University of Illinois College of Law
Law and Economics Working Papers

Year 2009 *Paper* 104

The Inequality of Sacrifice – Reducing Moral Hazard For Bailed-Out Homeowners: The Case For Compulsory Community Service

Michael Leroy*

*University of Illinois at Urbana-Champaign, m-leroy@illinois.edu

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

http://law.bepress.com/uiuclwps/art104

Copyright ©2009 by the author.

The Inequality of Sacrifice – Reducing Moral Hazard For Bailed-Out Homeowners: The Case For Compulsory Community Service

Michael Leroy

Abstract

Should homeowners be required to perform community service in order to receive federal aid that reduces their mortgage debt? The U.S. requires sacrifices from bailed-out banks and auto firms; and at the other end of the wealth spectrum, welfare laws require public aid recipients to work or perform community service. But 9 million middle class homeowners— a term used by the Treasury Department— who took out risky mortgages are targeted to receive a free subsidy. To stem foreclosures, one Treasury Department program gives low interest rate loans, while another forgives debt. These programs require nothing in return from recipients.

The mortgage crisis was fueled by unconventional loans that promoted moral hazard— for example, teaser rates that temporarily insulated borrowers from bad credit decisions. Now, U.S. debt relief programs add a new moral hazard, according to a recent GAO report: they encourage more borrowers to fall behind on mortgage payments to qualify for a bailout.

My study asks whether the U.S. can require homeowners to perform community service as a condition for debt relief. I propose 200 hours of service in programs such as Habitat for Humanity. This idea is based on my analysis of five groups of citizens who were ordered by government to perform a public service. The first group is men who labored on road duty. Tracing to the early 1800s, these state and local laws required citizens to build roads several days each year without pay. Lawyers were ordered in the 1800s to represent indigent defendants without pay. In the 1940s, the draft law allowed conscientious objectors to avoid combat by

accepting mandatory assignment to jobs in charitable organizations. In the 1970s, welfare recipients were required to work on community projects if they could not find a job. The National Health Service Corps required new physicians who received tuition grants to serve the poor.

My study of 441 court rulings from 1807 to 2002 focuses on recalcitrant individuals who challenged these compulsory service policies. In 83% of the cases, state and federal trial courts upheld government imposed work. In 100% of their rulings, the U.S. Constitution did not prohibit government imposed obligations. However, 37.5% of trial courts ruled in favor of individuals who raised state constitutional claims. In appellate cases, only 8% of courts ruled that a work or service obligation violated a right in the U.S. Constitution. In narrow rulings, individuals won 48% of cases before appellate courts when their challenge was based on state statutes.

The results suggest that courts would not interfere with a federal policy that requires community service in return for mortgage relief. My research also shows that compulsory service requires a compelling and overarching purpose— plus an egalitarian ethos that justifies its imposition. The mortgage relief programs satisfy these pre-conditions. In an age when the poor and powerful are required to make sacrifices, mortgage bailouts to the middle class perpetuate the spendthrift mentality that dug the nation's deep financial hole. There is wisdom in assisting millions of strapped debtors, but why is no thought given to a policy of requiring bailed-out homeowners to pay back part of their debt relief by serving their communities? If millions of homeowners who face foreclosure performed community service, moral hazard would be reduced by making them more responsible for their credit behavior, while other homeowners would be discouraged from intentionally falling behind on their loans.

THE INEQUALITY OF SACRIFICE—
REDUCING MORAL HAZARD FOR BAILED-OUT HOMEOWNERS:
THE CASE FOR COMPULSORY COMMUNITY SERVICE

MICHAEL H. LEROY

PROFESSOR

SCHOOL OF LABOR AND EMPLOYMENT RELATIONS
AND
COLLEGE OF LAW
UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN
504 E. ARMORY
CHAMPAIGN, IL 61820
(217) 244-4092
e-mail: m-leroy@illinois.edu

FALL 2009

Manuscript: 45 Pages
Word Count: 17,966 (Including Footnotes and Appendix)

TABLE OF CONTENTS

I. INTRODUCTION 1

A. Mortgage Relief in Context: The Historical Connection between Debt and Labor 1

B. Organization of The Article 5

II. WORK SCENARIOS FOR MANDATORY SERVICE 6

A. Road Duty and *Trinoda Necessitas* 6

B. Lawyers and *Pro Bono Publico* 9

C. Conscientious Objectors and Compulsory Work. 13

D. Public Assistance and Workfare 18

E. Mandatory Work Assignments for Physicians 20

III. RESEARCH METHODS AND EMPIRICAL FINDINGS 20

A. Research Methods 20

B. Statistical Findings 22

C. Qualitative Discussion of the Statistical Findings 27

IV. MORAL HAZARD FOR BAILED-OUT HOMEOWNERS: THE CASE FOR COMPULSORY SERVICE 32

A. The Mortgage Crisis Created Unusual Moral Hazards 33

B. The Treasury Department's Mortgage Relief Programs: New Moral Hazard 34

C. Mortgage Debt Relief and the Feasibility of Compulsory Community Service 37

V. CONCLUSIONS: WHY THE LAW DISTINGUISHES COMPULSORY PUBLIC SERVICE AND INVOLUNTARY SERVITUDE 38

APPENDIX 41

Summary

Should homeowners be required to perform community service in order to receive federal aid that reduces their mortgage debt? The U.S. requires sacrifices from bailed-out banks and auto firms; and at the other end of the wealth spectrum, welfare laws require public aid recipients to work or perform community service. But 9 million middle class homeowners— a term used by the Treasury Department— who took out risky mortgages are targeted to receive a free subsidy. To stem foreclosures, one Treasury Department program gives low interest rate loans, while another forgives debt. These programs require nothing in return from recipients.

The mortgage crisis was fueled by unconventional loans that promoted moral hazard— for example, teaser rates that temporarily insulated borrowers from bad credit decisions. Now, U.S. debt relief programs add a new moral hazard, according to a recent GAO report: they encourage more borrowers to fall behind on mortgage payments to qualify for a bailout.

My study asks whether the U.S. can require homeowners to perform community service as a condition for debt relief. I propose 200 hours of service in programs such as Habitat for Humanity. This idea is based on my analysis of five groups of citizens who were ordered by government to perform a public service. The first group is men who labored on road duty. Tracing to the early 1800s, these state and local laws required citizens to build roads several days each year without pay. Lawyers were ordered in the 1800s to represent indigent defendants without pay. In the 1940s, the draft law allowed conscientious objectors to avoid combat by accepting mandatory assignment to jobs in charitable organizations. In the 1970s, welfare recipients were required to work on community projects if they could not find a job. The National Health Service Corps required new physicians who received tuition grants to serve the poor.

My study of 441 court rulings from 1807 to 2002 focuses on recalcitrant individuals who challenged these compulsory service policies. In 83% of the cases, state and federal trial courts upheld government imposed work. In 100% of their rulings, the U.S. Constitution did not prohibit government imposed obligations. However, 37.5% of trial courts ruled in favor of individuals who raised state constitutional claims. In appellate cases, only 8% of courts ruled that a work or service obligation violated a right in the U.S. Constitution. In narrow rulings, individuals won 48% of cases before appellate courts when their challenge was based on state statutes.

The results suggest that courts would not interfere with a federal policy that requires community service in return for mortgage relief. My research also shows that compulsory service requires a compelling and overarching purpose— plus an egalitarian ethos that justifies its imposition. The mortgage relief programs satisfy these pre-conditions. In an age when the poor and powerful are required to make sacrifices, mortgage bailouts to the middle class perpetuate the spendthrift mentality that dug the nation's deep financial hole. There is wisdom in assisting millions of strapped debtors, but why is no thought given to a policy of requiring bailed-out homeowners to pay back part of their debt relief by serving their communities? If millions of homeowners who face foreclosure performed community service, moral hazard would be reduced by making them more responsible for their credit behavior, while other homeowners would be discouraged from intentionally falling behind on their loans.

I. INTRODUCTION

A. Mortgage Relief in Context: The Historical Connection between Debt and Labor

Should distressed homeowners be required to perform community service in order to receive federal aid that reduces their mortgage debt? The mortgage crisis was caused by an upsurge in risky lending practices.[1] As a remedy, the U.S. Treasury Department is offering to bail out nine million homeowners with low interest rate loans while paying off their costlier debt.[2] A second program modifies mortgages by writing off debt.[3]

My study focuses on the unconditional grant of government largess for these borrowers. They must meet qualification standards—but are not obligated to repay the large personal savings that these programs generate. My research is motivated by the inequality of sacrifice that surrounds this bailout. As the U.S. funds bailouts for powerful companies, and aid for the poor, it requires sacrifice and additional effort by recipients.[4] But a subsidy of $50 billion to "middle class"[5] homeowners— a term used by the U.S. Treasury— requires nothing more than meeting eligibility requirements.

---

[1] *See* Dallas Federal Reserve Bank, *Quick Slide Show on the U.S. Housing Market*, at http://dallasfed.org/data/data/Housing-charts.pdf, Chart 7 ("Rising Use of Multiple, Interest-Only and Negative Amortization Mortgages in the U.S."). The share of home buyers using more than one mortgage rose from about 5% in 1985-1995 to almost 25% in 2005. Meanwhile, private mortgages with interest-only payment options rose from about 1% in 2001 to 35% in 2004. Home values rose continuously from 2000 through 2006, but then dropped steeply in 2006—and the decline continued into 2009. *See* Chart 3 ("Home-Price Appreciation Slowing Sharply").

[2] U.S. Department of Treasury, *Making Home Affordable*, at http://www.financialstability.gov/docs/borrower_qa.pdf, at 1.

[3] *Id*.

[4] As the U.S. government bailed out banks, insurance companies, and the auto industry, it imposed tough terms on companies. For example, executive pay was capped at banks that were bailed out by the U.S. *See* Heidi N. Moore, *Citigroup: The Struggle to Keep Phibro Happy*, WALL ST. J. (April 29, 2009), at http://blogs.wsj.com/deals/2009/04/29/citigroup-the-struggle-to-keep-phibro-happy/. The United States was forced out the CEO at General Motors as it spelled out tough terms to reorganize itself. Neil King, Jr. & John D. Stoll, *Government Forces Out Wagoner at GM*, WALL ST. J. (March 30, 2009), at http://online.wsj.com/article/SB123836090755767077.html. An example of government requiring poor people to work in order to qualify for public aid appears in Ballentine, *infra* note 131.

[5] U.S. Department of Treasury, *Fact Sheet: Financial Stability Plan*, at 6, http://www.financialstability.gov/docs/fact-sheet.pdf.

Government bailouts create moral hazard.[6] This problem occurs when an insurance program encourages individuals to take fewer precautions against the insured risk.[7] In this case, moral hazard arises when the Treasury Department's debt relief programs act as insurance against foreclosures.[8]

While there are good reasons to relieve home borrower debt, this government handout raises questions. By benefiting property owners, it favors the more affluent. Low income renters, in contrast, receive no hardship subsidy to pay for their housing. Similarly, welfare programs are now recast as workfare.[9] Aid recipients must work or perform public service to receive benefits.[10]

With this in mind, I ask whether the U.S. can require home loan borrowers to perform community service in exchange for debt relief. My study draws loosely from Depression-era programs such as the Civilian Conservation Corps[11] and Works Project Administration,[12] when the U.S. engaged destitute citizens in public service projects. But my inquiry relates to a deeper historical relationship between debt relief and labor. Jewish law decreed unconditional debt forgiveness in sabbatical years.[13] By contrast, Rome

---

6 Stiglitz, *infra* note 218.

7 *Infra* notes 188 - 190.

8 GAO, *infra* note 219.

9 Julie A. Nice, *Welfare Servitude*, 1 GEO J. ON FIGHTING POVERTY 340 (1994).

10 *See* Ballentine, *infra* note 131.

11 John Salmond, *The Civilian Conservation Corps and the Negro*, 52 J. AM. HISTORY 75 (1965).

12 Michael R. Darby, *Three-and-a-Half Million U.S. Employees Have Been Mislaid: Or, An Explanation of Unemployment*, 1934-1941, 84 J. POLITICAL ECON. 1 (1976).

13 David S. Kennedy & R. Spencer Clift, III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy Court and Its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 166 (2000), quoting DEUTERONOMY 15:1-4:

> At the end of every seven years thou shalt make a release. And this is the manner of the release: Every creditor that lendeth aught unto his neighbor shall release it; he shall not exact it of his neighbor or his brother; because it is called the Lord's release.

executed debtors and carved them for pro-rata distribution to creditors.[14] Henry VIII steered England on a middle path by imprisoning debtors.[15]

The criminalization of debt delinquency influenced the American colonies. The English practice of imprisonment for debt evolved in the U.S. to allow debt bondage, known as indentured servitude. Masters recruited impoverished Europeans and Englishmen to bind themselves for five years of labor in exchange for passage money and subsistence.[16] An involuntary system also arose in which English convicts were shipped to America under indenture.

In time, American idealism tempered these coercive practices. The Ordinance of 1787 prohibited involuntary servitude in the Northwest Territory.[17] Influenced by this noble charter, an antebellum court nullified a servitude contract that bound a woman of color to a white man.[18] Lincoln's Emancipation Proclamation declared an end to slavery, and laid the foundation for the Thirteenth Amendment.[19]

---

[14] Vern Countryman, *Bankruptcy and the Individual Debtor— and a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U.L. REV. 809, 810 (1983).

[15] Robert J. Landry, III & Nancy Hisey Mardis, *Consumer Bankruptcy Reform: Debtors' Prison without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U.L. REV. 91 (2006).

[16] Countryman, *supra* note 14.

[17] Phoebe v. Jay, 1 Ill. 268 (1828), quoting the Ordinance of 1807 at * 2, n.1: '"There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted."'

