Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment

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Hard is the fortune of all womankind
She is always controlled, always confined
Controlled by her parents until she is a wife
A slave to her husband the rest of her life
Traditional

When Congress debated the Thirteenth Amendment[1] and its prohibitions against slavery and involuntary servitude, anxious members inquired whether it would alter the traditional relationship of husband and wife.[2] Their concern materialized out of a political context in which those who sought abolition of African American chattel slavery and the establishment of women's rights were applying the norm of individual freedom beyond the narrow scope of landed white men.[3] At that time, the metaphor "women are slaves" had rhetorical currency and suggested that white women shared with African American men and women a similar legal and social status of non-identity and disability.[4] No matter how rhetorically useful this metaphor may have seemed then or may

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1. U.S. CONST. amend. XIII, § 1 provides in pertinent part "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Section 2 provides that Congress shall have the power to enforce this article by appropriate legislation.

2. "I suppose before the law a woman would be equal to a man, a woman would be as free as a man. A wife would be equal to her husband before the law." CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864) (statement of Sen. Howard). "A husband has a right of property in the service of his wife; he has the right to the management of his household affairs . . . . All these rights rest upon the same basis as a man's right of property in the service of slaves." CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865) (statement of Rep. White).

3. See ELIZABETH SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988), in which she acknowledges the link between "women's movements in the nineteenth and twentieth centuries" and "abolitionist and civil rights activity," but later argues that too much can be made of this because of the role played by sexist and racist attitudes in both movements. *Id.* at 11, 115-26.

4. JOHN STUART MILL, THE SUBJECTION OF WOMEN 32 (1869) ("[A] female slave has (in Christian countries) an admitted right . . . to refuse to her master the last familiarity. Not so the wife . . . he can claim her and enforce the lowest degradation of a human being . . . . she is held in this worst description of slavery . . . .").

seem now, it was and remains grossly inaccurate and inherently racist.[5] It obscured the fact that white women were slaveholders or beneficiaries of the slave system.[6] It failed to recognize that even though there were significant legal, political and social restraints on white women, they did not as a class suffer in the way that African Americans did under slavery. Finally, it ignored the fact that African American women were slaves and that other women were not, no matter what their subordinate legal or socio-economic status.[7] So, the metaphor was and is fundamentally flawed both by its generality and its exclusion.

It was not slavery, as metaphor or term, however, that evoked the concern of some Congressmen that their dominant positions in their families were in jeopardy. Rather, their uneasy recognition of the Amendment's potential to reach into marital relationships was sparked by the term "involuntary servitude," which was explicitly included in the Thirteenth Amendment to prohibit the creation of slave-like conditions through the private use of force. Although the Congressmen's anxiety was treated as absurd by sponsors of the Amendment, an examination of the Thirteenth Amendment's prohibition against involuntary servitude in the context of the conditions to which women who are battered[8] in intimate relationships such as marriage[9] are subjected reveals that

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5. See SPELMAN, *supra* note 3, at 40 n.8, 47, 50, 114-32, where she attempts to show "that the notion of a generic 'woman' functions in feminist thought much the way the notion of generic 'man' has functioned in Western philosophy: it obscures the heterogeneity of women and cuts off examination of the significance of such heterogeneity for feminist theory and political activity." *Id.* at ix.

This metaphor is a prime example of what Adrienne Rich refers to as "white solipsism:" a vantage point from which we "think, imagine, and speak as if whiteness described the world." ADRIENNE RICH, ON LIES, SECRETS, AND SILENCE 299 (1979). The metaphor also encapsulates the way in which the experience of African American women is excluded from the experience of "women," which when it is not preceded by a racial adjective has always meant "white women." The exclusion of African American women by white women is addressed by ANGELA DAVIS, WOMEN, RACE, AND CLASS (1981); BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (1981); BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984); BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK (1989); AUDRE LORDE, SISTER OUTSIDER (1984); María C. Lugones & Elizabeth V. Spelman, *Have We Got a Theory for You! Feminist Theory, Cultural Imperialism, and the Demand for "The Woman's Voice,"* 6 WOMEN'S STUD. INT'L F. 573 (1983); Elizabeth Spelman, *Theories of Race and Gender: The Erasure of Black Women*, 5 QUEST 36 (1982).

6. *See* SPELMAN, *supra* note 3, at 141.

7. *Id.*

8. Lenore Walker, an expert on battered women, defines a battered woman as one "who is or has been in an intimate relationship with a man who repeatedly subjects or subjected her to forceful physical and/or psychological abuse." LENORE WALKER, THE BATTERED WOMAN SYNDROME 203 (1984). Throughout this article, I use her definition, but restrict it to physical behavior only, as the United States Supreme Court in 1988 limited involuntary servitude to physical coercion. See *infra* text accompanying notes 79-92 for a discussion of United States v. Kozminski, 487 U.S. 931 (1988).

9. I adopt the gender specificity of Lenore Walker's definition since the available data on heterosexual battering overwhelmingly demonstrates that the typical heterosexual battering relationship is one in which a woman is battered by a man to whom she is married or with whom she is in an intimate relationship. Nonetheless, I recognize that those who are battered and those who batter can be of either gender and that they are not necessarily in heterosexual relationships.

This article consciously explores battering only in the context of heterosexual relationships. Such an approach admittedly renders this work heterosexist, but there are four reasons for the limited focus. First, the metaphor "women are slaves" implicitly answers the question, "the slaves of whom?" with the answer, men. Therefore, the metaphor, which serves as the point of departure of this article, is male-referenced. Second, the metaphor was used during the 19th century to refer to the condition of women upon marriage.

their anxiety was well-founded. This article undertakes an examination of the theoretical, doctrinal and factual connections between involuntary servitude and intimate violence.[10]

First, this article explores the meaning of involuntary servitude as prohibited by the Thirteenth Amendment and its criminal enforcing statutes. The scope of the Thirteenth Amendment is revealed through an examination of chattel slavery as an exploitive legal, economic, and social system; contemporaneous Congressional debate; and judicial interpretation of the Amendment and the criminal statutes. From an examination of these sources, a paradigm of involuntary servitude emerges. Second, this article examines battering and its social context as a backdrop to the analysis of whether three battered women,[11] whose lives are portrayed through narrative,[12] were held in involuntary servitude by their batterers. This study reveals that the key distinction between the battered women's cases and the judicially recognized cases of involuntary servitude is the intimate origin of their relationships and not the degree or nature of the coercion or the services they provided.[13]

Third, the connections between chattel slavery and the status and conditions of married women were noted in the debate on the Thirteenth Amendment. Finally, there are many reported cases of battering in heterosexual relationships and extensive literature and research on the topic, while literature and research on battering in lesbian and gay relationships is only now emerging, and there are few reported cases. *See* NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel ed., 1986); Claudia Card, *Defusing the Bomb: Lesbian Ethics and Horizontal Violence*, 3 LESBIAN ETHICS 91 (1989); Claire M. Renzetti, *Violence in Lesbian Relationships: A Preliminary Analysis of Causal Factors*, 3 J. INTERPERSONAL VIOLENCE 381 (1988); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U.L. REV. 567 (1990); Comment, *The Defending of Accused Homosexuals: Will Society Accept Their Use of the Battered Wife Defense?*, 4 GLENDALE L. REV. 208 (1982).

Having acknowledged the limited focus of this paper, however, it is important to state that battering in gay and lesbian relationships is as serious as battering in heterosexual relationships and that it too may present cases that constitute involuntary servitude. This article is only meant to lay the groundwork for further examinations of involuntary servitude in all types of intimate relationships. *See* Robson, *supra*, at 572 (citing JANICE G. RAYMOND, A PASSION FOR FRIENDS 66-64 (1986)).

10. In 1979 Kathleen Barry wrote a ground-breaking book entitled *Female Sexual Slavery* in which she exposed the international extent of violence against women and the passive role of the United Nations in working against female sexual slavery. Her sociological work along with the personal experiences related to me by battered women sparked this article. I thank them. *See generally* KATHLEEN BARRY, FEMALE SEXUAL SLAVERY (1979).

11. These three cases represent the end of the continuum of the violence and coercion that battered women experience. These are all cases in which the battered women ultimately killed their batterers in self-defense, yet they are typical of the violence and the services provided in battering relationships generally. Each case provides unusually detailed accounts of the violence and the services.

12. *See* Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WISC. WOMEN'S L. REV. 81, 90 (1987) ("[N]arrative is emerging as a feminist method of moral argument, both in practice and theory.").

13. A comparison of the services provided in the involuntary servitude and battering cases reveals that while domestic services are found in both, sexual services provided directly to the coercer are not. However, an examination of the full range of services provided by female chattel slaves reveals that both sexual and reproductive services were a well-entrenched characteristic of chattel slavery and that these services were provided directly to the master. Thus, if involuntary servitude prohibits that which is "akin to slavery," then it must be interpreted as prohibiting violent coercion of sexual services. *See* Butler v. Perry, 240 U.S. 328, 332 (1916) (Involuntary servitude was intended "to cover those forms of compulsory labor akin to African slavery.").

This is not to suggest that there is not a real distinction between the relationship between master and slave and batterer and battered woman. There is. The most important distinction is that in the former the

Third, this article challenges the legitimacy of the view that the involuntary servitude clause of the Thirteenth Amendment prohibits only public sphere "marketplace" behavior and thereby does not reach private sphere cases of battering. Fourth, it finds support for the inclusion of battering in the involuntary servitude prohibition of the Thirteenth Amendment in the mutability of the private/public dichotomy, in changes in the legal status of women, and in the trend to treat crimes in the private and public spheres as equally worthy of the laws' protection, as demonstrated by the movement to abrogate the marital rape exemption.[14]

This article demonstrates that some battered women are held in involuntary servitude and suggests that a civil constitutional claim as well as a criminal constitutional claim could be brought against the batterer. More importantly, however, this article seeks to begin a new theoretical discourse on battering. In recent years, much of the theory developed about battered women has been about the psychological and emotional responses to the battering, issues raised in cases where battered women kill or attempt to kill their batterers in self-defense.[15] The woman's internal responses to battering and the ways in which they shape her conduct are embodied in the concept of the "battered woman syndrome."[16] Although naming the characteristics shared by many battered

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slave had neither control over entering the relationship nor legal or social power to end it; in the latter the battered woman enters voluntarily, and while she may not be able to end it because of the batterer's violence and the socio-economic and legal conditions that make leaving difficult as well as dangerous, she does in fact have the "freedom" to leave. However, this distinction is irrelevant in the contemporary law of involuntary servitude. The law recognizes that even where a relationship between an employer and an employee is entered into voluntarily by both parties, when the relationship is coercively maintained by threats of or actual physical violence, it converts to one that is involuntary. Thus, the person held in involuntary servitude has the "freedom" to leave, but does not because of the violence and the socio-economic and legal conditions that make escape both difficult and dangerous.

14. Public and private sphere distinctions have been used to justify dissimilar treatment of similar conduct. This has been particularly true of battering and of marital rape. Until very recently battering of one's wife was treated as a non-crime, and the battered wife had no criminal remedies available to her. In contrast, if similar conduct occurred between strangers, making it more public in nature, the conduct was a crime and remedies were available. The law's treatment of marital rape is even more revealing as it has been more resistant to change. There are still jurisdictions that do not regard marital rape as a crime. In all jurisdictions, however, rape is a crime when it occurs between strangers. Both the exclusion of battery of one's wife and marital rape from the law's protection have been historically justified by categorizing them as private-sphere events and thus not to be interfered with by the state. The state's refusal to interfere in marital relationships involving battery and rape preserved the relationship of domination and subordination. However, the law regarding violence in the marital relationship has changed substantially.

This trend is rooted in the relatively recent recognition of women as independent human beings, regardless of marital status, with the same rights to privacy, physical safety and dignity as men. When similar conduct is treated differently by the law based on whether it occurs in the public or the private sphere, the legitimacy of the distinction is immediately suspect. *See infra* notes 232-247 and accompanying text.

15. *See* State v. Kelly, 178 A.2d 364 (N.J. 1984).

16. The battered woman syndrome is a psychological response to battering. *See generally* WALKER, *supra* note 8. As a psychological concept it is incorporated into the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS III, the diagnostic bible of psychological and psychobiological phenomena. The battered woman syndrome is used to explain the conduct of a battered woman when she kills her batterer in self-defense. Evidence of the syndrome through expert testimony is relevant to the woman's self-defense claim in a criminal prosecution for murder. *See* Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986); Jenge R. Bunyak, *Battered Wives Who Kill: Civil*

women was a step forward in understanding their behavior, it has had the unwelcome effect of focusing discussion on the reasonableness of the battered woman's response rather than on the unreasonableness of the batterer's conduct. By demonstrating the similarities between the situations of battered women and involuntary servitude, in which the analytic focus is on the coercive conduct of the "master" and only secondarily on the conduct's effect on the "servant," this article attempts to shift the discourse away from the internal life of the battered woman to a new theoretical perspective on the conduct of the batterer.

I acknowledge that to use three cases in which battered women have killed their batterers seems to contradict my goal of shifting the theoretical discourse away from the internal life of the battered woman and toward the conduct of the batterer. I have chosen this approach for two reasons, the first analytically pragmatic and the second theoretically significant. First, these cases provide more factual detail than any others I reviewed. They thus permit a textured comparison between the coercion used in involuntary servitude cases and that used in battering cases. Second, these cases do not focus on the internal life of the battered woman, but rather on the coercive behavior of the man and what she did to him as a result. Each case reveals that battering is more than the expression of uncontrolled anger; it is the expression of the batterer's desire to control the will of another—the woman he batters.

I. THE THIRTEENTH AMENDMENT

A. *History, Society and Involuntary Servitude*

In the following section I explore the historical and social context within which Congress created the Thirteenth Amendment. I do this to add texture to the meaning of the Amendment's prohibition against involuntary servitude. This task is essential because judicial interpretation of the Amendment in criminal involuntary servitude cases has unnecessarily and, I argue, inaccurately characterized the Amendment as narrow in scope—intended only to address the evil of violently coerced wage labor. A review of statements made in Congressional debates reveals that members of Congress knew that slavery was both a social and an economic evil and that there were parallels between the relationships of master/slave and husband/wife.

The Thirteenth Amendment declares that "[n]either slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States . . . ."[17] Congress intended the Thirteenth Amendment to abolish the

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Liability and the Admissibility of Battered Woman's Syndrome Testimony, 4 LAW & INEQ. J. 603 (1986); Comment, *Evidence—The Battered Woman's Syndrome in Illinois: Admissibility of Expert Testimony*, 11 S. ILL. U. L.J. 137 (1986).

17. U.S. CONST. amend. XIII, § 1. This section is self-executing. The United States Supreme Court has consistently stated that where there is a violation of a law enacted to enforce the Thirteenth Amendment

system of chattel slavery under which whites legally possessed African Americans as personal property[18] and to abolish legal ownership of any human being of any color.[19] It was an unusual prohibition, reaching as it did to control private rather than state conduct.[20] It is evident from the language of the Amendment itself that Congress did not confine its action to the prohibition of chattel slavery, but employed the term "involuntary servitude" to abolish all prospective forms of slavery as well.[21]

In an early twentieth-century case, the United States Supreme Court announced that involuntary servitude included "those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results."[22] Ten years earlier the Court had stated, "[t]he things denounced are slavery and involuntary servitude . . . All

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there is also an independent violation of the Thirteenth Amendment. Pollock v. Williams, 322 U.S. 4, 25 (1944); Taylor v. Georgia, 315 U.S. 25, 31 (1942); United States v. Reynolds, 235 U.S. 133, 150 (1914); Bailey v. Alabama, 219 U.S. 219, 239 (1911).

18. For the history of the Thirteenth Amendment, see G. Sidney Buchanan, *The Quest For Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1 (1974). For articles discussing application of the Thirteenth Amendment to modern conditions, see generally Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990); Robert L. Misner & John H. Clough, *Arrestees as Informants: A Thirteenth Amendment Analysis*, 29 STAN. L. REV. 713 (1977); Harry H. Shapiro, *Involuntary Servitude: The Need For A More Flexible Approach*, 19 RUTGERS L. REV. 65 (1964); Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CAL. L. REV. 171, 174-183 (1951); John M. Cook, Note, *Involuntary Servitude: Modern Conditions Addressed In* United States v. Mussry, 34 CATH. U. L. REV. 153 (1984); James H. Haag, Note, *Involuntary Servitude: An Eighteenth-Century Concept In Search of a Twentieth-Century Definition*, 19 PAC. L.J. 873 (1988).

19. In 1906, the United States Supreme Court declared the Thirteenth Amendment to be "the denunciation of a condition" reaching "every race and every individual." Hodges v. United States, 203 U.S. 1, 16-17 (1906). To emphasize the sweep of the Amendment, the Court quoted Justice Miller in the Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873): "To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government . . . requires an effort, to say the least of it." *Id.* at 69.

