

The Thirteenth Amendment at the Intersection of Class and Gender: Robertson v. Baldwin's Exclusion of Infants, Lunatics, Women, and Seamen

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The Thirteenth Amendment at the Intersection of Class and Gender: *Robertson v. Baldwin*'s Exclusion of Infants, Lunatics, Women, and Seamen

James Gray Pope*

*The common law has recognized certain classes of persons who may be kept in pupillage, viz. infants, lunatics, married women*¹

– John Chipman Gray

*Indeed, seamen are treated by congress, as well as by the parliament of Great Britain, as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians. “Quemadmodum pater in filios, magister in discipulos, dominus in servos vel familiares.”*²

– Justice Henry Billings Brown, writing for the Court in *Robertson v. Baldwin*

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1. JOHN CHIPMAN GRAY, RESTRAINTS ON ALIENATION 243 (2d ed. 1895).

2. *Robertson v. Baldwin*, 165 U.S. 275, 287 (1897). As translated by Professor Katherine Tachau, scholar of medieval intellectual history, the Latin quotation reads: “[I]n the same way that the father has over his sons, the teacher over his students, and the lord over his servants and retinue.” E-mail from Katherine H. Tachau, Professor of History, Univ. of Iowa, to author (Sept. 19, 2015) (on file with author) [hereinafter E-mail from Tachau]. For the likely source of the quotation, see *infra* note 55.

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INTRODUCTION

In *Robertson v. Baldwin*, the Supreme Court held that merchant seamen under contract could be legally compelled to work notwithstanding the Thirteenth Amendment's prohibition on slavery and involuntary servitude.³ According to the Court, seamen were "deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults," and therefore could—along with children and wards—be deprived of liberty.⁴ From a present-day perspective, the Court's casual deprecation of seamen's intelligence and character might seem anachronistic, even shocking. But the Court's most recent Thirteenth Amendment opinion, *United States v. Kozminski* (1988), approvingly mentioned not only *Robertson*'s broad principle—"that the Thirteenth Amendment was not intended to apply to 'exceptional' cases well established in the common law at the time of the Thirteenth Amendment"—but also the specific examples of children, wards, and sailors.⁵

Robertson's domestic exclusion raises intertwined issues of class and gender. As a general rule, the Thirteenth Amendment limits inequalities of class, where class is conceived as "power relationships among groups involved in systems of production."⁶ Regardless of contractual consent, workers may not be legally or physically compelled to work.⁷ The Supreme Court has explained this principle in terms of class power, as necessary to prevent the "master" from dominating the "laborer": "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 work."⁸ *Robertson* carves out a gendered exception to this protection, relegating

3. *Robertson*, 165 U.S. at 287–88.

4. *Id.* at 287.

5. *United States v. Kozminski*, 487 U.S. 931, 944 (1988).

6. See Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 819 (2003); Frances L. Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024–25 (1989). The concept of class is distinct from that of economic status. Status is measured in gradations on a vertical scale, and the competition for status typically takes the form of a zero-sum game in which success is measured by how many others are lower on the scale. Mahoney, *supra*, at 823–26.

7. *Pollock v. Williams*, 322 U.S. 4 (1944); *Bailey v. Alabama*, 219 U.S. 219, 242–44 (1911).

8. *Pollock*, 322 U.S. at 18.

seamen to what political theorist Carole Pateman has described as “the private sphere of natural subjection and womanly capacities.”⁹

By contrast, it is an open question whether the Amendment reaches gender relations.¹⁰ On that issue, *Robertson* has historically served to block jurisprudential development by preserving the domestic sphere as a zone where services can be coerced free from Thirteenth Amendment scrutiny. As Joyce McConnell has shown, *Robertson*’s domestic exclusion has operated to deprive women, married or not, of protection against coercion by intimate partners.¹¹ When a woman enters into an intimate relationship with a man, then, she departs the public sphere of class relations and loses her Thirteenth Amendment protection against coercion of services.