[18] In a bold decision that pre-dates the Emancipation Proclamation, an Indiana court refused to hold a "Woman of Color" to a contract that provided for indentured service, stating: "Deplorable indeed would be the state of society, if the obligee in every contract had a right to seize the person of the obligor, and force him to comply with his undertaking." *See* The Case of Mary Clark, A Woman of Color, 1 Blackf. 122 (Ind. 1812), also available in 1821 WL 974 (Ind.).

[19] *See* President Lincoln's Emancipation Declaration on September 22, 1862, available at The Emancipation Proclamation, in the National Archives, http://www.archives.gov/exhibits/american_originals_iv/sections/preliminary_emancipation_proclamation.html#, stating: "That on the first day of January in the year of our Lord, one thousand eight hundred and sixty-three, all persons held as slaves within any State, . . . the people whereof shall then be in rebellion against the United States shall be then, thenceforward, and forever free. . . ." This idea was broadened and codified in the Thirteenth Amendment, which states: "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." U.S. Const., Amendment XIII, Section 1.

This history bears on the five groups of Americans in my study who have been subject to compulsory public service. The first group performed road duty, a practice that I trace to 1801.[20] Able-bodied men were required by state and county governments to work several days each year building roads and bridges, without pay, or face fines and imprisonment. In another practice, dating to the 1600s, lawyers were ordered to represent indigent defendants without pay.[21] Beginning in the 1940s, draft laws allowed conscientious objectors to avoid combat.[22] These men were required, however, to accept full-time jobs in charitable organizations. The 1970s brought two new forms of public service. Some welfare programs required aid recipients to accept assignment in community projects if they could not find employment.[23] Separately, the U.S. sought to improve health care in underserved areas by paying tuition to train doctors.[24] In return, physicians were required to accept a job assigned by a federal agency.

In all five work scenarios, federal and state government used coercive sanctions to force recalcitrant individuals to work. Often, this meant imprisonment or fines.[25] For doctors, the U.S. trebled their debt.[26] Public aid recipients were threatened with benefits termination or contempt.[27]

My statistical analysis of 441 court rulings from 1807– 2002 joins a growing research literature on moral hazard related to the mortgage crisis.[28] In particular, I study

---

20 Overseers of Amenia, *infra* note 49.

21 Case 501, *infra* note 66

22 Selective Training and Service Act, *infra* note 108.

23 Ballentine, *infra* note 131.

24 *Infra* notes 141-142.

25 *Infra* note 126.

26 *Infra* note 146.

27 Ballentine, *infra* note 131.

28 A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, IND. L. J. (2009); Rachel D. Godsil, *Protecting Status: The Mortgage Crisis,*

constitutional theories for resisting compulsory work. The Thirteenth Amendment prohibits involuntary servitude.[29] A related federal law prohibits peonage, a form of servitude in which a person is coerced to work off a debt.[30] My study suggests that these laws would not impede a federal policy that requires homeowners to perform community service in return for debt relief. I propose that individuals perform 200 hours of service in programs such as Habitat for Humanity.

B. Organization of the Article

In Part II, I examine government imposed work scenarios for five groups of citizens.[31] Road duty, in Part II.A, derived from a Roman law doctrine, *trinoda necessitas*.[32] Part II.B explores the evolution of *pro bono publico*, a duty imposed by judges on lawyers to serve the poor.[33] The next section explains how military draft laws allowed conscientious objectors to avoid combat by working full-time in charitable jobs.[34] Part II.D describes how welfare requires aid recipients to work or perform community service,[35] and Part II.E reports on a federal program that funds tuition for

---

Eminent Doman, and the Ethic of Home Ownership, 77 FORD. L. REV. 949 (2008); and Rachel Carlton, *Mortgage Forgiveness Debt Relief Act of 2007*, 45 HARV. J. ON LEGIS. 601 (2008).

[29] Amendment XIII, *supra* note 19.

[30] After recent amendments, 18 U.S.C. § 1584 now provides:

> Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

See 18 U.S.C.A § 1584, reporting amendments in 1948 (June 25, 1948, c. 645, 62 Stat. 773); 1994 (Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(1)(K)); 1996 (Sept. 30, 1996, 108 Stat. 2147, Pub.L. 104-208, Div. C, Title II, § 218(a), 110 Stat. 3009-573); and 2000 (Oct. 28, 2000, Pub.L. 106-386, Div. A, § 112(a)(1), 114 Stat. 1486).

[31] *Infra* notes 48 - 156.

[32] *Infra* notes 48 - 65.

[33] *Infra* notes 66 - 99.

[34] *Infra* notes 100 - 126.

[35] *Infra* notes 127 - 140.

doctors if they agree to accept assignment in a poor and underserved area.[36]

Part III reports my research methods and findings.[37] The first section describes my empirical methodology,[38] while Part III.B reports my statistical findings for federal and state courts.[39] My data tables summarize trial and appellate rulings. Breaking the sample into five citizen groups, Tables 1A and 1B quantify the percentage of cases won by the government and the individual.[40] Tables 2A and 2B break down the main legal issues and quantify government and individual success rates.[41] Tables 3A and 3B summarize the type of government compulsion—for example, required employment versus unpaid service— and report on government and individual win rates.[42] Part III.C presents cases that add qualitative context and legal analysis.[43]

Part IV.A describes loose lending practices that caused the mortgage crisis,[44] while Part IV.B explains that the Treasury Department's mortgage relief programs create a new moral hazard.[45] Part IV.C explains that a community service requirement is a feasible condition for receiving mortgage relief.[46] My conclusions appear in Part V.[47]

II. WORK SCENARIOS FOR MANDATORY SERVICE

A. Road Duty and Trinoda Necessitas

Road duty originated under a Roman law doctrine called *trinoda necessitas*. All

---

36 *Infra* notes 141 - 156.
37 *Infra* notes 157 - 187.
38 *Infra* notes 157 - 160.
39 *Infra* note 161.
40 *Infra* at manuscript page 23.
41 *Infra* at manuscript page 24.
42 *Infra* at manuscript page 25.
43 *Infra* notes 161 - 187.
44 *Infra* notes 192 - 204.
45 *Infra* notes 205 - 224.
46 *Infra* notes 225 - 230.
47 *Infra* notes 231 - 241.

free men were required to participate in "expedition against the enemy, the construction of arsenals, and the repairing of bridges."[48] In American law, *trinoda necessitas* meant road duty— conscription of male adults to build and maintain roads.[49]

Many states required this annual service.[50] Though not a tax, this duty was similar to unpaid jury or military service.[51] Courts rejected arguments that road duty was involuntary servitude.[52] Violators were fined[53] or jailed.[54]

The duty was controversial because it was imposed unequally. Town dwellers were exempt from work outside city limits,[55] but rural residents had county-wide duties.[56]

---

[48] Harper (Collector) v. Broosher, 240 S.W. 729 (Ark. 1922).

[49] *See* Overseers of the Poor of Amenia v. The Overseers of Stanford, 6 Johns. 92 (1810), reporting on the Act of 1809. The court treated the assessment and performance of highway labor as a duty rather than a tax.

[50] Examples are Kansas (in re Dassler, 35 Kan. 678 (1886)); North Carolina (State v. Wheeler, 141 N.C. 773 (1906), State v. Halifax, 15 N.C. 345 (1883), State v. Sharp, 34 S.E. 264 (N.C. 1899), and State v. Johnston, 23 S.E. 921 (N.C. 1896)); Illinois (Sawyer v. Alton, 4 Ill. 127 (Ill. 1841), and People, for the Town of Highland v. Suppiger, 103 Ill. 434 (1882)); Georgia (Johnston v. City of Macon, 62 Ga. 645 (1879)); Louisiana (Barrow v. Hepler, 34 La.Ann. 362 (1892)); Vermont (Town of Starksborough v. Town of Hinesboro, 13 Vt. 215 (1841)); New York (Walker v. Moseley, 5 Denio 102 (N.Y. Sup. 1847), and Bank of Ithaca v. King, 12 Wend. 390 (N.Y. 1834)); Alabama (Whitt v. City of Gadsen, 49 So. 682 (Ala. 1909), Taylor v. State, 41 So. 776 (Ala. 1906), and Ward v. State, 7 So. 298 (Ala. 1890)); New Hampshire (Pickering v. Pickering, 11 N.H. 141 (N.H. 1841)); Texas (Ex Parte Roberts, 11 S.W. 782 (Tex.Ct.App. 1889)); Nebraska (Burlington & M.R.R.Co. v. Lancaster County, 4 Neb. 293 (Neb. 1876)); Pennsylvania (Miller v. Gorman, 38 Pa. 309 (Pa. 1861)); Arkansas (Lowery v. State, 12 S.W. 563 (Ark. 1889)); Indiana (State v. Porter, 32 N.E. 1021 (Ind. 1893)); and Wisconsin (Biss v. Town of New Haven, 42 Wis. 605 (Wis. 1877)).

[51] *E.g.*, Probst v. Calhoun County Court, 106 S.E. 878, 880 (W.Va. 1921).

[52] *E.g.*, Dennis v. Simon, 36 N.E. 832 (1894).

[53] *E.g.*, Bouton v. Neilson, 3 Johns. 474 (N.Y.Sup. 1808).

[54] *E.g.*, State v. Hathcock, 20 S.C. 419 (S.C. 1884) (state law provided for ten day imprisonment for ignoring road duty);

[55] *E.g.*, DeTavernier v. Hunt, 53 Tenn. 599 (Tenn. 1871). A county road assessor took action against Jacksboro residents to compel their service on county roads. The court dismissed the action, reasoning: "It follows that the County Court has no authority to assign the inhabitants of Jacksboro to work on the public roads outside of the town." *Id*. at * 1.

[56] *E.g.*, State v. Wheeler, 53 S.E. 358 (1906), where a county resident subject to road duty four days every year complained that city dwellers were exempted from this requirement. The court, in rejecting this contention, concluded:

> Whenever, in the judgment of the people of Wake County, the four days' labor per annum still exacted should be reduced, or entirely abolished, they can send representatives to the General Assembly, who can doubtless procure such changes as the people may wish in the manner of working their public roads."

Id. at 360.

The latter furnished wagons and teams, plus feed. Courts acknowledged the disparities but viewed them as legal.[57] The law tolerated other inequalities. Slaves worked for their owners.[58] Road laws exempted men who performed public duties such as fire fighting.[59]

In the early 1900s, states responded to growing criticism by enacting road taxes.[60] But road duty did not end before the Supreme Court affirmed the practice in a far-reaching decision. *Butler v. Perry* upheld a Florida law that required men to work without pay for six days every year on roads and bridges.[61] J.W. Butler was jailed for 30 days after he ignored this duty.[62] Upholding the conviction, *Butler* traced road duty to Roman law.[63] The Court noted that several states, once a part of the Northwest Territory, adopted the Territory's prohibition against involuntary servitude while also enacting road duty laws. *Butler* therefore concluded that the Thirteenth Amendment, which derived from the Northwest Territory's ban on servitude, did not intend to extinguish this duty.[64] *Butler* is a vital precedent even though road duty was abolished long ago. Courts cite it to uphold community service mandates that are graduation requirements for high school students.[65]

---

[57] *E.g.*, State v. Holloman, 52 S.E. 408, 409 (N.C. 1905), stating: "The old system of working the roads by conscription of labor was exceedingly inequitable, because it threw the cost of road maintenance upon those deriving the least benefit therefrom, the laboring element."

[58] Woolard v. McCullough, 1841 WL 746 (N.C. 1841).

[59] Leedy v. Town of Bourbon, 40 N.E. 640 (1895).

[60] Holloman, *supra* note 57 at 409, observing: "The change to working the roads by taxation has been complete in most civilized countries, but has been slower in this state than in most."

[61] 240 U.S. 328 (1916).

[62] *Id.* at 330.

[63] *Id.* at 331, explaining that the duty applied "with respect to the construction and repairing of ways and bridges [and] no class of men of whatever rank or dignity should be exempted from conscription."

[64] *Id*. recalling that the ordinance of 1787 for the government of the Northwest Territory declared: "'There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted.'" Compare this language to the text of the Thirteenth Amendment: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const., Amendment XIII, Section 1.

[65] *See infra* note 240.

B. Lawyers and Pro Bono Publico

In the 1600s, English courts ordered lawyers to represent criminal defendants.[66] Early American colonial courts adopted the practice,[67] though a few appellate courts overruled this duty.[68] Typical of these early courts, the Illinois Supreme Court declared: "The law confers on licensed attorneys rights and privileges, and with them imposes duties and obligations, which must be reciprocally enjoyed and performed."[69] Similarly, the Supreme Court of California acknowledged that lawyers "are not considered at liberty to reject, under circumstances of this character, the cause of the defenseless."[70] *Nabb v. U.S.* extended appointment of unpaid counsel to a Kickapoo Indian who was charged with manslaughter.[71]

This involuntary duty continued after passage of the Thirteenth Amendment.[72] However, some eighteenth century courts presaged a more contemporary approach of ordering payment to appointed counsel. The Indiana Supreme Court said that lawyers should be treated like any other profession: "The idea of one calling enjoying peculiar privileges . . . is not congenial to our institutions. And that any class should be paid for

---

[66] Case 501. _____ v. Sir William Scroggs and J.S., 3 Keb. 424, 89 Eng. Rep. 289 (King's Bench, 1674), stating that "if the Court should assign him to be counsel, he ought to attend; and if he refuse, per C.J. Hale, we would not hear him, nay, we would make bold to commit him."

[67] *E.g.*, Whicher v. Bd. of Commissioners of Cedar County, 1 Greene 217 (Iowa 1848); Hall v. Washington County, 2 Greene 473 (Iowa 1850); Webb v. Baird, 6 Ind. 13 (Ind. 1854); and Carpenter v. Dane County, 9 Wis. 274 (Wis. 1859).

[68] *See* Blythe v. State, 4 Ind. 525, 1853 WL 3375 (Ind. 1853). After a trial court held an attorney in contempt for refusing to represent an indigent defendant without pay, the Supreme Court of Indiana overturned the contempt ruling because compulsory appointment violated the state constitution.

[69] Vise v. Hamilton County, 19 Ill. 78 (1857).

