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## Prostitution and Civil Rights

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## PROSTITUTION AND CIVIL RIGHTS†‡

Catharine A. MacKinnon \*

The gap between the promise of civil rights and the real lives of prostitutes is an abyss which swallows up prostituted women.<sup>1</sup> To speak of prostitution and civil rights in one breath moves the two into one world, at once exposing and narrowing the distance between them.

Women in prostitution are denied every imaginable civil right in every imaginable and unimaginable way,<sup>2</sup> such that it makes sense to understand prostitution as consisting in the denial of women's humanity, no matter how humanity is defined. It is denied both through the social definition and condition of prostitutes and through the meaning of some civil rights.

The legal right to be free from torture and cruel and inhuman or degrading treatment is recognized by most nations and is internationally guaranteed. In prostitution, women are tortured through repeated rape and in all the more conventionally recognized ways. Women are prostituted precisely in order to be degraded and subjected to cruel and brutal treatment without human limits; it is the opportunity to do this that is exchanged when women are bought and sold for sex. The fact that most legal prohibitions on torture apply only to official torture,

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1. This discussion focuses on prostituted women and girls as the paradigm case, remembering that boys and sometimes men are also prostituted.
2. This discussion builds upon prior presentations at the conference in which the conditions of women in prostitution were documented. See generally Evelina Giobbe, *Juvenile Prostitution: Profile of Recruitment*, in CHILD TRAUMA I: ISSUES AND RESEARCH 117 (Ann W. Burgess ed., 1992); Evelina Giobbe, *Prostitution: Buying the Right to Rape*, RAPE AND SEXUAL ASSAULT III: A RESEARCH HANDBOOK 143 (Ann W. Burgess ed., 1991); and citations throughout this article.

specifically torture by state actors, illustrates the degree to which the legal design of civil rights has excluded women's experience of being denied them.

Security of the person is fundamental to society. The point of prostitution is to transgress women's personal security. Every time the woman walks up to the man's car, every time the man walks into the brothel, the personhood of women—not that secure in a male dominated society to begin with—is made more insecure. Women in prostitution attempt to set limits on what can be done to them. But nothing backs them up. Pimps supposedly do, but it shows how insecure prostitutes' lives are that pimps can look like security. Nothing limits pimps, and, ultimately, anything can be done to their property for a price. As Andrea Dworkin has said, "whatever can be stolen can be sold."<sup>3</sup> In rape, the security of women's person is stolen; in prostitution, it is stolen and sold.

Liberty is a primary civil right. Kathleen Barry has analyzed female sexual slavery as prostitution one cannot get out of.<sup>4</sup> A recent study of street prostitutes in Toronto found that about ninety percent wanted to leave but could not.<sup>5</sup> If they are there because they cannot leave, they are sexual slaves. Need it be said: to be a slave is to be deprived of liberty, not to exercise it. To lack the ability to set limits on one's condition or to leave it is to lack consent to it. At the same time, liberty for men is often construed in sexual terms and includes liberal access to women, including prostituted ones. So while, for men, liberty entails that women be prostituted, for women, prostitution entails loss of all that liberty means.

The right to privacy is often included among civil rights. In the United States, one meaning privacy has effectively come to have is the right to dominate free of public scrutiny. The private is then defined as a place of freedom by effectively rendering consensual what women and children are forced to do out of the public eye. Prostitution is thus often referred to as occurring in private between consenting adults, as is

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3. See ANDREA DWORKIN, *LETTERS FROM A WAR ZONE: WRITINGS 1976-1989* 229 (1989).

4. See generally KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (1979).

5. ELIZABETH FRY SOCIETY OF TORONTO, *STREETWORK OUTREACH WITH ADULT FEMALE STREET PROSTITUTES 13* (May 1987) ("Approximately 90% of the women contacted indicated they wished to stop working on the streets at some point, but felt unable or unclear about how to even begin this process.").

marriage and family.<sup>6</sup> The result is to extend the aura of privacy and protection from public intervention from sex to sexual abuse. In prostitution, women have no space they can call off-limits to prying eyes, prying hands, or prying other parts of the anatomy, not even inside their own skin.

Freedom from arbitrary arrest is also a civil right. Criminal prostitution laws make women into criminals for being victimized as women, so are arguably arbitrary in the first place.<sup>7</sup> Then these laws are often enforced for bureaucratic, turf-protective, funding, political, or advancement reasons<sup>8</sup>—that is, arbitrarily, against women.

Property ownership is recognized as a civil right in many countries. Women in prostitution not only begin poor, they are systematically kept poor by pimps who take the lion's share of what they earn. They are the property of the men who buy and sell and rent them—placing the civil right, once again, in the hands of their tormenters.

Particularly in the United States, the right to freedom of speech is cherished. Prostitution as an institution silences women by brutalizing and terrorizing them so horribly that no words can form, by punishing them for telling the truth about their condition, by degrading whatever they do manage to say about virtually anything because of who they are seen as being. The pornography that is made of their violation—pimps' speech—is protected expression.<sup>9</sup>

One civil right is so deep it is seldom mentioned: to be recognized as a person before the law. To be a prostitute is to be a legal nonperson in the ways that matter. What for Blackstone and others was the legal nonpersonhood of wives<sup>10</sup> is extended for prostitutes from one man to all men as a class. Anyone can do anything to you and nothing legal will be done about it. John Stoltenberg has shown how the social definition of personhood for men is importantly premised on the

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6. Some think there is a separate civil right to family. Women face losing their children if it is found they are prostitutes. I have never heard of a man losing his children because he was found to be a trick or a pimp.

7. One of the best things about this conference was the relative absence of lawyers and with them the narrow terms and endless posturing of the decriminalization debate, in which harm is recognized to result only from criminal laws against prostitution, almost never from prostitution itself.

8. *See generally* *People v. Superior Court of Alameda County*, 562 P.2d 1315 (Cal. 1977).

9. *See generally* *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

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prostitution of women.<sup>11</sup> Prostitution as a social institution gives men personhood—in this case, manhood—through depriving women of theirs.