Over the past few years, however, several courts have applied statutory bans on “involuntary servitude” and “forced labor” (a “species of involuntary servitude”¹²) to protect women and children in domestic settings.¹³ These cases suggest that *Robertson*’s categorical exclusion is ripe for reconsideration. Part I of this Article traces its roots to the common law of the household, the shared point of origin both of class and gender hierarchies. It suggests that the Thirteenth Amendment posed a potential challenge to traditional assumptions of natural hierarchy and benevolent paternalism in the domestic sphere. Part II reviews the *Robertson* decision, focusing especially on justifications for the exclusion. Part III discusses Thirteenth Amendment law and scholarship concerning the physical coercion of services from children and women in domestic settings.

I. THE THIRTEENTH AMENDMENT AND THE DOMESTIC LAW: EARLY TENSIONS

In colonial America, the household served as a crucible of class and gender hierarchies. Slaves, bound servants, apprentices, hired servants, wives, children, and wards all lived under the dominion and protection of

9. CAROLE PATEMAN, *THE SEXUAL CONTRACT* 113 (1988); see also *infra* note 43 and accompanying text.

10. See *infra* text accompanying notes 119–134.

11. Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 *YALE J.L. & FEMINISM* 207, 216–17 (1992); see *infra* note 119 and accompanying text.

12. *United States v. Bradley*, 390 F.3d 145, 156 (1st Cir. 2004), cert. granted, judgment vacated on other grounds, 545 U.S. 1101 (2005) (stating that forced labor was considered by Congress to be a “species of involuntary servitude,” providing evidence from the text and legislative history of the statute to support that conclusion, and holding that a penalty enhancement provision that expressly applied only to “involuntary servitude” and “peonage” also applied to forced labor).

13. See *infra* notes 104–114, 135–148 and accompanying text. The involuntary servitude and forced labor statutes were enacted under authority of the Thirteenth Amendment.

the master of the house.¹⁴ “[T]he household stands,” observes legal historian Christopher Tomlins, “as the crucial and historically specifiable point of intersection in the genealogy of [three] strands of legal discourse: the law of service and of employment, the law of conjugal and familial relations, the law of slavery.”¹⁵ To Adam Smith, for example, the law of slavery nested in the broader category of master-servant law, which, in turn, fell under the heading “Domestic Law” along with the law of “Husband and Wife,” “Parent and Child,” and “Guardian and Ward.”¹⁶ As of the late nineteenth century, Anglo-American legal thinkers continued to treat “the interrelationship of these strands, spun together over the previous two centuries, as both obvious and natural, a timeless legal homology—‘the domestic relations’—that boxed the compass of normative social life.”¹⁷ Even when faced with cases involving factory workers who could not plausibly be classified as part of their employer’s household, nineteenth-century American courts chose to import the principles of domestic master-servant law, complete with their underlying assumptions of natural hierarchy and benevolent paternalism.¹⁸

The Thirteenth Amendment, with its broad prohibition of “slavery” and “involuntary servitude,” threatened to disrupt the master’s dominion not only over slaves, but also over children, wives, and apprentices. During congressional debates over the Amendment, Representative Chilton White of Ohio warned that all of these relations rested on the same constitutional foundation:

The guarantee of the Constitution is for the enforcement of the local municipal laws by the concentration of the power of the whole people. The parent has the right to the service of his child; he has a property in the service of that child. A husband has a right of property in the service of his wife; he has the right to the management of his household affairs. The master has a right of property in the service of his apprentice. All these rights rest upon the same basis as a man’s right of property in the service of slaves. The relation is

14. See *Labor and Employment Law - United States Law*, in 3 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 477, 477 (Stanley Katz ed., 2009).

15. CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865*, at 376 (2010). To illustrate his point, Tomlins points to the title of an influential American treatise: TAPPING REEVE, *THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT* (1816). *Id.*

16. ADAM SMITH, *Lectures On Jurisprudence*, in 5 THE GLASGOW EDITION OF THE WORKS AND CORRESPONDENCE OF ADAM SMITH (R.L. Meek, D.D. Raphael & P.G. Stein eds., 1982) (1762–1763).