20. To place control of conduct within the private sphere in the scope of the Thirteenth Amendment was radical; it limited the power of masters over slaves and employers over employees where power has been unbridled. It implicated the rights of husbands over wives by analogy. Amy D. Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471 (1988) states that Senator Sumner, the original proponent of the Thirteenth Amendment, "[l]ike most others of his generation . . . . took for granted that relations of marriage and wage labor were complementary." *Id.* at 471. She also suggests that Sumner's assumptions dated back to enlightenment theories of natural rights, relying on Elizabeth Fox-Genovese, *Property and Patriarchy in Classical Bourgeois Political Theory*, 4 RADICAL HIST. REV. 36-59 (1977). *Id.* at 471 n.1.

21. "The word servitude is of a larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery." Slaughter-House Cases, 83 U.S. (16 Wall.) at 69.

22. *E.g.*, Butler v. Perry, 240 U.S. 328, 332 (1916); *see also* Robertson v. Baldwin, 165 U.S. 275, 282 (1897). Thus, the forms of involuntary servitude are varied. Peonage is a form of involuntary servitude prohibited by the Thirteenth Amendment arising from indebtedness to a master. Labor is coerced, either through legal sanction or physical force or threats of either, to pay off the debt. Clyatt v. United States, 197 U.S. 207, 215, 218 (1905). Involuntary servitude is also the "[c]ompulsion of . . . service by the constant fear of imprisonment under the criminal laws" where a person fined for a misdemeanor could contract with another to pay off his or her debts, but the law has made the breach of the contract a crime. United States v. Reynolds, 235 U.S. 133, 146, 150 (1914). Where state laws made it a crime to fail to provide labor after receiving an advance, the Court found the laws to create a condition of involuntary servitude. Pollock v. Williams, 322 U.S. 4 (1944); Taylor v. Georgia, 315 U.S. 25 (1942); Bailey v. Alabama, 219 U.S. 219 (1911).

understand by these terms a condition of enforced compulsory service of one to another."[23] While the meaning of the term "involuntary servitude" is broader than that of slavery, the nature of the servitude and the ways in which one's services are coerced are impossible to discern from the phrase alone.

Nonetheless, the Thirteenth Amendment is generally, albeit implicitly, interpreted by the courts as a prohibition against coerced wage labor in the market economy.[24] One view of chattel slavery is that it is merely an economic system of free labor. If one accepts this limited perspective, the Thirteenth Amendment guarantees workers nothing more than the freedom to contract their labor. Although this perspective reflects the ideology of individualism and free will essential to the industrial expansion of the late nineteenth and early twentieth centuries,[25] it ignores the many ways in which scholars deem slavery to have been as much a complex social system as an economic one. This economic justification has limited the Thirteenth Amendment to a public sphere "marketplace" prohibition, rather than a private sphere "family" prohibition.[26]

The contemporary criminal[27] involuntary servitude cases[28] reflect the

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23. Hodges v. United States, 203 U.S. 1, 16 (1906).

24. *See infra* notes 60-116 and accompanying text.

25. Justice Harlan believed that the Thirteenth Amendment reflected

> the individualistic ethic of [the] time, which emphasized personal freedom and embodied a distaste for governmental interference which was soon to culminate in the era of laissez-faire . . . . [M]ost of those men would have regarded it as a great intrusion on individual liberty for the Government to take from a man the power to refuse . . . to enter into a . . . private transaction.

Jones v. Alfred H. Mayer Co., 392 U.S. 409, 473-74 (1968) (Harlan, J., dissenting).

26. Frances Olsen in *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1501 & n.16 (1983) describes this "characterization" of the public/private dichotomy as "misleading" because there "are two different dichotomies involved . . . on one hand, a dichotomy between the market, considered public, and the family, considered private; on the other hand, a dichotomy between the state, considered public, and civil society, considered private." This article uses the first dichotomy to demonstrate, as Olsen does in her article, the degree to which these categories are mutable.

27. The original criminal statute passed to enforce the Thirteenth Amendment's prohibition against slavery and involuntary servitude was the 1867 peonage statute, Act of Mar. 2, 1867, ch. 187, § 1, 14 Stat. 546. It prohibited "[t]he holding of any person to service or labor under the system known as peonage . . . and all laws . . . which have . . . established, maintained or enforced . . . the voluntary or involuntary service . . . of any persons as peons, in liquidation of any debt or obligation . . . ." Later, this became 18 U.S.C. § 1581 (1982) (originally enacted as Act of June 25, 1948, ch. 645, § 1581, 62 Stat. 772), which provides that "[w]hoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined . . . or imprisoned . . . or both." *Id.* Peonage is defined as a condition of forced labor coerced due to indebtedness. *See* Clyatt v. United States, 197 U.S. 207, 215 (1904). However, other criminal statutes prohibiting the importation of African slaves had been passed prior to the Thirteenth Amendment, and were made applicable to "any person" regardless of race by the Thirteenth Amendment. Act of Mar. 1807, ch. 22, § 6, 2 Stat. 427 (prohibiting the sale or purchase or the holding to service or labor of slaves imported after Dec. 31, 1807 and modified by the Act of Apr. 20, 1818, ch. 91, 3 Stat. 452. This statute was the precursor to Act of Mar. 4, 1909, ch. 10, § 248, 35 Stat. 1139 (1909) (prohibiting the importation, holding or selling of a slave) and Act of Mar. 4, 1909, ch. 10, § 271, 35 Stat. 1142 (1909) (prohibiting the importation of slaves, "inveigled or forcibly kidnapped" to be held in involuntary servitude). These sections, 248 and 271, were consolidated in the 1948 revision of the Crimes and Criminal Procedure Code as 18 U.S.C. § 1584 (1982) (originally enacted as Act of June 25, 1948, ch. 645, 62 Stat. 773). Section 1584 provides that "[w]hoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person . . . held shall be fined not more than $5,000 or imprisoned not more than five years, or both."

In the 1948 revisions, sections 1581 (peonage) and 1584 (involuntary servitude) were grouped with

economic view of the Thirteenth Amendment. Cases of involuntary servitude prosecuted under the Amendment's criminal enforcing statutes have addressed explicitly the sufficiency of coercion, but have assumed without explanation that the servitude fits within the scope of the Amendment's prohibition. The typical involuntary servitude case involves an otherwise legitimate employer/employee relationship. By "legitimate" I mean that there is an exchange of labor for wages in the above-ground economy. By "otherwise" I mean that unlike most market employer/employee relationships, the involuntary servitude relationship is characterized by either the threat or the use of violence to coerce the worker against his or her will to provide services for the employer's profit or pleasure.[29] These cases frequently involve immigrant and impoverished agricultural or domestic workers.

Other involuntary servitude cases,[30] however, involve illegitimate market relationships, such as prostitution.[31] I refer to these relationships as illegitimate because they are not considered part of the above-ground or legitimate economy. The distinction I draw between legitimate and illegitimate markets does not in any way challenge the public/private dichotomy that pervades involuntary servitude doctrine, as both the legitimate and the illegitimate market are part of the public sphere.

Although judicial interpretations of the Amendment have adopted a narrow view of it as governing only public sphere relationships, slavery and, derivatively, involuntary servitude were not solely of either sphere, but of both. A competing view of the Thirteenth Amendment which takes account of the breadth of the impact of slavery and involuntary servitude challenges the rigid theoretical boundaries between the public and the private, the market and the family spheres. This broad view of slavery holds that slavery was not simply an economic system of free labor, but was also a complex social system.[32] From this perspective, the prohibition of slavery and involuntary servitude was a prohibition on much more than coerced wage labor. This

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the following sections prohibiting other aspects of slavery: section 1582 (vessels for slave trade); section 1583 (enticement into slavery); section 1585 (seizure, detention, transportation or sale of slaves); section 1586 (service on slave vessels); section 1587 (possession of slaves on a vessel); section 1588 (transportation of slaves from United States). Of all of these, section 1584 is the most broadly applicable and most relevant to this article's inquiry. In United States v. Kozminski, 487 U.S. 931 (1988), Justice O'Connor writing for the majority, stated that involuntary servitude as used in section 1584 "clearly was borrowed from the Thirteenth Amendment . . . [making] the conclusion that Congress intended the phrase to have the same meaning in both places logical, if not inevitable." 487 U.S. at 944-45.

28. *See infra* notes 60-116 and accompanying text.

29. *See infra* notes 61-92 and accompanying text.

30. These cases certainly do not depict the only or even the typical relationship between a prostitute and a pimp. Frequently, such a relationship is quite complex, having characteristics of both an employer/employee relationship as well as an intimate one between lovers.

31. Prositution is illegal in most states. *See, e.g.*, NEV. REV. STAT. ANN. § 201.300 (Michie 1986); N.Y. PROSTITUTION LAW § 230 (McKinney 1989); N.J. STAT. ANN. § 2C:34-1 (West 1979).

32. Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1301-02 (1969) (arguing that Congress recognized that slavery "involved a complex of social and economic as well as legal interrelationships . . . . [The Thirteenth Amendment] appears to have been designed as a full response to the evil perceived.").

perspective on the Thirteenth Amendment recognizes that slavery had economic and non-economic, personal and non-personal elements.

Congress must have recognized African-American chattel slavery as both a social and an economic system sanctioned by laws governing both the private sphere of the master and slave relationship and the public sphere of the economic relationship of capital and labor.[33] And it knew only too well the extent to which the South depended on this system.[34] Nonetheless, when Congress constructed the Thirteenth Amendment including the term "involuntary servitude," it did so to address what it believed to be the root of slavery and the antithesis of healthy capitalism: coerced labor.[35] In doing so, it collapsed a complex system of subordination with both private and public aspects into a flattened concept of involuntary servitude—a state in which the right of the individual worker to exchange his or her labor freely for wages[36] is nullified by coercion.

Congressional concern about the Amendment's reach into traditional social relationships manifested itself in discussions of the Amendment's regulation of private conduct: that of one person coercing another to provide services against his or her will.[37] The regulation of the private conduct of persons in the public sphere of the market raised the spectre of control of private conduct in the private sphere of the home.[38] Some Congressmen expressed concern that the Thirteenth Amendment had the potential to reach into the private sphere of the home and to alter the traditional relationship between husband

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33. *See infra* notes 54-57 and accompanying text.

34. See Note, *supra* note 32, at 1301-1302 for an interesting discussion of the extent to which this realization had an impact on the framers of the Amendment.

35. Evidence of this appears throughout Congressional debates on the Amendment. For example, Representative Ingersoll of Illinois stated that the Thirteenth Amendment would guarantee the slave's right "to till the soil, to earn his bread, to enjoy the rewards of his own labor, [to enjoy] the endearments of family ties." CONG. GLOBE, 38th Cong., 1st Sess. 2989-90 (1864). *See generally* Buchanan, *supra* note 18.

President Andrew Johnson summarized the belief that slavery was antithetical to the needs of capitalism:

> Slavery was essentially a monopoly of labor, and as such locked the states where it prevailed against the incoming of free industry . . . . Here there is no room for favored classes or monopolies; the principle of our government is that of equal laws and freedom of industry.

Letter to Congress, Dec. 4, 1865 quoted by Buchanan, *id.* at 5, from J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENT 3559 (1897).

36. The Supreme Court has recognized that:

> [t]he undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States . . . [I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of labor.

Pollock v. Williams, 322 U.S. 4, 17-18 (1944).

37. Unlike the Fourteenth Amendment, U.S. CONST. amend. XIV, the Thirteenth Amendment, U.S. CONST. amend. XIII, does not require state action and governs individual conduct.

38. Stanley, *supra* note 20, at 474 ("those who clarified the meaning of emancipation, whether inside legislative chambers or out of doors, stated the link between contract and freedom with new urgency and precision. That enterprise and the configuration of legal tenets, economic principles, and moral assumptions to which it gave credence were rife with unsettling implications for the law of husband and wife.").

and wife.[39] This anxiety was fueled by the ongoing and contemporaneous debate of women's suffrage and equality and was voiced in Congressional debate on the Amendment.[40]

Senator Howard worried that if the Amendment was to be enacted "a woman would be equal to a man . . . [a] wife would be equal to her husband and as free . . . before the law."[41] Representative Cox was concerned that if Congress had the power to regulate "domestic slavery" then perhaps it could exercise this power to "change the relation of . . . husband and wife."[42] To allay his colleagues' fears, Senator Sumner the chief proponent of the Thirteenth Amendment in the Senate, argued that the right to contract and the right to maintain a family were natural rights essential to the concept of freedom.[43] In this he implied that to regard the Thirteenth Amendment as interfering with the traditional legal relationship between husband and wife would be reductio ad absurdum. His narrow interpretation of the Thirteenth Amendment assured its opponents that the Amendment would not in any way alter the family under the law, but rather was to give everyone, regardless of their race, the right to create and maintain a family under the laws then applicable to only whites and freed slaves.[44] Such a family presumed the traditional authority of the husband over the wife.

Early cases interpreting the Thirteenth Amendment indicate that Congress did not intend it to alter traditional relationships other than that of master and slave. In addition, Congress did not intend it to abrogate the right of the sovereign to demand services from its citizens. To this end, the courts excluded service relationships mandated by the sovereign such as jury service,[45] military service,[46] and work on the roads.[47] The text of the Amendment itself excludes from the definition of involuntary servitude coerced labor as punishment for a crime.[48] Furthermore, the United States Supreme Court interpreted the Thirteenth Amendment as never intending to disturb traditional relationships regarded by the common law as deserving of special status, such as the rights of parents over children.[49] Although the relationship of husband and wife was of great concern to Congress, no cases refer to this relationship. Nonetheless, it is reasonable to conclude that, like the parent and

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39. *Id.* at 477.

40. *Id.* at 479.

41. CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864). He raised this concern in debate over the form of the constitutional amendment proposed by Senator Sumner in 1864, which declared that "Everywhere within the limits of the United States . . . all persons are equal before the law, so that no person can hold another as a slave." CONG. GLOBE, 38th Cong., 1st Sess. 521-522 (1864).

42. CONG. GLOBE, 38th Cong., 2d Sess. 242 (1865).

43. Senator Sumner, CONG. GLOBE, 39th Cong., 1st Sess. 91 (1865); *See also* Robert Kasson, CONG. GLOBE, 38th Cong., 2nd Sess. 193 (1865).

44. *Id.*

45. Hurtado v. United States, 410 U.S. 578, 589, n.11 (1973) (dictum).

46. Selective Draft Law Cases, 245 U.S. 366, 390 (1918).

47. Butler v. Perry, 240 U.S. 328 (1916).

48. *See supra* note 1.

49. Robertson v. Baldwin, 165 U.S. 275, 282 (1897) (dictum).

child relationship, the relationship of husband and wife was considered by the courts to be protected from the Thirteenth Amendment's prohibition by its unique common law status.

If Congress had embodied all of the services provided in chattel slavery through its definition of involuntary servitude, it would have been more faithful to its attempt to prohibit, through involuntary servitude, all prospective forms of slavery "akin to African slavery." This would have forced the courts to apply the Thirteenth Amendment, and its sweeping prohibition of slavery and involuntary servitude, in a much broader range of cases. Congress, however, chose to limit the scope of the Amendment, no doubt fearing the slippery slope of a constitutional amendment with the breadth to touch the most sacred of social institutions, the relationship between man and woman in marriage.

Such a narrow perspective on the Thirteenth Amendment's prohibition against involuntary servitude ignores history, which demonstrates that slavery was much more than the coercion of economically productive labor.[50] To focus only on the economic aspect of slavery as a system of production in the public sphere is to remove slavery from its hellish private context. Given Congress's intention to abolish anything "akin to African Slavery," it is necessary to examine the services performed by African Americans under chattel slavery and to discern the potential breadth of the meaning of involuntary servitude.[51] This examination can justifiably be confined to the services provided by women who labored under this system. Their services included not only those that could have been provided by substitute wage labor, but also sexual and reproductive services that clearly fell outside the wage-labor system.[52] While it is indisputable that all slaves, regardless of

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50. Historical scholarship on slavery is extensive. A sample of sources consulted for this article follows: JOHN BAYLISS, BLACK SLAVE NARRATIVES (1970); JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH (1972); SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS, AND AUTOBIOGRAPHIES (John W. Blassingame ed., 1976) [hereinafter SLAVE TESTIMONY]; STANLEY ELKINS, SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE (1968); STANLEY FELDSTEIN, ONCE A SLAVE: THE SLAVE'S VIEW OF SLAVERY (1971); ROBERT W. FOGEL, WITHOUT CONSENT OR CONTRACT (1989); ROBERT W. FOGEL, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY (1974); ELIZABETH FOX-GENOVESE, FRUITS OF MERCHANT CAPITAL (1983); ELIZABETH FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD (1988); EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1974) [hereinafter ROLL, JORDAN, ROLL]; EUGENE D. GENOVESE, THE WORLD THE SLAVEHOLDERS MADE: TWO ESSAYS IN INTERPRETATION (1969); EUGENE D. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY (1965); HERBERT G. GUTMAN, SLAVERY AND THE NUMBERS GAME: A CRITIQUE OF TIME ON THE CROSS (1975); GERDA LERNER, BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY (1972); JAMES MELLON, BULLWHIP DAYS: THE SLAVES REMEMBER (1988); ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY (1982); KENNETH STAMPP, THE PECULIAR INSTITUTION (1956); DEBORAH G. WHITE, AR'N'T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH (1985). *See also infra* note 52, describing sexual exploitation of female slaves.