The civil right to life is basic. The Green River murders, the serial murders of women in Los Angeles, the eleven dead African-American women who had been in prostitution and were found under piles of rags in Detroit—these acts are “gender cleansing.” Snuff films are part of it. When killing women becomes a sex act, women have no right to their lives. Women in prostitution, along with women cohabiting with men, are the most exposed.

Equality is also a civil right, both equal humanity in substance and formal equality before the law. In the United States, constitutional equality encompasses equal protection of the laws under the Fourteenth Amendment and freedom from slavery or involuntary servitude under the Thirteenth Amendment. Prostitution implicates both.

The Fourteenth Amendment provides for equal protection and benefit of the law without discrimination. What little equality litigation exists in the prostitution context misses the point of their unequal treatment in a number of illuminating ways. Some older prostitution statutes, challenged as sex discriminatory on their face, made prostitution illegal only when a woman engaged in it. For example, Louisiana provided that “[p]rostitution is the practice by a female of indiscriminate sexual intercourse with males for compensation.”<sup>12</sup> Applying the sex discrimination test at the time, the court ruled that “[d]ifferences between the sexes does bear a rational relationship to the prohibition of prostitution by females.”<sup>13</sup> In other words, defining prostitution as something only women do is simple realism. Women really do this; mostly only women do this; it seems to have something to do with

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11. See generally John Stoltenberg, *Male Sexuality: Why Ownership Is Sexy*, 1 MICH. J. GENDER & L. 59 (1993).

12. *State v. DeVall*, 302 So. 2d 909, 910 (La. 1974) (quoting LA. REV. STAT. ANN. § 14:82 (West 1986)).

13. *DeVall*, 302 So. 2d at 913. See also *City of Minneapolis v. Burchette*, 240 N.W.2d 500, 505 (Minn. 1976) (arresting chiefly female violators of prostitution law is a rational way to meet the objective of controlling prostitution). This position has not changed significantly with elevated scrutiny. See, e.g., *State v. Sandoval*, 649 P. 2d 485, 487 (N.M. Cr. App. 1982) (ruling that there is no arbitrary enforcement of prostitution statute under state equal rights amendment); *Bolser v. Washington State Liquor Control Bd.*, 580 P.2d 629, 633 (Wash. 1978) (holding that male and female dancers are equally covered by restrictions on topless dancing, resulting in no violation of state equal rights amendment).

being a woman to do this; therefore, it is not sex discrimination to have a law that punishes only women for doing this.

Here, the fact that most prostitutes are women is not a sex inequality, nor does equating prostitution with being a woman tell us anything about what being a woman means. That most prostitutes are women is the reason why legally defining the problem of prostitution as a problem of women is *not* a sex inequality. Thus does the soft focus of gender neutrality blur sex distinctions by law and rigidly sex-divided social realities at the same time. By now, most legislatures have gender-neutralized their prostitution laws<sup>14</sup>—without having done anything to gender-neutralize prostitution's realities.

The cases that adjudicate equal protection challenges to sex-discriminatory enforcement of prostitution laws extend this rationale. Police usually send men to impersonate tricks in order to arrest prostitutes. Not surprisingly, many more women than men are arrested in this way.<sup>15</sup> The cases hold that this is not intentional sex discrimination but a good faith effort by the state to get at "the sellers of sex,"<sup>16</sup> "the profiteer."<sup>17</sup> Sometimes the tricks are even described by police as the women's "victim."<sup>18</sup> Courts seem to think the women make the money; in most instances, they are conduits from trick to pimp and the money is never theirs.<sup>19</sup> Sometimes the male police

14. *But cf.* *Fluker v. State*, 282 S.E.2d 112, 113 (Ga. 1981) (applying *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981)) (upholding a sex-specific pandering statute based on U.S. Supreme Court recognition of biological differences between the sexes when upholding a statutory rape law). Another strategy for preserving sex-specific prostitution statutes, a two-wrongs-make-a-right rationale, was exhibited in *Morgan v. City of Detroit*, 389 F.2d 922, 928 (E.D. Mich. 1975) (a prostitution statute allegedly selectively enforced against women was found not to ground an equal protection claim because the second section of the challenged ordinance against pimping applied only to males). *Compare Plas v. State*, 598 P.2d 966, 968 (Alaska 1979) (striking a sex-specific prohibition but finding it severable).
15. I am told by women police officers that they loathe being decoys, although some of their work has resulted in spectacular arrests of pillars of the community. No woman should be forced to present herself as available for sexual use, whether as a prostitute or as a police officer ordered to pose as a prostitute as part of her employment.
16. *United States v. Moses*, 339 A.2d 46, 55 (D.C. 1975). Another reason offered for not using women police decoys is that, due to past sex discrimination, there are few or no women to use. *See People v. Burton*, 432 N.Y.S.2d 312, 315 (City Ct. of Buffalo 1980).
17. *People v. Superior Court of Alameda County*, 562 P.2d 1315, 1321 (Cal. 1977).
18. *People v. Nelson*, 427 N.Y.S.2d 194, 195 (City Ct. of Syracuse 1980).
19. Janice Toner, a former prostitute, argued that the money she made as a prostitute

decoys wait to arrest until the sex act is about to happen—or, prostitutes complain, until after it happens.<sup>20</sup>

Another all-too-common practice is arresting accused prostitutes, women, while letting arrested customers, men, go with a citation or a warning.<sup>21</sup> This, too, has been challenged as sex discrimination, and it sure sounds like it. Yet this, courts say, is not sex discrimination because male and female prostitutes are treated alike<sup>22</sup> or because customers violate a different, noncomparable, law from the one under which the women are charged.<sup>23</sup> There are some men in prostitution,

was not income to her because she was merely a conduit to her husband/pimp, who beat and threatened to kill her and their children. The Tax Court rejected the argument, although her husband was convicted of assault in a separate case. *Toner v. Commissioner*, 60 T.C.M. (CCH) 1016, 1019 (1990). The Court found that Toner did not show that her husband's abuse was causally connected to her earning of an income from prostitution and characterized her as an active, voluntary participant in some aspects of the prostitution business. *Id.* at 1021.