[70] Rowe v. Yuba County, 17 Cal. 61 (Cal. 1860).

[71] 1 Ct. Cl. 173 (1864).

[72] *E.g.*, Posey & Tompkins v. Mobile County, 50 Ala. 6 (Ala. 1873); Arkansas County v. Freeman & Johnson, 31 Ark. 266 (Ark. 1876); Lamont v. Solano County, 49 Cal. 158 (Cal. 1874); Elam v. Johnson, 48 Ga. 348 (Ga. 1873); Johnson v. Whiteside County, 110 Ill. 22 (Ill. 1884) Johnston v. Lewis and Clarke County, 2 Mont. 159 (Mont. 1874); Washoe Co. v. Humboldt Co., 14 Nev. 123 (Nev. 1879); Wayne County v. Waller, 90 Pa. 99 (Pa. 1879); and House v. Whitis, 64 Tenn. 690 (Tenn. 1875).

their particular services in empty honors is an obsolete idea belonging to another age and to a state of society hostile to liberty."[73] Similarly, the Iowa Supreme Court reasoned: "It is not presumable that this humane provision of the law for the protection of the accused, but innocent, poor citizen, was intended by the legislature to be at the expense . . . of the citizen, whose profession is that of an attorney."[74]

Nonetheless, *pro bon publico* remained vital in the twentieth century. Judge Cardozo's scholarly decision set the tone for expanding the duty during the New Deal and the civil rights movement.[75] However, several Supreme Court rulings that required states to provide counsel to the poor loosened *pro bono publico*'s grip.[76] In response to more appointments that resulted from these precedents, Congress enacted the Criminal Justice Act of 1964 to provide limited pay.[77]

As more attorneys represented indigent clients, they raised constitutional objections.[78] But courts dismissed Thirteenth Amendment challenges to compulsory appointments.[79] *State v. Williamson* said that the "Thirteenth Amendment has never been

---

[73] Webb v. Baird, 6 Ind. 13, 1854 WL 3268 (Ind. 1854).

[74] 2 Greene 473, 1850 WL 157 (Iowa 1850), at *3.

[75] *See* People ex rel. Karlin v. Kulkin, 248 N.Y. 465, 470 (N.Y. 1928), stating: "Membership in the bar is a privilege burdened with conditions. The appellant was received into that ancient fellowship for something more than private gain."

[76] *See* Gideon v. Wainwright, 372 U.S. 335 (1963), Douglas v. California, 372 U.S. 353 (1963), and Argersinger v. Hamlin, 407 U.S. 25 (1972).

[77] The Criminal Justice Act of 1964, Pub.L. No. 88-455, 78 Stat. 552, 553 (1964), codified as amended 18 U.S.C. § 3006A(d)(2)(1976), responded to the increased number of compulsory appointments that resulted from Gideon and similar rulings. The law's provision for limited fee awards is discussed in U.S. v. Johnson, 549 F.Supp. 78 (D.D.C. 1982).

[78] Contempt of Spann, 443 A.2d 239 (N.J. 1982) (attorney received suspended sentence of six months in jail for failing to obey order to represent an indigent client, and was also fined $1,000).

[79] Williamson v. Vardeman, 647 F.2d 1211, 1214 (8th Cir. 1982), concluded that attorneys may be compelled to represent indigent defendants without compensation, noting that the "Thirteenth Amendment has never been applied to forbid compulsion of traditional modes of public service even when only a limited segment of the population is so compelled." *Also see* State ex rel. Dressler v. Circuit Court for Racine County, 472 N.W.2d 532, 538 (Wis. 1991). For an interesting court opinion, *see* Bradshaw v. U.S. Dist. Court for Southern Dist. of California, 742 F.2d 515 (9th Cir. 1984), where attorneys suggested that their court appointments were a form of involuntary servitude. Struck by the reluctance of lawyers to

applied to forbid compulsion of traditional modes of public service even when only a limited segment of the population is so compelled."[80] Courts also ruled that unpaid appointments do not deprive lawyers of their property,[81] nor deny equal protection.[82]

While the clear weight of authority favors appointment of counsel, *pro bono publico* is not an endless duty. In the nineteenth century, some states softened it by enacting statutes that provided courts discretion to assign or *request* attorneys to serve without compensation (emphasis added).[83] *Hall v. Washington County* justified its refusal to order unpaid representation by emphasizing that a lawyer's "time, labor and professional skill are his own. He should not be required to bestow them gratuitously at the will of the court, any more than should any other office."[84] The Wisconsin Supreme Court, in *Carpenter v. the County of Dane*,[85] reasoned that lawyers cannot always choose

---

aid Bradshaw, the court reflected: "When the degree of resistance is so high that attorneys would rather confront the court with questionable thirteenth amendment arguments than provide counsel for an indigent, the helpfulness of coercive appointment is subject to question." *Id*. at 517.

[80] 382 A.2d 588, 596 (Md. 1978).

[81] State v. Doucet, 352 So. 2d 222, 223 (La. 1977), stating: "Defense counsel's argument that an appointment without compensation violates the lawyer's rights under the Fifth and Fourteenth Amendments has consistently been rejected . . . on grounds that there is no 'taking' where the lawyer performs a duty required of him in his exercise of the privilege of membership in the bar."

[82] New Jersey Div. of Youth and Family Services v. D.C., 571 A.2d 1295 (N.J. 1990) illustrates the equal protection argument. Attorneys argued that failure to pay lawyers for compulsory representation violated equal protection by treating attorneys differently from other licensed professionals. The court dismissed this reasoning, stating that the "distinctions between attorneys and other professionals . . . need be only rationally related to a legitimate state objective." *Id*. at 1301. But some courts have been sensitive to the disparity of compulsory service among licensed professionals. While Madden v. Township of Delran, 601 A.2d 211 (N.J. 1992) rejected an equal protection challenge, it expressed concern about growing disparities in assigning counsel to cases, and modified New Jersey's service requirement. In dictum, State v. Lynch, State v. Lynch, 796 P.2d 1150, 1157 (Ok. 1990), observed:

> A lawyer's skills and services are his/her only means of livelihood. The taking thereof, without adequate compensation, is analogous to taking the goods of merchants or requiring free services of architects, engineers, accountants, physicians, nurses or of one of the thirty-four other occupations or professions in this state which require a person to be licensed before practicing the occupation or profession.

[83] *See* Mallard, *infra* note 89, at 302-303, citing state laws for appointing counsel.

[84] 2 Greene 473 (Iowa 1850).

[85] 9 Wis. 274 (Wis. 1859), stating: "It is the boast of the profession that its members have ever been ready to volunteer their services in behalf of the unfortunate, despised, degraded criminal, so that he should have a fair trial." *Id*. at * 2.

their client and must be ready to summon their talents for people who may have committed despicable acts.[86] However, *Carpenter* asked, "But is it just to impose upon them the burden of laborious and gratuitous services, or the alternative of witnessing all principles of law and justice outraged in the conviction of an undefended prisoner?"[87]

The U.S. Supreme Court also placed limits on *pro bono publico*. Ruling that a mother was not entitled to appointed counsel in an action to terminate her parental rights, Justice White stated that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel."[88] More recently, the Supreme Court ruled in *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa* ruled that federal law does not require appointed attorneys to represent inmates who sue prison officials.[89] After *Mallard*, some courts denied motions for appointed counsel.[90]

---

[86] *Id*.

[87] *Id*. The court concluded: "It seems eminently proper and just that the county . . . should pay an attorney for defending a destitute criminal." *Id*.

[88] Lassiter v. Dep't of Social Services of Durham County, N.C., 452 U.S. 18, 26 (1981).

[89] 490 U.S. 296 (1989). An inexperienced attorney who was assigned a case involving complex litigation sought reappointment to a case that would pose more familiar legal issues. *Id*. at 296. The federal statute authorizing appointment of counsel said that the court may request an attorney to provide representation. *Id*. Giving weight to this permissive clause, Mallard ruled that the Iowa federal district court did not have authority to compel the attorney to represent the inmate. The court declared:

> We emphasize that our decision today is limited to interpreting § 1915(d). We do not mean to question, let alone denigrate, lawyers' ethical obligation to assist those who are too poor to afford counsel, or to suggest that requests made pursuant to § 1915(d) may be lightly declined because they give rise to no ethical claim. On the contrary, in a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills *pro bono publico* is manifest. Nor do we express an opinion on the question whether the federal courts possess inherent authority to require lawyers to serve.

Id. at 310.

[90] *E.g*., Colbert v. Rickmon, 747 F.Supp. 518 (W.D. Ark. 1990) (court lacked statutory and discretionary authority to order unwilling attorney to help prisoner prosecute a civil rights claim); and Spencer v. Williams, 2005 WL 2671345 (W.D.Va. 2005) (dismissing prisoner's § 1983 claim that he was denied proper medical care for his diabetes). For an example of a court that interpreted the federal counsel law as providing discretion to make such appointments in civil cases, *see* Reid v. Charney, 235 F.2d 47 (6th Cir. 1956). The court said: "In contrast to criminal proceeding, in which the court has a duty to 'assign' counsel to represent a defendant in accordance with his Constitutional right, . . . the court in a civil case has the statutory power only to 'request an attorney to represent' a person unable to employ counsel." *Id*. at 47.

Nonetheless, *pro bon publico* has been extended beyond criminal defense to a wide range of civil actions, including involuntary transfer of elderly patients from a hospital to a nursing home,[91] marital dissolution,[92] termination of parental rights,[93] adoptions,[94] paternity disputes,[95] contested deeds,[96] civil contempt,[97] eviction cases,[98] and prisoner exposure to cruel and unusual punishment.[99]

C. Conscientious Objectors and Compulsory Work

The Constitution provides Congress far-reaching authority to call up a militia.[100] The War of 1812 provided the first occasion to propose a draft, but the idea was not implemented.[101] President Lincoln acted on the idea by calling up males between the ages of 20 and 45.[102] During World War I, Congress authorized another draft.[103] The law required all men between the ages of 21 and 30 to register and present themselves for service.[104] However, it also exempted members of religious groups who objected on

---

91 *E.g.,* Application of St. Luke's-Roosevelt Hosp. Center, 607 N.Y.S.2d 574 (N.Y. 1993).

92 *E.g.,* Smiley v. Smiley, 356 N.Y.S.2d 733 (N.Y.A.D. 1974); Jacox v. Jacox, 350 N.Y.S.2d 435 (1973); Bartlett v. Kitchin, 352 N.Y.S.2d 110 (N.Y. Sup. 1973); and Emerson v. Emerson, 308 N.Y.S.2d 69 (N.Y.A.D. 1970).

93 *E.g.,* In re Ella B., 285 N.E.2d 288 (1972); In re Luscier's Welfare, 524 P.2d 906 (Wash. 1974); State ex rel. v. Lemaster v. Oakley, 203 S.E.2d 140; V.F. v. State, 666 P.2d 42 (Alaska 1983); and In Interest of D.B., 385 So.2d 83 (Fla. 1980).

94 *E.g.,* in re Adoption of R.I., 312 A.2d 601 (Pa. 1973).

95 *E.g.,* Salas v. Cortez, 593 P.2d 226 (1979).

96 *E.g.,* in re Goreson v. Gallagher, 485 N.Y.S.2d 664 (N.Y. 1983).

97 *E.g.,* Otton v. Zaborac, 525 P.2d 537 (Alaska 1974); and in re Williams v. Williams, 458 N.Y.S. 2d. 641 (N.Y. 1983).

98 *E.g.,* Hotel Martha Washington Mgmt. Co. v. Swinick, 322 N.Y.S.2d 139 (N.Y. 1971).

99 *E.g.,* Lofton v. Delassandri, 3 Fed.Appx. 658 (10th Cir. 2001) (prison officials failed to isolate prisoners who tested positive for tuberculosis from other inmates).

100 U.S. Const., Art. 1, § 8, providing Congress authority "for calling forth the militia to execute the laws of the nation, suppress insurrections and repel invasions. . . ."

101 This history is recounted in Arver v. U.S., *infra* note 106.

102 Universal Military Training and Service Act, Act of March 3, 1863, ch. 75, 12 Stat. 731.

103 Act of May 18, 1917, Public Law No. 12, 65th Congress, ch. 15, 40 Stat. 76.

104 *Id*.

moral grounds.[105] Sustaining congressional power to enact this legislation, *Arver v. U.S.* rejected a Thirteenth Amendment argument against a war-time draft.[106]

More recently, Congress created an exempt classification for conscientious objectors.[107] This law required objectors to contribute "to the maintenance of the national health, safety, or interest"[108] by performing civilian work in lieu of military service. These assignments lasted 24 months,[109] and were structured as employment.[110]

Conscientious objectors worked harder and for less pay compared to their civilian jobs.[111] During World War II, they labored in rural camps,[112] sometimes six days per week.[113] Hard physical work was replaced after World War II by urban assignments with social service agencies.[114] Often, objectors worked for hospitals or charities.[115]

Courts did not view compulsory civilian work as involuntary servitude,[116] or a

---

105 Universal Military Training and Service Act, *supra* note 102.

106 245 U.S. 366, 380 (1918).

107 Universal Military Training and Service Act, *supra* note 102.

108 Selective Training and Service Act, as amended, 54 Stat. 885, 50 U.S.C.A.Appendix, § 301, et seq. A detailed excerpt of regulations under the law appears in Kramer v. U.S., 147 F.2d 756, 761 (6th Cir. 1945).

109 U.S. v. Gidmark, 440 F.2d 773 (9th Cir. 1971).

110 *See* U.S. v. Crouch, 415 F.2d 425, 428-29 (5th Cir. 1971), reciting 32 CFR §1660.1 (A):

> The types of employment which may be considered . . . to be civilian work contributing to the maintenance of the national health, safety, or interest . . . shall be limited to the following:
>
> . . .
>
> (2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, . . ."