51. Justice Brennan in his concurrence in United States v. Kozminski, 487 U.S. 931, 961 (1988), suggests that one must return to slavery to determine the coercion contemplated by the Amendment.

52. Historians who have examined the extent to which female slaves were used for the purposes of breeding to increase the wealth of their masters have tended to focus their inquiry on whether breeding operations, such as those used to breed farm animals, were common. *See, e.g.*, FOGEL, WITHOUT CONSENT OR CONTRACT, *supra* note 50, at 151-152 (there was no large-scale breeding of slaves).

This focus ignores the fact that forced breeding was common to slavery, but through a different

their sex, were potential, if not actual, willing and unwilling participants in chattel breeding, it is equally indisputable that African American women were forcibly used by their masters for sex and that this represented one way in which they were forced to reproduce.

Given that the courts have found that Congress intended the Thirteenth Amendment to prohibit anything with the characteristics of chattel slavery and that there is ample evidence that the sexual exploitation of women slaves was a recognized evil of the chattel slavery system, coerced sexual services, whether for pleasure or profit, should be considered as falling within the scope of the involuntary servitude prohibition. This is true even though there are no explicit references in the debates on the Thirteenth Amendment to a specific intention to protect female slaves from sexual exploitation.

To understand this, one must recognize that members of Congress did not need to recite the particulars of the evils of slavery to justify the Amendment. This can be explained by placing the debates in historical context. By the time of the debates, slavery had existed as a legal institution for almost two hundred years. Attempts to abolish it or to protect it had been common to the nation's politics for many years.[53] By the mid-eighteen hundreds, the abolitionist movement and the question of whether slavery should be abolished pervaded the American consciousness.

Pamphlets,[54] books[55], newspapers[56] and speeches[57] provide a glimpse

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method: the wide-spread rape of female slaves by masters and others. Although there is no estimate of the "increase" created in this manner, there is such overwhelming evidence that it took place with frequency that the numbers must have been high. *See* Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 26 ("[Black women] . . . performed a reproductive function which was crucial to the economic interests of the slaveholders."); OCTAVIA ALBERT, THE HOUSE OF BONDAGE OR CHARLOTTE BROOKS AND OTHER SLAVES 72, 120 (1988) (Slave named Hattie had three children by master's son. Slave was daughter of the master and was sold to other slaveholder "to be his kept woman"); *Frederick Douglass Discusses Slavery, in* A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 309, 313 (Herbert Aptheker ed., 1951) (On December 8, 1850, Frederick Douglass stated, "more than a million women . . . through no fault of their own, [are] consigned to a life of revolting prostitution . . . slave breeding is relied upon . . . [e]very slaveholder is . . . a guilty party . . . he deserves to be held up before the world as the patron of lewdness . . ."); SLAVE TESTIMONY, *supra* note 50, at 156, 221, 400, 474-475, 506, 540, 703 (slave testimony on sexual exploitation of female slaves by slaveholders); LINDA BRENT, INCIDENTS IN THE LIFE OF A SLAVE GIRL, 26-27, 51-66, 82-92 (1861) (autobiographical accounts of her sexual exploitation by her master); L. MARIA CHILD, AN APPEAL IN FAVOR OF AFRICANS 23 (1968) (Reveals sexual exploitation of female slaves and concludes that it is "betrayed by the amount of mixed population"); MELVIN DRIMMER, BLACK HISTORY: A REAPPRAISAL 167 (1968) (instructions from master to agent on treatment of "breeding wenches"); FELDSTEIN, *supra* note 50, at 128-134 (1971) (sexual exploitation of female slaves); FOGEL, WITHOUT CONSENT OR CONTRACT, *supra* note 50, at 181-182 (High rates of slave children with white fathers); FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD, *supra* note 50, at 188-191, 294 (Sexual exploitation of female slaves); GENOVESE, ROLL, JORDAN, ROLL, *supra* note 50, at 413-431 (Sexual exploitation of female slaves); MARTHA GRIFFITH BROWNE, AUTOBIOGRAPHY OF A FEMALE SLAVE 175 (1875) (Recounting a slaveholder saying, "'[b]ut I wants her fur my own use; a sorter private gal . . . .' [h]e gave a lascivious blink . . . . Oh God! . . . Sold! and for such a purpose!").

53. *See generally* DONALD I. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765-1820 (1971). Comments made by James Madison at the Constitutional Convention on July 14, 1787 indicated Madison's view that the "real difference" between the North and the South was "[t]he institution of slavery and its consequences." *Id.* at viii.

54. See PAUL FINKELMAN, SLAVERY IN THE COURTROOM: AN ANNOTATED BIBLIOGRAPHY OF AMERICAN CASES (1985), in which the author provides a six-page list of pamphlets used as sources for

into the content of the public debate. It is in these works and not Congressional debate that one finds evidence of the conditions of slavery. These conditions were known to the public and the Thirty-Ninth Congress when it decided to abolish the legal institution of African-American chattel slavery. Within this context, members of Congress did not need to describe what they sought to abolish. The word "slavery" itself evoked a shared national consciousness of its horrors, including sexual exploitation for the pleasure of slave-owners and their financial benefit. Even if Congress did not explicitly state that the Thirteenth Amendment prohibited the sexual exploitation of African-American women, it is highly likely that they knew this was one of the consequences of the chattel slavery system.

To fully understand the potential reach of the Thirteenth Amendment's prohibition, it is best to dispense, if only for a minute, with the mind's attempt to define slavery and to permit the soul to explore the horror of what it meant to be owned as human property. The owner of human chattel could freely use this human property as she or he would any other piece of property, animate or inanimate. Although there were some legal sanctions against certain egregious acts, such as unjustified murder of a slave, they were seldom enforced and had little if any impact on slaveholders' conduct.[58] Their freedom was essentially unbridled.

As important as legal ownership was, the slaveholders' belief in their moral right of ownership, in their natural superiority, and in the African-Americans' natural inferiority provided the justification for daily degradation and subjugation. Thus, the system of American slavery is best understood as the absolute control by white slaveholders over all aspects of the lives of their slaves. This is not to diminish the ways in which the slaves manifested their free will, but rather to acknowledge the legal right and the power of the slaveholders to attempt to break it and to supplant it with their own. Understood in this way, the concept of the servitude contemplated by slavery as being just like that exchanged by the free worker for wages becomes absurd. The owner of humans was free to demand whatever she or he pleased, and what pleased was not confined to existing market equivalents. Thus, along with forced economic production and domestic tasks, with their obvious counterparts in the free wage-labor system, came other personal services such as sex and

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the bibliography and the title page from the SLAVE RIOT AND TRIAL OF ANTHONY BURNS (1854), a pamphlet recounting the trial of Anthony Burns, a fugitive slave, and the public reaction to the enforcement of the Fugitive Slave Act. *Id.* at ii, xiii-xix.

55. *See, e.g.*, HARRIET BEECHER STOWE, UNCLE TOM'S CABIN (Alfred Kazin ed., Bantam Books 1981) (1852). *Uncle Tom's Cabin* was the "greatest fiction success of the nineteenth century." *Id.* at vii.

56. DOCUMENTS OF UPHEAVAL: SELECTIONS FROM WILLIAM LLOYD GARRISON'S *THE LIBERATOR*, 1831-1865 (Truman Nelson ed., 1966). William Lloyd Garrison was a well known abolitionist who published *The Liberator*, one of the most widely circulated of the abolitionist newspapers.

57. *See, e.g.*, Frederick Douglass' speech of Dec. 8, 1850, *supra* note 52; *see generally* FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM (1855).

58. DANIEL J. FLANIGAN, THE CRIMINAL LAW OF SLAVERY AND FREEDOM: 1800-1865 at 145-167 (1987).

reproduction.

Furthermore, there were services demanded through coercion that should be categorized as such, but which are more typically thought of as aspects of the coercion itself. For example, splitting families,[59] removing children, controlling food, water, medical care, movement, formal education, religion, and familial affiliation are all coercive techniques. They involve services of the body, mind, heart and spirit, all outside the bounds of the free marketplace, but completely and legitimately within the private sphere of the master/slave relationship. Viewed in historical context, the concept of the servitude embodied in the Thirteenth Amendment is an expansive one with roots in both the public and private spheres.

Congress recognized that the system of absolute control existing in slavery flowed from the legal status of slaves as chattel. Thus, when Congress prohibited slavery, it started from the premise that one person should not be permitted by law to own another. But Congress also recognized that, even without the imprimatur of the state, an evil similar to slavery could exist. The system of chattel slavery provided proof of the abuses springing from the actual ownership of, or the belief in the right of domination over, other human beings. The nature and level of coercion used against slaves was violent and horrific. It included deprivation, beatings, maimings, whippings, rape, murder, torture, starvation and the ever present threat of any or all of them. In addition, it included the constant threat and actual separation of mothers from children and other family members from one another.

Congress sought to abolish not just slavery, but the characteristics of slavery created through coercion. Thus, in adopting the Thirteenth Amendment, Congress not only forbade the legal ownership of human chattel (slavery) but prohibited anyone from treating another as if such ownership existed (involuntary servitude). The Thirteenth Amendment sought to preserve the tenet of free will and prohibited the use of coercion sufficient to break it.

B. *Lives as Cases: Involuntary Servitude*

In the previous section, I argued that Congress knew of both the economic and social aspects of slavery as well as slavery's parallels to the husband/wife relationship. In this section I examine criminal involuntary servitude cases which were prosecuted under the federal criminal statutes enacted to implement the Thirteenth Amendment.[60] By looking at these cases, I seek to reveal both

59. Families were divided for different reasons. The sale of slaves away from their families was often used as punishment. Upon the death of a master and distribution of the estate, slave families were separated. *See, e.g.*, M'Vaughters v. Elder, 4 S.C.L. (2 Brev.) 307, 314 (1809), in which the court stated that the children of both slaves and horses were to be treated as the "increase" of animals and therefore as part of the estate to be distributed among the heirs.

60. This article focuses exclusively on cases prosecuted under criminal statutes enforcing the Thirteenth Amendment because they provide the most detailed guidance to conditions, caused and maintained through threats of or actual physical violence, found sufficient to constitute involuntary servitude. These cases share

the nature of the master/servant relationships and the servitudes coerced that are regarded as within the scope of the Amendment. The courts have addressed explicitly the issue of whether certain servitudes have been provided "involuntarily." But they have been silent as to why the master/servant relationship before it or the servitude coerced were "servitudes" contemplated by the Thirteenth Amendment. The effect of this has been that "involuntary servitude" has been discussed by the courts as a unitary concept. To collapse the two words in this way, however, elides their distinct meanings and obscures their significance. A review of the criminal involuntary servitude cases reveals that when treated as a unity, involuntariness becomes the focus of judicial inquiry and servitude is ignored. As a result, free will and its negation have been the focus of the last half century of criminal cases enforcing the Thirteenth Amendment. So while these cases clarify the kinds of conditions as well as the legal standard that will satisfy the first element of "involuntariness," a discussion of the kinds of services that have been accepted by the courts to satisfy the requirement of the second element "servitude" is absent. Thus, this section begins with an examination of the legal standard of coercion and then turns to a review of the salient facts which have been found implicitly to constitute a servitude prohibited by the Thirteenth Amendment.

In 1987, the United States Supreme Court granted certiorari in *United States v. Kozminski*,[61] "to resolve the conflict among the Courts of Appeals on the meaning of involuntary servitude for the purpose of criminal prosecution under § 241 and § 1584."[62] In fact, the inquiry was limited to the types of coercion embraced by the definition of the word "involuntary." The case was only tangentially concerned with the services provided by those held in involuntary servitude. The boundaries of the debate were drawn by the Second and Ninth Circuits as to whether physical force, legal coercion, or threats of either were required to render a service involuntarily provided[63] or whether psychological coercion alone was sufficient.[64] Judge Friendly for the Second

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with battering cases the use of force by a private individual against another. Other cases in which practices have been alleged to violate the Constitution's prohibition against involuntary servitude, but not the criminal statutes, typically involve circumstances that are non-violent and concern legal coercion. *See, e.g.*, Garcia v. United States, 421 F.2d 1231, 1232 (5th Cir. 1970) (ordering taxpayers to pay taxes and penalties to United States government does not violate the Thirteenth Amendment), *cert. denied*, 400 U.S. 945 (1970); Wicks v. Southern Pacific Co., 231 F.2d 130, 138 (9th Cir. 1956) (union security agreements creating "closed shops" do not violate the Thirteenth Amendment), *cert. denied sub nom.* Wicks v. Brotherhood of Maintenance of Way Employees, 351 U.S. 946 (1956); United States v. United Mine Workers, 89 F. Supp. 187, 190 (D.C. 1950) (anti-strike injunctions do not violate the Thirteenth Amendment); Trustees of California State Colleges v. Local 1352, San Francisco Fed'n of Teachers, 13 Cal. App. 3d 863, 867 (1st Dist. 1970); Jefferson County Teachers Ass'n v. Board of Educ., 463 S.W. 2d 627, 630 (Ky. Ct. App. 1970) (teachers anti-strike laws do not violate the Thirteenth Amendment), *cert. denied*, 404 U.S. 865 (1971); Clark v. Clark, 278 S.W. 65, 68 (Tenn. 1925) (court order to pay alimony does not violate the Thirteenth Amendment); Turner v. Unification Church, 473 F. Supp. 367 (R.I. 1978) (cult "brainwashing" does not constitute involuntary servitude), *aff'd*, 602 F.2d 458 (2nd Cir. 1979).

61. 487 U.S. 931 (1988).

62. *Id.* at 939.

63. United States v. Shackney, 333 F.2d. 475 (2nd Cir. 1964).

64. United States v. Mussry, 726 F.2d. 1448 (9th Cir. 1984).

Circuit had held in *Shackney* that threats of or actual physical coercion were required to support a finding of involuntary servitude, while Judge Reinhardt for the Ninth Circuit had held in *Mussry* that psychological coercion alone could be sufficient to break another's will.

In *Shackney,* Judge Friendly concluded that the use or threatened use of law or physical coercion, such as beatings and physical barriers to leaving, were essential to a finding of slavery or involuntary servitude.[65] He concluded that there was insufficient evidence of such coercion where a farmer recruited and paid for the transportation of a man and his family from Mexico to work on his farm.[66] Once on the farm, the family lived in a corrugated metal shed without lights, heat or plumbing.[67] The farmer isolated the family on the farm. Although the man ran errands in town for the farmer, the man and his family were not permitted to come and go freely. The farmer threatened them with deportation, belittled their work and according to the man and his family created an atmosphere of fear sufficient to make them believe that they could not leave and that they must continue to work for the farmer.[68] The key factors missing from this portrait were physical violence or threats of physical violence and physical barriers to leaving.[69] The Court rejected the threat of deportation as a threat of the use of legal sanction because it was merely the threat to send the workers back to their country of origin and there was no evidence that somehow this would be equivalent to "imprisonment or worse."[70] Judge Friendly reversed the conviction and held unequivocally that without evidence of physical or legal coercion there could be no involuntary servitude.[71]

For the next twenty years, there was no significant departure from Judge Friendly's coercion formula requiring at least threats, with the apparent ability to carry them out, or the actual use of legal sanction or physical harm. Then the Ninth Circuit in *Mussry*,[72] departed from the other circuits and concluded that psychological coercion could be just as effective at breaking another's will.[73] It reversed the dismissal of all counts of the indictment not supported by allegations "that the defendants used, or threatened to use, law or force."[74] The Court of Appeals did not make factually clear where threats or use of force or legal sanction were missing, and it provided only a general description of the living conditions of those alleged to have been held in involuntary

65. 333 F.2d at 486-87.
66. *Id.* at 486, 477-78.
67. *Id.* at 478.
68. *Id.* at 479.
69. *Id.* at 486.
70. *Id.*
71. *Id.* at 487.
72. 726 F.2d. 1448. The defendants were indicted under U.S. CONST. amend. XIII, 18 U.S.C. §§ 371, 1581, 1583, 1584. 726 F.2d. at 1450.
73. *Id.* at 1455-56.
74. *Id.* at 1450.

servitude.[75]

In *Mussry*, the defendants had recruited Indonesians, none of whom spoke English, to come to the United States to work as undocumented workers in their homes. The defendants paid the servants wages higher than those they would have received in Indonesia, but far below the United States minimum wage. The defendants withheld the servants' passports and return airline tickets and required them to work to pay off the costs of their transportation to the United States. The servants worked fifteen hours per day, seven days per week, cleaning, cooking, massaging, and performing other services. All lived in the defendants' homes. While some left the homes apparently without retaliation, others made no attempt to leave.[76] Apparently, viewing the government's claims in the context of the psychological climate created by the defendants, the court of appeals found these allegations sufficient to warrant the indictment. In interpreting the scope of the term "involuntary servitude" as included in the Thirteenth Amendment and Section 1584, the court concluded that "[a] holding in involuntary servitude 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 labor."[77] To determine whether the coercion, however caused, was sufficient to break another's will, the Court advised that one had to ask whether the coercion would have had that effect on a "reasonable person of the same general background and experience."[78] Thus, rather than limiting coercion to prescribed forms, the Court looked at the totality of the circumstances and then employed a modified objective standard.