20. *State v. Tookes*, 699 P.2d 983, 984 (Haw. 1985) (finding no denial of due process when civilian police agent had sex with woman for money before arresting her for prostitution).
21. *See Superior Court of Alameda County*, 562 P.2d at 1320–23. When both prostitute and customer are male, anecdotal evidence suggests that it is more typical to arrest both. Some cases alleging sex-differential enforcement fail for lack of showing of discriminatory intent. *See, e.g.*, *People v. Adams*, 597 N.E.2d 574, 585 (Ill. 1992); *United States v. Wilson*, 342 A.2d 27, 31 (D.C. Ct. App. 1975). Others fail for lack of proof that men in comparable circumstances are treated differently. *See, e.g.*, *United States v. Cozart*, 321 A.2d 342, 344 (D.C. Ct. App. 1974) (finding that male homosexual prosecuted for solicitation to sodomy failed to prove equal protection violation based on unequal enforcement because “[t]here is no indication in the record . . . as to whether lesbian solicitation was known to the police.”); *State v. Gaither*, 224 S.E.2d 378, 380 (Ga. 1976) (finding no evidence that male prostitutes exist in detectable numbers); *Young v. State*, 446 N.E.2d 624, 626 n.4 (Ind. Ct. App. 1983); *Commonwealth v. King*, 372 N.E.2d 196, 205 (Sup. Jud. Ct. Mass. 1977) (finding no evidence that male prostitutes are not prosecuted); *City of Minneapolis v. Buschette*, 240 N.W.2d 500, 504 (Minn. 1976).
22. *See Superior Court of Alameda County*, 562 P.2d at 1323. *See also Morgan v. City of Detroit*, 389 F. Supp. 922, 928 (E.D. Mich. 1975).
23. One court rejected this decisively in the 1920s:

Men caught with women in an act of prostitution are equally guilty, and should be arrested and held for trial with the women. The law is clear, and the duty of the police is to act in pursuance of the law. The practical application of the law as heretofore enforced is an unjust discrimination against women in the matter of an offense which, in its very nature, if completed, requires the participation of men. . . . As long as the law is upon the statute books, it must be impartially administered without sex discrimination.

*People v. Edwards*, 180 N.Y.S. 631, 635 (Ct. Gen. Sess. 1920). In 1980, the City

most (but not all) prostituting as women. You can tell you have walked into the world of gender neutrality when the law treats men as badly as women when they do what mostly women do, and that makes treating women badly non-sex-based. Of course, compared with customers, prostitutes also more often fail to satisfy the gender-neutral conditions of release: good money, good name, good job, good family, good record, good lawyer, good three-piece suit . . . .

Some states quarantine arrested women prostitutes but not arrested male customers. This, too, is not sex discrimination, according to the courts, because the women are more likely to communicate venereal diseases than the men are.<sup>24</sup> Where the women got the venereal diseases is not discussed; women are walking disease vectors from which men's health must be protected. This was before AIDS, but the reality remains—the recipient of the sperm is most likely to become infected.<sup>25</sup>

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Court of Syracuse, endorsing this reasoning, further rejected the dodge arguing that prostitute and patron are "not similarly situated" for equal protection purposes because they violate separate sections of the penal code. That court found that "the only significant difference in the proscribed behavior is that the prostitute sells sex and the patron buys it. Neither gender nor solicitation is a differentiating factor." *People v. Nelson*, 427 N.Y.S.2d 194, 197 (City Ct. of Syracuse 1980) (finding no evidence of intent to discriminate, therefore no discrimination shown). One court upheld a gender-neutral prostitution law from equal protection attack by pointing out that "[w]hat would be prostitution for a female would be equally prohibited and punished as lewdness for a male." *State v. Price*, 237 N.W.2d 813, 815 (Iowa 1976), *appeal dismissed*, 426 U.S. 916 (1976). It was apparently inconceivable that a male could be a prostitute. Most courts that have considered sex-differential enforcement challenges on equal protection grounds have relied, for rejecting them, on the distinction in statutes under which prostitutes and patrons fall. *See, e.g., Matter of Dora P.*, 418 N.Y.S.2d 597, 604 (N.Y. App. Div. 1979) (prostitution and patronizing a prostitute are discrete crimes making differential treatment of women and men under them not discriminatory); *Commonwealth v. King*, 372 N.E.2d 196 (Sup. Jud. Ct. Mass. 1977) (finding that the lack of a statute against patronage does not violate equal protection rights of prostitutes). *See also Garrett v. United States*, 339 A.2d 372 (D.C. Ct. App. 1975) (holding that a state's failure to require corroboration in prostitution cases, although requiring it in homosexuality cases, is not unconstitutional sex discrimination because it is not based on gender). A ray of reality is provided by one recent ruling holding that women's equality rights were violated when female performers, and not male patrons, were selectively prosecuted for sexual activity at a private club. However, it was important to the ruling that the sexes were "similarly situated" because the women and the men could have been charged under the same statutory provision. *See generally State v. McCollum*, 464 N.W.2d 44 (Wis. Ct. App. 1990).

24. *See Superior Court of Alameda County*, 562 P.2d at 1323.

25. *See Reynolds v. McNichols*, 488 F.2d 1378, 1383 (10th Cir. 1973) (finding no equal protection violation in arresting only the prostitute when she is regarded as "the potential source" of venereal disease and the customer is not).



These cases represent the extent to which equal protection of the laws has been litigated for prostitutes.<sup>26</sup> The disparity between the focus of this litigation and the civil rights violations inherent in prostitution is staggering. Behind the blatant sex discrimination these cases rationalize is the vision of equality they offer prostitutes—the right to be prostituted without being disproportionately punished for it. As unprincipled as the losses in these cases are, if they had been won, this is the equality they would have won.