111 Frank v. U.S., 236 F.2d 39 (9th Cir. 1951).

112 *E.g.,* Kramer v. U.S., 147 F.2d 756 (6th Cir. 1945), reporting assignment to Camp No. 23 in Carroll County, Ohio; and Brooks v. U.S., 147 F.2d 134 (2d Cir. 1945 (2d Cir. 1945), reporting assignment to Civilian Public Service Camp No. 111 in Mancos, Colorado.

113 *E.g.,* U.S. v. Emery, 168 F.2d 454 (2d Cir. 1948), noting that the conscientious objector was compelled to work on a dairy herd from 4:30 a.m. until 5:30 p.m.

114 *E.g.,* U.S. v. Sutter, 127 F.Supp. 109 (C.D. Cal. 1954).

115 *E.g.,* U.S. v. Harris, 446 F.2d 129 (7th Cir. 1971) (assignment in state hospital), and Badger v. U.S., 322 F.2d 902 (9th Cir. 1963) (assignment to county department of charities).

116 *E.g.,* Howze, *infra* note 165.

taking of property without just compensation.[117] A military emergency was not needed to justify the government's requirement for duty.[118] While many objectors held religious titles, they did not qualify for a ministerial exemption from mandatory duty.[119]

Judges were also unmoved when conscientious objectors claimed that their work conditions were harsh. *U.S. v. Emery* concluded that the selective service system, with its "requirements of forced military service for selectees in general and of the substituted work of national importance for conscientious objectors, would not be operable if claimed harshnesses in detail could be contested by refusing any obedience to the system."[120] Nor did courts equate forced civilian duty with convict labor.[121]

Courts took a broad view of work that constituted the national interest. The conscientious objector in *U.S. v. Copeland* [122] failed to convince a judge that assignment to Goodwill Industries did not fulfill a public purpose. On rare occasion, however, objectors avoided civilian duty and escaped criminal sanctions. *U.S. v. Casias* overturned a conviction because the government failed to provide this objector his *Miranda* rights when it sought incriminating information from him.[123] The Seventh Circuit overturned a five year sentence in *Huisinga* after the trial judge and draft board ignored information that the objector qualified for a full ministerial exemption.[124]

But court reversals of draft board decisions were rare. The Supreme Court, in *Cox*

---

117 *E.g.,* U.S. v. Hobbs, 450 U.S. 935 (10th Cir. 1971).

118 *E.g.,* O'Connor v. U.S., 415 F.2d 1110 (9th Cir. 1969).

119 *E.g.,* U.S. v. Smith, 124 F.Supp. 406 (E.D. Ill. 1954); U.S. v. Niles, 122 F.Supp. 383 (N.D.Cal. 1954); Atherton v. U.S., 176 F.2d 835 (9th Cir. 1949); U.S. v. Thorn, 317 F.Supp. 389 (E.D.La. 1970); and U.S. v. Von Nieda, 134 F.Supp. 455 (E.D. Pa. 1955).

120 U.S. v. Emery, *supra* note 113, at 457.

121 *See* Brooks v. U.S., 54 F.Supp. 995, 996 (D.C.N.Y. 1944), alluding to the isolated conditions of the "labor camp" and the fact that the conscientious objector was not convicted of a crime.

122 U.S. v. Copeland, 126 F.Supp. 734 (D.C. Conn. 1954).

123 306 F.Supp. 166 (D.C. Col. 1969).

124 422 F.2d 635 (7th Cir. 1970).

v. U.S., explained that Congress denied judges "the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified."[125] Thus, objectors who failed to complete civilian assignments were jailed up to five years.[126]

D. Public Assistance and Workfare

In the 1820s, indigents could be declared by law as paupers and required to work for the public as a condition for support.[127] A pauper's work in a poorhouse paid his debt for support.[128] Similarly, during the Depression a relief worker's civic service paid his debt to a city.[129] In the same period, public service employees were unable to block a work relief program that created labor market competition.[130]

Workfare came back into vogue in the 1970s, when some states enacted laws that required aid recipients to perform public services.[131] New York, for example, withheld

---

[125] 332 U.S. 442, 448-49 (1947).

[126] U.S. v. Chaudron, 425 F.2d 605 (8th Cir. 1970) (individual sentenced to five years in prison).

[127] *See* Commonwealth v. Inhabitants of Cambridge, 37 Mass. 267 (Mass 1838). The state lost its lawsuit against a city to recover for alleged overpayments to paupers from 1828 through 1836.

[128] *See* City of Taunton v. Talbot, 71 N.E. 785 (Mass. 1904). The court concluded that the "defendant has been a valuable hand at the almshouse, being steady and industrious, having charge of the barn, with general oversight of the horses, cows, etc., for which duties he had peculiar aptitude, and has performed services fully commensurate with the amount sought to be recovered by the city." *Id*. at 786.

[129] *See* City of Marlborough v. City of Lowell, 10 N.E.2d 104 (Mass. 1937). The city argued that because the purpose of work was to rehabilitate the recipient, the city should receive full reimbursement of its cash assistance. The court rejected this theory. *Id*. at 105.

[130] *See* Social Investigator Eligibles Ass'n v. Taylor, 197 N.E 262 (1935), dismissing a wage-law challenge: "These persons are among those selected by a unit of the Temporary Emergency Relief Administration for the bounty of work needed to sustain life. At the request of that body their services have been used in conformity with the statutory machinery devised for warfare with unemployment." *Id*. at 237.

[131] *E.g*., Ballentine v. Sugarman, 344 N.Y.S.2d 39 (N.Y. Sup. 1973), provides a detailed illustration of how a public aid law conditions public aid upon a recipient's performance of public duties. Employable persons who receive public aid "shall be required to perform such work as shall be assigned to them by the social services official furnishing such home relief." *Id*. at 42. The law authorized a social services agency to establish "public work projects for the assignment of employable persons in receipt of home relief to perform work for such county, city or town or for the state, and the head of any department." *Id*. Agency officials were also authorized to "assign such persons in receipt of home relief who, in his judgment, are able to perform the work indicated." *Id*. Also, the law also provided a detailed work schedule

benefits unless an individual registered with the job services office.[132] The requirement to register for work in order to receive public aid did not constitute involuntary servitude or peonage.[133] Failure to report to work resulted in aid termination.[134]

Today, recipients are not entitled to the same pay as public employees, nor are they owed a minimum wage.[135] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 allows states to require aid recipients to work in order to qualify for benefits.[136]

As a condition for providing aid to a needy family, a state may order a neglectful father to perform community service.[137] A trial court may constitutionally impose a

---

formula. *Id*. Finally, the law also authorized termination of benefits for anyone who refused "to report for or to perform work to which he has been assigned." *Id*.

[132] *See* New York Dep't of State Social Services v. Dublino, 413 U.S. 405 (1973), where the issue was whether the Social Security Act of 1935 barred a state from independently requiring individuals to accept employment as a condition for receipt of federally funded aid to families with dependent children.

[133] Brogan v. San Mateo County, 901 F.2d 762 (9th Cir. 1990). After Brogan suffered a disabling heart attack at 61 years of age, he alleged that his medical condition was caused by poor working conditions in the workfare program, and asked for $250,000 in damages. *Id*. at 764. He also challenged his mandatory participation in San Mateo County's Vocational Rehabilitation Program, required as a condition for receiving public assistance. *Id*. Rejecting Brogan's argument that the workfare program violated the Thirteenth Amendment and peonage laws, the Ninth Circuit concluded:

> State work programs are one valid way of encouraging the recipients of public assistance to return to gainful employment (citations omitted). They do not constitute involuntary servitude or peonage in violation of the thirteenth amendment, which occurs when an individual coerces another into his service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform the labor.

Id.

[134] Delgado v. Milwaukee County, 611 F.Supp. 278 (E.D. Wisc. 1985), ruling that the aid recipient did not state a claim for relief under the anti-peonage law. The court observed that "[s]ince 1945 the state has permitted counties to condition the receipt of general assistance benefits on participation in a work relief program." *Id*. at 280.

[135] Johns v. Stewart, 57 F.3d 1544 (10th Cir. 1995) (recipients were required to perform thirty-two hours per week of community work, adult education, and skills training activities, and eight hours per week of job search activities). *Also see* Brukham v. Guiliani, 705 N.Y.S.2d 558 (N.Y. 2000), ruling that the wage law did not apply to this relief program.

[136] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which in turn authorized a new program, Temporary Assistance to Needy Families ("TANF"). Act of Aug. 14, 1935, ch. 531, Title IV, § 401, as amended by Act of Aug. 22, 1996, Pub.L. 104-193, Title I, § 103(a)(1), 110 Stat. 2113, and amended by Act of Aug. 5, 1997, Pub.L. 105-33, Title V, § 5514(c), 111 Stat. 620.).

[137] Commonwealth v. Pouliot, 198 N.E. 256 (Mass. 1935). A man was charged with criminal

contempt sanction on a parent who refuses to seek employment in order to pay child support.[138]

Courts reject the idea that workfare is peonage.[139] *Ballentine v. Sugarman* reasoned that however difficult the loss of public aid, "a person is not held in a state of peonage when the only sanction for his refusing to work is that he will not receive payments currently. That may be a form of mankind's immemorial bondage of bread; but it is not peonage."[140]

In short, the current trend requires employment or community service as a condition for public aid. Recipients who do not comply with these requirements face termination of benefits. But for some individuals, this amounts to coercion.

E. Mandatory Work Assignments for Physicians

In a program called the National Health Service Corps (NHSC),[141] the U.S. pays tuition to medical students who agree to work in areas that are underserved by health care

---

failure to provide support for his wife and six minor children. *Id*. at 256. Unable to find employment, Pouliot was dependent on public aid for income. *Id*. The welfare department required recipients to work as a condition for receiving income, but Pouliot refused to report for duty. *Id*. Upholding his conviction, the Massachusetts Supreme Court rejected Pouliot's Thirteenth Amendment argument:

> Manifestly, it is not slavery or involuntary servitude as thus authoritatively defined to sentence this defendant if he fails to perform his duty to support his family. The obligation of a husband and father to maintain his family, if in any way able to do so, is one of the primary responsibilities established by human nature and by civilized society. . . . In a period of depression like the present, it is reasonable to require one in the position of the defendant to work under the conditions shown in the case at bar in order to meet his obligation to his family.

Id. at 257.

[138] Moss, *infra* note 167, explaining that involuntary servitude is "contextual," and in the case of ordering employment to satisfy the duty of providing child support, a decree does not force labor because the individual "is free to leave, either in favor of another employer or if the working conditions are objectively intolerable." *Id*. at 71. The court also explained: "It has never held that employment undertaken to comply with a judicially imposed requirement that a party seek and accept employment when necessary to meet a parent's fundamental obligation to support a child is involuntary servitude." *Id*. at 66.

[139] *See* Delgado, *supra* note 134, at 280, explaining that an individual "is under no compulsion to participate in [a state's] general relief program. Moreover, because there is no threat of penal sanction for failure to abide by the work relief rules, the program does not constitute peonage."

[140] 344 N.Y.S.2d 39, 45 (N.Y. Sup. 1973).

[141] The program was established by the Emergency Health Personnel Act of 1970, Pub.L. No. 91-623, 84 Stat. 1868, 1868-69, codified at 42 U.S.C.A. §201.

providers.[142] NHSC doctors must work one year in an assignment for each year of financial support, with a maximum obligation of four years.[143]

But some recipients renege on undesirable assignments.[144] The U.S. does not force doctors to work against their will, but sues to recover three times the outstanding amount on the tuition grant. To illustrate, in *U.S. v. Bloom* the government sued to recover $152,579, plus interest of $345,410.[145]

Some physicians argue that treble damages are so coercive that the assignment amounts to involuntary servitude. *U.S. v. Redovan* rejected this reasoning, noting that the doctor's circumstances differed from poor illiterates who were victims of peonage.[146] Courts consistently uphold the treble damages provision of the law.[147] They reason that the value of lost services "is difficult if not impossible to determine."[148] Another provision allows the government to also collect compensatory damages. *U.S. v. Vanhorn*[149] awarded NHSC $183,953 in damages based on tuition grants that totaled $26,582. Ruling that this amount was not unconscionable, the court noted that the doctor

---

142 *See* 42 U.S.C.A. § 254e.

143 *See* 42 U.S.C.A. § 254o. *See* Rendleman v. Bowen, 860 F.2d 1537, 1539 (9th Cir. 1988) (program was designed to "address the maldistribution of health care manpower in the United States").

144 *See* U.S. v. Hatcher, 922 F.2d 1402 (9th Cir. 1991) (doctor was assigned to Texas instead of preferences in California); U.S. v. Kokayi, 968 F.Supp. 870 (E.D.N.Y. 1997) (doctor objected to relocation from Yale University to Alamaba); and U.S. v. Ledwith, 805 F.Supp. 371 (E.D. Va. 1992) (doctor refused assignment to position with Indian Health Services).

145 *E.g.*, U.S. v. Bloom, 112 F.3d 200, 203 (5th Cir. 1997).

146 656 F.Supp. 121, 129 (E.D.Pa 1986). The court explained:

> All of the cases cited by the defendant involved unfortunate individuals, some of whom were illiterate and even unable to communicate in English, who were ill equipped to understand the scope of the obligation they entered into until the die was cast. Redovan can hardly claim to be in a similar position. He understood the nature of the obligation before he entered into it as an educated professional.

147 *See* U.S. v. Bills, 639 F.Supp. 825 (D.N.J. 1986); U.S. v. Hayes, 633 F.Supp. 1183 (M.D.N.C. 1986); U.S. v. Fowler, 659 F.Supp. 624 (N.D.Cal. 1987); U.S. v. Haithco, 644 F.Supp. 63 (W.D. Mich. 1986); and U.S. v. Armstrong, 784 F.Supp. 356 (N.D. Tex. 1991).

148 *See* U.S. v. Turner, 660 F.Supp. 1323, 1332-1333 (E.D.N.Y. 1987).