Writing for the majority in *Kozminski*, Justice O'Connor adopted the requirement of threats of or actual physical or legal coercion and rejected the *Mussry* court's psychological coercion standard.[79] In *Kozminski*, two mentally-retarded men had worked on the Kozminski's dairy farm, one since 1967 after he had been picked up by Mrs. Kozminski when she found him walking along the side of the road, and the other since the early 1970s, when Mr. Kozminski found him in a nearby city.[80] Both men had worked on the farm seven days a week, seventeen hours per day. At first they were paid fifteen dollars per day; later they received no pay at all. The trial court found that the farm family and their other hired hands physically and verbally abused the men, and that the men lived in squalid conditions without adequate food, housing, clothing or medical care. Furthermore, the men were isolated. They were not permitted to talk to other people, including their relatives. They could

75. *Id.* at 1453-54.
76. *Id.* at 1454.
77. *Id.* at 1453.
78. *Id.*
79. 487 U.S. at 952-53.
80. *Id.* at 934-35.

not leave the farm and remained there until another worker contacted county officials and they were placed in adult foster care.[81]

The Supreme Court, in holding that the use or threatened use of physical or legal coercion is a necessary element of involuntary servitude under the Thirteenth Amendment and its enforcing statute Section 1584, rejected the position that the term prohibited "the compulsion of services by any means that, from the victim's point of view" leaves the victim with no alternative but to serve.[82] The Court noted that if psychological coercion alone were sufficient to establish the element of involuntariness, the determination of the sufficiency of the coercion would be entirely subjective, dependent solely on the defendant's state of mind. Such a purely subjective standard, reasoned Justice O'Connor, would make ambiguous the nature of the conduct criminalized; individuals could become the victims of arbitrary prosecution and would have no certainty as to what conduct was expected of them. The Court suggested that a standard allowing for the subjective experience of psychological coercion could criminalize "a broad range of day-to-day activity."[83] It provided as an example that a parent who threatened to withdraw affection from a child unless she or he agreed to work in the family business would be prosecutable under the Thirteenth Amendment's criminal enforcing statutes.[84] Interestingly, this example suggests an expansion of the Thirteenth Amendment into private family relationships with market attributes.

Justice Brennan concurred in the judgment in an opinion joined by Justice Marshall.[85] Justice Brennan advocated an alternative position: that the involuntary servitude clause prohibits any means of coercion that succeeds in breaking another's will such that she or he is reduced to a condition of servitude resembling that of a chattel slave.[86] While he found psychological coercion alone to be too broad, he reasoned that a standard combining coercion with conditions similar to those of chattel slavery would be sufficiently limited and capable of evaluation by a jury. This "comport[ed] better with the evident intent of Congress."[87] Curiously, when Brennan provided factual examples of why the psychological coercion test alone was too broad, he included examples of services that were clearly outside of the employer/employee context:

> [o]ne can . . . imagine troublesome applications of that test such as . . . the religious leader who admonishes his adherents that unless they work for the church they will rot in hell, or the husband who relegates

81. *Id.*
82. *Id.* at 949.
83. *Id.*
84. *Id.*
85. *Id.* at 953 (Brennan, J., concurring).
86. *Id.* at 962-64.
87. *Id.* at 953.

> his wife to years of housework by threatening to seek custody of the children if she leaves. Surely being unable to work in one's chosen field, suffering eternal damnation, or losing one's children can be far worse than taking a beating, but are all these instances of involuntary servitude?[88]

Brennan suggested that the scope of the Thirteenth Amendment was broad enough to encompass several kinds of relationships, including that of husband and wife. One can draw this conclusion because it was not the relationships with which Brennan was concerned, but rather with the term "servitude." Brennan noted that servitude is qualitatively different than service; the former "denotes a relation of complete domination and lack of personal liberty resembling the conditions in which slaves were held prior to the Civil War."[89]

Despite the clarity of this statement, Brennan's opinion as to what the Thirteenth Amendment could permit is unclear. After the above statement, he uses the word "labor," which can be interpreted as referring to public sphere labor; then, he repeats his broad definition of servitude; finally, he includes in a footnote that "slave-like conditions can presumably . . . be contrasted with the conditions normally implicated by 'the right of parents and guardians to the custody of their minor children or wards.'"[90] Despite this ambiguity, it appears as if Justice Brennan did not restrict the Thirteenth Amendment to the public sphere, because in his view the conditions of servitude, rather than the sphere or relationship in which they occurred, were more important to the determination of whether the Amendment applied. The conditions had to be slave-like and, for purposes of Section 1584, had to include the intent to coerce others to perform a service involuntarily.[91]

Justice O'Connor rejected Brennan's formula, arguing that it did not provide the degree of certainty that the majority favored.[92] Her reasoning, however, focused only on the ambiguity of the coercion, not of the servitude. Thus, through *Kozminski* the Court implicitly ratified previous cases in which involuntary servitude had been based upon physical or legal coercion or threats of either, but left open the question of whether the Thirteenth Amendment servitudes could include traditional private-sphere "familial" relationships.

A review of relevant cases provides further insight into the nature and level of coercion sufficient to establish involuntary servitude, the nature of the services actually provided, and the type of relationship between the coercer and the coerced. In addition, the cases demonstrate two well-settled principles of involuntary servitude: (1) a relationship freely entered into can convert to one of involuntary servitude, and (2) where the level of coercion meets the

88. *Id.* at 960.
89. *Id.* at 961.
90. *Id.* at 962-63 & n.10, quoting Robertson v. Baldwin, 165 U.S. 275, 282 (1897).
91. *Id.* at 964-65.
92. *Id.* at 951.

legal standard, the mere fact that one held in involuntary servitude does not avail herself or himself of an opportunity to escape does not defeat a finding that the person is held in involuntary servitude. All of these cases involve a successful criminal prosecution under a variety of the Thirteenth Amendment's criminal enforcing statutes. They all include physical violence, threats of physical violence, or threats of arrest or deportation. Two cases involve forced or attempted forced prostitution; one invloves domestic service; the others involve agricultural work.

In the first of the prostitution cases, Aurelia P. Bernal recruited Rosenda Nava, a domestic worker, to work at Bernal's hotel by offering higher wages than she had been receiving.[93] The hotel was a long distance from where Nava was working when Bernal recruited her. When Nava arrived at the hotel, she discovered that it was a house of prostitution and that Bernal expected her to prostitute herself as well as to perform various household services. When Nava refused to prostitute herself, Bernal detained her until she paid off her transportation costs. After noting that Bernal had kept Nava under constant surveillance and had threatened to contact the immigration service to imprison and deport her, and despite citing evidence that Nava was able to leave the hotel to perform errands in town, the Fifth Circuit upheld Bernal's conviction for peonage.[94] The decision was influenced by Nava's relative isolation, in spite of evidence that she had managed to send a note to a relative. For her crime, Aurelia P. Bernal was sentenced to two and one-half years.

In another prostitution case,[95] Joel Thomas Pierce posted bond for female prisoners in exchange for their services and lured others to work for him as waitresses, hostesses, bartenders and prostitutes.[96] He regularly beat the women if they refused to prostitute for him; he did not let them leave; he threatened them with further physical abuse; and he did not clear their debts, no matter how much they worked or earned.[97] Pierce was convicted of seven counts of peonage.[98] He was sentenced to eighteen months imprisonment and a $500 fine for each count. The Fifth Circuit found the evidence of coercion, service, and alleged debt sufficient to support a conviction for peonage, the "status or condition of compulsory service or involuntary servitude based upon a real or alleged indebtedness."[99] The Fifth Circuit thus affirmed the conviction on all but one count.[100]

Domestic service has also led to a conviction under the Thirteenth Amendment. In a 1947 case, Elizabeth and Alfred Wesley Ingalls, the

93. Bernal v. United States, 241 F.2d 339, 341 (5th Cir. 1917), *cert. denied*, 245 U.S. 672 (1918).
94. *Id.*
95. Pierce v. United States, 146 F.2d 84 (5th Cir. 1944), *cert. denied*, 324 U.S. 873 (1945). This case was prosecuted under 8 U.S.C. § 56 and 18 U.S.C. § 444. 146 F.2d at 86.
96. *Id.* at 84.
97. *Id.* at 85.
98. *Id.* at 84.
99. *Id.* at 86.
100. *Id.* at 86.

employers of a domestic worker, were denied a new trial and their conviction for slavery was permitted to stand.[101] For more than twenty-five years, Dora L. Jones, an African American woman, had worked for them as a servant performing all of the household labor, "drudgery of the most menial and laborious type."[102] For most of those twenty-five years she received no wages, no days off, and no vacations. She was given substandard food and accommodation. The Ingalls isolated her from relatives and friends and forbade her to leave the household except on errands. Jones was at times physically abused, and when she protested her living conditions and threatened to leave, Mrs. Ingalls reminded her of the "adulterous relationship" that she had had with Ingalls' first husband.[103] The "relationship" had resulted in pregnancy and Jones had had an illegal abortion. Mrs. Ingalls used this to threaten Jones with arrest and imprisonment and also told her that if she were not sent to prison she would be sent to a mental institution because she was too stupid to make her way in the world. Jones believed all of this and remained "against her free will" until the defendant's daughter convinced her to escape.[104] In the presence of police, the defendant wife renewed her threats to the victim and others who had helped in the escape. Jones believed the threats and returned to the defendant. It is unclear how Jones finally escaped.

Ingalls was convicted at trial of inducing Jones to move to her home, with the intent of keeping her as a slave. The district court denied her motion for a new trial.

The remaining involuntary servitude cases resulting in convictions involved agricultural workers. In 1977, the Fifth Circuit affirmed the involuntary servitude convictions of defendant crew leaders and their employees.[105] The defendants, Ivory Lee Wilson, Roscoe Wilson, and William Bibbs controlled, isolated, and physically abused four men.[106] They controlled where the men lived, what and where the workers ate, and charged the workers for everything they used or ate, thereby keeping them in debt.[107] The defendants forced back at gunpoint two employees who had attempted to escape. The defendants refused to let them leave until they paid off their debts. Others tried to escape, but were captured and beaten. It was a common practice for workers to be beaten and forced to work the next day. After a beating in which his arm was fractured and his back injured, one worker returned to work the following day because he believed he would be killed if he did not. Upholding the involuntary servitude convictions, the court reasoned that even though the employees could have escaped, their fear of being punished, along with the

101. United States v. Ingalls, 73 F. Supp. 76, 79 (S.D. Cal. 1947).
102. *Id.* at 77.
103. *Id.*
104. *Id.*
105. United States v. Bibbs, 564 F.2d 1165 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978). This case was prosecuted under 18 U.S.C. §§ 2, 1584. 564 F.2d at 1166.
106. *Id.* at 1166.
107. *Id.* at 1167.

pervasive physical violence used by the crew leaders, realistically barred escape.[108]

Similarly, the Fourth Circuit upheld the convictions of Tony Booker, the operator of a migrant agricultural labor camp, and J.D. Rollins and Tony Gibson, two of his henchmen, of holding two men in involuntary servitude.[109] The defendants had transported the two workers from another state to the camp. The two men worked intermittently and the defendants withheld all of their wages. The defendants carried and openly displayed guns and severely beat other workers.[110] On one occasion, two men attempted to go to the grocery store without permission. The defendants followed them, beat them with their fists and an axe handle, choked them, cursed at them, and threatened them with serious physical abuse and death if they tried to leave again.[111] Ultimately, the workers left with Farm Workers' Legal Services, but they refused medical attention because of their fear of the defendants.[112]

The Fourth Circuit found that farmworkers were held in involuntary servitude in another case.[113] The defendants, John Harris, Dennis Warren, and Richard Warren, controlled migrant workers in an agricultural labor camp. They guarded the workers at night, returned them to the farm if they tried to escape, subjected them to physical violence to prevent them from leaving or to force them to work faster, and confined them in a "jail" as punishment.[114] One worker died because he was refused medical assistance. The court found that such conditions constitute involuntary servitude.[115]

These cases involving the criminal enforcement of the Thirteenth Amendment reveal the coercion required to establish involuntary servitude. There is no question that physical violence, such as beatings with fists or weapons, or threats of physical violence with the apparent ability through strength or weapons to carry out the threats, constitute sufficient coercion to meet the element of involuntariness. In all of the cases, the person held in involuntary servitude initially entered the relationship voluntarily. In addition, although Judge Friendly[116] found that the apparent opportunity to escape because of the lack of physical barriers indicated a lack of sufficient coercion, all the other cases imply or make explicit that neither physical barriers nor failed escape attempts are required to establish a case of involuntary servitude. In addition, while all of the cases discuss deprivation and isolation as part of the typical context of involuntary servitude, none require these elements to be

108. *Id.* at 1168.

109. United States v. Booker, 655 F.2d 562 (4th Cir. 1981). The defendants were convicted under 18 U.S.C. §§ 2, 1583. 655 F.2d at 564.

110. *Id.* at 563.

111. *Id.* at 563-64.

112. *Id.* at 564.

113. United States v. Harris, 701 F.2d 1095 (4th Cir.), *cert. denied*, 463 U.S. 1214 (1983). Three managers of a migrant labor farm were convicted under 18 U.S.C. §§ 2, 1584. 701 F.2d at 1097.

114. *Id.* at 1098.

115. *Id.* at 1100.

116. United States v. Shackney, 333 F.2d 475 (2d Cir. 1964).

present to find that an individual is being held in involuntary servitude.

II. THE BATTERED WOMAN

A. *History, Society, and Battering*

The battering of women in intimate relationships is an enormous social problem rooted in the patriarchal power of men. While each woman is battered as an individual, her condition is shared by many. The status of womanhood renders her physically and emotionally vulnerable to violence at the hands of the man she loves. In this section, I describe the historical and social context of battering in order to address more fully the question of whether a particular batterer holds his partner in involuntary servitude.

The terms used to name the problem, its victim/survivors, and its perpetrators are varied. Battered women are also referred to as abused women and battering is referred to as domestic violence, family violence, spousal abuse, wife abuse, and wife beating.[117] Because this article is concerned with women who are coerced through physical violence or threats of physical violence to provide services they do not choose to provide, the term battering is used throughout to describe the use of physical violence in an intimate relationship by a batterer to control his partner.[118] Although some experts believe "battering" includes a single slap or shove, the kind of battering explored here is characterized by escalating violence over a period of time, including the degradation and isolation of the woman being battered.

Battering of women by men in intimate relationships is a significant social problem.[119] Studies indicate that from fifty to sixty percent of married

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117. *See generally* JULIE BLACKMAN, INTIMATE VIOLENCE: A STUDY OF INJUSTICE (1989); NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel ed., 1986); MIRIAM HIRSCH, WOMEN AND VIOLENCE (1981); LENORE WALKER, THE BATTERED WOMAN (1979); R. EMERSON DOBASH, VIOLENCE AGAINST WIVES (1979); SUZANNE K. STEINMETZ, THE CYCLE OF VIOLENCE (1977); DEL MARTIN, BATTERED WIVES (1976); ERIN PIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR (1974).

118. *See* WALKER, *supra* note 8.

119. MURRAY A. STRAUS, RICHARD J. GELLES, & SUZANNE K. STEINMETZ, BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY (1980). The authors estimate that battering occurs at some point in 28% of all marriages. *Id.* at 32. They also estimate that 1.8 million married women are battered each year. *Id.* at 40. These estimates are limited to physical battering and do not include cases of psychological abuse. As with estimates of crimes generally, these statistics must be understood as reflecting a much larger number that go unreported.

