Reagan Administration's philosophy was prompted by a belief that welfare was utilized by those who were not truly needy. *Id.* President Reagan himself expressed this philosophy when he commented: "There's a woman in Chicago. She has 80 names, 30 addresses, 12 social security cards, and is collecting veteran's benefits on four non-existing deceased husbands. . . . She's got Medicaid, is getting food stamps and . . . welfare under each of her names. Her tax-free cash income alone is over \$150,000." DeParle, *Better Work Than Welfare*, *supra* note 1, at 48 (quoting Ronald Reagan, Feb. 14, 1976).

²¹⁰ Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 2301-2321, 95 Stat. 357, 843-60 (1981) (codified as amended in scattered sections of 42 U.S.C.); *see also* Brenner, *supra* note 113, at 116; Sorenson, *supra* note 10, at 112. For example, the \$30 and one-third earned "income disregard" was eliminated after four months of consecutive employment. Sorenson, *supra* note 10, at 112. This meant that after four months, AFDC grants were reduced by one dollar for every dollar earned. *Id.* Furthermore, deductions for child care, transportation, and other work-related expenses were allowable only up to specified maximum monthly amounts. *Id.*

²¹¹ Handler, *Transformation of Aid*, *supra* note 5, at 492.

²¹² *Id.* By September of 1985, 23 states had CWEP and 12 had implemented job search programs. *Id.* In addition, Congress authorized experiments in work-relief in eight states. *Id.* The programs ranged from voluntary job training in New Jersey to straight work-for-relief in West Virginia. *Id.*

²¹³ *Id.* at 494; *see also* Sorenson, *supra* note 10, at 110 (discussing a variety of employment, training, and workfare programs implemented in Michigan).

²¹⁴ LaPedis, *supra* note 195, at 766.

both the services provided by the state and the recipient's corresponding obligations.²¹⁵ Once the state met its training and educational services obligations, a recipient had approximately 90 days to find employment.²¹⁶ If employment was not obtained within that period, recipients were required to enter a workfare program.²¹⁷

The workfare jobs in California were with public and private non-profit employers.²¹⁸ The workfare position did not need to be the one for which the participant was trained; it only needed to be "related."²¹⁹ The number of hours of labor required was computed based on an average entry-level wage.²²⁰ Recipients did not receive unemployment benefits, sick time, vacation, or any other benefits associated with employee status.²²¹ Refusals to comply without good cause were sanctioned.²²²

Both liberals and conservatives heralded CWEP programs such as GAIN.²²³ Liberals viewed them as tools of empowerment, and conservatives valued explicit agreements that placed mutual obligations on welfare recipients.²²⁴ The popularity of CWEP was heightened in light of an intensive eight state study by the Manpower Demonstration Research Corporation (MDRC) that indicated that CWEP results were "promising—although not large and dramatic."²²⁵ The new style workfare was placed high on the national agenda when, in 1985, it was given

²¹⁵ *Id.* at 766–68. For example, the contract specifies whether the state is obligated to provide transportation, literacy training, English as a Second Language (ESL) programs, or child care services, and outlines the participant's responsibilities. *Id.* at 767. Sanctions for noncompliance are also described in this document. *Id.*

²¹⁶ *Id.* at 768.

²¹⁷ *Id.* at 768–69. To obtain employment that exceeds or matches AFDC benefit levels including food stamps and medicaid, a recipient would have to find a job with a starting wage of at least \$8.00 per hour. Handler, *Transformation of Aid*, *supra* note 5, at 497. In 1989, the average starting wage in California was \$5.80 per hour. *Id.*

²¹⁸ Handler, *Transformation of Aid*, *supra* note 5, at 497. Statutory limits exist as to the kind of positions that GAIN participants may take. LaPedis, *supra* note 195, at 770. The work relief programs may not operate in any manner so as to disadvantage current employees. *Id.* For example, recipients may not be placed in any positions created as a result of budget reductions, valid labor disputes, or positions that would otherwise be promotional opportunities for current employees. *Id.* Although designed to protect the current work force, these restrictions effectively deny GAIN work relief participants meaningful employment. *Id.* at 771.

²¹⁹ Handler, *Transformation of Aid*, *supra* note 5, at 498.

²²⁰ *Id.* at 497.