149 *See* U.S. v. Vanhorn, 20 F.3d 104 (4th Cir. 1994).

was told to comply with her service commitment before NHSC imposed damages.[150]

Chapter 7 bankruptcy litigation highlights the hard choice that physicians face between accepting an assignment and paying dearly for the freedom to practice medicine elsewhere. In *Mathews v. Pineo* an internist preferred to work in Pennsylvania but was assigned to a job in South Dakota.[151] She made no effort to accept the assignment, and took her preferred job. The NHSC program won a court repayment order of about $400,000.[152] After Dr. Mathews filed for bankruptcy, the court discharged part of her tuition debt.[153] But the Third Circuit reversed this ruling, finding that she failed to prove that assignment to South Dakota was shockingly unfair, harsh, or unjust.[154]

Like *Mathews*, most courts strictly construe unconscionability in the NHSC regulations.[155] Only a few deviate from this trend.[156] Courts view the NHSC program as voluntary. While medical students are not forced to apply for tuition help, some find their assignments are so distant or disruptive that they perceive their job as involuntary work.

III. RESEARCH METHODS AND EMPIRICAL RESULTS

A. Research Methods

I derived my sample from Westlaw's internet service. Using federal and state databases, I began by exploring cases that used keywords such as "involuntary

---

150 *Id*. at 113.

151 19 F.3d 121, 123 (3d Cir. 1994).

152 *Id*.

153 *Id*.

154 *Id*. The fact that she would uproot her family from Pennsylvania was unpersuasive.

155 U.S. v. Kephart, 170 B.R. 787 (W.D.N.Y. 1994), denying discharge of NHSC scholarship debt on grounds of unconscionability. The court said "it would be perverse to allow the debtor to benefit from her own inaction, delay and recalcitrance by automatically granting discharge simply because the debt is sizeable." *Id*. at 792.

156 In re Ascue, 2002 WL 192561 (W.D. Va. 2002) (affirming bankruptcy court's discharge of more than $300,000 because doctor had two accidents involving his neck); and in re Owens, 82 B.R. 960 (Bankr. N.D. Ill. 1988) (denying objections to a discharge plan that allowed repayment of 15% of the debt).

servitude," "Thirteenth Amendment," "compulsory service," and similar expressions. This helped me to identity nine types of individuals who challenged mandatory service assignments: high school students; lawyers performing court ordered representation; military conscripts; witnesses and jurors who were under subpoena; men who performed road duty; public aid recipients; physicians who received NHSC tuition grants; and prisoners who were sentenced to perform labor.

I excluded high school students and prisoners from further analysis because of the special state powers that apply to their circumstances. As minors, high school students are subject to a degree of government control that fundamentally differs from adults. Similar reasoning applies to court ordered labor for convicts. Their work cannot be considered as employment or service in the same vein as other forms of compulsory work in my study. I dropped involuntary servitude claims by witnesses and jurors because their cases were too rare to compare in a statistical analysis with other groups.

As I became more familiar with cases involving the remaining types of individuals who challenged compulsory assignments, I expanded my search techniques. I gained cases by researching statutes such as 18 U.S.C. § 1891,[157] the law governing the military's selective service,[158] and the NHSC's tuition payment program.[159]

After I identified a potential case, I read it to see if it involved some aspect of government ordered service or employment. If it met this criterion, I checked it against a roster of previously read cases to avoid duplication. Data were recorded for each decision.[160] The cases are listed in the Appendix.

---

157 *Infra* note 231.

158 *Infra* note 108.

159 *Infra* note 142.

160 Variables included: (1) state or federal court; (2) year of trial; (3) year of appellate

B. Statistical Findings

The sample contained 134 federal and 101 state cases. The earliest case was decided in 1807. The most recent one occurred in 2002. Each of the 235 cases was adjudicated at a trial, while 194 were decided by an appellate court, and 12 more were ruled on by a supreme court. Thus, the sample of 235 cases yielded 441 judicial rulings on individual challenges to mandatory service or employment.

My database had serious limitations. Often, cases were cursory opinions with incomplete information. For example, many lawyer challenges to a *pro bono* assignment did not report the legal basis for the action. Other cases did not have a year for the lower court ruling, and therefore had at least one missing variable. The cross-tabulations in Table 1A through 3B dropped entire cases when data was missing on one of the pertinent variables. This explains why the totals vary for the cases reported in these tables.

Finding 1: In 82.9% of state and federal trials, courts upheld government-imposed work and service requirements (*see* Total, Table 1A). Government enjoyed its greatest success defeating challenges made by conscientious objectors, winning 95.1% of these cases. In contrast, physicians in the NHSC program were the most successful challengers to government ordered work, winning 34.6% of their cases at trial.

---

decision; (4) status of individual who challenged the mandatory duty (e.g., lawyer, conscientious objector, men assigned to road duty, public aid recipients, and NHSC doctors); (5) federal laws used for legal challenge; (6) state laws used for legal challenge; (7) type of challenged action (e.g., forced employment, or forced service); (8) party who won at trial (individual or government); (9) party who won on appeal; and (10) party who won at the highest court.

Table 1A **Individual Challenges to Government Imposed Work or Service** ***Trial Court Rulings***		
Status of Individual	*Trial Court Rules For Individual*	*Trial Court Rules for Government*
Conscientious Objector *Mandatory Employment*	5 4.9%	98 95.1%
Public Aid Recipient *Public Service or Employment Requirement*	1 7.7%	12 92.3%
Men on Road Duty *Mandatory Civic Service*	17 25.8%	49 74.2%
Lawyer *Pro Bono Publico Appointment*	8 30.8%	18 69.2%
Physician *Mandatory Work Assignment*	9 34.6%	17 65.4%
TOTAL (N = 194)	**40** **17.1%**	**194** **82.9%**

Table 1B **Individual Challenges to Government Imposed Work or Service** ***Appellate Court Rulings***		
Status of Individual	*Appellate Court Rules For Individual*	*Appellate Court Rules for Government*
Physician *Mandatory Work Assignment*	1 9.1%	10 90.9%
Lawyer *Pro Bono Publico Appointment*	3 13.0%	20 87.0%
Conscientious Objector *Mandatory Employment*	13 15.9%	69 84.1%
Men on Road Duty *Mandatory Civic Service*	30 46.2%	35 53.8%
Public Aid Recipient *Public Service or Employment Requirement*	6 50.0%	6 50.0%
TOTAL (N = 193)	**53** **27.5%**	**140** **72.5%**

Table 2A **Legal Issues to Challenge Government Imposed Work or Service** ***Trial Court Rulings***		
Legal Issue	*Trial Court Rules for Individual*	*Trial Court Rules for Government*
Thirteenth Amendment	0 0%	34 100%
Equal Protection	0 0%	6 100%
Due Process	0 0%	36 100%
Other Federal Statutes	15 11.5%	116 88.5%
State Constitution	10 35.7%	18 64.3%
Other State Statutes	16 25.8%	46 74.2%
TOTAL (N=297)	**41** **13.8%**	**256** **86.2%**

Table 2B **Legal Issues to Challenge Government Imposed Work or Service** ***Appellate Court Rulings***		
Legal Issue	*Appellate Court Rules for Individual*	*Appellate Court Rules for Government*
Thirteenth Amendment	2 8.0%	23 92.0%
Equal Protection	0 0%	5 100%
Due Process	2 6.9%	27 93.1%
Other Federal Statutes	15 15.8%	80 84.2%
State Constitution	7 25.0%	21 75.0%
Other State Statute	29 47.7%	32 52.5%
TOTAL (N= 243)	**55** **22.6%**	**188** **77.4%**

Table 3A **Government Coercion of Individuals** ***Trial Court Rulings***		
Government Action	*Trial Court Rules for Individual*	*Trial Court Rules for Government*
Imprisonment for Disobeying Required Duty	0 0%	67 100%
Compulsory Employment	14 10.6%	118 89.4%
Compulsory Civic Duty	17 25.4%	50 74.6%
Criminal Fine for Disobeying Required Duty	12 27.9%	31 72.1%
Pay for Performing Required Duty	7 25.0%	21 75.0%
TOTAL (N = 337)	**50** **14.8%**	**287** **85.1%**

Table 3B **Government Coercion of Individuals** ***Appellate Court Rulings***		
Government Action	*Appellate Court Rules for Individual*	*Appellate Court Rules for Government*
Compulsory Employment	17 17.9%	78 82.1%
Imprisonment for Disobeying Required Duty	11 18.0%	50 82.0%
Pay for Performing Required Duty	5 20.8%	19 79.2%
Compulsory Civic Duty	30 45.5%	36 54.5%
Criminal Fine for Disobeying Required Duty	21 48.8%	22 51.2%
TOTAL (N = 289)	**84** **29.1%**	**205** **70.9%**

Finding 2: For the most part, appellate courts followed trial courts in upholding mandatory work and service, but the government's win rate fell to 72.5% of state and federal trial rulings (*see* Total, Table 1B). Federal and state governments were highly successful in challenges brought by physicians (90.9%), lawyers (87.0%), and conscientious objectors (84.1%). However, men on road duty (46.2% win-rate) and public aid recipients (50.0% win-rate) won half of their cases before appellate courts.

Finding 3: Trial courts ruled that the U.S. Constitution does not prohibit government imposed work and service (*see* top three rows, Table 2A). In all 34 cases alleging a violation of the Thirteenth Amendment, the government prevailed. Every Equal Protection and Due Process challenge failed.

Finding 4: Table 2A shows that individuals were moderately successful when their trial arguments were based on state constitutions (35.7%). They had less success when they relied on other state (25.8%) or federal (11.5%) laws. As I explain below, these were often narrow rulings that the law was not properly applied to circumstances.

Finding 5: Appellate courts in Table 2B rarely ruled that a work or service obligation violated the U.S. Constitution. Individuals won only two cases (*see* top left cell, 8%). The individual's success rate rose in appellate cases when they based their challenge on state statutes (*compare* 47.7% rate in lower left cell in Table 2B, and 25.8% rate in lower-left cell in Table 2A).

Finding 6: When governments sought to imprison individuals for failing to perform a public duty such as road duty or employment in lieu of military service, they prevailed in 100% of these cases (*see* Table 3A, top right cell). Important to note, fines were a common alternative to jail in road duty cases. When governments required

conscientious objectors and public aid recipients to seek employment, they won 89.4% of trials. These courts upheld a compulsory civic duty in 74.6% of cases. When attorneys sought pay for performing court ordered representation, they won 25.0% of their cases.

Finding 7: Appellate courts were twice as likely, compared to trial courts, to rule for individuals who challenged mandatory work or service obligations. Individuals won 29.1% of their cases before appellate courts (*see* Table 3B, row for total), compared to 14.8% of trials (*see* Table 3A, row for total).

C. Qualitative Discussion of the Statistical Findings

Tables 1A and 1B (Findings 1 and 2): Overall, trial and appellate courts upheld government imposed work and service requirements. A century ago, the Wisconsin Supreme Court said that "in defending indigent persons, 'the good lawyer finds his opportunity to do this kind of labor, and he should do it cheerfully . . . without complaining, and remembering that his best reward is the sense of a public duty faithfully performed.'"[161] Modern courts agreed. Utah's highest court set forth an expansive view of the lawyer's professional responsibility to serve the public without pay.[162] Similarly, the New Jersey Supreme Court said that "an assigned attorney . . . needs no motivation beyond his sense of duty and his pride."[163]

A similar view of civic duty permeated cases involving conscientious objectors. *Hopper v. U.S.* declared: "Surely it is not expecting too much to require of them that they

---

161 Green Lake County v. Wuapaca County, 89 N.W. 549, 552 (Wis. 1902).

162 Bedford v. Salt Lake County, 447 P.2d 193, 194 (Utah 1968).

> Indigent defendants in criminal cases who desire counsel have always been represented, and the court has always appointed a lawyer for that purpose. The assignment has been assumed by the lawyer out of respect for the court in which he serves and out of a sense of responsibility which lawyers feel towards humanity in general.

163 State v. Rush, 217 A.2d 441, 444 (N.J. 1966).

do civilian work of national importance at a time when their brothers, under the same compulsion, are giving their lives for them and for the Nation."[164] Emphasizing related themes, *Howze v. U.S.* reasoned that "[c]ompulsory civilian labor does not stand alone, but it is the alternative to compulsory military service. It is not a punishment, but is instead a means for preserving discipline and morale in the armed forces."[165]

Judicial support for public duty carried over to welfare cases, where recipients were compelled to work to support their families. *Commonwealth v. Pouliot* remarked: "The obligation of a husband and father to maintain his family, if in any way able to do so, is one of the primary responsibilities established by human nature and by civilized society. The statute enforces this duty by appropriate sanctions."[166] Continuing in this vein, *Moss v. Superior Court (Ortiz)* held a parent in contempt for willfully failing to seek employment to support his children. The Court believed that "[e]mployment chosen by the employee which the employee is free to leave, either in favor of another employer or if the working conditions are objectively intolerable, is simply not akin to peonage."[167]

Table 2A and 2B (Finding 3): Nearly all trial and appellate courts ruled that the U.S. Constitution did not prohibit government imposed work duties. Their forceful tones matched their statistical record of decisiveness.

In re Amendments to Rules Regulating the Florida Bar-1-3.1(a) rejected a challenge to involuntary appointment, concluding that "[f]or the condition of servitude to be within the thirteenth amendment's prohibition, the person must be subjected to

---

164 Hopper v. U.S., 142 F.2d 181, 186 (9th Cir. 1943).

165 272 F.2d 146, 148 (9th Cir. 1959).

166 198 N.E. 256, 257 (Mass. 1935).