17. TOMLINS, *supra* note 15, at 376.

18. CHRISTOPHER TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 229–30 (1993).

clearly and distinctly defined by the law, and as clearly and distinctly recognized by the Constitution of the United States.¹⁹

If all of these relations rested on the same foundation, then the abolition of any one of them might entail the abolition or regulation of all. Opponents cited this danger in support of their contention that the Thirteenth Amendment so fundamentally altered the constitutional order that it could not be enacted under a mere power to “amend.” If the federal government “by constitutional amendment, can regulate the relation of master and servant,” warned one senator, “it certainly can, on the same principle, make regulations concerning the relation of parent and child, husband and wife, and guardian and ward.”²⁰ After ratification, the same specter was deployed against the Civil Rights Act of 1866, enacted to enforce the Amendment. “I say that this bill,” charged Senator Edward Cowan, “confers upon married women, upon minors, upon idiots, upon lunatics . . . the right to make and enforce contracts.”²¹ To Cowan and his allies, the Act exceeded the scope of the Amendment by regulating these and other domestic relations, for example, apprenticeships.²² Proponents of the Amendment and of the Civil Rights Act responded by denying that either the Amendment or enforcement legislation would affect, in the words of historian Amy Dru Stanley, “any household relation but slavery.”²³

Nevertheless, the Amendment’s ratification in December 1865 inevitably posed the question whether the enacted text, which contained no such limitation, covered domestic relations other than chattel slavery. African-Americans across the South wasted no time seeking relief for their children from involuntary apprenticeship, usually to their former masters.²⁴ Freedmen’s Bureau officials and southern judges and juries struggled to distinguish between valid and invalid apprenticeships and, in 1867, Supreme Court Justice Salmon Chase, riding circuit, ruled that a black girl’s apprenticeship constituted “involuntary servitude” in violation of the Amendment.²⁵ These early cases focused on the absence of parental consent but, eventually, “[a] patriarchal domination of the fami-

19. CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865) (statement of Rep. White); *see also* CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864) (statement of Rep. Fernando Wood).

20. CONG. GLOBE, 38th Cong., 1st Sess. 1483 (1865) (statement of Sen. Powell).

21. CONG. GLOBE, 39th Cong., 1st Sess. 1782 (1866) (statement of Sen. Cowan).

22. CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Cowan).

23. AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 57 (1998).

24. *See* JAMES D. SCHMIDT, *FREE TO WORK: LABOR LAW, EMANCIPATION, AND RECONSTRUCTION, 1815–1880*, at 178–93 (1998).

25. *Id.*; *see also In re Turner*, 24 F. Cas. 337 (C.C.D. Md. 1867). The Freedmen’s Bureau was an agency of the U.S. government, established to assist liberated slaves in the transition to freedom.

ly eroded, apprenticeship came to be seen more as a labor relationship . . . [falling] within the proscription of the thirteenth amendment.”²⁶

If the Amendment pulled apprenticeship partly or entirely out of the household, then it might do the same for other domestic relations of service. The Supreme Court first addressed this issue in a case involving adult seamen.

II. *ROBERTSON V. BALDWIN*

Robert Robertson and three other seamen contracted with a shipping company to serve on a voyage of the barkentine *Arago* from San Francisco to Washington State and then to Valparaiso, Chile. By the time the ship reached Astoria, Oregon, the men had become dissatisfied with the work. They departed the ship without permission. The master of the *Arago* sought and obtained a warrant for their arrest pursuant to the Shipping Commissioner’s Act of 1872. U.S. Marshal Barry Baldwin jailed them pending the *Arago*’s departure date, and then forcibly returned them shipboard.²⁷ With help from the Seamen’s Union of the Pacific, they challenged the constitutionality of the Shipping Commissioner’s Act.²⁸ In *Robertson v. Baldwin*, the Supreme Court rejected their suit, holding that seamen under contract may be legally and physically coerced to work for private ship owners notwithstanding the Thirteenth Amendment’s ban on slavery and involuntary servitude.²⁹

Justice Henry Billings Brown, writing for a majority of eight, offered several justifications for the ruling. First, he reasoned that the Thirteenth Amendment was not intended to change the law with regard to “services which have from time immemorial been treated as exceptional,” and that seamen had been legally prohibited from “deserting” (quitting their jobs) since the days of ancient Rhodes.³⁰ By itself, this criterion could not do the work of distinguishing exceptions from prohibited practices. The Thirteenth Amendment was enacted precisely to abolish practices that had been recognized in law from time immemorial.³¹ There

26. Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 458 (1989). Cf. *United States v. King*, 840 F.2d 1276, 1282 (6th Cir. 1988) (holding that the coercion of children’s labor by cult leaders constituted “involuntary servitude” under a statute enacted to enforce the Thirteenth Amendment notwithstanding the parents’ consent).