²²¹ *Id.*

²²² LaPedis, *supra* note 195, at 771. Noncompliance initially results in the replacement of cash grants with a system of money management or vendor and third party payments. *Id.* After three months of continued noncompliance, or in the event of second offenses, benefit levels are reduced or terminated for up to six months. *Id.*

²²³ Handler, *Transformation of Aid*, *supra* note 5, at 494.

²²⁴ *Id.*

²²⁵ KATZ, *supra* note 8, at 226.

bipartisan support by the National Governor's Association.²²⁶ By 1987, both the House and the Senate had introduced welfare reform legislation,²²⁷ and in 1988, the Family Support Act was passed.²²⁸

F. *The Family Support Act of 1988*

The Family Support Act of 1988 (FSA) effectively codified state workfare options.²²⁹ The statute outlined a broad federal program for public training, education, and workfare known as Job Opportunities and Basic Skills (JOBS).²³⁰ JOBS required that states provide basic education, job skill training, job readiness activities, and job development and placement.²³¹ States were also required to provide at least two of the following: individual job search assistance, on-the-job training, work supplementation, and workfare.²³² Generally, a state had full discretion either to focus on education and training, or on job search and work relief.²³³

Participation in JOBS was mandatory for AFDC recipients,²³⁴ but the program did provide a few exemptions.²³⁵ For example, women with children under three years of age were not required to participate,²³⁶ and states had to guarantee to the recipients child care and transportation if needed.²³⁷ In addition, participants who cared for a

²²⁶ *Id.*

²²⁷ *Id.* at 226–29.

²²⁸ Family Support Act, Pub. L. No. 100–485, 102 Stat. 2343 (1988) (codified as amended in scattered sections of 42 U.S.C.).

²²⁹ Handler, *Constructing the Political Spectacle*, *supra* note 10, at 925. This Article addresses only the workfare aspects of the FSA. Other sections of the FSA relate to child support enforcement, child care and medical assistance, and other various AFDC amendments. Family Support Act, tit. I, §§ 101–129; tit. II, §§ 201–204; tit. IV, §§ 401–406.

²³⁰ 42 U.S.C. § 682(d)(1)(A)(i)(I)–(IV) (1988); *see also* Greenberg, *supra* note 111, at 421; Handler, *Transformation of Aid*, *supra* note 5, at 502; Casey, *supra* note 205, at 935.

²³¹ 42 U.S.C. § 682(d)(1)(A)(i)(I)–(IV). Literacy and English proficiency programs were included in this education component. § 682(d)(1)(A)(i)(I).

²³² 42 U.S.C. § 682(d)(1)(A)(ii)(I)–(IV). Each of these activities is described in full at 42 U.S.C. § 682(e)–(g).

²³³ *See* 42 U.S.C. § 682(d)(1)(B); *see also* Handler, *Transformation of Aid*, *supra* note 5, at 504. This discretion has caused some critics to fear that the more prosperous and liberal states will have programs that are less punitive and provide more services than those in the more conservative and poorer states. Brenner, *supra* note 113, at 123.

²³⁴ 42 U.S.C. § 602(a)(19)(B)(i)(I) (1988 & Supp. V 1993).

²³⁵ 42 U.S.C. § 602(a)(19)(C)(i)–(vii).

²³⁶ 42 U.S.C. § 602(a)(19)(C)(iii)(I).

²³⁷ 42 U.S.C. § 602(a)(19)(F)(iv). States may, however, apply for a waiver compelling women with children no younger than one year old to participate. 42 U.S.C. § 602(a)(19)(D). This provision contrasts markedly with a similar provision under WIN that exempted women with children under six. Casey, *supra* note 205, at 936. Furthermore, states also have discretion as to the nature and extent of child care and supportive services that a participant will receive. Greenberg, *supra* note 111, at 432.

child below the age of six were not required to participate for more than 20 hours per week.²³⁸

The FSA also codified the salient features of state-implemented workfare programs.²³⁹ The statute provided that the maximum number of hours a recipient could work was determined by dividing his or her grant by the minimum wage.²⁴⁰ In addition, workfare assignments had to be limited to some sort of public service and, where possible, the prior training, experience, and skills of the recipient were to be considered in determining the actual placement.²⁴¹ There were also restrictions preventing states from forcing recipients to take jobs which lowered their standard of living.²⁴² Sanctions for failure to participate in the program were directed only at the parental portion of the family grant.²⁴³

G. Current Welfare Reform Proposals

As Governor of Arkansas, Bill Clinton was a major force behind the FSA.²⁴⁴ Consequently, the Clinton Administration's Work and Re-

²³⁸ 42 U.S.C. § 602(a)(19)(C)(iii)(II).