Sisterhood Is Global describes the problem through the use of multiple statistics that evoke its tragedy, enormity, and social cost:

> Approx. 2 million-6 million women each yr. are beaten by the men they live with or are married to; 50-70% of wives experience battery during their marriages; 2000-4000 women are beaten to death by husbands each yr.; in 1979, 40% of all women who were killed were murdered by their partners . . . 25% of women's suicide attempts follow a history of battery; wife battery injures more US women than auto accidents, rape or muggings; every 18 seconds a woman is beaten by her husband severely enough to require hospitalization (1983). Police spend 1/3 to 1/2 of their time responding to domestic violence calls; 97% of spouse abuse is directed against wives. Battery is a cross-class, cross-race problem.

SISTERHOOD IS GLOBAL 703-4 (Robin Morgan, ed., 1984).

women in the United States experience some form of spouse abuse.[120] Although battering cuts across socio-economic and racial lines,[121] it is often inaccurately perceived as more common in the lower socio-economic class.[122] This presumption stems from the fact that women from this class have fewer resources and are therefore more likely to come to the attention of the legal and social service systems.[123]

Battering results in a range of physical injuries, from slight injuries to those requiring medical treatment or hospitalization, to those ending in death.[124] Nearly one third of the homicides of women are committed by the victim's husband or boyfriend.[125] In addition, because battering may begin with or escalate during pregnancy,[126] physical injuries to the woman can result in other physical harm to the fetus, including premature birth and miscarriage.[127] Battering also often includes violent sexual assaults.[128]

Embodied in the definition of battering is the concept that the batterer is acting violently not only out of rage, but also out of the desire "to coerce [the woman] to do something he wants her to do without any concern for her rights."[129] Thus, from this definition of battering the concept of coerced services emerges. Of course, the exchange of freely given services is part of every relationship. For example, parties to intimate heterosexual relationships, symbolized by the marriage relationship, expect reciprocal services that are commonly gender differentiated. Social norms would have women provide household services, childcare and the cluster of services embodied in the concept of conjugal fellowship: love, affection, sex and reproduction. Reciprocally, norms would have men provide financial security, household maintenance and conjugal fellowship.

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120. ROGER LANGLEY & RICHARD LEVY, WIFE BEATING: THE SILENT CRISIS 12 (1977).

121. U.S. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE FINAL REPORT, U.S. DEP'T OF JUSTICE 11 (1984) [hereinafter TASK FORCE ON FAMILY VIOLENCE REPORT].

122. Dr. F.G. Bolton Jr. takes this position in *The Domestic Violence Continuum: A Pressing Need for Legal Intervention*, 66 WOMEN LAW. J. 11, 13 (1980). *See* Mary E. Combo, *Comment, Wife Beating: Law and Society Confront the Castle Door*, 15 GONZ. L. REV. 171, 175 (1979). *See also* TASK FORCE ON FAMILY VIOLENCE REPORT, *supra* note 121, at 11.

123. *But see* WALKER, *supra* note 8, at 14-16.

124. DOBASH, *supra* note 117, at 238. Table 8 specifies the extent and nature of battered women's injuries.

125. TASK FORCE ON FAMILY VIOLENCE REPORT, supra note 121, at 11 (citing U.S. DEP'T OF JUSTICE, F.B.I., UNIFORM CRIME REPORTS FOR 1983 (1984).

126. WALKER, *supra* note 8, at 51; Richard J. Gelles, *Violence and Pregnancy: A Note on the Extent of the Problem and Needed Services*, 24 FAM. COORDINATOR 81, 81-82 (1975).

127. In some studies, 40% of the battered women interviewed reported being battered during pregnancy. Diane Bohn, *Domestic Violence and Pregnancy*, J. NURSE-MIDWIFERY, March-April 1990, at 86, 88-91 (1990); Judith McFarlane, *Battering During Pregnancy: Tip of an Iceberg Revealed*, 15(3) WOMEN & HEALTH 69, 71-72 (1989).

128. DAVID FINKLHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 6-7 (1985) (one out of ten wives has been sexually assaulted at least once by her husband). DIANA RUSSELL, RAPE IN MARRIAGE, 87-101 (1990); M. Faulk, *Sexual Factors in Marital Violence*, MED. ASPECTS OF HUM. SEXUALITY, Oct. 1977, at 30. At common law a man could not rape his wife. This principle was embodied in the law of rape until very recently. Irene Henason Frieze, *Investigating the Causes and Consequences of Marital Rape*, 8 SIGNS 532, 532-33 (1983).

129. WALKER, *supra* note 117, at xv.

As the third party to a legal marriage, the law formalizes these norms. Divorce cases involving child support and visitation demonstrate the law's gendered expectations.[130] Generally, women are assumed to have provided housework and child care and men are assumed to have provided the bulk of the family income.[131] These normative expectations of intimate hetereosexual relationships are very resistant to change. For example, in households where both husband and wife hold full-time jobs outside the home, the wife continues to shoulder a disproportionate share of the housework.[132] In most relationships these services are provided voluntarily as part of an implicit agreement between partners and, to some degree, there is reciprocity.

While services in most intimate relationships are provided voluntarily, services in battering relationships frequently are not. Although it is impossible to set forth a profile of the typical batterer,[133] these men generally seem to believe more strongly than non-violent men in traditional gender roles. They emphasize a man's right to a woman's services, including sex, and the right to obtain these services through violence.[134] Outbreaks of violence in battering relationships are triggered when the batterer believes that the woman has failed to serve him in the way he deserves and desires. Battered women report battering triggered by trivial events such as forgetting to buy cigarettes or by wanting to watch a different television channel.[135]

These women also report being battered to engage in sexual intercourse and other sexual acts against their will.[136] Ten percent of the women in one survey who had ever been married had been sexually assaulted by their husbands.[137] In another study, one out of every three battered women had been raped by her batterer.[138] Sex is frequently the most significant service in the battering relationship; it becomes symbolic of the man's total domination of the woman.[139] Research on marital rape reveals that it most often occurs "in the context of an exploitative and destructive relationship"[140] and that

130. *See generally* Karen Czapanski, *Child Support and Visitation: Rethinking The Connections*, 20 RUTGERS L.J. 619 (1989).

131. *Id.*

132. *See generally* ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989).

133. *See* DEL MARTIN, BATTERED WIVES 45 (1976) ("[i]n the professional social-science literature, little concrete data on the batterer is to be found.").

134. Del Martin, author of BATTERED WIVES, *supra* note 132, testified before the United States Commission on Civil Rights on battering as an extension of the patriarchal structure of intimate hetereosexual partnerships, such as marriage. U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 5 (1978).

135. FINKELHOR & YLLO, *supra* note 128, at 24.

136. *Id.* at 18.

137. *Id.* at 6-7. *See also* RUSSELL, *supra* note 128, at 57 (reporting that 14% of 644 women who had ever been married reported at least one completed or attempted rape by their husbands or former husbands).

138. RUSSELL, *supra* note 128, at 61.

139. ELIZABETH A. STANKO, INTIMATE INTRUSIONS 9 (1985) ("Women's experiences of . . . battering [and] rape . . . become the sources for documenting all women's actual and potential experiences. . . . In each case, a woman endures an invasion of self, the intrusion of inner space, a violation of her sexual and physical autonomy.").

140. FINKELHOR & YLLO, *supra* note 128, at 18.

the sexual violence is "only peripherally about sex."[141] Between fifty and eighty-seven percent of women who have experienced rape in an intimate relationship such as marriage indicate that they had been sexually assaulted at least twenty times by their partners.[142] In addition, battered women report being forced to submit to sexual acts other than vaginal intercourse. In one study alone, one-third of the women reported forced anal intercourse.[143]

The batterer's belief in a man's right to chastise his partner and to coerce sexual services remains entrenched in the law.[144] The law expects both partners to provide sex and reproductive services. A spouse's refusal to have sex or to have children is a valid reason for divorce or annulment.[145] So central are these services to the marital relationship that one court would not honor an antenuptial agreement where the contracting spouses agreed not to have children, in part because "the right to normal and proper sex relations is implicit in the marriage contract."[146]

Courts will not enforce contracts for sexual services.[147] However, unlike other spousal services, without the invalidation of marital rape exemption laws, a husband can get what amounts to specific performance of sexual services by the use of physical force.[148] While a husband cannot sue a wife for specific performance of her services generally,[149] the legal system, by not allowing a wife to press criminal charges against her husband for rape, de facto supports the husband's right to sexual services within marriage.[150] Due to the

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141. *Id.* Catharine MacKinnon disagrees with this characterization. Instead, she argues that "[s]o long as we say that those things are abuses of violence, not sex, we fail to criticize what has been made of *sex*, what has been done to us *through* sex, because we leave the line between rape and intercourse, sexual harassment and sex roles . . . exactly where it is." CATHARINE MACKINNON, FEMINISM UNMODIFIED 86-87 (1987).

142. FINKELHOR & YLLO, *supra* note 128, at 23.

143. *Id.* at 28.

144. Chastisement in the law is traced to the late 1400s when Friar Cherubino of Sienna in his *Rules of Marriage* instructed husbands that when a wife committed an offense against her husband, he should "[s]cold her sharply, bully and terrify her. And if this still doesn't work . . . take up a stick and beat her soundly . . . ." Thereafter, laws throughout Europe made women the property of their husbands. By the 1700's Blackstone wrote, "[f]or, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children . . . ." 1 WILLIAM BLACKSTONE, COMMENTARIES 443.

145. HOMER CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, §13.3 at 504 (2d ed., Student ed. 1988).

146. Height v. Height, 187 N.Y.S.2d 260, 262 (N.Y. App. Div. 1959).

147. Marvin v. Marvin, 557 P.2d 106 (Cal. 1976); Lovallo v. Guerrera, No. 093735, 1991 WL 61420 (Conn. Super. Ct. April 11, 1991); Thomas v. La Rosa, 400 S.E.2d 809 (W. Va. 1990).

148. Judge Scalera, in granting a husband's motion to dismiss an indictment for the rape of his wife of the New Jersey Superior Court, recognized this when he wrote, "Rape subjugates and humiliates the woman, leaving her with little retaliatory capability save that provided by law . . . ." State v. Smith, 372 A.2d 386, 390 (Essex County Ct. 1977).

149. Courts refuse to order specific performance in any labor contract precisely because of the Thirteenth Amendment's prohibition against involuntary servitude. Arthur v. Oakes, 63 F. 310, 317-318 (7th Cir. 1894); Beverly Glen Music, Inc. v. Warner Communications, Inc., 224 Cal. Rptr. 260, 261 (Cal. Ct. App. 1986)(citing Poultry Producers v. Barlow, 189 Cal. 278, 288 (1922)).

150. As of 1986, over thiry-five states maintained some form of the marital rape exemption. Nearly one quarter of the states regarded unmarried cohabitors as married for the purpose of the marital rape exemption. Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99

overwhelming gender specificity of rape as a crime of violent sexual domination of women by men, there is no specific performance analogy for women, even though they are equally entitled to the husband's sexual services. While sex and reproduction are entitlements in marriage, the husband is in the unique position of being able to enforce the entitlement through violence. It is not surprising then that many battered women are subjected to forced sex and that the batterers view sex as an essential service of right.[151]

Despite the law's recent movement toward recognizing the equality of women, cultural beliefs about men's rightful domination over women persist.[152] While sexual coercion is an excellent example of this domination, it is not the only one. The inability of many battered women to escape their abusive situations is another powerful manifestation of the batterer's belief in his right to coerce his victim. In one study, 68% of the battered women reported feeling trapped.[153] In addition, batterers seek out battered women wherever they go, even when they have attempted to terminate the relationship and have moved out of the shared residence. In fact, many marital rape cases involve rapes committed after the parties have stopped living together.[154] These phenomena, as well as the rate at which temporary restraining orders are violated, demonstrate that batterers believe that their rights of domination over the women they batter should not be interfered with, even by the law.[155]

Battering is not simply violence, it is violence used as a tool to effect total domination of a woman by a man. Thus, it is common to find that the most basic aspects of battered women's lives are controlled. For example, batterers often attempt to control the woman's access to others by isolating her.[156] This ranges from stopping women from seeking medical care to prohibiting them from seeing family members. The attempts to dominate a woman can take many forms, from controlling access to food or money to threatening children with abuse. Battered women are threatened by their batterers with the loss of their children through custody battles or removing the children to unknown places.[157] The cumulative effect of all of these coercive techniques is to reinforce the ultimate power of the man over the woman.

The following accounts of three battered women's experiences provide

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HARV. L. REV. 1255, 1260 (1986). *See infra* note 237 and accompanying text.

151. RUSSELL, *supra* note 128.

152. *See* STRAUS, GELLES & STEINMETZ, *supra* note 119, at 242.

153. Suzanne Prescott & Carolyn Letko, *Battered Women: A Social Psychological Perspective*, *in* BATTERED WOMEN 72, 84 (Maria Roy, ed., 1977).

154. Shunn v. State, 742 P.2d 775 (Wyo. 1987); State v. Smith, 426 A.2d 38 (N.J. 1981); People v. Liberta, 474 N.E.2d 567 (N.Y. 1984).

155. *See generally* Gary R. Brown, *Battered Women and the Temporary Restraining Order*, 10 WOMEN'S RTS. L. REP. 261 (1989). For a discussion of the limitations of protection orders, see Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43 (1989).

156. *See, e.g.*, MARTIN, *supra* note 133, at 84.

157. Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991).

specific examples of the patterns described above. They have been selected to illustrate the degree to which particular battered women are subjected to ongoing abuse, including the coercion of services in a context of degradation and subjugation. These stories detail cases of involuntary servitude.

B. *Lives as Cases: Battering*

1. *Judy Norman*[158]

Judy and John Norman were married for twenty-five years and had five children.[159] Five years after they were married, John Norman began beating his wife and forcing her to work as a prostitute to support them. When she begged him not to force her to work, he beat her. If she failed to earn the $100 per day that he required of her, he beat her. In fact, he beat her almost every day for twenty years using a variety of implements ranging from his fists to a baseball bat. When Judy was pregnant with their last child, he beat her and kicked her down a flight of stairs. The child was born prematurely the next day. In addition to the beatings, John used other physical and psychological torture. He extinguished cigarettes on Judy's skin, refused to let her eat for days at a time and regularly called her a "dog," a "bitch" and a "whore." To degrade her he made her bark and eat pet food out of the pet bowls and sleep on the concrete floor. He frequently threatened to kill her, to cut her breast off and to cut her heart out.[160]

Whenever Judy tried to leave, he found her, took her home and beat her. She believed that she could not escape and feared his retaliation for her attempts. In the twenty-fifth year of their marriage, Judy shot her husband dead while he was napping. The events immediately preceding his death demonstrate his coercion of her and her provision of services to him. Given the history of battering in their relationship, it is possible to speculate that these events were characteristic of the abuse.

Thirty-six hours before his death, John forced Judy to prostitute herself.[161] He came to the place where she was working, beat her with his fists, slammed her into the car door and threw hot coffee in her face. That night he was arrested for drunk driving and kept overnight in jail. When he was released he went home and beat Judy throughout the day. He forced her to make him a sandwich and he then threw it on the floor and ordered her to make another one. She made a second sandwich and he did the same, ordering her not to touch the next one. She made a third sandwich and carried it to him

158. State v. Norman, 366 S.E.2d 586 (N.C.Ct. App. 1988), *rev'd*, 378 S.E.2d 8 (N.C., 1989) (All subsequent references are to the North Carolina Court of Appeals decision, 366 S.E.2d 586).

159. 366 S.E.2d at 587.

160. *Id.* at 587-88.