Criminal laws against prostitution make women into criminals for being victimized as women, yet there are no cases challenging these laws as sex discrimination on this ground. Criminal prostitution laws collaborate elaborately in women's social inequality;<sup>27</sup> through them, the state enforces the exploitation of prostituted women directly. When legal victimization is piled on top of social victimization, women are dug deeper and deeper into civil inferiority, their subordination and isolation legally ratified and legitimated. Disparate enforcement combines with this discriminatory design to violate prostituted women's Fourteenth Amendment right to equal protection of the laws.

This is not to argue that prostitutes have a sex equality right to engage in prostitution. Rather, prostitution subordinates and exploits and disadvantages women as women in social life, a social inequality which prostitution laws then seal with a criminal sanction.

The argument to decriminalize trafficking women has no such support. Disadvantage on the basis of sex directly supports strict enforcement of laws against pimps, who exploit women's inequality for gain,<sup>28</sup> and against tricks, who benefit from women's oppressed status

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26. One significant departure from this line of cases, from the standpoint of equality analysis, is represented by the Seventh Circuit's invalidation of a strip-search policy for prostituted women only, which ignored "similarly situated males." This policy was found not to be validly based on gender and therefore in violation of the equal protection guarantee under current standards of scrutiny. *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273–74 (7th Cir. 1983). *See also White v. Fleming*, 522 F.2d 730 (7th Cir. 1975) (finding that a statute prohibiting female, but not male, bar-employees from sitting or standing at or behind the bar violates equal protection).

27. As Margarer Baldwin has stressed to me, part of the complexity of this situation is that jail sometimes provides comparative safety for the women, and the criminal status of prostitution provides some barrier to recruitment and validation for the women's sense of violation. These concerns could be met without making women criminals.

28. For a vivid description of the inequality between pimp and prostitute, see Dorchen Leidholdt, *Prostitution: A Violation of Women's Human Rights*, 1 CARDOZO

and subordinate individual women skin on skin.

Beyond eliminating discriminatory criminal laws and enforcing appropriate ones, it is time the law did something *for* women in prostitution. Getting the criminal law off their backs may keep the state from reinforcing their subordinate status but it does nothing to change that status. The Thirteenth Amendment, which applies whether or not the state is involved, may help.

The Thirteenth Amendment prohibits slavery and involuntary servitude. It, and its implementing statutes, was passed to invalidate the chattel slavery of African-Americans and kindred social institutions.<sup>29</sup> Its language that slavery "shall [not] exist" gives support to its affirmative elimination. The Thirteenth Amendment has been applied to invalidate a range of arrangements of forced labor and exploitive servitude.<sup>30</sup> The slavery of African-Americans is not the first or last example of enslavement, although it has rightly been one of the most notorious. To apply the Thirteenth Amendment to prostitution is not to equate prostitution with the chattel slavery of African-Americans but to draw on common features of institutions of forcible inequality in the context of the Thirteenth Amendment's implementation.

Compared with slavery of African-Americans, prostitution is older, more pervasive across cultures, does not include as much non-sexual

WOMEN'S L.J. 133 (1993).

29. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). *See also* *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897) (Justice Brown said that "involuntary servitude" was added to "slavery" to cover the peonage of Mexicans and the trade in Chinese labor); *Butler v. Perry*, 240 U.S. 328, 332 (1916) ("[T]he term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results."). *See generally* Howard D. Hamilton, *The Legislative and Judicial History of the Thirteenth Amendment*, 9 NAT'L B.J. 7 (1951) (an illuminating history of the early years of the Thirteenth Amendment).
30. *See* *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) ("[T]he words involuntary servitude have a 'larger meaning than slavery.' ") (quoting *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 69 (1872)). Also the Ninth Circuit has stated:

[Y]esterday's slave may be today's migrant worker or domestic servant. Today's involuntary servitor is not always black; he or she may just as well be Asian, Hispanic, or a member of some other minority group. Also, the methods of subjugating people's wills have changed from blatant slavery to more subtle, if equally effective, forms of coercion.

*United States v. Mussry*, 726 F.2d 1448, 1451-52 (9th Cir. 1984) (citation and footnotes omitted), *cert. denied*, 469 U.S. 855 (1984).

exploitation, and is based on sex, and sex and race combined. For Black women in the United States, the relation between prostitution and slavery is less one of analogy than of continuity with their sexual use under slavery.<sup>31</sup> Applying the Thirteenth Amendment to prostitution claims enslavement as a term and reality of wider application, which historically it has been. It also takes the view that the Thirteenth Amendment was intended to prohibit the forms slavery took for Black women just as much as those it took for Black men.

Thirteenth Amendment<sup>32</sup> standards require a showing of legal or physical force, used or threatened, to secure service, which must be "distinctly personal service . . . in which one person possesses virtually unlimited authority over another."<sup>33</sup> Some cases predicated servitude on psychological coercion,<sup>34</sup> but the Supreme Court recently held that a climate of fear alone is not enough.<sup>35</sup> The vulnerabilities of the victims are still relevant to determining whether physical or legal coercion or threats compel the service, rendering it "slavelike."<sup>36</sup> Recognized vulnerabilities have included mental retardation, being an illegal immigrant, not speaking the language, being a child, and being stranded in a foreign city without means of support.<sup>37</sup> Poverty has been pervasively

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31. See Vednita Nelson, *Prostitution: Where Racism & Sexism Intersect*, 1 MICH. J. GENDER & L. 81, 84, 85 (1993).

32. Prosecutions under the Thirteenth Amendment are typically brought under 18 U.S.C. § 1584 (1988), which makes it a crime knowingly and willfully to hold or sell another person "to involuntary servitude," and 18 U.S.C. § 241 (1988), which prohibits conspiracy to interfere with an individual's Thirteenth Amendment right to be free from "involuntary servitude."