²³⁹ See generally 42 U.S.C. § 682(f).

²⁴⁰ 42 U.S.C. § 682(f)(1)(B)(i).

²⁴¹ 42 U.S.C. § 682(f)(1)(A).

²⁴² See 42 U.S.C. § 602(a)(19)(B)(iv). For those participants who found non-subsidized employment, the FSA increased the maximum child care and work expense "income disregard" deductions. 42 U.S.C. § 602(a)(8)(A). Furthermore, the FSA provided childcare and health care subsidies for one year after an individual left welfare for employment. 42 U.S.C. § 602(g)(1)(A)(iii).

²⁴³ 42 U.S.C. § 602(a)(19)(G)(i)(I)-(II). Generally, the sanction period lasts for as long as the participant refuses to comply, but after the second failure to comply, the sanction period lasts for at least three months, regardless of when the failure to comply ceases. 42 U.S.C. § 602(a)(19)(G)(ii)(I)-(II). The third instance of non-compliance results in a sanction period of at least six months, even if the non-compliance ceases before that time. 42 U.S.C. § 602(a)(19)(G)(ii)(III).

The effectiveness of the FSA has been the subject of wide criticism. Casey, *supra* note 205, at 935; Mickey Kaus, *Welfare Waffle: What's That Again Bill? Bill Clinton Reform Plans*, NEW REPUBLIC, Oct. 12, 1992, at 10 [hereinafter Kaus, *Welfare Waffle*] (noting marginal results of FSA). For example, little evidence exists that the expanded workfare programs under the FSA were effective in reducing poverty. Casey, *supra* note 205, at 935. In a recent study of six state programs that generally emphasized job search and/or workfare, the programs had no measurable effect on earnings. *Id.* In the programs where a positive effect was found, the largest percentage difference between employment in workfare participants versus nonparticipants was 5.6%. *Id.*

In addition, critics are concerned that recipients will not receive any real skills or training. Brenner, *supra* note 113, at 101. Serious education and training programs are expensive. Handler, *Transformation of Aid*, *supra* note 5, at 503. Because federal matching funds are statutorily capped and many states are operating under budget deficits, it is feared that most states will opt in favor of workfare programs which are cheaper to operate and generally fail to offer substantive training. *Id.*; Brenner, *supra* note 113, at 101.

²⁴⁴ Gwen Ifill, *The 1992 Campaign: The Democrats; Clinton Presses Welfare Overhaul, Stressing Job Training and Work*, N.Y. TIMES, Sept. 10, 1992, at A1 [hereinafter Ifill, *The 1992 Campaign*];

sponsibility Act of 1994 closely mirrors the FSA, especially with respect to the workfare component.²⁴⁵ The Clinton Plan, however, offers a more strident approach to workfare than the FSA.²⁴⁶ This approach is partly due to President Clinton's criticism of the FSA, which he felt never really went far enough,²⁴⁷ and the competition that the Administration is experiencing from Republicans with respect to welfare reform.²⁴⁸ Each group wants to be able to take credit for a "get tough" policy, and as such, current workfare proposals offer recipients fewer options and fewer benefits, such as job training and counseling, than did previous experiments with workfare.

The main "get tough" feature of the Clinton Plan is a two-year lifetime limit on welfare.²⁴⁹ After two years, welfare recipients would have to work, preferably in the private sector, but in public service jobs if necessary.²⁵⁰ The workfare component of the Plan is limited, however,

Kaus, *Welfare Waffle*, *supra* note 243, at 10. The National Governors Association (NGA) was a strong proponent of the FSA because of its emphasis on state-control and its support of workfare. KATZ, *supra* note 8, at 226. During this time, Bill Clinton was Governor of Arkansas and chairperson of the NGA from 1986 through 1987. *Editorial*, CHRISTIAN SCI. MONITOR, Dec. 11, 1992, available in LEXIS, News Library, Arcnws File.