161. *Id.*

with a paper towel, but he took it and smeared it in her face.[162]

That evening the police responded to a domestic violence report and found Judy bruised and crying.[163] She told the police that John had been beating her throughout the day. They advised her to take out a warrant, but she told them that she was afraid that he would kill her if she did. Later that evening, she took an overdose of drugs. John would not permit the emergency medical personnel to treat her, and a police officer had to intercede to have her taken to the hospital. John told Judy that she deserved to die and that he would give her more pills to make her die. He also threatened to kill her mother and grandmother.[164]

Judy went to the hospital but spent the night at her grandmother's house.[165] She returned home the next day. Again, John beat her throughout the day. He forced her to drive him and his friend on an errand. While she was driving he slapped her, poured a beer on her head, kicked her in the side of the head, and threatened to "cut her breast off and shove it up her rear end."[166] After they returned home, he continued the beating, smashed food in her face, put a cigarette out on her chest, threatened to cut her throat, to cut off her breast, and to kill her. He forced her to lie on the floor and he lay down on the bed to nap. After he fell asleep, one of their daughters entered the bedroom and asked her mother to take care of her baby. When the baby began to cry, Judy became alarmed that it would wake up John, so she got up and took the baby to her mother's house. There she found a gun, returned to the house and shot John.[167]

Two experts testified in her criminal trial as to whether Judy Norman fit the profile of a battered woman. One testified that this case went beyond battering and had become "torture, degradation and reduction to an animal level of existence, where all behavior was marked purely by survival . . . ."[168] The expert testified further that Judy believed that escape was impossible.[169] The expert found her situation to be much like that of a prisoner of war and that she justifiably believed that the only way to escape to protect herself was to kill him.[170] The second expert testified that Judy suffered from "abused spouse syndrome" and that she reasonably believed that it was necessary for her to kill her batterer to ensure her own survival.[171]

Judy Norman was indicted for first degree murder. She was convicted at trial of voluntary manslaughter and was sentenced to six years in prison. The

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162. *Id.*
163. *Id.*
164. *Id.* at 588.
165. *Id.*
166. *Id.*
167. *Id.* at 588-89.
168. *Id.* at 589.
169. *Id.*
170. *Id.*
171. *Id.*

North Carolina Court of Appeals granted a new trial, but the Supreme Court reversed, characterizing her fears as "indefinite . . . concerning what her sleeping husband would do at some time in the future."[172]

2. *Pamela Fielder*[173]

Pamela and Darwin Fielder had been married for three years when Pamela Fielder shot her husband.[174] They had both worked throughout their marriage, and they had no children. Darwin Fielder was an obstetrician/gynecologist and Pamela was a real estate broker with her own business. The marriage was characterized by escalating physical and sexual abuse.[175]

At the start of their marriage, Pamela consented to "playful" sexual "bondage and discipline" games.[176] However, after a short period of time, the severity of the sado-masochistic games grossly exceeded the level to which she willingly consented.[177] Darwin converted a utility closet in their house into a torture chamber equipped with rings with which to shackle his wife. He used handcuffs, shackles, leather straps, metal rings, pinchers, bull rings, a discipline helmet, a metal collar, a leather hood, a bullwhip, a riding crop, a gag, and a chair that fit over the head so that a person could defecate onto the wearer's face. To force Pamela to engage in the sado-masochistic acts, he injected her with drugs. While she was in a drugged state, he pierced her genitals with a ring and hung her from large metal rings, nude, shackled and tied.[178] In addition to the use of drugs, he threatened her with the knowledge that if he chose to, he could perform a vulvectomy on her as he allegedly had on another woman.[179] When she refused to comply with his sexual requests, he hurt her physically and once left her hanging in the utility closet, unclothed and shackled for an entire day. When she hid some of the sexual equipment, he beat her and threatened to kill her if she told anyone of his activities. When she threatened to leave him, he told her that there was no place that she could hide where he could not find her.[180]

Several months before Pamela killed her husband, he agreed to a divorce under the condition that he maintain complete control over the process in order to ensure that she would not reveal his sexual proclivities or his coercive

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172. 378 S.E.2d 8, 14 (N.C. 1989).

173. Fielder v. State, 683 S.W.2d 565 (Tex. Ct. App. 1985), *rev'd* 756 S.W.2d 309 (Tex. Crim. App. 1988).

174. 756 S.W.2d at 310.

175. *Id.*

176. *Id.* at 311.

177. The Court stated, "[t]hese games . . . crossed into the realm of what would clearly be, to the average person, a nightmare of sado-masochism." *Id.*

178. *Id.*

179. *Id.* at 314.

180. *Id.* at 311.

sexual conduct.[181] He ordered her to use the same attorney as he did and to consult the attorney only in his presence. On the day before she killed him, she went to see another attorney. On the attorney's advice, she returned to the house and packed the equipment to take to the attorney's office. She was so terrified, however, that she left the equipment packed in the closet.[182]

The next day she went to her husband's new apartment to discuss the divorce.[183] There she discovered that he was having an affair. She returned to their house and he followed. Enraged, he ordered her to fix him a drink, and she refused. They fought, and she told him that she had gone to see another attorney. He panicked, assuming that she had told the attorney about his sexual practices, and ran for the utility closet. She ran for the back door, but he caught her and pushed her onto the floor screaming, "I've told you; I've told you," meaning that he would kill her for revealing his sexual conduct to the attorney.[184] He reached into a cabinet, pulled out Pamela's pistol, and banged it down on the table toward her.[185] She grabbed the gun, he moved toward her, and the gun went off. He got his hands around the pistol and it fired seven times, killing him.[186]

Pamela Fielder was convicted of voluntary manslaughter and sentenced to two years in prison.[187] The prosecution asserted that she willingly participated in the sexual activities and that she killed her husband not in response to physical and sexual abuse, but rather in a jealous rage upon discovering that her husband was having an affair.[188] She was not permitted to introduce expert testimony on the battered woman syndrome at trial. The appellate court held that, given Pamela Fielder's history of physical and sexual abuse, it was reversible error to exclude expert testimony by a psychologist regarding the reasonableness of her fear.[189] The Court of Criminal Appeals subsequently reversed her conviction due to the exclusion of this testimony and remanded for a new trial.[190]

3. *Sheri Boyd*[191]

From the beginning of his relationship with Sheri Boyd, Earl Boyd was

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181. *Id.*
182. *Id.* at 311-312.
183. *Id.* at 312.
184. *Id.*
185. *Id.* Pamela Fielder testified, "I knew [this meant] he was going to kill me." *Id.*
186. *Id.* at 310.
187. *Id.*
188. *Id.* at 313. The Court noted that "[t]he State's entire case was devoted to depicting [Pamela Fielder's] version of the facts and of her role in her marriage to Darwin as implausible." *Id.*
189. *Id.* at 321.
190. *Id.*
191. The woman whose life is revealed here requested that pseudonyms be used to protect her identity and those of her children. The facts presented here are from a Petition for Post-Conviction Relief. A copy of the Petition along with Ms. Boyd's affidavit with all identifying information deleted is on file with the author.

possessive, jealous, and physically abusive.[192] He began to slap her very early in their relationship. In January 1977, Sheri Boyd became pregnant, but because of Earl's abusive behavior she did not marry him until July 1977. The day they were married, Earl told Sheri, "You're mine now, bitch." From that point on, both his possessive and violent behavior increased drastically.[193]

His possessive behavior manifested itself in a variety of ways. He isolated Sheri from her family and friends by not allowing her to see them, to talk with them or to correspond with them.[194] He forced Sheri to stay in the house unless she was out with him. He insisted that she keep her eyes averted when riding with him in the car, so that she could not look at men on the street. He constantly accused her of seeing other men and called the house eight times a day to be certain she was there. He controlled her in other ways as well. He forced her to dress the way he wanted, did not permit her to wear make-up, fixed her hair and did not allow her to go to the obstetrician until she was seven months pregnant.[195]

Over the course of their relationship his physical abuse of her became more intense and occurred more often.[196] He slapped her, hit her, and shoved her into walls, leaving bruises. He often carried out his physical attacks against Sheri during drinking binges. In her eighth month of pregnancy, she and her daughter by a previous marriage, attempted to move in with her mother to escape Earl's beatings. Her mother refused and advised her to make her marriage work. The abuse, however, continued. Once, Earl held his gun to her head and pulled the trigger over and over again. The gun was empty, but Sheri did not know it at the time.[197] On another occasion, in a mad rage, he forced open the bedroom door that Sheri had locked to protect herself.[198] Earl's abuse was not only directed at Sheri, but also at to her five year-old daughter.[199] He verbally assaulted the child and kept her isolated from the rest of the family by making her eat in a separate room, away from everyone else.

Earl was also extremely sexually abusive.[200] He often forced Sheri to cut him with objects, to watch pornographic movies, and to engage in sexual acts that were painful and degrading. Once, he jammed his thumb into Sheri's shoulder leaving a permanent indentation and scar. He also forced her to engage in public acts of degradation, such as dressing up in a black bikini and high heels to serve as a party hostess for his friends.[201]

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192. Petition at 5.
193. *Id.*
194. *Id.* at 6.
195. Affidavit at 3, 5.
196. Petition at 5.
197. Affidavit at 2.
198. Petition at 5.
199. *Id.* at 6.
200. *Id.*
201. *Id.*

In addition to this abuse, Earl Boyd initiated and frequently repeated a murder-suicide ritual with his loaded gun.[202] He would begin by telling Sheri that, if the two of them died together, they would be together forever. She would then beg him not to kill them and, eventually, he would set the loaded gun down and walk away. He then would order Sheri to bring him the gun. She routinely obeyed him, and he would unload it. This ritual occurred throughout their marriage, but happened more frequently during the six weeks after their son's birth. During that six-week period, Earl Boyd started to extend the death threats to their newborn son and to Sheri's daughter. In those last weeks, he threatened to take his life and the lives of his family two or three times a week.[203]

One day he initiated this ritual with several significant deviations.[204] It began with Earl arguing about money for Christmas and escalated to the point where he pulled out his gun and threatened to kill Sheri and the children. This time however, he deviated from the ritual and cocked the gun. Sheri got down on her hands and knees and begged him not to kill them. Eventually, he put the gun down on the living room floor. He then called to Sheri to bring him his gun to unload; when she brought him the gun, he did not exhibit the relative calm that he usually did at the end of the ritual. Rather, he reinstated the argument over the Christmas money and demanded the cocked gun. Sheri was so disoriented by his renewed anger that she was unable to determine whether he intended to unload the gun or to kill them all. When she handed him the gun, it went off.[205] He died shortly thereafter. His ability to isolate Sheri had been so complete that there were no witnesses to his violence. When the ambulance arrived the day he was shot, the next door neighbor, having no idea that Sheri had given birth six weeks earlier, assumed that Sheri had gone into labor.[206]

Sheri Boyd was convicted of first degree murder in 1978 and is currently serving a sentence of life imprisonment.[207] No evidence of her abuse was adduced at trial and accordingly no theory of self-defense was presented to the jury.[208]

III. BATTERING AND THE THIRTEENTH AMENDMENT

A. *Lives and Legal Doctrine*

In this section I compare the lives of the three battered women described

202. *Id.* at 6-7.
203. *Id.*
204. *Id.*
205. Affidavit at 6.
206. *Id.* at 3.
207. Petition at 1.
208. *Id.* at 20-26.

in the previous section to those lives described in the criminal involuntary servitude cases. Through this process I seek to reveal the similarities between the cases which were found to violate the criminal prohibitions against involuntary servitude and those of these three battered women. Ultimately, I argue that the similarities are legally significant.

Judy Norman was beaten and threatened by her husband regularly over a twenty-year period. His techniques of control included physical torture, ranging from the infliction of physical pain to the control of basic needs such as eating and sleeping. He also used psychological abuse to degrade her. When she attempted to escape he found her, beat her, and forced her to return. A comparison of the level of physical violence in this case to that found in the involuntary servitude cases demonstrates that the violence used against Judy Norman was equal to or greater than the level of violence or threats of violence that has been determined sufficient to break another's will.

John Norman used these techniques throughout the marriage to force Judy Norman to work as a prostitute and to give him the money she earned. In the battering incident immediately preceding John Norman's death, he forced her to perform domestic services for him as well. Forced prostitution is within the scope of the Thirteenth Amendment, at least where the service is not provided directly to the coercer, but is instead used as a means of generating income. As discussed previously, there are two cases of criminal involuntary servitude in which the service provided was prostitution.[209] There is also a case in which the services provided were domestic in nature.[210] Although there is not a recounting of the domestic services performed by Judy Norman over the years, it is reasonable to conclude, given what we know about expectations of services in marriage generally and in battered women's marriages specifically, that she performed at least some domestic services for her husband involuntarily as a result of his coercion of her.[211]

While the similarities between Judy Norman's case and the involuntary servitude cases are evident, Pamela Fielder's case presents less immediately clear analogies. At first glance, the nature of the coercion used by her husband appears atypical of the involuntary servitude cases. Pamela Fielder was shackled, locked in a room, injected with narcotics, and threatened with maiming, and ultimately, death. Upon a closer examination, however, the shackles and other mechanical restraints, as well as the use of the utility closet as a place to confine her, have their equivalents in the involuntary servitude cases.

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209. Bernal v. United States, 241 F. 339 (5th Cir. 1917), *cert. denied*, 245 U.S. 672 (1918) and Pierce v. United States, 146 F.2d 84 (5th Cir. 1944), *cert. denied*, 324 U.S. 873 (1945).

210. United States v. Ingalls, 73 F. Supp. 76, 79 (S.D. Cal. 1947).

211. To speculate in this way about what a particular battered woman did in her relationship is justified in light of the sociological study completed by Arlie Hochschild in which she finds that the overwhelming majority of women, battered or not, provide domestic services to their husbands and families. *See* HOCHSCHILD, *supra* note 132, at 276 and accompanying text.

The use of these tools both coerced and restrained Pamela Fielder no less than the beatings, weapons and the use of the "jail" in the involuntary servitude cases. The various forms of restraint, the maiming and threats of maiming, the use of narcotics, and the threats of death created a context within which the attempt to escape would appear to a reasonable person to be extremely risky. In the involuntary servitude cases, courts have clearly considered the context of fear created by threats of and actual use of physical violence and restraint, to explain why the victim did not seize opportunities to escape.[212] Although none of the criminal involuntary servitude cases have addressed directly whether narcotics are considered a weapon, it is reasonable to conclude that where they are used as a physical means of coercion, and thus serve the same function as a weapon, they will be legally recognized as such.

Finally, Darwin Fielder's threat to maim his wife was clearly one that he had the ability and power to carry out. While no criminal involuntary servitude case has dealt precisely with maiming or threats thereof, the concept of physical coercion is sufficiently broad to include such conduct. Although some of Darwin Fielder's threats to kill were not accompanied by the presence of a weapon, the involuntary servitude cases embrace the idea that the context within which the threat occurs can render the threats as coercive as if they had been accompanied by a weapon.[213] Thus, the threats and physical coercion used against Pamela Fielder would meet the standard of conduct applied in the involuntary servitude cases.

The services provided involuntarily by Pamela Fielder as a result of the coercion are more difficult to reconcile with the criminal involuntary servitude cases because her services were entirely sexual and she provided them directly to her husband for his pleasure. Pamela Fielder's case is distinguishable from the two involuntary servitude cases involving prostitution, as the women in those cases were forced to have sex with men other than their batterers for profit. While the cases of both Judy Norman and Pamela Fielder force a direct confrontation with Congress' original intent that the Thirteenth Amendment not disturb the traditional rights of husband over wife, Judy Norman's case comes closest to the two prostitution cases. In contrast, Pamela Fielder involuntarily provided sex to her husband—exactly the kind of coercion found in marital rape, which still is not universally recognized as a legal wrong.[214]

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212. U.S. v. Harris, 701 F.2d 1095 (4th Cir. 1983).

213. See West, *supra* note 12, at 93, 97-101, in which she discusses the context of fear within which battered women live. West argues that the "near-universal response to the pervasive fear with which a battered woman lives is to redefine herself as a giving rather than a liberal self." *Id.* at 99. The giving self is "other-regarding" rather than "self-regarding and rational. Women who define themselves in this way "consent to transactions, changes, or situations . . . so as to satisfy not their own desires or to maximize their own pleasure, as liberal legalism and liberal legal feminism both presume, but to maximize the pleasure and satiate the desires of others . . ." *Id.* at 93. A battered woman "consents to everything, absolutely, and at all levels of being, and she does so for the subjectivity of the other, and the survival of herself." *Id.* at 99.

214. This argument is dealt with in more detail in the discussion of the judicial reasoning supporting the abrogation of the marital rape exemption. *See infra* text accomanying notes 232-47.

Given the history of coerced sexual services in slavery, however, and the resulting argument that such services should be included in the definition of involuntary servitude, it follows that the services Pamela Fielder provided should also fall within the definition of servitude. The growing abrogation of the marital rape exemption further supports this position.

Another issue focused sharply by the Fielder case is whether Pamela Fielder's voluntary entry into marriage and initial voluntary participation in the sexual conduct should preclude a claim of involuntary servitude. The reasoning of the courts in the involuntary servitude cases is uniform on this point: even though a service is provided initially of one's own free will, once the coercion meets the legal standard to render one's service involuntary, there is a claim of involuntary servitude. Accordingly, while at the beginning of her marriage Pamela Fielder participated in the sexual acts voluntarily, at some point her participation became involuntary. A similar issue regarding the transformation of voluntary sex to involuntary sex is at the heart of the marital rape exemption.

Sheri Boyd's case raises many of the issues also raised in the previous two cases. For example, the level of coercion used against her ranged from threats to the use of a loaded gun. That range of coercive behavior is clearly sufficient to render her conduct involuntary. In addition, like Pamela Fielder, she was forced to engage in sexual acts against her will.