33. Hamilton, *supra* note 29, at 7.

34. See, e.g., *United States v. Ancarola*, 1 F. 676, 683 (C.C.S.D.N.Y. 1880) (considering the case of an eleven-year-old Italian boy held in involuntary servitude by a padrone due to his youth and dependence which left him incapable of choosing alternatives).

35. *United States v. Kozminski*, 487 U.S. 931, 949–50 (1988). For an analysis of combined psychological and economic coercion, see *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964).

36. *Kozminski*, 487 U.S. at 952.

37. See *Kozminski*, 487 U.S. at 952 (mental retardation); *United States v. King*, 840 F.2d 1276 (6th Cir.), *cert. denied*, 488 U.S. 894 (1988) (children); *United States v. Mussry*, 726 F.2d 1448, 1450 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984) (non-English speaking, passports withheld, paid little money for services); *Bernal v. United States*, 241 F. 339, 341 (5th Cir. 1917), *cert. denied*, 245 U.S. 672 (1918) (alienage, no means of support, "did not know her way about town"); *Ancarola*, 1 F. at 676 (child).

understood as part of the setting of force.<sup>38</sup>

The Thirteenth Amendment has often been found violated when a person is tricked into peonage or service through fraud or deceit and is then kept unable to leave, including through contrived and manipulated indebtedness.<sup>39</sup> Debt is not a requirement of servitude, but it is a common incident of it. One recent case found that victims—called victims in these cases—were forced into domestic service by enticing them to travel to the United States, where they were paid little for exorbitant work hours and had their passports and return tickets withheld, while they were required to work off, as servants, the cost of their transportation.<sup>40</sup> Corroborating evidence has included extremely poor working conditions.<sup>41</sup>

Indentured servitude has long been legally prohibited in the United States, even prior to the passage of the Thirteenth Amendment.<sup>42</sup> In interpreting the Thirteenth Amendment in contemporary peonage contexts, courts have been far less concerned with whether the condition was voluntarily entered and far more with whether the subsequent service was involuntary.<sup>43</sup> That victims believe they have no

38. No cases of involuntary servitude involve wealthy or solvent victims. For examples where the poverty of the victims is emphasized as both a precondition of the servitude and a product of it, see *Kozminski*, 487 U.S. at 935 (“Molitoris was living on the streets of Ann Arbor, Michigan, in the early 1970s when Ike Kozminski brought him to work . . . .”); *United States v. Warren*, 772 F.2d 827, 832 (11th Cir. 1985), *cert. denied*, 475 U.S. 1022 (1986) (“Gaston could not leave because he had no money . . . . These accounts . . . revealed an operation where individuals were picked up under false pretenses, delivered to a labor camp to work long hours for little or no pay, and kept in the fields by poverty, alcohol, threats, and acts of violence.”) (citations omitted); *Mussry*, 726 F.2d at 1450 (poor Indonesians paid little for services); *United States v. Booker*, 655 F.2d 562, 566 (4th Cir. 1981) (finding that migrant labor camp, into which laborers were abducted, fits vision of forced labor under statutes which protected “persons without property and without skills save those in tending the fields. With little education, little money and little hope . . . .”); *Pierce v. United States*, 146 F.2d 84, 84 (5th Cir. 1944), *cert. denied*, 324 U.S. 873 (1945) (women who could not pay their own fines were released when pimp paid their fines, then forced them to work at his road house); *Bernal*, 241 F. at 341 (low-paid woman fraudulently induced by promise of better pay to go to brothel where “[s]he had no money”).

39. See generally *Mussry*, 726 F.2d 1448.

40. *Mussry*, 726 F.2d at 1450, 1453.

41. *Kozminski*, 487 U.S. at 952 (O’Connor, J., for the plurality); *id.*, at 956 (Brennan, J., concurring).

42. Case of Mary Clark, 1 Blackf. 122 (Ind. 1821). See generally Hamilton, *supra* note 29.

43. See, e.g., *Mussry*, 726 F.2d 1448. The later ruling by the Supreme Court in

viable alternative but to serve in the ways in which they are being forced has also supported a finding of coercion, and with it the conclusion that the condition is one of enslavement.<sup>44</sup> Involuntary servitude has embraced situations in which a person has made a difficult but rational decision to remain in bondage.<sup>45</sup>

If the legal standards for involuntary servitude developed outside the sexual context are applied to the facts of prostitution, the situations of most of the women in it are clearly prohibited. In prostitution, human beings are bought and sold as chattel for use in “distinctly personal service.”<sup>46</sup> Many women and girls are sold by one pimp to another as well as from pimp to trick and for pornography. Prostitution was not formerly called “white *slavery*” for nothing.<sup>47</sup>

Prostitution occurs within multiple power relations of domination, degradation, and subservience<sup>48</sup> of the pimp and trick over the

*Kozminski*, 487 U.S. 931, restricting *Murray* doctrines does not cut back on this aspect of the courts’ customary approach to this issue.

44. *United States v. King*, 840 F.2d 1276, 1281 (6th Cir. 1988), *cert. denied*, 488 U.S. 894 (1988) (finding a conspiracy to deprive children living in a religious commune of rights under Thirteenth Amendment, in part because of a belief by the children that they “had no viable alternative but to perform service for the defendants.”). When physical force is also present, *Kozminski* poses no barrier to prosecution. *Id.* at 1281.
45. *United States v. Bibbs*, 564 F.2d 1165, 1168 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978).
46. Hamilton, *supra* note 29, at 7.
47. This term was apparently used originally to parallel and distinguish prostitution of all women, including women of color, from slavery of Africans as such. *Traite des Noires*, trade in Blacks, referred to slavery of Blacks; in 1905, *Traite des Blanches*, trade in whites, was used at an international conference to refer to sexual sale and purchase of women and children. Marlene D. Beckman, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 GEO. L.J. 1111 n.2 (1984) (citing V. BULLOUGH, *PROSTITUTION: AN ILLUSTRATED HISTORY* 245 (1978)); KATHLEEN BARRY, *supra* note 4, at 32 (1979). The British government translated the latter term as “White Slave Traffic or Trade,” then shortened to white slavery. Beckman, *supra* at 1111 n.2 (quoting BULLOUGH, at 245). Whatever its initial intent, the appellation “had immediate appeal to racists who could and did conclude that the efforts were against an international traffic in *white* women,” although women of all colors were exploited in prostitution. BARRY, *supra* note 4, at 32. Kathleen Barry further observes that the 1921 substitution of the term “Traffic in Women and Children” for white slavery worked to separate international trafficking in women from local prostitution, “thereby distracting attention from the continuing enslavement of women in local prostitution.” BARRY, *supra* note 4, at 32–33. Recognizing prostitution as unconstitutional slavery would help restore this attention.
48. Here I draw on Akhil Amar’s and Daniel Widawsky’s proposed working definition