27. *Robertson v. Baldwin*, 165 U.S. 275, 288 (1897) (Harlan, J., dissenting).

28. HYMAN WEINTRAUB, ANDREW FURUSETH: EMANCIPATOR OF THE SEAMEN 35–36 (1959).

29. See *Robertson*, 165 U.S. at 287–88.

30. *Id.* at 282–87.

31. See Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1374 (1992) (commenting that “[a]lthough the *Robertson* dictum rested on immemorial custom, custom alone cannot be the sole test of the Thirteenth Amendment’s meaning, because the Amendment was designed to challenge longstanding institutions and practices that violated its core values of personhood and dignity,” and pro-

could be no time-honored exceptions to a ban on slavery and involuntary servitude until and unless there was such a ban in effect.³² When Congress first provided for the forcible return of deserting seamen in 1792, for example, most states permitted slavery, indentured servitude remained lawful, and the Constitution provided for the return of any person “held to Service or Labour” who escaped across state lines.³³ In that legal context, a seaman’s contract would have looked more like a short-term indenture—lawful in any trade—than an occupational exception to a general ban on slavery and involuntary servitude. On the criterion of origins in “time immemorial,” then, seamen’s contracts could not be distinguished from numerous other instances of coerced labor.

Second, Brown warned that if a sailor could not be coerced to work, then he could “abandon his ship at any intermediate port or landing, or even in a storm at sea.”³⁴ Today, with regard to most constitutional rights guarantees, this kind of concern would be met by applying some level of judicial scrutiny, ranging from rational basis to strict scrutiny. Because the right to quit work is a core Thirteenth Amendment right,³⁵ its infringement would trigger heightened scrutiny, which requires that the infringement serve an important or compelling interest and that it be substantially related or narrowly tailored to the protection of that interest. Nobody would doubt that the safety of passengers and crew at sea is a compelling interest, but it is hard to see how a ban on quitting in port is

posing that “[a]ny exception to the Amendment’s reach must be limited to those historic practices that are consistent with the Amendment’s central thrust”).

32. As Andrew Koppelman remarks, the notion that some services have “‘from time immemorial been treated as exceptional’ . . . simply makes no sense; how can there be an exception that antedates the rule?” Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 *Nw. U. L. REV.* 480, 525 (1990). Justice Harlan, dissenting, made this point with regard to various examples offered by the majority. The maritime laws of ancient Rhodes, for example, “were enacted at a time when no account was taken of man as man, when human life and human liberty were regarded as of little value, and when the powers of government were employed to gratify the ambition and the pleasures of despotic rulers rather than promote the welfare of the people.” *Robertson*, 165 U.S. at 293 (Harlan, J., dissenting). It is interesting to note, however, that at least some abolitionists prefigured *Robertson*’s exception for seamen. See E. R. TYLER, *SLAVEHOLDING A MALUM IN SE, OR INVARIABLY SINFUL* 4 (1837) (quoted in David R. Upham, *The Understanding of “Neither slavery nor involuntary servitude shall exist” Before the Thirteenth Amendment*, 14 *GEO. J.L. & PUB. POL’Y* (forthcoming 2016) (stating that the “services which children, wards, seamen and others, owe to their parents, guardians and employers, may be unwillingly rendered, and yet justly exacted”).

33. *Robertson*, 165 U.S. at 287; ROBERT J. STEINFELD, *COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY* 253–54 (2001). Indentured servitude remained legal in some areas covered by the Northwest Ordinance, from which the Thirteenth Amendment’s ban on “slavery” and “involuntary servitude” was drawn. See *id.* at 256–61 (Ohio and Illinois). It could not be said, then, that under the Ordinance seamen were excepted from a general ban on coerced labor.

34. *Robertson*, 165 U.S. at 280.