Two significant aspects of Sheri Boyd's case distinguish it from those of the other two women. First, while Judy Norman was forced to work as a prostitute for money, Sheri Boyd was forced to degrade herself publicly by dressing in a bikini and heels to entertain her husband's friends. Second, Sheri Boyd's case is distinguished by the extent to which her husband isolated her and controlled basic personal decisions in her life that the rest of us take for granted. Both isolation and control, as demonstrated through the criminal involuntary servitude cases, are frequently important coercive techniques that serve not only to intimidate, but also to discourage escape. Furthermore, such isolation and control are in themselves servitudes, because they require an individual to give up basic rights of personal choice for another's pleasure.

In each of these battered women's cases, the level and nature of coercion either equals or exceeds the coercion in the involuntary servitude cases. The domestic and sexual services which the women in these cases provided for profit have direct counterparts in the modern involuntary servitude cases, while coerced sex for the batterers' pleasure does not. Rather, support for the inclusion of coerced sex derives from the fact that the prohibition against involuntary servitude legitimately includes this form of sexual exploitation, in part because sexual exploitation of slave women directly by their masters was characteristic of chattel slavery.

It must also be explored further whether it is legitimate to continue to limit the legal theory of involuntary servitude to market relationships in the public

sphere. While it must be acknowledged that Congress did not intend the Thirteenth Amendment to reach into the private sphere of the family, it must also be recognized that African-American chattel slavery, the likes of which Congress sought to abolish through the Thirteenth Amendment, was not simply a public-sphere market relationship. Both the laws of husband and wife and of master and slave involved private-sphere relationships sharing similarities that Congress understood. Given that contemporary law treated women and family relationships as completely outside the public sphere, Congress' absolutism is historically comprehensible.[215] The law has changed, however. Just as the relationship between slave and master was both an economic and a private social relationship, there is now support for the theory that the intimate relationship between a man and a woman has both public economic and private personal aspects. Finally, the reasons justifying the exclusion of the marital relationship from the Thirteenth Amendment's prohibitions are anachronistic.

B. *Irrelative Dichotomies: Public and Private Spheres/Intimate and Stranger*

1. *Market Attributes of Intimate Relationships*

In this section I develop further the dichotomy of the public and private spheres described in the discussion of the historical and social context within which Congress inscribed the words "involuntary servitude" into the text of the Thirteenth Amendment. In the previous section the dichotomy was relevant to Congress' simultaneous recognition and denial that the Thirteenth Amendment could be interpreted as reaching into the marital relationship. Here, in this first subsection, I demonstrate that the dichotomy is irrelevant in light of market attributes of intimate relationships such as marriage.

The distinction traditionally drawn between the private and public spheres is that the private sphere is comprised of familial non-market functions separate from the market economy, while the public sphere is comprised of marketplace, non-familial functions separate from family relationship. This distinction blurs when viewed through the lenses of a variety of economic and legal theories. As has been illustrated previously, the perspective that the Thirteenth Amendment applies only to economic relationships in the public sphere is based on the historically inaccurate characterization of slavery as a purely economic system. This illustrates an initial weakening in the interpretation of the Thirteenth Amendment as a purely public sphere prohibition.

A second weakness is the inaccuracy of the traditional characterization of

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215. *See* Olsen, *supra* note 26, at 1510 ("the assertion that family affairs should be private has been made by men to prevent women and children from using state power to improve the conditions of their lives.")

the family structure as purely private with no public sphere economic dimension. This characterization is as inaccurate as the previously discussed characterization of slavery as purely public. This section elucidates some of the public sphere aspects of the non-wage services performed within the family that are essential to the market economy to demonstrate the illogic of the argument that the relationship should be excluded from the Thirteenth Amendment's scope because it is not of the public sphere. It also explores two ways in which the law turns to the public-sphere market to find equivalents to services provided within the private sphere. The categorization of slavery and the family into the two distinct spheres is a matter of analytic convenience and does not necessarily reflect reality.

Economists have long argued that the marital relationship and the unpaid services provided within in it by women are central to a capitalist economy and are as much a part of the profit-generating work of the public sphere as the work of the husband in the marketplace.[216] The central argument supporting the theory that unpaid household services have economic value is found in economic critiques of the exclusion of such work from the Gross National Product (GNP). As early as the 1910s, economists began to analyze the effect of unpaid non-market work performed by women in the home on the GNP.[217] They found the calculation of the GNP to be inherently inaccurate because of the exclusion of women's non-market work. They posited that the calculation is flawed because when women enter the market and receive wages which are included in the GNP, there is no calculation on the other side of the ledger noting the loss in value of the services provided previously at home. In other words, these economists theorized that the GNP is inflated whenever women enter the paid workforce because there is no subtraction of the "forgone nonmarket services." [218]

Economists of this school argue that these non-market services should be measured by calculating the value of the forgone opportunity of working in

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216. *See generally* Margaret Bentson, *The Political Economy of Women's Liberation*, *in* FROM FEMINISM TO LIBERATION 199-210 (Edith H. Altbach ed., 1971); Jean Gardiner, *Women's Domestic Labor*, 89 NEW LEFT REVIEW 47 (1975); Joan Landes, *Wages for Housework: Subsidizing Capitalism?*, QUEST: A FEMINIST QUARTERLY, Fall 1975, at 17.

217. JUANITA KREPS, SEX IN THE MARKETPLACE: AMERICAN WOMEN AT WORK 67-68 (1971). The GNP is the measure of the goods and services produced for purchase during a one-year period. Professor Kreps, drawing from an address given by Sylva M. Gelber to the Canadian Department of Labour in 1970 entitled "The Labour Force; the GNP; and Unpaid Housekeeping Services," reviews proposals to include unpaid domestic work in the GNP. In 1918 the National Bureau of Economic Research estimated the value of services performed by "housewives" at one-fourth of the GNP. In the 1930's, Simon Kuznets found the value to be "slightly" more than one-fourth. During the same period, "Swedish economists" proposed valuing the work of wives and daughters by determining what domestics would be paid to provide the same services. Other economists deplored the exclusion of household services from the GNP. In 1959, Colin Clark proposed a method of imputing the value of such work in COLIN CLARK, THE ECONOMICS OF HOUSEWORK: BULLETIN OF THE OXFORD INSTITUTE OF STATISTICS 20 (1958), *cited in* KREPS at 67-68. *See also* GARDNER ACKLEY, MACROECONOMIC THEORY 55 (1961) (claiming that the exclusion was the "source of a serious bias in the national product.") Finally, Professor Kreps notes that a 1968 study placed the value "at about one-fourth of the GNP." *Id.* at 68.

218. KREPS, *supra* note 217, at 66.

the marketplace for wages and that this should be reflected in the GNP. The opportunity costs represent the wages that a rational person would choose to forego to pursue the occupation of homemaker. These "opportunity costs" are calculated for an individual woman by adding the number of hours she spent in providing non-paid services and multiplying it by the average wage earned by a woman of that particular age, education and employment history. The aggregate "opportunity cost" of all women performing nonmarket services is calculated by adding the number of hours spent in providing services multiplied by the average wage earned by all women in particular age, education and employment history categories multiplied by the total number of women in non-market household work.[219] Economically, the aggregate opportunity costs represent the contribution of women to the market economy through their unpaid domestic labor.

A woman's uncompensated services within the home inure to the benefit of her husband's employer and the economy generally, as well as to the economic and social well-being of the individual family unit. Women's private sphere labor has market value separate from the GNP calculation, albeit unrecognized and uncompensated. The employer benefits through the increased job performance due to the wage-earner's ability to concentrate on the job rather than on the other demands of maintaining a home and raising children. The economy benefits because money that would be paid to purchase these services can be saved by the family and would be available in the economy for investment. According to this theory, the woman benefits ultimately in that her standard of living rises along with the husband's greater earning power.[220]

In keeping with the economic theories that services provided within the home have market value there are legal theories based on the assumption that unpaid household services have economic value. Tort law recognizes damages for domestic services and loss of consortium,[221] and equitable distribution in divorce law demands that monetary value be attributed to a homemaker's unpaid services.[222] Under either of these theories market equivalents must be established for these services.

Tort law is unique in recognizing damages for the loss of sexual and relational services as well as household services.[223] Typically such damages are sought in wrongful death actions or in cases of serious injury to a spouse.

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219. Kreps notes that "[m]any questions can be raised regarding the foregoing calculations, not the least of which are questions of the method and the validity of the data used." *Id.* at 73. She points out that economists in particular would be disturbed by the fact that she did not account for the decrease in wages that would be predicted when greater numbers of women enter the paid labor force.

220. *See id.* at 64-75.

221. WILLIAM L. PROSSER, TORTS 931-934 (5th ed. 1988).

222. Ealey v. Ealey, 596 A.2d 43 (1991); Mary Downey, *The Need to Value Homemaker Services Upon Divorce*, 87 W. VA. L. REV. 115 (1984).

223. Dini v. Naiditch, 170 N.E.2d 881 (Ill. 1960); Lewis v. Hughes Helicopter, 220 Cal. Rptr. 615 (Cal. Ct. App. 1985); Medley v. Strong, 558 N.E.2d 244 (Ill. App. Ct. 1990).

Other than sexual and relational services, most services performed by women within the private sphere have paid equivalents in the marketplace.[224] Evidence as to the market equivalents of the various services provided by a woman guide the calculation of "replacement costs" by the courts. The replacement costs are calculated by determining the cost of hiring others to perform the tasks of the full-time homemaker.[225] Although services such as sex and reproduction have their counterparts in prostitution[226] and surrogacy,[227] the courts typically do not turn to the market value of these for guidance, but rather speculate as to their worth in computing damages for loss of a wife or husband.[228] That the market provides equivalents for non-paid work within the private sphere delegitimates the distinctions drawn between the private and the public spheres based on whether the work within it is compensated or not.

In diverse ways and for diverse reasons, women's non-market work has been the focus of efforts to attribute market value to it retroactively. Equitable distribution is in fact retroactive or delayed compensation for a homemaker's work. The property settlement is vested in the discretion of the judiciary,[229] which usually distributes the marital estate according to the contribution of the parties, including the contribution of domestic services by the homemaker.[230]

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224. KREPS, *supra* note 217, at 67-8. Kreps points out that some work such as "companionship, attention, interest in the family's welfare, [and] continuity of relationship with young children" are difficult to attach a monetary value to.

225. Nancy R. Hauserman, *Homemakers and Divorce: Problems of the Invisible Occupation*, 17 FAM. L.Q. 41, 49-51 (1973). Professor Hauserman points out the deficiencies in replacement costs although they apply equally to the flaws inherent in opportunity costs. First, a homemaker provides many varied services simultaneously. Second, the manner in which the task is categorized greatly changes its valuation: babysitting versus early childhood education, short order cook versus chef, grocery shopping versus meal planning by a dietician. Third, services such as love, stability, companionship, and sex are excluded from the valuation. Fourth, fringe benefits are commonly not included. *Id.* at 50-51.

226. Jody Freeman, *The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent*, 5 BERKELEY WOMEN'S LAW JOURNAL 75, 84 n.49 (1990). Freeman quotes the English Collective of Prostitutes position "that 'for some women to get paid for what all women are expected to do for free is a source of power for all women to refuse *any* free sex.'"

227. *See, e.g.*, In re Baby M, 537 A.2d 1227 (N.J. 1988).

228. For example, in New York, plaintiffs in wrongful death actions can recover only "fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought." N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (McKinney 1981 & Supp. 1992). One New York court, in grappling with the value of a father's relationship to his children, stated, "I know of no mathematical formula which I may employ in ascertaining the value of last parental guidance and training." Rogow v. United States, 173 F. Supp. 547, 562 (S.D.N.Y. 1959). Nevertheless, the court was able to determine a "reasonable award" after an examination of the character of the father and the nature of the father and child relationship. *Id.* at 562.

With regard to homemakers, there is wide recognition that the value of a wife and mother is impossible to determine, and courts generally allow compensation in excess of replacement costs. Frances Jean Pottick, Note, *Tort Damages For The Injured Homemaker: Opportunity Costs or Replacement Costs?* 50 U. COLO. L. REV. 59, 67 (1978). *See also* Francis M. Dougherty, Annotation, *Excessiveness or Adequacy of Damages for Personal Injuries Resulting in Death of Homemaker*, 47 A.L.R. 4TH 100 (1986).

229. Hauserman, *supra* note 225, at 48 (citing, Doris J. Freed & Henry H. Foster, *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229, 246 (1981).

230. Hauserman, *supra* note 225, at 48 n.46. Professor Hauserman notes that the Uniform Marriage and Divorce Act, Section 307 on Disposition of Property factors the "contribution of each spouse as homemaker . . . ."

Equitable distribution recognizes the value of a woman's work within the home, compares it to the financial contribution of the wage-earning husband, and attributes a comparative monetary value to it to determine what distribution is equitable.[231]

Retroactive or delayed compensation for non-market work is also part of the social security system which provides women benefits based on their husband's market work. Thus, women who have worked as unpaid homemakers receive social security benefits derivatively from their spouses' earnings records. Thus, just as in equitable distribution, the value of the woman's private-sphere work is linked to the value of her husband's market or public-sphere work. In effect, both equitable distribution and social security benefits demonstrate the degree to which the dichotomy drawn between the public and private spheres based on contributions to the economy are false.

Finally, there is an argument that governments should compensate women for the work they do in their homes, thereby recognizing the contributions of their labor to the economy. While such radical notions have never been accepted in the United States, they have been adopted in other countries. While it is difficult to imagine that such a policy would be adopted in the United States, it is further evidence that the the public/private distinction is mutable.

2. *Abrogation of Marital Rape Exemption*

In this section, I explore further the false dichotomy of the public and private spheres by examining the traditional marital rape exemption and the trend to abrogate it. By doing so, I attempt to demonstrate in yet another way both the original absurdity of the dichotomy and the current attempts to delegitimize it. I demonstrate that when Congress recognized the legal and factual similarity between slavery and marriage but pushed marriage safely outside the reach of the Amendment, it did so by placing slavery in the public sphere as a market relationship, and marriage in the private sphere. This section argues that in light of the current trend to treat crimes such as rape similarly whether or not they occur within the private sphere, it would be unreasonable to continue to limit the Thirteenth Amendment exclusively to public sphere conduct.

The law has evolved away from treating private sphere crimes, such as battery and rape, differently from those committed in the public sphere. This is due to the change in the social and legal status of women from legal non-entities or chattel into autonomous individuals.[232] This transition in the status of women and the way in which it has altered the legal landscape of the public and private is revealed in the national trend to abrogate the marital rape

231. *See generally* Hauserman, *supra* note 225.

232. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (marriage is a union, but of two indivduals who remain autonomous after marriage); Griswold v. Connecticut, 381 U.S. 479 (1965).

exemption. The marital rape exemption declares rape in marriage to be a legal impossibility.[233] Historically, the exemption was justified on several different legal theories of marriage. One, the chattel theory, was based upon the conversion of a woman upon marriage into her husband's chattel to be used as he willed.[234] The second, the contract theory, was grounded in the belief that a woman contracted away her right to withdraw her consent to sex upon marriage.[235] The third, the unity theory, was premised on the theory that upon marriage a woman's identity merged into her husband's, thereby making rape an impossibility because a man cannot rape himself.[236] Perhaps more than any other change in the treatment of crimes in the private sphere, the change in the law's treatment of marital rape reveals principles for expanding the traditional scope of the Thirteenth Amendment. Those states that have wholly abrogated the marital rape exemption reject the principle that sexual services are a right of marriage and, therefore, when not freely given can be lawfully coerced by force.[237] Declaring coerced sex in marriage a criminal act is based on the same moral grounds as classifying coerced services in marriage as involuntary servitude.

While the marital rape exemption has its roots in the historic subjugation of women, the courts trace the first explicit statement about rape in marriage to Sir Matthew Hale, the Chief Justice of the Court of King's Bench from 1671-1675. On the impossibility of marital rape, he stated, "[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself

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233. *See* Michael D. A. Freeman, *"But If You Can't Rape Your Wife, Who[m] Can You Rape?": The Marital Rape Exemption Re-examined*, 15 FAM. L.Q. 1, 14-16 (1981).

234. *Id.* at 16.

235. Regina v. Clarence, 22 Q.B. 23 (1988) (woman brought husband to court for knowingly infecting her with gonorrhea. She argued that had she known, she would not have consented to sex. The court decided that because rape of one's wife was not unlawful, he could not be convicted); Regina v. Miller, 2 All E.R. 529 (1954) (filing for divorce did not revoke implied contractual consent to intercourse).

236. Warren v. State, 336 S.E.2d 221, 223 (Ga. 1985). *Warren* discusses these three theories of the transformation upon marriage of women's status as alternative justifications for the origination of the marital rape exemption. From a feminist perspective, the recent trend to regard marriage as a contract masks the underlying reality that marriage is still a status relationship with its roots in patriarchal principles.