prostitute: men over women, older over younger, citizen over alien, moneyed over impoverished, violent over victimized, connected over isolated, housed over homeless, tolerated and respected over despised. All of the forms of coercion and vulnerabilities recognized under the Thirteenth Amendment are common in prostitution, and then some. No social institution exceeds it in physical violence. It is common for prostitutes to be deprived of food and sleep and money, beaten, tortured, raped, and threatened with their lives, both as acts for which the pimp is paid by other men and to keep the women in line.<sup>49</sup> Women in prostitution are subject to near total domination. Much of this is physical, but pimps also develop to a high art forms of nonphysical force to subjugate the women's will. Their techniques of mind control often exploit skills women have developed to survive sexual abuse, such as denial, dissociation, and multiplicity. They also manipulate women's desire for respect and self-respect.

Criminal laws against prostitution provide legal force behind its social involuntariness. Women in prostitution have no police protection because they are criminals, making pimps' protection racket both possible and necessary. In addition to being able to inflict physical abuse with impunity, pimps confiscate the women's earnings and isolate them even beyond the stigma they carry. The women then have nowhere but pimps to turn to bail them out after arrest, leaving them in debt for their fines which must be worked out in trade. Thus the law collaborates in enforcing women's involuntary servitude by turning the victim of peonage into a criminal.<sup>50</sup> Such legal complicity is state action, raising a claim under the Fourteenth Amendment for sex discrimination by state law.<sup>51</sup>

While it is dangerous to imply that some prostitution is forced, leaving the rest of it to seem free, as a matter of fact, most if not all prostitution is ringed with force in the most conventional sense, from

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of slavery. Akhil Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1365 (1992).

49. See generally Leidholdt, *supra* note 28; BARRY, *supra* note 4, at 3-5; *Activities for the Advancement of Women: Equality, Development and Peace*, U.N. ESCOR, 1st Sess., Provisional Agenda Item 12, at 7-8, U.N. Doc. E/1983/7 (1983).

50. For analogous situations, see *Jaramillo v. Romero*, 1 N.M. 190, 197-99 (1857) (involuntary servitude formally sanctioned by law). See also *Taylor v. Georgia*, 315 U.S. 25, 29-31 (1942) (striking down state laws which did not sanction involuntary servitude directly, but played a key role in it).

51. This raises a civil claim under 42 U.S.C. § 1983 (1981) and potential criminal prosecution under 18 U.S.C. § 242 (Supp. 1992).

incest to kidnapping to forced drugging to assault to criminal law. Sex-based poverty, both prior to and during prostitution, enforces it; while poverty alone has not been recognized as making out a case of coercion, it has been recognized as making exit impossible in many cases in which coercion has been found. If all of the instances in which these factors interacted to keep a woman in prostitution were addressed, there would be little of it left.

Beyond this, the Thirteenth Amendment may prohibit prostitution as an institution. In the words of The Three Prostitutes' Collectives from Nice, "all prostitution is forced prostitution . . . we would not lead the 'life' if we were in a position to leave it."<sup>52</sup> In this perspective, prostitution as such is coerced, hence could be prohibited as servitude. At the very least, there is authority for taking the victims' inequality into account when courts assess whether deprivation of freedom of choice is proven.<sup>53</sup>

On a few occasions in the past, the Thirteenth Amendment has been used to prosecute pimps for prostituting women.<sup>54</sup> In these federal criminal cases, the prostitution was forced in order to pay a debt the women supposedly owed the pimp. In one case, the defendant procured two women from a prison by paying their fines and then forced them to repay him by prostituting at his road house.<sup>55</sup> In another, young Mexican women were induced to accept free transportation to jobs which did not exist and then were told they could not return home until they repaid the cost of the transportation through prostitution.<sup>56</sup> These women were financially trapped, sometimes physically assaulted, always threatened, and in fear. Some complied with the prostitution; some were able to resist. In these cases, the prostitution as such was not

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52. *Activities for the Advancement of Women: Equality, Development and Peace*, *supra* note 49, at 8 (quoting testimony by three "collectives" of women prostitutes given to the Congress of Nice on September 8, 1981).

53. *The Peonage Cases*, 123 F. 671, 681 (M.D. Ala. 1903) (stating that the trier of fact "must consider the situation of the parties, the relative inferiority or inequality between the person contracting to perform the service and the person exercising the force or influence to compel its performance . . .").

54. *See, e.g.*, *Pierce v. United States*, 146 F.2d 84 (5th Cir. 1944), *cert. denied*, 324 U.S. 873 (1945); *Bernal v. United States*, 241 F. 339 (5th Cir. 1917), *cert. denied*, 245 U.S. 672 (1918). *See also* *United States v. Harris*, 534 F.2d 207, 214 (10th Cir. 1975), *cert. denied*, 429 U.S. 941 (1976) (upholding conviction for involuntary servitude in prostitution context).

55. *Pierce*, 146 F.2d at 84.

56. *Bernal*, 241 F. at 341.

considered involuntary servitude—the coercion into doing it was. But it is implicit in these cases that prostitution is not something a woman, absent force, would choose to do.