167 950 P.2d 59, 72 (Cal. 1998) ("It does not become so because a person would prefer not to work but must do so in order to comply with a legal duty to support the person's children.").

physical restraint or threat of legal confinement as an alternative to the service."[168] In dismissing a Thirteenth Amendment challenge by attorneys who were ordered to represent indigent parents, *Family Div. Trial Lawyers of Superior Court-D.C., Inc. v. Moultrie* reasoned that "[i]nability to avoid continued service is the essential ingredient of involuntary servitude."[169] *Williamson v. Vardeman* said that attorneys may be required to represent indigent defendants without pay, noting that the "Thirteenth Amendment has never been applied to forbid compulsion of traditional modes of public service even when only a limited segment of the population is so compelled."[170]

Physicians fared no better than attorneys in making constitutional arguments. In *Bertelsen v. Cooney* the "Doctors' Draft Law" was upheld against a Thirteenth Amendment challenge.[171] The court declared: "There is nothing unique in the obligation to serve. It is quite analogous to, but much more vital, than other obligations to serve in the public interest."[172] In a similar ruling rejecting a Thirteenth Amendment claim by a conscientious objector, *U.S. v. Boardman* quoted Justice Cardozo, stating: '"The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war. . . . The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government."'[173]

Table 2A and 2B (Findings 4 and 5): Individuals were moderately successful when they used a specific law to challenge a work or service duty. Many of these cases

---

[168] 573 So.2d 800, 805 (Fla. 1990) ("the amendment does not apply if the individual may choose freedom even though the consequences of that choice result in some diminution of economic earning power.").

[169] 725 F.2d 695, 705 (D.C. 1984).

[170] 647 F.2d 1211, 1214 (8th Cir. 1982).

[171] 213 F.2d 275, 277 (5th Cir. 1954).

[172] *Id*.

[173] 419 F.2d 110, 113 (1st Cir. 1969) (citation omitted).

ruled narrowly that that the law was not properly applied to a person's circumstances.

Walker v. Moseley is a case in point.[174] In a summary proceeding before a local justice of the peace, a county overseer of highways won a summary proceeding against someone who ignored a summons to road duty.[175] The local justice directed a police officer to levy on the defendant's property.[176] Moseley appealed to a state court on grounds that the overseer failed to prove that he held his office[177] The court agreed with Mosely, stating: "In this case, one of the material facts necessary to the jurisdiction of the justice, was that the party complaining should be an Overseer of the Highway. . . . [T]he person who instituted these proceedings and procured the warrants, must show the fact that he was an Overseer of Highways."[178]

Bank of Ithaca v. King[179] shows the aggressive enforcement methods to enforce road duty. A county overseer appeared before a local justice to impose a fine upon the president, directors and company of a bank for failure to appear and work on the highways. Reversing the local court, New York's Supreme Court narrowly construed the meaning of person under the road law.[180] Citing the statute that requires a person to receive 24 hours notice of his assessment, the court asked, "How can such notice be served on a corporation? It can not be served upon the president, or . . . any other servant, for the statute does not authorize any such service. . . ; nor is it any part of the duties of

---

174 5 Denio 102 (N.Y. Sup. 1847).

175 *Id*.

176 *Id*. at 103.

177 *Id*.

178 *Id*. at 104.

179 12 Wend. 390 (N.Y. 1834).

180 *Id*. noting that corporations are persons for purposes of levying taxes, but road duty requires personal service. The court added that the "labor of the person assessed is as much required as a personal service as is the performance of military duty." *Id*.

such officers or servants to perform such labor."[181]

In rare cases where conscientious objectors prevailed, courts made narrow, procedural rulings. The Seventh Circuit overturned a five year sentence in *Huisinga v. U.S.*, after the trial judge and draft board failed to take account of new information showing that the objector had become a full time Jehovah's Witness minister.[182] Reversing a two year sentence for a Jehovah's Witness in *Pate v. U.S.*, the court ruled that the individual was improperly denied a ministerial exemption.[183] Other courts used similar reasoning to overrule draft boards or to reverse convictions.[184]

Tables 3A and 3B (Findings 6 and 7): Governments always prevailed when they sought to imprison individuals for failing to perform road duty or report for a job in lieu of combat. While few courts addressed imprisonment as a sanction, the issue arose in *U.S. v. Dudley*, a case where a Jehovah's Witness was sentenced to five years in prison for failing to report to work.[185] In denying Dudley's motion to reconsider the sentence, the Sixth Circuit reasoned that the trial court's application of uniform sentencing standards outweighed the occasional practice of court discretion in imposing sentences.[186] Reflecting the trend to sentence conscientious objectors to five years in prison for

---

181 *Id.*

182 422 F.2d 635 (7th Cir. 1970).

183 243 F.2d 99, 103 (5th Cir. 1957), stating that when a registrant shows that ministry is his vocation, "he is entitled, not as a matter of grace but as a matter of right to the statutory exemption."

184 Wiggins v. U.S., 261 F.2d 113, 119 (5th Cir. 1958), concluding that "Wiggins has shown that he dedicated himself at an early age to serving Jehovah's Witnesses; that he regarded this endeavor as his chief purpose in life, the secular employment being incidental." *Also see* Robertson v. U.S., 404 F.2d 1141 (5th Cir. 1968). Emphasizing that government must play by its own rules, the court said: "Men must turn square corners when they deal with the Government. But the government in dealing with its citizens owes them an equal obligation to right its angles." *Id.* at 1145-46.

185 436 F.2d 1057 (6th Cir. 1971).

186 *Id.* at 1059.

refusing work orders, the appellate court in *U.S. v. Griffin* took a rare stance in voicing concern about the severity of this sentence.[187]

IV. ADDRESSING MORAL HAZARD FOR BAILED-OUT HOMEOWNERS: THE CASE FOR COMPULSORY SERVICE

Moral hazard occurs when there is an "incentive for someone to behave badly because he is insulated from the consequences of his actions."[188] The concept originated in private insurance contracts. An early Aetna Insurance Guide warned that '"the insured should never make money by a loss. The contract should never be so arranged, that under any circumstances it would be profitable to the insured to meet with disaster. Any other arrangement is offering a premium for carelessness and roguery.'"[189] This shows how insurance incentives can bring "out the bad in otherwise good people."[190] More recently, moral hazard has been applied to government policies that insure private risks.[191]

I now demonstrate how moral hazard played a role in the mortgage crisis. I also contend that the U.S. Treasury's mortgage relief programs create a new moral hazard. Following this discussion, I suggest how the U.S. could address this problem by requiring

---

[187] 434 F.2d 740 (6th Cir. 1970). Judge Brooks, concurring in the judgment, disagreed with the appeals court decision to remand the sentencing order. The judge explained:

> I also disagree with the comment in the Court's opinion relating to the 'severity' of the sentence imposed in this case. Since, within statutory limitations, the length of a sentence lies solely within the discretion of the district judge, I do not think an appellate court should undertake to comment upon its reasonableness. A district judge has before him all the necessary information upon which to base a proper exercise of discretion, whereas an appellate court does not.

Id. at 744.

[188] *Tackling Hazards*, INVESTORS CHRONICLE (March 24, 2009), at 2009 WLNR 5946841. Moral hazard is created by risk sharing contracts or public policies that discourage individuals from avoiding costly behaviors.

[189] Tom Baker, *On the Geneology of Moral Hazard*, 75 TEX. L. REV. 237, 251 (1996).

[190] *Id.* at 251.

[191] For early studies that develop the moral hazard idea, *see* Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941 (1963); Richard Zeckhauser, *Medical Insurance: A Case Study of the Tradeoff Between Risk Spreading and Appropriate Incentives*, 2 J. ECON. THEORY 10 (1970); Isaac Ehrlich & Gary S. Becker, *Market Insurance, Self-Insurance, and Self-Protection*, 80 J. POL. ECON. 623 (1972); and Mark V. Pauly, *Overinsurance and Public Provision of Insurance: The Roles of Moral Hazard and Adverse Selection*, 88 Q.J. ECON. 44 (1974).

aid recipients in the Treasury's mortgage programs to perform community service.

A. The Mortgage Crisis Created Unusual Moral Hazards

A recent GAO study shows how moral hazard led to the mortgage crisis.[192] Starting in 2003, Alternative Mortgage Products (AMPs) became popular. These loans were aimed at less creditworthy borrowers.[193] One AMP allowed the borrower to make only interest payments to keep the loan current, while another had a low teaser rate that allowed the borrower to finance a purchase before the rate adjusted to a higher level.[194]

These loans fostered irresponsible credit behaviors. Borrowers were allowed to defer repayment of principal and interest for several years.[195] This increased the borrower's debt without ascertaining his ability to pay off growing loan balances. The GAO concluded that borrowers turned to alternative mortgage products (AMPs) to "purchase homes they might not be able to afford with a conventional fixed-rate mortgage."[196] By 2008, nearly 20% of sub-prime loans were delinquent.[197]

As the volume of these mortgages grew, more borrowers were unable to pay these loans in the long run.[198] But the risk of default remained a hidden problem while housing prices climbed, because these borrowers were able to refinance their loans.[199] Once the

---

192 *Id*. at 15.

193 *Id*. at 4.

194 *Id*. at 1.

195 *Id*.

196 *Id*.

197 Todd J. Zywicki, *The Law and Economics of Subprime Lending*, 80 COLO. L. REV. 1 (2009).

198 Henry M. Paulson, Jr., *Statement on Comprehensive Approach to Market Developments* (Sept. 19, 2008), at http://www.ustreas.gov/press/releases/hp1149.htm.

199 Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5 (March 2009), at *7 - *8. Mortgage originations exploded from $1 trillion a year to $4 trillion in 2003. *See* Frank A. Hirsch, Jr., *The Evolution of a Suitability Standard in the Mortgage Lending Industry: The Subprime Meltdown Fuels the Fires of Change*, 11 N.C. BANKING INST. 21 (March 2008), at 44.

explosive growth in home values reversed course in 2006, falling prices set off a major correction in the housing market.[200] Many borrowers could not refinance their mortgages because their loans were greater than their home values.[201] By late 2007, some low equity borrowers abandoned their homes when they fell far behind on payments.[202]

As foreclosures grew, plummeting bank balance sheets led to a deep recession.[203] Homeowners could have been left to suffer the consequences of their poor credit decisions. The U.S. intervened, however, because policy makers feared harmful spillover effects from millions of foreclosures.[204]

B. The Treasury Department's Mortgage Relief Programs: New Moral Hazard

The U.S. Treasury Department's "Making Home Affordable Program" addresses the housing crisis by providing 9 million Americans with more affordable mortgages.[205] The program has two elements—one to refinance,[206] and the other to modify,[207] loans.

By offering to lend money at 105% of the current value of a home, the refinance

---

[200] Henry M. Paulson, Jr., *Remarks on Housing and Capital Markets before the New York Society of Securities Analysts* (Jan. 7, 2008), available at http://www.ustreas.gov/press/releases/hp757.htm.

[201] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-78R, DEFAULT AND FORECLOSURE TRENDS (Oct. 16, 2007), at 4, available at http://www.gao.gov/new.items/d0878r.pdf, informing Congress that the decline in housing prices may have provided disincentives to borrowers to keep paying their mortgages while making it more difficult to refinance or sell so as to avoid default or foreclosure.

[202] Carl Prine, *The Subprime Mortgage Mess: 5 Myths to Put to Rest*, PITTSBURGH TRIB. REV. (Feb. 10, 2008), at 2008 WLNR 2586031. According to a study of the Mortgage Bankers Association, lenders initiated 384,000 foreclosures the third quarter of 2007, and in more than half these cases, the borrowers received either modified loans or new repayment plans. The remainder "either abandoned their homes or didn't respond to foreclosure notices, leaving banks no option but to seize the properties." *Id.*

[203] *See* Testimony by Secretary of Treasury Henry M. Paulson, Jr. before the House Committee on Financial Services, *Turmoil in US Credit Markets: Recent Actions Regarding Government Sponsored Entities, Investment Banks and Other Financial Institutions* (Sept. 24, 2008), in http://www.treas.gov/press/releases/hp1154.htm.

[204] Timothy Geithner, *Secretary Geithner Introduces Financial Stability Plan* (Feb. 10, 2009), at http://www.ustreas.gov/press/releases/tg18.htm.

[205] U.S. Department of Treasury, *Making Home Affordable*, *supra* note 2.

[206] U.S. Department of Treasury, *Fact Sheet: Financial Stability Plan*, supra note 5, at 1-4.

[207] *Id.* at 5-12.

program targets borrowers who put little or no money down on their home purchase.[208] The program also lends to borrowers who took out a second mortgage, even if combined debt under the first and second mortgages exceeds 105% of the home value.[209]

Thus, the program targets a broad swath of higher-risk borrowers. It applies to first mortgages that are held by Fannie Mae or Freddie Mac. This rewards corporations whose loose underwriting standards caused the U.S. to seize them in 2008.[210]

The refinance program benefits a homeowner by keeping him in his home with a lower mortgage payment. The government loan pays off his more expensive loan. The Treasury's mortgage modification program provides additional relief to borrowers. It differs from the refinancing program by postponing or forgiving debt.[211] Taxpayer dollars create incentives for new mortgage issuers to make loans with annual interest rates as low as 2%.[212] Government incentives allow lenders to lengthen loan maturities from 30 years to 40 years.[213] Two policy features seem especially generous. If a borrower fails to qualify for a 40 year amortization loan, the program provides principal forbearance—that is, temporary deferral of the borrower's payment.[214] In addition, the policy allows forgiveness of part of the debt.[215]

Critics say that the modification program creates moral hazard by rewarding

---

208 *Id*. at 2.

209 *Id*.

210 James R. Hagerty & T.W. Farnam, *Freddie's CFO an Apparent Suicide*, THE WALL ST. J. (April 23, 2009), at A3.

211 U.S. Department of Treasury, *supra* note 5, at 5.

212 *Id*.

213 *Id*.

214 *Id*.