²⁴⁵ Compare Work and Responsibility Act, *supra* note 3, tit. I (Jobs); tit. II (Work) with 42 U.S.C. §§ 602, 681, 682. Indeed, the Work and Responsibility Act specifically refers to JOBS programs created under the FSA. Compare Work and Responsibility Act, *supra* note 3, § 101(a) (Requirement to Participate in Enhanced JOBS Program) with 42 U.S.C. §§ 602(a)(19), 682.

²⁴⁶ For example, the FSA does not include any mandatory cut off provisions, whereas the Work and Responsibility Act terminates benefits for welfare recipients who, after 24 months, refuse to participate in WORK programs. Work and Responsibility Act, *supra* note 3, § 104 (Twenty-four Month Limit). The FSA also exempts participation for individuals who have a child less than three years of age, whereas the Work and Responsibility Act exemptions exist only for individuals who have a child less than one year of age. Compare 42 U.S.C. § 602(a)(19)(C)(iii)(I) with Work and Responsibility Act, *supra* note 3, § 101(a).

²⁴⁷ Ifill, *The 1992 Campaign*, *supra* note 244, at A20.

²⁴⁸ See *supra* notes 4-5 and accompanying text.

²⁴⁹ Work and Responsibility Act, *supra* note 3, § 104 (AFDC will not be payable after twenty-four month period if certain conditions are not met); see also *Study Sees Challenges of Welfare*, COMM. APPEAL (Memphis), June 22, 1994, at 4A. The Clinton Plan does, however, provide for increased education, training, and job placement. *Clinton Bill Proposes Benefits Time Limit*, FACTS ON FILE WORLD NEWS DIGEST, July 21, 1994, available in LEXIS, News Library, Curnws File [hereinafter *Clinton Bill Proposes Benefit Time Limit*]. For example, it provides a \$4 billion allocation for child care, and a \$400 million allocation for a campaign to educate against teenage pregnancy. *Id.* Welfare recipients would also be allowed to earn additional money without loss of benefits. *Id.*

²⁵⁰ Work and Responsibility Act, *supra* note 3, § 101(a); see also *Welfare Reform in America—You Say You Want A Revolution*, ECONOMIST, June 18, 1994, at 21. Clinton's ideas have been strongly influenced by Harvard professor David Ellwood, whose 1988 book *Poor Support* has recently been popular in policy circles. Jason DeParle, *Arkansas Pushes Plan To Break Welfare Cycle*, N.Y. TIMES, Mar. 14, 1992, at A10. For example, the two-year time limit is a position advocated by Professor Ellwood, who now serves as an advisor to President Clinton. *Id.*

to individuals born after 1971.²⁵¹ The public sector jobs, known as WORK jobs, would be offered only as a last resort.²⁵² These jobs are likely to pay less than the minimum wage, so that participants are encouraged to move on to private sector jobs that pay the minimum wage.²⁵³ According to one proponent of the Plan, "[i]t would be grossly unfair to give some Americans access to better jobs just because they become single mothers and went on welfare."²⁵⁴ In addition, the program allows recipients to stay in WORK jobs indefinitely, as long as they can prove they made an effort to find other work.²⁵⁵ The Clinton Plan severs benefits only if welfare recipients refuse to work.²⁵⁶

This provision of the Clinton Plan has drawn criticism from Republicans and conservative Democrats who argue that it does nothing to eliminate dependency on the Government.²⁵⁷ The Republican counterpart to the Clinton Plan offers more stringent curbs on aid to the poor.²⁵⁸ For example, one year after its enactment, the Republican Plan would eliminate AFDC, food stamps, and housing benefits to women under 21 who have children outside of marriage²⁵⁹ and would eliminate public assistance to women who have additional children.²⁶⁰ The Republicans propose that savings from these cuts would go directly to other forms of care such as adoptions or supervised group homes for young unmarried women and their children.²⁶¹

Conservatives also take strong exception to the exemption for parents born before 1971.²⁶² They argue that the exemption will elimi-

²⁵¹ Work and Responsibility Act, *supra* note 3, § 101(a). The Administration estimates that this group would make up only about one-third of all adults enrolled in AFDC in 1996, but would comprise two-thirds of adult recipients by the year 2004. *Clinton Bill Proposes Benefits Time Limit*, *supra* note 249.

²⁵² Work and Responsibility Act, *supra* note 3, § 101(a).