237. This is not to say that all states have abrogated the marital rape exemption. States that have abrogated the exemption have taken differing approaches. For example, some states take the absolute position that a husband can be found criminally liable for raping his wife, even while they are living together. *See* Smith v. State, 401 S.2d 1126 (Fla. Dist. Ct. App. 1981); Warren v. State, 336 S.E.2d 221 (Ga. 1985); Commonwealth v. Chretien, 417 N.E.2d 1203 (Mass. 1981); People v. Liberta, 474 N.E.2d 567 (N.Y. 1984); NEB. REV. STAT. §§ 28.319, -320 (1989); N.J. STAT. ANN. § 2C:14-5(b) (West 1982); OR. REV. STAT. § 163.305 (1977); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1991); WIS. STAT. ANN. § 940.225(6) (West 1982). Other states take the modified position that a husband can be found criminally liable for rape only when the couple is living separately. *See, e.g.*, VA. CODE ANN. § 18.2-61B (Michie 1988). Other states require that there be a legal separation as well as a physical separation between the husband and wife. *See, e.g.*, IDAHO CODE § 18-6107 (1987). Finally, some states treat co-habiting partners and voluntary social companions as married and therefore covered by the marital rape exemption. DEL. CODE ANN. tit. 11 §§ 761, 773-775. *See* NATIONAL CENTER ON WOMEN AND FAMILY LAW, MARITAL RAPE EXEMPTION (1991). *See also* Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255 (1986).

in this kind unto her husband, which she cannot retract."[238]

Sir Hale made this statement three-hundred years ago without reference to supporting authority, and states that have abrogated the marital rape exemption regard Hale's proposition as anachronistic and as derived from, and limited by, the law of marriage at the time the statement was made.[239] At the time Sir Hale made his pronouncement, neither man nor woman could legally revoke a marriage. However, given the difference in the legal and social status of men and women at that time, men could for the most part alter their marital relationship with impunity. But once married, a woman could neither legally nor practically alter her status and could not, as Sir Hale said, "retract" her perpetual consent to sex with her husband.

To support the abrogation of the marital rape exemption, the courts have recognized that both the legal and social status of women has changed since Hale's time. Marriages throughout the United States are revocable, and if Hale's rule had any validity at the time he articulated it, this has long since eroded.[240] For example, three theories upon which the exemption was based originally are no longer valid. First, women are no longer chattel. Thus, to the extent that the marital rape exemption is based on the husband's right to treat his chattel as he sees fit, the exemption is no longer valid. Second, if a woman can break her marriage contract entirely through divorce, she should be entitled to revoke a particular clause of the contract such as the consent to sex. Third, the unity theory of marriage no longer applies, as women remain autonomous individuals upon marriage.[241] Thus, these theories no longer form a basis for justifying the marital rape exemption.

The invalidity of these theories is further demonstrated by other changes in the law as it affects women. These changes are due in large part to the law's recognition of women as independent human beings with individual rights to make independent choices. Women are no longer compelled by the law to adopt their husband's surnames. In addition, by virtue of the Married Women's Property Acts in the nineteenth century, women gained the right to sue, to be sued, to contract, and to own property. In further recognition of the changes in women's status and the importance of affording them rights of legal redress, interspousal tort immunity is no longer operable in more than half of the

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238. 1 Hale P.C. 629. Sir Hale was the Chief Justice Of the Court of King's Bench, 1671-1675. Sir Hale provided no citation to precedent. The New Jersey Supreme Court, in the case in which it judicially abolished the marital rape exemption, stated:

> Thus the marital exemption rule expressly adopted by many of our sister states has its source in a bare, extra-judicial declaration made some 300 years ago. Such a declaration cannot itself be considered a definitive and binding statement of the common law, although legal commentators have often restated the rule since the time of Hale without evaluating its merits . . . .

State v. Smith, 426 A.2d 38, 41 (N.J. 1981).

239. *Id. See also* Warren v. State, 336 S.E.2d at 223-24 (Ga. 1985).

240. State v. Smith, 426 A.2d 38 at 43 ("[t]he rule may simply not have been applicable to revocable marriages, which exist today . . .").

241. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

states.[242] Rape laws are no longer written to protect the property of husbands or fathers, but rather to protect the physical, emotional, and dignitary interests of the woman. The law is less tolerant of the physical and sexual abuse of women and recognizes that a woman's most fundamental right is the control of her own body, a proposition which obviously extends to control of sex and reproduction.[243] Nowhere is this more pronounced than in the recognition that forced sex is a violation of a woman's privacy because it is a violation of her bodily integrity. This is also true in part because it can result in forced conception.[244] Accordingly, when equal protection challenges have been mounted against rape statutes that are not sex neutral, some courts have found no lack of equal protection where the physiological reality of rape is that men rape women and that only women can become pregnant and thereby be forced to begin the reproductive process.[245] Women's right of reproductive choice has been used to justify the abrogation of the marital rape exemption. The argument is logical: If a woman has the right to decide when to conceive, she

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242. Alabama (Penton v. Penton, 135 So. 481 (Ala. 1931)); Alaska (Cramer v. Cramer, 379 P.2d 95 (Alaska 1963)); Arkansas (Leach v. Leach, 300 S.W.2d 15 (Ark. 1957)); California (Klein v. Klein, 376 P.2d 70 (Cal. 1962)); Colorado (Rains v. Rains, 46 P.2d 740 (Col. 1935)); Connecticut (Silverman v. Silverman, 145 A.2d 826 (Conn. 1958)); Idaho (Lorang v. Hays, 209 P.2d 733 (Idaho 1949)); Indiana (Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972)); Kentucky (Layne v. Layne, 433 S.W.2d 116 (Ky. 1968)); Louisiana (United States v. Haynes, 445 F.2d 907 (5th Cir. 1971)); Massachusetts (Lewis v. Lewis, 351 N.E.2d 526 (Mass . 1976)); Michigan (Mosier v. Carney, 138 N.W.2d 343 (Mich. 1965)); Minnesota (Beaudette v. Franna, 173 N.W.2d 416 (Minn. 1969)); Nebraska (Imig v. March, 279 N.W.2d 382 (Neb. 1979)); Nevada (Rupert v. Stienne, 528 P.2d 1013 (Nev. 1974)); New Hampshire (Morin v. Letourneau, 156 A.2d 131 (N.H. 1959)); New Jersey (Immer v. Risko, 267 A.2d 481 (N.J. 1970)); New Mexico (Maestas v. Overton, 531 P.2d 947 (N.M. 1975)); New York (Weicker v. Weicker, 283 N.Y.S.2d 385 (N.Y. 1967)); North Carolina (Bogen v. Bogen, 12 S.E.2d 649 (N.C. 1941)); North Dakota (Fitzmaurice v. Fitzmaurice, 242 N.W. 526 (N.D. 1932)); Oklahoma (Courtney v. Courtney, 87 P.2d 660 (Okla. 1938)); South Carolina (Fowler v. Fowler, 130 S.E.2d 568 (S.C. 1963)); South Dakota (Scotvold v. Scotvold, 298 N.W. 266 (S.D. 1941)); Texas (Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1977) abrogated immunity for intentional torts); Vermont (Richard v. Richard, 300 A.2d 637 (Vt. 1973)); Virginia (Surratt v. Thompson, 183 S.E.2d 200 (Va. 1971)); Washington (Freehe v. Freehe, 500 P.2d 771 (Wash. 1962)); and Wisconsin (Bodenhagen v. Farmers Mut. Ins. Co., 95 N.W.2d 822 (Wis. 1959)). Other states have limited the immunity: Illinois (Domestic Violence Act provides that spouses may sue one another for intentional torts where there is physical harm. ILL. REV. STAT. ch. 40, ¶ 1001 (1981).

243. Roe v. Wade, 410 U.S. 113 (1973).

244. I do not imply here that the only reason rape is objectionable is because of the possibility of pregnancy, but I do believe it to be a significant result of the intolerable violation of physical and psychological integrity and liberty that is the reality of rape.

245. Some courts apply the standard found in Reed v. Reed, 404 U.S. 71 (1971) to criminal rape statutes that are not sex-neutral to conclude that the classification is based on real differences having a fair and substantial relation to the legislative object. The essential differences are the physical uniqueness of men and women. The language employed by the courts in supporting their decisions reveals judicial recognition that forced sex and reproduction are inextricably linked. State v. Kelly, 526 P.2d 720, 723 (Ariz. 1974) *cert. denied*, 420 U.S. 935 (1975) ("perceiv[ed] no need by males for protection against females from rape. . . ."); Brooks v. State, 330 A.2d 670, 673 (Md. Ct. Spec. App. 1975) (regarded the woman's physical ability to become pregnant as a result of a rape as supporting its claim that "[i]t would be anomolous indeed if our aspirations toward the ideal of equality . . . caused us to overlook our disparate human vulnerabilities."); Stewart v. State, 534 S.W.2d 875, 877 (Tenn. Crim. App. 1976) (concluding that the statute is constitutional as it is "'intended to protect women from unlawful forced sexual intercourse . . . and possible resulting pregnancy . . . . '"); State v. Ewald, 216 N.W.2d 213, 218 (Wisc. 1974) (did not believe it necessary "to engage in a dissertation of the . . . problems as they relate to a woman subjected to . . . a possible pregnancy."). *But see* State v. Smith, 426 A.2d 38 (N.J. 1981) (rape statute criminalizing only rape of women by men violates the equal protection clause).

cannot be forced against her will to risk conception through coerced sex, even by her husband. Ultimately, the courts have justified the end of the marital rape exemption by suggesting that if is not abrogated, women will continue to be the "sexual property of their husbands,"[246] resulting "in a kind of bondage of a wife."[247]

The language justifying the end of the marital rape exemption mirrors language describing involuntary servitude. The article began by acknowledging that the metaphor "women are slaves" is inaccurate. But it has demonstrated that certain battered women are held in involuntary servitude. What are the implications, however, of demonstrating that certain battered women are held in involuntary servitude? This is the subject of the conclusion.

IV. CONCLUSION

Some Congressmen understood that the sweeping statements of the Thirteenth Amendment could be interpreted as reaching into the private-sphere relationship of husband and wife. When they voiced their concerns in an attempt to defeat the Amendment, their concerns were quickly laid to rest by the Amendment's proponents. Thus, intuitive connections were dismissed as absurd. This article has attempted to revalidate those intuitive connections by demonstrating that some women are held in involuntary servitude and should be protected by the Thirteenth Amendment. More remains to be said, however, about the significance and limits of the theory.

Battered women's lawyers could use the theory developed here to plead a violation of a battered woman's constitutional right to be free from involuntary servitude, but given the previously unchallenged assumption that private-sphere conduct was excluded from the Thirteenth Amendment's protection, it is likely that the courts will be resistant. Moreover, one would have to establish that a civil cause of action and remedy could be implied from the language of the amendment itself[248] or from the federal criminal involuntary servitude statute, 18 U.S.C. § 1584.[249] Obviously, testing this theory carries the risks of uncharted territory and the advocate should include all possible theories of liability to avoid any possibility of Rule 11 sanctions.

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246. State v. Smith, 426 A.2d 38 (N.J. 1981).

247. State v. Smith, 372 A.2d 386 (N.J. Super. 1977).

248. In Turner v. Unification Church, 602 F.2d 458 (1st Cir. 1979), the court upheld the district court's determination that a civil cause of action and damages could not be inferred from the Thirteenth Amendment or its criminal enforcing statutes. In affirming, the Fifth Circuit noted that it did not "subscrib[e] to every particular" of the lower court opinion, but agreed with the conclusion that the plaintiff failed to state any claim upon which relief could be granted and "with the substance of its analysis material to that conclusion." *Id.* at 458. Turner alleged that she had been held in involuntary servitude because she had been brainwashed and forced to serve the Unification Church. Because *Turner* raised the issue of a civil cause of action only in the context of psychological coercion, it offers little guidance for cases of involuntary servitude involving coercion by physical violence.

249. In Turner v. Unification Church, the district court incorrecty refers to 18 U.S.C. § 1583, instead of 18 U.S.C. § 1584, as the criminal statute prohibiting the holding of another in involuntary servitude. 473 F. Supp. 367 at 375 (R.I. 1978). 18 U.S.C. § 1583 prohibits the transportation of slaves on vessels.

As to the prosecution of battered women's cases as involuntary servitude, even if the Justice Department, which is responsible for prosecuting cases of criminal involuntary servitude, agreed to seek and then received criminal indictments of battered women's involuntary servitude cases, a battle would be fought before the courts to uphold indictments criminalizing conduct within a private-sphere relationship. In addition, the Justice Department's prosecution would depend on the investigation of the underlying complaint by the Federal Bureau of Investigation (FBI). Even if the FBI agreed to investigate these alleged cases of involuntary servitude, the priority attributed to these cases would no doubt be low. Furthermore, federalizing a crime such as battering, which has always been regarded as a crime within a state's jurisdiction, raises complex issues of law enforcement jurisdiction.[250]

The theoretical implications of demonstrating that some battered women are held in involuntary servitude are vast and complex. Metaphysically, its most significant contribution is to name certain cases of battery more accurately. Battery merely describes being struck as in a "beating."[251] It fails to capture the kind of abuse of power central to the battered women's cases examined in this article. In contrast, involuntary servitude describes the unwilling "subjection to [a] master,"[252] a much more accurate description.[253] This renaming is extremely important as language shapes our knowledge.[254] In addition, by renaming these cases of battering, we begin the important task of understanding that violence in intimate relationships can and often does result in much more than physical and emotional injury; that it is violence with a purpose, and that the purpose is to end another's free will.

Thus, because involuntary servitude thrusts to the forefront issues of domination, subordination, and free will, it permits a theoretical shift in the way in which we think of the issues raised by battering. For example, judges and legal service providers have been trained in the patriarchal perspective of battering consciously used in this article in which the dominance and submission are explained, in part, by gender stereotypes.[255] This

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250. In Turner v. Unification Church, the district court reasoned that where "state law has traditionally addressed such torts as false imprisonment, intentional infliction of emotional distress, assault and battery", there is little "compulsion for the judiciary to erect an additional constitutional cause of action." *Id.* at 374. The Court's reasoning is flawed. There are many civil causes of action within a state's jurisdiction that are also protected by the Constitution. In addition, involuntary servitude is not identical to these state causes of action.

251. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 187 (1981).

252. *Id.* at 2076.

253. *See* West, *supra* note 12, at 86, in which she argues that the first step to understanding the suffering in women's lives is to develop language that captures the truth of women's experience.

254. It is through language and its associations that we invest the world in which we exist with meaning. "Language is socially constructed and a facile manipulator of our understanding rather than a neutral descriptive tool." Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 16 n.44 (1988), (citing Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152, 1167-70 (1985)). For a thorough presentation of literature on the role of language in shaping meaning and knowledge, see *id.* at 1160 n.6.

255. Robson, *supra* note 9, at 579, in which she describes the effects of training that "emphasize[s]

"hetero-patriarchal" view of battering may be accurate in relation to the husband/wife relationship used here, but it is not necessarily accurate in relation to other kinds of intimate relationships in which battering occurs.[256] Perhaps the comparison of battering cases and involuntary servitude cases will be particularly useful because in the involuntary servitude cases, issues of dominance and submission are not gendered; the comparison may therefore have the potential to expand the concepts of dominance and submission.

Other examples are found in battering cases in which the women who are battered are referred to as "victims," a category that is used to describe the whole woman, thereby swallowing the ways in which she is not a victim at all. This kind of encompassing definition of a battered woman's selfhood is nowhere more obvious than in cases in which the battered woman's syndrome is used to describe a woman's view of herself and her inability to control her world. In contrast, the language of victim is seldom used in the involuntary servitude cases, and those held in servitude are generally referred to by their names or by pronouns, not by an ascribed status. Therefore, those held in involuntary servitude are not labeled wholly as victims. The discourse among feminists about whether battered women, as victims, can or should be held responsible for their actions could be informed by an understanding of the role of free will in the involuntary servitude cases, which include in their definition of involuntary servitude the supplanting of the subordinate person's will with the will of the "master." Perhaps through the renaming of some battered women's cases as cases of involuntary servitude, feminists can use this article as a point of departure for exploring whether battered women are perceived as continuing to have free will in situations very similar to those in which the courts have found that the free will of a person being held to involuntary servitude was broken by a level and pattern of physical coercion. This article lays the foundation for such explorations.

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dominant/submissive patriarchal arrangement based on objective criteria such as gender." *Id.* at 579.

256. See Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMPLE L. REV. 511, 513 n.11 (1990), in which the authors advise that "[h]etero-patriarchy is a term preferred by many lesbians as it denotes the structural, systemic, and ideological arrangements that determine women's oppression by men through heterosexuality."