It is worth asking whether coercion of women into sex in a Thirteenth Amendment context would be measured by the legal standards by which courts have measured the coerciveness of nonsexual exploitation of groups that include men. The coercion of women into and within prostitution has been invisible because prostitution is considered sex and sex is considered what women are for. The standards for the meaning of women's "yes" in the sexual context range from approximating a dead body's enthusiasm, to fighting back and screaming "no," to pleading with an armed rapist to use a condom.<sup>57</sup> This being free choice, one wonders what coercion would look like. Sex in general, particularly sex for survival, is so pervasively merged with the meaning of being a woman that whenever sex occurs, under whatever conditions, the woman tends to be defined as freely acting.

Suits for prostitution as involuntary servitude confront the notion that women—some women who are "just like that" or women in general—are in prostitution freely. No condition of freedom is prepared for by sexual abuse in childhood, permits and condones repeated rapes and beatings, and subjects its participants to a risk of premature death of forty times the national average.<sup>58</sup> The fact that most women in

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57. A grand jury in Austin, Texas failed to indict a man for rape where the victim asked him to wear a condom. Apparently, the woman's request somehow implied her consent. Ross E. Milloy, *Furor Over a Decision Not to Indict in a Rape Case*, N.Y. TIMES, Oct. 25, 1992, § 1 at 30. A second grand jury did indict the man for rape and he was later convicted in a jury trial. *Rapist Who Agreed to Use Condom Gets 40 Years*, N.Y. TIMES, May 15, 1993, § 1 at 6.

58. For data on rape in prostitution, see Leidholdt, *supra* note 28, at 138; Mimi H. Silbert & Ayala M. Pines, *Occupational Hazards of Street Prostitutes*, 8 CRIM. JUST. BEHAV. 395, 397 (1981) (70% of San Francisco street prostitutes reported rape by clients an average of 31 times); COUNCIL FOR PROSTITUTION ALTERNATIVES, 1991 ANNUAL REPORT 4 (48% of prostitutes were raped by pimps an average of 16 times a year, 79% by johns an average of 33 times a year). For data on beatings, see Silbert & Pines, *supra* at 397 (65% of prostitutes beaten by customers); COUNCIL FOR PROSTITUTION ALTERNATIVES, *supra* at 4 (63% were beaten by pimps an average of 58 times a year). For data on mortality, see PORNOGRAPHY AND PROSTITUTION IN CANADA: REPORT OF THE SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION, VOLUME II 350 (1985) (finding that in Canada the mortality rate for prostituted women is 40 times the national average); Leidholdt, *supra* note 28, at 138 n.15 (the Justice Department estimates that a third of the over 4,000 women killed by serial murderers in 1982 were prostitutes).



prostitution were sexually abused as children,<sup>59</sup> and most entered prostitution itself before they were adults,<sup>60</sup> undermines the patina of freedom and the glamour of liberation that is the marketing strategy apparently needed for most customers to enjoy using them. Such suits would also challenge freedom of choice as a meaningful concept for women under conditions of sex inequality. Women's precluded options in societies that discriminate on the basis of sex, including in employment, are fundamental to the prostitution context. If prostitution is a free choice, why are the women with the fewest choices the ones most often found doing it?<sup>61</sup>

When a battered woman sustains the abuse of one man for economic survival for twenty years, not even this legal system believes she consents to the abuse anymore. Asking why she did not leave has begun to be replaced by noticing what keeps her there.<sup>62</sup> Perhaps when women in prostitution sustain the abuse of thousands of men for economic survival for twenty years, this will, at some point, come to be understood as non-consensual as well. And many do not survive. They are merely kept alive until they can no longer be used. Then they are sold one last time to someone who kills them for sex, or they are OD'd in an alley or otherwise end up under those trash heaps in Detroit.

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59. See Mimi H. Silbert & Ayala M. Pines, *Entrance into Prostitution*, 13 *YOUTH & SOCIETY* 471, 479 (1982) (60% of prostitutes were sexually abused in childhood); Leidholdt, *supra* note 28, at 136 n.4 (quoting MIMI SILBERT, *SEXUAL ASSAULT OF PROSTITUTES: PHASE ONE* 40 (1980)) (66% of subjects are sexually assaulted by father or father figure); THE COUNCIL FOR PROSTITUTION ALTERNATIVES, 1991 ANNUAL REPORT 3 (85% of clients have histories of sexual abuse in childhood, 70% most frequently by their fathers).

60. See CECILIE HØIGARD & LIV FINSTAD, *BACKSTREETS: PROSTITUTION, MONEY, AND LOVE* 76 (Katherine Hanson et al. trans., 1992) (average age of prostitutes interviewed in Norway began at 15 1/2 years). Compare Leidholdt, *supra* note 28, at 136 n.3 (citing Evelina Giobbe, founder of Minneapolis-based advocacy project, Women Hurt in Systems of Prostitution Engaged in Revolt (WHISPER)) (fourteen is the average age of women's entry into prostitution); Roberta Perkins, *Working Girls: Prostitutes, This Life and Social Control* 258 (1991) (finding in her Australian sample that almost half entered prostitution before age 20, and over 80% before age 25); Mimi H. Silbert & Ayala M. Pines, *Occupational Hazards of Street Prostitutes*, 8 *CRIM. JUST. BEHAV.* 395, 396 (1981) (68% were 16 years or younger when entered prostitution).

61. For a superb discussion of the "choice" illusion, see Leidholdt, *supra* note 28, at 136-138.

62. For an argument that domestic battery of women is involuntary servitude, see Joyce E. McConnell, *Beyond Metaphor: Battered Woman, Involuntary Servitude, and the Thirteenth Amendment*, 4 *YALE J.L. & FEMINISM* 207 (1992).

The fact that the coercion in prostitution will be difficult to establish in law when it is so overwhelmingly obvious in life is both why it would be difficult to win these cases and why it is crucial to try. It is also helpful to be trying in a legal context such as the Thirteenth Amendment that has traditionally emphasized less how one was subjected in the first place and more the barriers to leaving the subjected state.