²⁵³ *Welfare Reform Revision: Limiting Cash Payments*, Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means, 103rd Cong., 2d Sess. (1994) (statement of Mickey Kaus, Senior Editor, *The New Republic*) reprinted in FEDERAL DOCUMENT CLEARINGHOUSE CONG. TESTIMONY, Aug. 16, 1994 available in LEXIS, Legis Library, Cngtst File [hereinafter Statement of Mickey Kaus].

²⁵⁴ *Id.*

²⁵⁵ Work and Responsibility Act, *supra* note 3, § 104; see also *Clinton Bill Proposes Benefits Time Limit*, *supra* note 249.

²⁵⁶ Work and Responsibility Act, *supra* note 3, § 104.

²⁵⁷ *Clinton Bill Proposes Benefits Time Limit*, *supra* note 249.

²⁵⁸ See *supra* notes 4-5 and accompanying text.

²⁵⁹ Personal Responsibility Act of 1995, *supra* note 4, §§ 105 (Denial of AFDC for certain children born out-of-wedlock), 107 (State option to deny AFDC benefits to children born out-of-wedlock to individuals 18, 19, or 20, and to deny such benefits and housing benefits to such individuals).

²⁶⁰ Personal Responsibility Act, *supra* note 4, § 106 (Denial of AFDC for additional children).

²⁶¹ Robert Rector, *How Bill Clinton's Bill Extends Welfare as We Know It*, HERITAGE FOUNDATION REPORTS, Aug. 1, 1994, available in LEXIS, News Library, Curnws File.

²⁶² *Id.*

nate almost 80% of the current AFDC caseload from work requirements.²⁶³ The Republican Plan calls for a much wider expansion of workfare, requiring 1.5 million recipients to join a work program by the year 2000, in contrast to the estimated 400,000 under the Clinton Plan.²⁶⁴ Republicans would pay for their plan by permanently denying welfare benefits to young unmarried mothers and by denying all aid to legal immigrants.²⁶⁵

Certainly, there are significant differences between the Clinton Administration's and the Republicans' welfare reform plans. Despite the Republican stronghold in Congress, it remains unclear which plan will emerge as legislation.²⁶⁶ It is clear, however, that any plan labelled "welfare reform" will contain some form of state-mandated work or workfare, because poverty policy has historically been focused around work.²⁶⁷

IV. WORKFARE AS A VIOLATION OF THE THIRTEENTH AMENDMENT'S PROHIBITION AGAINST INVOLUNTARY SERVITUDE

A. *The Right to Individual Labor*

The property which every man has is his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable.²⁶⁸

Control over one's own labor, or self-ownership, is uniquely tied to an individual's sense of worth and dignity.²⁶⁹ In our society, self-ownership is a deeply ingrained idea of what it means to be a full person.²⁷⁰ When this control is removed from individuals, they are cast into a category of persons deemed inferior and unworthy.²⁷¹ With its imposition of mandatory work requirements, modern workfare denies the

²⁶³ *Id.*

²⁶⁴ DeParle, *Momentum Builds*, *supra* note 5, at A30.

²⁶⁵ Personal Responsibility Act, *supra* note 4, §§ 105, 106, 107, 401.

²⁶⁶ Some congressional Republicans have characterized some features of the Republican Plan as "unduly harsh." DeParle, *Momentum Builds*, *supra* note 5, at A30. Moreover, public opinion is fickle. *Id.* The public that currently rallies for "welfare reform" may have less support for a program defined as "reducing aid to the poor." *Id.* To date, neither the Republican Plan nor the Clinton Plan has been enacted into law.

²⁶⁷ *See supra* part III.

²⁶⁸ *The Slaughter-House Cases*, 83 U.S. 36, 110 (1883) (quoting ADAM SMITH, *THE WEALTH OF NATIONS* 151 (1776)).

²⁶⁹ Koppelman, *supra* note 60, at 494.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 495.

poor this self-ownership and control. Consequently, the poor are once again denied societal notions of dignity.

The purpose of the Thirteenth Amendment, especially given its interpretation in the Peonage Cases, was to assure that such control and self-ownership were inviolate.²⁷² This principle of free labor is so thoroughly embedded in the foundation of constitutional law that it has not been challenged for years.²⁷³ Mandatory workfare programs, however, once again raise the specter of impermissible involuntary servitude.

B. Workfare as Peonage

The similarities between the nineteenth century systems of peonage and modern workfare programs are striking. Workfare, like peonage, exacts mandatory labor as satisfaction for a debt, and imposes legal sanctions for nonperformance. With workfare, the state assumes the position of the former "employer," and the debt to be paid is the welfare grant itself.