215 *Id*.

borrowers who took on too much debt.[216] They also believe that current debt relief programs pile new moral hazards on the original ones that led to the credit crisis. One critic suggests that "moral hazard sends a clear message to the American people: The worse the behavior, the greater the reward."[217] Joseph Stiglitz, a Nobel Prize economist, cautions that safety nets for borrowers who are thought to be too big to fail reward bad risks and punish prudent behaviors.[218] A 2009 GAO sees moral hazard in the Treasury's mortgage relief program: new loans might cause borrowers who would otherwise not default to fall behind on mortgage payments in the expectation of being bailed-out.[219]

The Treasury Department has a third program that finances shorts sales, whereby a borrower—with lender approval— sells a home for less than the amount due on the loan.[220] The program is intended to help hundreds of thousands of borrowers who cannot qualify for a mortgage modification, and face certain foreclosure.[221] The Treasury Department promises to pay mortgage servicing companies up to $1,000, and borrowers up to $1,500, for executing short sales.[222]

Short sales lower the transaction cost in transferring title from a foreclosed

---

[216] John C. Coffee Jr., *A Systematic Risk Regulator? Who, What, and Why?*, N. Y. LAW J. (March 19, 2009), at 5, also available in 2009 WLNR 5946841. Similarly, critics argue that direct government intervention into the refinancing of loans would reward irresponsible behavior and create moral hazard. *See* Edmund L. Andrews, *A 'Moral Hazard' for a Housing Bailout: Sorting the Victims from Those Who Volunteered*, N.Y. TIMES (Feb. 23, 2008), at C1 (describing a proposal by Bank of America advocating a massive federal intervention by creating a Federal Homeowner Preservation Corporation to "buy up billions of dollars in troubled mortgages at a deep discount"); and Ronald D. Utt, *President's Homeownership Proposals Should Be Sent Back to the Drawing Board*, Heritage Found. Web Memo (Feb. 7, 2008), at http:// www.heritage.org/Research/Economy/upload/wm_1802.pdf.

[217] *Tackling Hazards*, INVESTORS CHRONICLE (March 24, 2009), at 2009 WLNR 5946841.

[218] Joseph E. Stiglitz, *Systemic Risk of Large Financial Institutions*, CONG. TEST. (April 21, 2009), at 2009 WLNR 742094.

[219] GOVERNMENT ACCOUNTING OFFICE (GAO REPORT): STATUS OF EFFORTS TO ADDRESS TRANSPARENCY AND ACCOUNTABILITY ISSUES—PART 2 (April 3, 2009), at 2009 WLNR 6292935.

[220] Ruth Simon, *Housing-Rescue Plan Adds 'Short Sales,'* WALL ST. J. (May 15, 2009), at A2.

[221] *Id.*

[222] *Id.*

borrower to a lender. The program is controversial because it frees borrowers from paying any deficiency on the difference between the home's resale value and the amount due on the loan.[223] Referring to this moral hazard, Thomas Lawer, a housing economist, observed that "giving borrowers money to encourage selling their homes without having to repay their debt is a slap in the face to everyone else."[224]

C. Mortgage Debt Relief and the Feasibility of Compulsory Community Service

My research shows that federal and state governments required individuals to pay a literal or metaphorical debt to society by performing mandatory public service. I suggest that these experiences pave the way for the U.S. to require community service as a means to reduce moral hazard in the Treasury Department's mortgage relief programs.

Consider, for example, the simple proposal that a government subsidized mortgage modification would require a recipient to work for 200 hours in a local Habitat for Humanity program. This policy would enable cash strapped individuals to repay their debt subsidy with labor. Individual sacrifice would address a root problem of moral hazard— taking personal responsibility for the consequences of a bad decision whose costs are displaced on government insurance. Other community service might involve work in literacy programs, mentoring students, companion programs for the elderly, community beautification projects—to suggest a few possibilities.

How would the U.S. identify and coordinate with social services organizations? The nation dealt with this issue when it compelled conscientious objectors to accept employment that contributed to national health, safety, or interest.[225] The draft law stated

---

223 *Id.*

224 *Id.*

225 Universal Military Training and Service Act, *supra* note 102, at Section 6(j), 50 U.S.C.A. Appendix, § 456(j).

specific criteria for types of work that would satisfy a public service obligation.[226] Conscientious objectors were assigned to hospitals or government agencies.[227] More recently, the federal government has experience under the NHSC program in assigning jobs that assist underserved areas.[228] State welfare laws match aid recipients to appropriate work assignments,[229] and determine schedules for recipients.[230]

In sum, I do not advocate a specific community service program but suggest Habitat for Humanity to provide context for addressing new moral hazard in mortgage aid policies. Individual responsibility would be promoted by requiring aid recipients give back to their communities in return for receiving debt relief. My research also suggests that this policy is feasible, and faces no major legal hurdle. Compulsory service has been ordered in the U.S. since the early 1800s. It has been required of paupers and public aid recipients— people who experienced dire financial circumstances akin to current debtors. And the requirement has been imposed in national emergencies, similar to the crisis that has caused the U.S. to bail-out millions of homeowners.

V. CONCLUSION: WHY THE LAW DISTINGUISHES COMPULSORY SERVICE AND INVOLUNTARY SERVITUDE

Government ordered work assignments were challenged on numerous legal grounds and usually failed. Courts overwhelmingly rejected the suggestion that these compulsions violated the Thirteenth Amendment or laws against peonage. This outcome is explained by the judiciary's narrow interpretation of involuntary servitude. On one

---

226 Crouch, *supra* note 110.
227 *Supra* note 115.
228 *Supra* notes 141-142.
229 *Supra* note 131.
230 *Id*.

hand, Congress broadened involuntary servitude to apply to sex trafficking victims[231] and enslaved immigrants.[232] But the Supreme Court has not interpreted servitude beyond congressionally specified examples.

In a key 1988 ruling, *U.S. v. Kozminski*,[233] the Court reaffirmed the vitality of the public duty doctrine. A married couple who provided squalid housing to mentally challenged farm hands scared them into thinking that they could not leave the premises.[234] The U.S. successfully prosecuted the couple by arguing that the farm hands worked as psychological hostages.[235] But *Kozminski* rejected this approach by limiting involuntary servitude to situations involving physical or legal coercion.[236] Notably, the opinion upheld key exceptions to involuntary servitude.[237]

Kozminski built on *Butler*,[238] a major precedent that coincided with the draft in World War I. The significance of *Butler* cannot be dismissed even though road duty has long been abolished. The Court embraced the public duty doctrine, *trinoda necessitas*.[239] Today, courts apply *Butler* and its motivating doctrine by upholding community service mandates for high school graduation.[240]

---

[231] 18 U.S.C.A. § 1591(a)(2).

[232] 18 U.S.C.A. § 1582.

[233] 487 U.S. 931 (1988). It is a crime under 18 U.S.C. § 1584 to hold another person to involuntary servitude.

[234] *Id*. at 934. The Kozminskis threatened the two workers— both of whom had IQ scores under 70— with institutionalization if they left the farm. *Id*.

[235] *Id*. at 936-7.

[236] *Id*. at 947. While these terms are vague, they were more clearly revealed by the historical context of the Thirteenth Amendment and § 1584. Congress intended to outlaw the padrone system, and other forms of exploitation that take "advantage of the special vulnerabilities of their victims, placing them in situations where they were physically unable to leave." *Id.* at 948.

[237] *Id*. at 943-44, emphasizing that "the Court has recognized that the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties."

[238] *Id*. at 937.

[239] *Id*.

[240] Steirer by Steirer v. Bethlehem Area School Dist., 987 F.2d 989 (3d Cir. 1993);

To be clear, *trinoda necessitas* was not often cited in my database, but its reasoning pervaded various public policies in these cases. In Rome, *trinoda necessitas* meant that all free men were required to participate in empire building duties. In the U.S., courts specifically cited the doctrine in road work cases. But it is also easy to see how this rationale applied to conscientious objectors— free men whose conscience did not permit combat but whose nation demanded an equivalent form of civilian sacrifice. Similar reasoning applied to lawyers who served the public by working without pay.[241]

My research also shows that compulsory service requires a compelling and overarching government interest—plus an egalitarian ethos that justifies its imposition. The mortgage relief program meets these conditions. In an age of personal and corporate sacrifice, this handout perpetuates the spendthrift mentality that dug the nation's deep financial hole. My study puts this government largess in historical context. The mortgage subsidies in the Treasury Department's programs reflect the Judaic concept of unconditional debt forgiveness. By this lofty precept, once a debtor cannot pay his obligation, it is good for society to wipe his slate clean. There is wisdom in allowing hopeless debtors to start anew— but why is no thought given to a policy of requiring bailed out homeowners to pay back part of their debt relief by serving their communities? The fact that millions of distressed homeowners have too little money to pay on their mortgages does not mean they lack time, labor, and skills to share with their neighbors.

Immediato by Immediato v. Rye Neck School Dist., 873 F.Supp. 846 (S.D.N.Y. 1995); and Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996).

[241] *See* State el rel. Wolff v. Ruddy, 617 S.W.2d 64, 65-66 (Mo. 1981):

> The term 'profession,' it should be borne in mind, as a rule is applied to a group of people pursuing a learned art as a common calling in the spirit of public service where economic rewards are definitely an incidental, though under the existing economic conditions undoubtedly a necessary by-product. In this a profession differs radically from any trade or business which looks upon money-making and personal gain as its primary purpose. The lawyer cannot possibly get away from the fact that his is a public task.

Appendix: Table of Cases in the Empirical Database

Acko v. Brown, 489 F.Supp. 216 (D.Minn. 1980)
Atherton v. U.S., 176 F.2d 835 (9th Cir. 1949)
Arkansas County v. Freeman, 31 Ark. 266 (Ark. 1876)
Bacon v. County of Wayne, 1 Mich. 461 (1850)
Badger v. U.S., 322 F.2d 902 (9th Cir. 1963)
Ballentine v. Sugarman, 344 N.Y.S.2d 39 (N.Y. Sup. 1973)
Bank of Ithaca v. King, 12 Wend. 390 (N.Y. 1834)
Barrow v. Hepler, 34 La.Ann. 362 (1892)
Bertelson v. Cooney, 213 F.2d 275 (5th Cir. 1954)
Biss v. Town of New Haven, 42 Wis. 605 (Wis. 1877)
Bjorson v. U.S., 272 F.2d 244 (9th Cir. 1959)
Blair v. U.S., 250 U.S. 273, 279 (1919)
Bouton v. Neilson, 3 Johns 474 (1809)
Blythe v. State, 4 Ind. 525 (Ind. 1853)
Brogan v. San Mateo County, 901 F.2d 762, 764 (9th Cir. 1990)
Brooks v. U.S., 147 F.2d 134 (2d Cir. 1945)
Brown v. U.S., 338 F.Supp. 409 (D.C.Ill. 1972)
Brukhman v. Guiliani, 705 N.Y.S.2d 558 (N.Y. 2000)
Buffalo & B. Plank-Road Co. v. Town of Lancaster Highway Com'rs, 10 How. Pr. 237 (N.Y.Sup. 1854)
Buongiorno v. Sullivan, 912 F.2d 504 (D.C. Cir. 1990)
Burlington & M.R.R.Co. v. Lancaster County, 4 Neb. 293 (Neb. 1876)
Butler v. Perry, 240 U.S. 328 (1916)
Camp v. U.S., 413 F.2d 419 (11th Cir. 1969)
Carpenter v. Dane, 9 Wis. 274 (Wis. 1859)
Case v. Bd. of Commissioners of Shawnee County, 4 Kan. 511 (1868)
Chidsey v. Town of Scranton, 12 So. 545 (Miss. 1893)
City of Macomb v. Twaddle, 4 Ill.App. 254 (1879)
City of Marlborough v. City of Lowell, 10 N.E.2d 104 (Mass. 1937)
City of Taunton v. Talbot, 71 N.E. 785 (Mass. 1904)
Cleveland, C., C. & St. L.Ry. Co. v. Randle, 55 N.E. 728 (Ill. 1899)
Com. v. Colley Township Supervisors, 29 Pa. 121 (Pa. 1858)
Commonwealth v. Pouliot, 198 N.E. 256 (Mass. 1935)
Cox v. U.S., 332 U.S. 442 (1947)
Daniels v. U.S., 372 F.2d 407 (9th Cir. 1967) (Daniels I)
Daniels v. U.S., 404 F.2d 1049 (9th Cr. 1968) (Daniels II)
Davis v. U.S., 400 F.2d 577 (5th Cir. 1968)
Dearing v. Heard, 15 Me. 247 (Me. 1839)
Delgado v. Milwaukee County, 611 F.Supp. 278 (E.D. Wisc. 1985)
Dennis v. Simon, 36 N.E. 832 (1894)
DeTavernier v. Hunt, 53 Tenn. 599 (Tenn. 1871)
Dingman v. U.S., 156 F.2d 148 (9th Cir. 1946)
Dismukes v. Bd. of Supervisors, 58 Miss. 612 (1881)
Dixon v. Bd. of County Commissioners, 156 S.E. 852 (N.C. 1931)
Elam v. Johnson, 48 Ga. 348 (1873)
Ex Parte Brown, 288 P.2d 27 (Cal.App. 1955)
Ex Parte Roberts, 11 S.W. 782 (Tex.Ct.App. 1889)
Ex Parte Todd, 50 P. 1071 (Cal. 1871)
Falbo v. U.S., 320 U.S. 549 (1944)
Ferguson v. Moore, 5 Pa.Super. 353 (Pa. 1897)
Fitts v. U.S., 334 F.2d 416 (5th Cir. 1964)
Frank v. U.S., 236 F.2d 39 (9th Cir. 1951)
Foster v. U.S., 384 F.2d 372 (11th Cir. 1967)
Fox v. City of Rockford, 38 Ill. 451 (1865)