The best thing about criminal law is that the state does it, so women do not have to. The worst thing about criminal law is that the state does not do it, so women still have to. Fortunately for women, the Thirteenth Amendment has a civil application, meaning we can use it ourselves. Under § 1985(3), prostituted women could allege that they have been subjected to a conspiracy to deprive them of civil rights as women. The conspiracy is the easy part—pimps never do this alone. In a supply-side conspiracy, they prostitute women through organized crime, gangs, associations, cults, families, hotel owners, and police. There is also a demand-side conspiracy, more difficult to argue but certainly there, between pimps and tricks.

Long unresolved is whether § 1985(3) applies to conspiracies on the basis of sex. In a recent case, the Supreme Court held that the group “women who seek and receive abortions” was not an adequate class for purposes of § 1985(3) because it was not based on sex.<sup>63</sup> The court did not say that sex-based conspiracies are not actionable under § 1985(3); several members of the court said that they are. Prostituted women are an even more persuasive sex-based class. How hard can it be to prove that women are prostituted as women? Not only is prostitution overwhelmingly done to women by men, every aspect of the condition has defined gender female as such and as inferior for centuries. Evelina Giobbe explains how the status and treatment of prostitutes defines all women as a sex: “[T]he prostitute symbolizes the value of women in society. She is paradigmatic of women’s social, sexual, and economic subordination in that her status is the basic unit by which all women’s value is measured and to which all women can be reduced.”<sup>64</sup> As Dorchen Leidholdt puts it: “What other job is so deeply gendered that one’s breasts, vagina and rectum constitute the working equipment? Is

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63. *Bray v. Alexandria Women’s Health Clinic*, 122 L. Ed. 2d 34, 46, 47 n.2 (1993).

64. Evelina Giobbe, *Confronting the Liberal Lies about Prostitution*, in *THE SEXUAL LIBERTY AND THE ATTACK ON FEMINISM* 67, 77 (Dorchen Leidholdt & Janice G. Raymond eds., 1990).

so deeply gendered that the workers are exclusively women and children and young men used like women?"<sup>65</sup> In addition, the fact that some men are also sold for sex helps make prostitution look less than biological, less like a sex difference. Treatment that is socially and legally damaging and stereotypical that overwhelmingly burdens one sex, but is not unique to one sex, is most readily seen as sex discrimination.

A civil action under § 1985(3) would allow prostituted women to sue pimps for sexual slavery, refuting the lie that prostitution is just a job. Slavery is a lot of work, but that does not make it just a job, picking cotton being just picking cotton. The enforced inequality is the issue.

In addition to these legal tools, the law against pornography that Andrea Dworkin and I wrote gives civil rights to women in prostitution in a way that could begin to end that institution.<sup>66</sup> Pornography is an arm of prostitution. As Annie McCombs once put it to me, when you make pornography of a woman, you make a prostitute out of her. The pornography law we wrote is concretely grounded in the experience of prostituted women; women coerced into pornography are coerced into prostitution. It is also based on the experience of women in prostitution who are assaulted because of pornography. Beyond this, under its trafficking provision, any woman, in or out of prostitution, who can prove women are harmed through the materials could sue pornographers for trafficking women. This provision recognizes the unity of women as a class rather than dividing prostituted women from all women. The precluded options that get women into prostitution, hence pornography, affect all women, as does the fact that pornography harms all women, if not all in the same way.

Subordination on the basis of sex is key to our pornography law. Pornography is defined as graphic sexually explicit materials that subordinate women (or anyone) on the basis of sex. Women in prostitution are the first women pornography subordinates. In its prohibition on coercion into pornography, in making their subordination actionable, this law sets the first floor beneath the condition of prostituted women, offers the first civil right that limits how much they can be violated. It does not do all that they need, but it is a lot more than the nothing that they have.

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65. Leidholdt, *supra* note 28, at 138–39.

66. See ANDREA DWORKIN & CATHARINE A. MACKINNON, *PORNOGRAPHY & CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* apps. A, B, & C (1988).

This law uses the artifact nature of pornography to hold the perpetrators accountable for what they do. Before this, the pictures have been used against women: to blackmail them into prostitution and keep them there, as a technologically sophisticated way of possessing and exchanging women as a class. Under this law, the pornography becomes proof of the woman's injury as well as an instance of it.

Because pornography affects all women and connects all forms of sexual subordination, so does this law. And this law reaches the pornography. The way subordination is done in pornography is the way it is done in prostitution is the way it is done in the rest of the world: rape, battering, sexual abuse of children, sexual harassment, and murder are sold in prostitution and are the acts out of which pornography is made. Addressing pornography in this way builds a base among women for going after prostitution as a violation of equality rights.

For years I have been saying that I do not know what to do, legally, about prostitution. I still do not. State constitutions and human rights remedies could be adapted to use the argument I offer here. The Florida statute Meg Baldwin wrote and got passed is brilliant and is beginning to be used by women.<sup>67</sup> Recent international initiatives build on superb long-term work and support these efforts.<sup>68</sup> I do know that we need to put the power to act directly in women's hands more than we have.<sup>69</sup>

These thoughts are offered to honor Evelina Giobbe's demand for an institutional policy response to the reality of prostitution, toward the civil rights all women are entitled to. ♪

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67. FLA. STAT. ch. 796.09 (1992) (providing a cause of action for those coerced into prostitution to sue their pimps for compensatory and punitive damages). See Margaret A. Baldwin, *Strategies of Connection: Prostitution and Feminist Politics*, 1 MICH. J. GENDER & L. 65, 70 (1993) (reporting that several cases utilizing this statute are currently underway at the discovery stage prior to filing).

68. See Gayle Kirshenbaum, *A Potential Landmark for Female Human Rights*, Ms., Sept./Oct. 1991, at 13 (report on proposed U.N. Convention Against All Forms of Sexual Exploitation).

69. The proposed Sexual Exploitation convention would require states' parties to adopt legislature to "hold liable" traffickers in pornography. International Convention to Eliminate All Forms of Sexual Exploitation, Sept. 1993, Art. 6(d).