Workfare is a form of peonage because welfare recipients—like the victims in *Clyatt* and *Bailey*—lack any effective choice whether to continue their employment contract.²⁷⁴ Under workfare proposals, the state designs the specific operational details of the workfare program.²⁷⁵ It is of no consequence that recipients may dislike their assignments, have child care or transportation conflicts, or experience discrimination or harassment in their workfare placements.²⁷⁶ Unless they "choose" to forfeit their welfare grant, workfare participants are compelled to continue working.²⁷⁷

Under peonage, nonperformance brought criminal sanctions, and under workfare, nonperformance results in the termination of benefits. However, these benefits are more than just economic assistance; they are a legal entitlement. As such, termination of these benefits consti-

²⁷² See e.g., *Pollack v. Williams*, 322 U.S. 4, 25 (1944); *Taylor v. Georgia*, 315 U.S. 25, 31 (1942); *United States v. Reynolds*, 235 U.S. 133, 150 (1914); *Bailey v. Alabama*, 219 U.S. 219, 245 (1911); *Clyatt v. United States*, 197 U.S. 207, 216 (1905).

²⁷³ Koppelman, *supra* note 60, at 491 n.48.

²⁷⁴ 197 U.S. at 216; 219 U.S. at 245.

²⁷⁵ State control over workfare programs is best exemplified in the Clinton Plan. See *Work and Responsibility Act*, *supra* note 3, §§ 101–207 (establishing states' workfare requirements for welfare recipients).

²⁷⁶ For example, voluntarily leaving a WORK placement constitutes a failure to meet program requirements and is subject to a variety of sanctions. See *id.* at § 201. Moreover, the *Work and Responsibility Act* provides only for discretionary child care services. *Id.*

²⁷⁷ See *id.* (proposing to sanction welfare recipients' failure to participate in program).

tutes a legal sanction. Because this sanction is imposed for a failure to provide employment services, workfare, like peonage, represents a violation of the Thirteenth Amendment.

It cannot be argued that workfare benefits are merely compensation for services provided as in a typical employer-employee relationship. Welfare recipients are statutorily entitled to their cash benefits as long as they meet the prescribed eligibility requirements. Most employees are not *statutorily* entitled to either their employment or to their paychecks. Furthermore, an analogy to market employment relationships also fails because under workfare, benefits received are not a function of the work performed. In a normal employer-employee relationship, gross wages are directly related to the actual hours worked, the difficulty of the job, and the worker's level of skill, education, or experience. None of these factors affect a workfare participant's work obligation. "Gross wages" are nothing more than the statutorily calculated entitlement. The number of hours of work is determined by dividing the entitlement by a predetermined "wage" set below the average minimum wage.²⁷⁸

The idea that workfare instills the "value of work" in welfare recipients is also misplaced.²⁷⁹ The value of work may indeed be about getting up every morning, trudging off to a job, and then seeing one's efforts rewarded through a paycheck. Many hard-working Americans probably do not believe that their decision to work offers them any *choice*—they work to pay the bills. They know that if they don't work, they won't eat, and welfare recipients should not have it any easier. The critical flaw in this analysis, however, is that the economic coercion that forces most Americans to work is radically different from the state-sponsored coercion that is at the heart of workfare. State-sponsored coercion is expressly prohibited by the Thirteenth Amendment. Indeed, the United States Constitution was designed to limit the power and control that government has over its citizens. Although economic coercion may be just as powerful a force as state-sponsored coercion, it was not anticipated by the framers of the Constitution to be as dangerous or as threatening to citizens as state-sponsored coercion. Furthermore, on a practical level, when hard-working Americans refuse to work they often have marketable skills to sell elsewhere, savings to fall back on, unemployment benefits, and when all else fails—welfare.

²⁷⁸ Statement of Mickey Kaus, *supra* note 253 (asserting that workfare jobs must pay below minimum wage because it would be unfair to give welfare recipients access to "better" jobs than employees in the marketplace).