Galoway v. State, 202 S.W.76 (Tenn. 1918)
Gourley v. State, 129 P. 684 (Ok. 1913)
Greer v. U.S., 378 F.2d 931 (5th Cir. 1967)
Hall v. U.S., 437 F.2d 1063 (7th Cir. 1971)
Hall v. Washington County, 2 Greene 473 (Iowa 1850)
Harper (Collector) v. Broosher, 240 S.W. 729 (Ark. 1922)
Hopper v. U.S., 142 U.S. 181 (9th Cir. 1943)
House v. Whitis, 64 Tenn. 690 (1875)
Howze v. U.S., 272 F.2d 146 (9th Cir. 1959)
Huisinga v. U.S., 422 F.2d 635 (7th Cir. 1970)
In re Ascue, 2002 WL 192561 (W.D. Va. 2002)
in re Dassler, 35 Kan. 678 (1886)
in re Dillingham, 104 B.R. 505 (N.D. Ga. 1989)
in re Jennings, 184 Cal.Rptr. 53 (Cal. App. 1982)
In re Owens, 82 B.R. 960 (Bankr. N.D. Ill. 1988)
James v. Clarke County, 33 Ala. 51 (Ala. 1858)
Johnson v. Scott, 114 S.W. 45 (Mo. App. 1908)
Johnson v. U.S., 285 F.2d 700 (9th Cir. 1960)
Johnson v. Whiteside County, 110 Ill. 22 (1884)
Johnston v. City of Macon, 62 Ga. 645 (1879)
Johnston v. Lewis and Clarke County, 2 Mont. 159 (1874)
Jones v. U.S., 387 F.2d 909 (11th Cir. 1968)
Kelley v. Andrew County, 43 Mo. 338 (1869)
Kramer v. U.S., 147 F.2d 756 (6th Cir. 1945)
Lamont v. Solano County, 49 Cal. 158 (1874)
LaPorte v. U.S., 300 F.2d 878m (9th Cir. 1962)
Lawrence v. State, 161 So. 260 (Ala. 1935)
Leedy v. Town of Bourbon, 40 N.E. 640 (1895)
Lewin v. State, 77 Ala. 45 (Ala. 1884)
Loewing v. U.S., 392 F.2d 218 (10th Cir. 1968)
Lowery v. State, 12 S.W. 563 (Ark. 1889)
Lower Bd. of Commissioners of Roads for St. Peter's Parish v. Guerard, 1 Speers 215 (S.C. 1843)
Mathews v. Pineo, 19 F.3d 121, 123 (3d Cir. 1994)
Matyasik v. U.S., 392 F.2d 657 (5th Cir. 1968)
McDonald v. County of Madison, 43 Ill. 22 (1867)
Merritt v. U.S., 401 F.2d 768 (5th Cir. 1968)
Miller v. Gorman, 38 Pa. 309 (Pa. 1861)
Morris v. Town of Greenwood, 19 So. 105 (Miss. 1905)
Moss v. Superior Court (Ortiz), 950 P.2d 59 (1998)
Nabb v. U.S., 1 Ct.Cl. 173 (Ct.Cl. 1864)
New York Dep't of State Social Services v. Dublino, 413 U.S. 405 (1973)
Noble v. Clark, 1908 WL 554 (Ohio 1908)
O'Connor v. U.S., 415 F.2d 1110 (9th Cir. 1969)
People ex rel. Ransom v. Bd. of Supervisors, 78 N.Y. 622 (1879)
People ex rel. Whedon v. Bd. of Supervisors, 183 N.Y.S. 438 (3d Dep't 1920)
Pomorski v. U.S., 222 F.2d 106 (6th Cir. 1955)
Posey v. Mobile County, 50 Ala. 6 (Ala. 1873)
Presby v. Klickitat County, 31 P. 876 (1892)
Probst v. Calhoun County Court, 106 S.E. 878 (W.Va. 1921)
Robertson v. U.S., 404 F.2d 1141 (5th Cir. 1968)
Roodenko v. U.S., 147 F.2d 752 (10th Cir. 1944)
Rendleman v. Bowen, 860 F.2d 1537, 1539 (9th Cir. 1988)
Rendleman v. Shalala, 21 F.3d 957 (9th Cir. 1994)
Ruckenbrod v. Millins, 133 P.2d 325 (1943)
Sanders v. Levi, 7 So. 692 (La. 1890)
Sawyer v. Alton, 4 Ill. 127 (Ill. 1841)

Short v. State, 80 Md. 392 (1895)
Sims v. Hutcheson, 72 Ga. 437 (Ga. 1884)
Social Investigator Eligibles Ass'n v. Taylor, 197 N.E. 262 (N.Y. 1935)
State v. Covington, 34 S.E. 272, 272 (N.C. 1899)
State v. Byers, 134 P. 234 (N.M. 1913)
State v. Cauble, 70 N.C. 62 (N.C. 1874)
State v. Halifax, 15 N.C. 345 (1883)
State v. Hathcock, 20 S.C. 419 (S.C. 1884)
State v. Johnston, 23 S.E. 921 (N.C. 1896)
State v. Porter, 32 N.E. 1021 (Ind. 1893)
State v. Rayburn, 101 Pac. 1029 (1909)
State v. Sharp, 34 S.E. 264 (N.C. 1899)
State v. Simmons, 10 So. 382 (1892)
State v. Wheeler, 141 N.C. 773 (1906)
State v. Witherspoon, 75 N.C. 222 (N.C. 1876)
Tarkington v. McShea, 2 Jones 47 (N.C. 1854)
Taylor v. State, 41 So. 776 (Ala. 1906)
Taylor v. U.S., 285 F.2d 703 (9th Cir. 1960)
Toone v. State, 178 Ala. 70 (1912)
Town of Pleasant v. Kost, 29 Il.. 490 (1863)
Town of Starksborough v. Town of Hinesboro, 13 Vt. 215 (1841)
U.S. v. Armstrong, 784 F.Supp. 356 (N.D. Tex. 1991)
U.S. v. Bartell, 144 F.Supp. 793 (D.C.N.Y. 1956)
U.S. v. Bills, 639 F.Supp. 825 (D.N.J. 1986)
U.S. v. Bloom, 112 F.3d 200 (5th Cir. 1997)
U.S. v. Boardman, 419 F.2d 110 (1st Cir. 1969)
U.S. v. Boroski, 412 F.2d 608 (6th Cir. 1969)
U.S. v. Burns, 450 F.2d 44 (10th Cir. 1971)
U.S. v. Carlson, 248 F.Supp. 1003 (D.C. Wis. 1965)
U.S. v. Casias, 306 F.Supp. 166 (D.C. Colo. 1969)
U.S. v. Chaudron, 425 F.2d 605 (8th Cir. 1974)
U.S. v. Chodorski, 240 F.2d 590 (7th Cir. 1957)
U.S. v. Clark, 307 F.2d 1 (6th Cir. 1962)
U.S. v. Copeland, 126 F.Supp. 734 (D.C. Conn. 1954)
U.S. v. Crouch, 415 F.2d 425 (5th Cir. 1969)
U.S. v. Diercks, 223 F.2d 12 (7th Cir. 1955)
U.S. v. Dillon, 294 F.Supp. 38 (D.C. 1968)
U.S. v. Dudley, 436 F.2d 1057 (6th Cir. 1971)
U.S. v. Dyer, 272 F.Supp. 965 (D.C.W.Va. 1967)
U.S. v. Elizarraraz, 400 F.2d 898 (5th Cir. 1968)
U.S. v. Emery, 168 F.2d 454 (2d Cir. 1948)
U.S. v. Fielder, 136 F.Supp. 745 (D.C. Mich. 1954)
U.S. v. Fowler, 659 F.Supp. 624 (N.D.Cal. 1987)
U.S. v. Gary, 963 F.2d 180 (8th Cir. 1992)
U.S. v. Gidmark, 440 F.2d 773 (9th Cir. 1971)
U.S. v. Goodman, 435 F.2d 306 (7th Cir. 1970)
U.S. v. Gormly, 136 F.2d 227 (7th Cir. 1943)
U.S. v. Griffin, 434 F.2d 740 (6th Cir. 1970)
U.S. v. Haithco, 644 F.Supp. 63 (W.D. Mich. 1986)
U.S. v. Hamilton, 322 F.Supp. 1214 (D.C.La. 1970)
U.S. v. Harris, 446 F.2d 129 (7th Cir. 1971)
U.S. v. Hatcher, 922 F.2d 1402 (9th Cir. 1991)
U.S. v. Hawver, 437 F.2d 850 (7th Cir. 1971)
U.S. v. Hayes, 633 F.Supp. 1183 (M.D.N.C. 1986)
U.S. v. Heljenek, 275 F.Supp. 579 (D.C.Pa. 1967)
U.S. v. Henderson, 223 F.2d 421 (7th Cir. 1955)

U.S. v. Hoepker, 223 F.2d 921 (7th Cir. 1955)
U.S. v. Hogans, 253 F.Supp. 409 (D.C.N.Y. 1966)
U.S. v. Holmes, 387 F.2d 781 (7th Cir. 1967)
U.S. v. Hugelmeyer, 774 F.Supp. 559 (D. Az. 1991)
U.S. v. Huisinga, 422 F.2d 635 (7th Cir. 1970)
U.S. v. Hurt, 244 F.2d 46 (3d Cir. 1957)
U.S. v. Jackson, 369 F.2d 936 (4th Cir. 1966)
U.S. v. Kekich, 463 F.2d 1203 (6th Cir. 1972)
U.S. v. Kephart, 170 B.R. 787 (W.D.N.Y. 1994)
U.S. v. Kidson, 315 F.Supp. 132 (D.N.H. 1970)
U.S. v. Kokayi, 968 F.Supp. 870 (E.D.N.Y. 1997)
U.S. v. Kuehnau, 349 F.Supp. 1323 (D.C. Wis. 1972)
U.S. v. Kushmer, 365 F.2d 153 (7th Cir. 1966)
U.S. v. Kutz, 199 F.Supp. 205 (D.C. Wis. 1961)
U.S. v. Lebherz, 129 F.Supp. 444 (D.C.N.J. 1955)
U.S. v. Ledwith, 998 F.2d 1011 (4th Cir. 1993)
U.S. v. Lyzun, 444 F.2d 1043 (7th Cir. 1971)
U.S. v. Maldonado, 867 F.Supp. 1184 (S.D.N.Y. 1994)
U.S. v. Martin, 710 F.Supp. 271 (C.D. Cal. 1989)
U.S. v. Milligan, 457 F.2d 916 (8th Cir. 1972)
U.S. v. Mohammed, 288 F.2d 236 (7th Cir. 1961)
U.S. v. Mroz, 136 F.2d 221 (7th Cir. 1943)
U.S. v. Niles, 220 F.2d 278 (9th Cir. 1955)
U.S. v. Palmer, 327 F.Supp. 594 (D.C. Pa. 1971)
U.S. v. Pate, 243 F.2d 99 (5th Cir. 1957)
U.S. v. Phillips, 423 F.2d 1134 (5th Cir. 1970)
U.S. v. Ransom, 223 F.2d 15 (7th Cir. 1955)
U.S. v. Ream, 491 F.2d 1243 (5th Cir. 1974)
U.S. v. Redovan, 656 F.Supp. 121 (E.D.Pa 1986)
U.S. v. Robin, 419 F.2d 381 (5th Cir. 1969)
U.S. v. Rogers, 454 F.2d 601 (7th Cir. 1971)
U.S. v. Roper, 681 F.Supp. 77 (D. Me. 1988)
U.S. v. Simson, 135 F.Supp. 802 (D.C. Cal. 1955)
U.S. v. Slattendale, 168 F.Supp. 574 (D.C. Colo. 1958)
U.S. v. Smith, 124 F.Supp. 406, aff'd in U.S. v. Hoepker, 223 F.2d 921 (7th Cir. 1955)
U.S. v. Stepler, 258 F.2d 310 (3d Cir. 1958)
U.S. v. Stewart, 322 F.2d 592 (3d Cir. 1963)
U.S. v. Stidham, 248 F.Supp. 822 (D.C. Mo. 1965)
U.S. v. Sutter, 127 F.Supp. 109 (C.D. Cal. 1954)
U.S. v. Tettenburn, 186 F.Supp. 203 (D.C. Md. 1960)
U.S. v. Thorn, 317 F.Supp. 389 (D.C. La. 1970)
U.S. v. Tichenor, 403 F.2d 986 (6th Cir. 1968)
U.S. v. Turner, 660 F.Supp. 1323 (E.D.N.Y. 1987)
U.S. v. Van Den Berg, 139 F.2d 654 (7th Cir. 1944)
U.S. v. Vanhorn, 20 F.3d 104 (4th Cir. 1994)
U.S. v. Willis, 409 F.2d 830 (11th Cir. 1969)
U.S. v. Zieber, 240 F.2d 590 (7th Cir. 1957)
Varner v. Thompson, 60 S.E. 216 (Ga. 1908)
Vise v. Hamilton County, 19 Ill. 78 (Ill. 1857)
Walker v. Moseley, 5 Denio 102 (N.Y. Sup. 1847)
Wallace v. Bradshaw, 29 A. 156 (N.J. 1894)
Walling v. State, 232 S.W. 1115 (Tex. 1921)
Ward v. State, 7 So. 298 (Ala. 1890)
Washoe Co. v. Humboldt Co., 14 Nev. 123 (1879)
Wayne County v. Waller, 90 Pa. 99 (1879)
Weightman v. U.S., 142 F.2d 188 (1st Cir. 1944)

Whicher v. Bd. Of Com'rs of Cedar County, 1 Greene 217 (Iowa 1848)
Whitt v. City of Gadsen, 49 So. 682 (Ala. 1909)
Wiggins v. U.S., 261 F.2d 113 (5th Cir. 1958)
Willaford v. Pickle, 81 Tenn. 672 (Tenn. 1884)
Winfield Township ex rel. Patton v. Wise, 73 Ind. 71 (Ind. 1880)
Wolfe v. U.S., 149 F.2d 391 (6th Cir. 1945)
Woolard v. McCullough, 1 Ired. 432 (N.C. 1841)
Wood v. Inhabitants of Waterville, 5 Mass. 294 (Mass. 1809).
Wood v. U.S., 373 F.2d 894 (11th Cir. 1967)
Yaich v. U.S., 283 F.2d 613 (9th Cir. 1960)
Yarbrough v. Superior Court of Napa County, 197 Cal.Rptr. 737 (Cal. App. 1st Dist 1983)