²⁷⁹ *Id.*

The practical effect of the workfare system is to change the entitlement nature of these benefits to that of a debt. In a mandatory workfare program, welfare recipients are not allowed something for nothing.²⁸⁰ If they receive a grant, then an obligation to work, or a debt, is created. This obligation is not significantly different from the debts that compelled employment under peonage.²⁸¹

Furthermore, workfare affects essentially the same population that peonage did: the poor. As with peonage, the group targeted suffers societal stigma. Peonage affected the children of former slaves and immigrants, and workfare affects single mothers.²⁸²

Workfare also resembles peonage in that it creates a similar "wheel of servitude" found unconstitutional in *United States v. Reynolds*.²⁸³ Under peonage, victims of the system had difficulty breaking away, because the debt under which they labored could be increased practically at the whim of their employers.²⁸⁴ Under workfare, as long as the welfare recipient continues to receive a relief grant, she must continue to work.²⁸⁵ Unfortunately, the opportunities that this work provides her are practically nonexistent.²⁸⁶ The work available to workfare recipients provides no marketable training and does not have a promotion track.²⁸⁷ Consequently, like the peonage victim, she is effectively trapped in a system that compels her service.

Although workfare programs do not impose criminal sanctions for noncompliance, the sanctions that are imposed can be just as coercive. Under the Clinton Plan, noncompliance will result in a dramatic reduction of benefits,²⁸⁸ and under the Republican Plan, states may completely eliminate benefits for noncompliance.²⁸⁹ This reduction of benefits means that already destitute families will have no method of support. Although this form of coercion is more subtle than that endured by the the victims of peonage, it is no less real. As the peonage victims

²⁸⁰ This "something for nothing" idea erroneously assumes that full-time child care is "nothing."

²⁸¹ See *supra* part II.B–C.

²⁸² This analysis cannot overlook racial and ethnic factors. Nineteenth century peonage involved the black and immigrant labor force. Similarly, although modern welfare programs primarily service poor whites, society perceives that welfare recipients are black, latino, and Asian.

²⁸³ 235 U.S. 133, 146–47 (1914).

²⁸⁴ *Id.* at 147.

²⁸⁵ See Work and Responsibility Act, *supra* note 3, § 104 (termination of benefits shall not apply to individuals who continue working).

²⁸⁶ See *supra* note 243.

²⁸⁷ *Id.*

²⁸⁸ See Work and Responsibility Act, *supra* note 3, § 201 (discussing sanctions whereby already limited AFDC benefits would be reduced).

²⁸⁹ Personal Responsibility Act, *supra* note 4, at § 202.

were forced to “choose” between the chain gang and servitude, welfare recipients must make a similar choice between servitude and the well-being of their children.

The similarities between peonage and workfare provide more than just an idle history lesson. The system of peonage that existed in the Reconstruction Era South was dismantled because it violated basic notions of personal liberty.²⁹⁰ Peonage violated the Thirteenth Amendment’s prohibition against involuntary servitude.²⁹¹ Based on these same principles, modern workfare programs also violate the Thirteenth Amendment.

C. *Exceptions to Involuntary Servitude Distinguished*

Labelling workfare as a duty of citizenship is probably the strongest argument against viewing workfare as involuntary servitude. In fact, the Clinton Plan characterizes the program in just those terms.²⁹² The President has spoken widely about demanding that welfare recipients “give something back to their country.”²⁹³ The idea is that if the involuntary servitude benefits the State, as opposed to a private individual, then it simply falls outside the definition.²⁹⁴

The language of the Thirteenth Amendment does not distinguish between public and private servitude.²⁹⁵ Excluding from the purview of the Thirteenth Amendment all compulsory servitude of a public nature, however, is absurdly broad because it effectively swallows the Amendment. Under this interpretation, actual slavery would be permissible as long as the State was the direct beneficiary. As the Supreme Court stated in *Clyatt*, regardless of how it was created or whatever its mode of origin, it is the character of the servitude that is central.²⁹⁶ To argue that the citizenship exception applies to workfare would elevate form over substance. As with peonage, the basal fact of workfare is compulsory service based on indebtedness.²⁹⁷

Furthermore, the citizenship exception is limited to the government’s responsibility to protect liberty.²⁹⁸ It is unclear what liberty

²⁹⁰ See *supra* part II.B–C.

²⁹¹ See *supra* note 48 and accompanying text.

²⁹² See Work and Responsibility Act, *supra* note 3, § 101(a); see also Kelly, *supra* note 8, at A20.

²⁹³ Kelly, *supra* note 8, at A20.

²⁹⁴ Koppelman, *supra* note 60, at 519.

²⁹⁵ See *supra* part II.A.

²⁹⁶ See 197 U.S. 207, 215 (1905).

²⁹⁷ See *id.*

²⁹⁸ See *supra* part II.D.

interest is served by forcing welfare recipients to work for their wages. Tying workfare to duties of citizenship creates an effective media "sound-bite," but it does not comport with constitutional analysis.

The argument may also be asserted that a Thirteenth Amendment analysis is inapplicable to workfare proposals because requiring work from the poor has a long historical tradition.²⁹⁹ Practices that are strongly rooted in custom have been defined as an exception to the doctrine of involuntary servitude.³⁰⁰ As noted previously, however, this exception has been widely criticized.³⁰¹ The institution of slavery itself was once a common practice with a long historical tradition.³⁰² Furthermore, this exception would render the Thirteenth Amendment static and ineffective; its application would be impermissibly limited and constrained.

In *Kozminski*, the Supreme Court held that the term "involuntary servitude" means a condition of servitude in which the victim is forced to work by the use or threat of physical coercion or coercion through law or the legal process.³⁰³ A cursory review of this decision might suggest that workfare does not entail the type of physical or legal coercion required for a finding of involuntary servitude. Clearly, even the most virulent opponents of workfare do not insinuate that workfare conditions will include physical beatings, torture, or criminal penalties. Nonetheless, a more careful examination of *Kozminski* reveals that the decision actually supports the contention that workfare represents involuntary servitude.³⁰⁴

This interpretation hinges on the meaning of legal coercion within the Court's definition of involuntary servitude. If "coercion through law or the legal process" was limited solely to the imposition or threats of criminal penalties, the Court would have so stated.³⁰⁵ Instead, the Court's language specifically leaves open a plethora of legally coercive activity that cannot be employed against the victims of involuntary servitude. Impermissible legal coercion could include threatened or actual deportation, commitment to a mental institution, as well as the

²⁹⁹ See *supra* part III.

³⁰⁰ See *supra* text accompanying notes 90-94.

³⁰¹ See *supra* note 91.

³⁰² *Id.*

³⁰³ 487 U.S. 931, 952 (1987).

³⁰⁴ See *id.* This conclusion is not based on the fact that the decision was a statutory, not constitutional, interpretation of involuntary servitude. Given that the Court's analysis was almost wholly rooted in its understanding of the Thirteenth Amendment, such a distinction amounts to mere legal formalism. See *id.* at 945.

³⁰⁵ See *id.* at 952.

termination of welfare benefits. Indeed, all of these activities require certain formalities or legal process, and consequently, cannot be used under the *Kozminski* definition to compel labor.

Assuming, in the alternative, that the meaning of legal coercion is in fact much narrower, the *Kozminski* decision still does not necessarily undermine the argument that workfare is involuntary servitude. Even under a narrow construction of legal coercion, the opinion makes specific allowances for the special vulnerabilities or circumstances of the victim.³⁰⁶ The Court specifically infers that minors, immigrants, and the mentally incompetent suffer from such vulnerabilities.³⁰⁷ It is not unreasonable that poverty might also be the type of vulnerability envisioned by the court.

V. CONCLUSION

Workfare is a program rooted in the belief that the poor are morally deviant and personally culpable for their poverty. From the Elizabethan poorhouse to the state experiments with workfare in the 1980s, mandated work for relief has demonstrated a basic hostility to the poor. Proponents of workfare who contend that the program offers the poor greater dignity are fooling themselves. Forcing the poor into jobs they do not want, that offer no marketable skills, and that pay less than the minimum wage is not an effective way of bringing these people into the mainstream. People do not feel like they are equal citizens merely because they have a "job." There can be no equality if there exists one class of people who are free to choose their work, and another class of people who are forced into it.

The United States Supreme Court's interpretation of the Thirteenth Amendment in the Peonage Cases clearly holds that the right to one's own labor is inalienable. Free labor is a cornerstone in the foundation of United States constitutional law. This principle invalidated and effectively dismantled the system of peonage that prevailed in the Reconstruction Era South. Significantly, the factors and conditions of the peonage system are strikingly similar to workfare. Although the brutality of peonage is absent from workfare, the compulsion of service is the same. Like peonage, state mandated workfare violates basic notions of personal liberty, and therefore, it too is invalid under the Thirteenth Amendment of the Constitution.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 952-53.