35. *Pollock v. Williams*, 322 U.S. 4, 18 (1944); *Bailey v. Alabama*, 219 U.S. 219, 240–41 (1911).

substantially related or narrowly tailored to that interest.³⁶ In any case, Brown chose not to rely on the essential services rationale; his reference to storms at sea came in the midst of an extensive discourse about the general question whether the Amendment permitted the enforcement of labor contracts through physical or legal coercion—an issue left unresolved.³⁷ Instead, Brown held that even if the Amendment did generally prohibit such enforcement (the rule eventually adopted by the Court in *Bailey v. Alabama*), seamen were excluded from protection.³⁸

To distinguish seamen from other workers, Brown offered a third justification. Sailors could be denied the right to quit work because, like children and wards, they required the guidance and protection of others.³⁹ In particular, Brown suggested that seamen were “deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults.”⁴⁰ He found supporting evidence in what he considered to be “very careful provisions” of law protecting seamen against “the frauds and cruelty of masters, the devices of boarding-house keepers, and, as far as possible, against the consequences of their own ignorance and improvidence.”⁴¹ Interestingly, Brown’s disparaging view of seamen’s intelligence and responsibility did not appear in the parties’ briefs. It had, however, been propagated by the shipowners in the course of lobbying against legislative reform.⁴² In addition, it reflected popular perceptions of seamen who, though paragons of manliness aboard ship, were often unable to fulfill their shoreside gender roles as “man of the house,” not

36. This might help to explain why, within a few years of *Robertson*, courts declined to apply it as authority for permitting coerced labor in various, allegedly extreme circumstances. See Noah Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 943 nn.95–98 (2016). Interestingly, the seamen’s brief for rehearing, authored by U.S. Representative James G. Maguire and Stanford law faculty member Jackson H. Ralston, accepted the seamen’s duty not to desert at sea, but maintained that it ran not to the employer but to their fellow seamen, removing it from the category of “servitude.” Even in the “extreme case” of a dangerous storm at sea, argued the brief, a seaman was not “bound to continued servitude under his contract, but he is bound not to desert other men, in a danger into which he has led them, or into which they have gone, mutually relying upon each other. He must remain with them until the danger has passed, until they are in a position of safety, then and not until then does the question of his servitude under his contract arise, and then if he is not willing further to serve under his contract, he cannot, and should not, be compelled so to do involuntarily.” Petition for Rehearing and Recall of Mandate at 12–13, *Robertson v. Baldwin*, 165 U.S. 275, 287 (1897) (No. 334).

37. *Robertson*, 165 U.S. at 281.

38. *Id.* at 281, 287–88.

39. *Id.* at 287.

40. *Id.*

41. *Id.*

42. ARNOLD BERWICK, *THE ABRAHAM LINCOLN OF THE SEA: THE LIFE OF ANDREW FURUSETH* 49 (1993).

primarily because of ignorance or improvidence, but because of prolonged absences at sea.⁴³

In dissent, Justice John Marshall Harlan charged that the “supposed helpless condition” of sailors was nothing more than an “excuse for imposing upon them burdens that could not be imposed upon other classes.”⁴⁴ Neither Brown’s majority opinion nor Harlan’s dissent mentioned that a similarly paternalistic rationale had been deployed to justify the forcible extraction of labor from Africans, the core concern of the Amendment.⁴⁵ And, although the failure of paternalistic protection was far more egregious in the case of chattel slaves, it also appears that Brown’s “very careful” protections for seamen were ineffective on the ground.⁴⁶ At any rate, from our vantage point today, Brown’s commentary on seamen’s intelligence and character appears as nothing more than a casual expression of prejudice, deployed to justify the denial of a basic freedom.⁴⁷

The United States’ brief advanced a fourth possible justification. Seamen under contract, it suggested, are indistinguishable from enlisted soldiers. Both groups ceased “to be independent, separate, and distinct beings, directed and controlled only by their own distinct reason and will, and they each become . . . parts of a machine, the successful and

43. See Ruth Wallis Herndon, *The Domestic Cost of Seafaring*, in *IRON MEN, WOODEN WOMEN: GENDER AND SEAFARING IN THE ATLANTIC WORLD, 1700–1920*, at 55, 57–58 (Margaret S. Creighton & Lisa Norling eds., 1996).

44. *Robertson*, 165 U.S. at 299 (Harlan, J., dissenting).

45. See, e.g., Howard McGary, *Paternalism and Slavery*, in *SUBJUGATION AND BONDAGE: CRITICAL ESSAYS ON SLAVERY AND SOCIAL PHILOSOPHY 187–206* (Tommy L. Lott ed., 1998) (describing the paternalistic justifications for slavery and arguing that the system was not, in fact, paternalistic); MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 100 (2001) (recounting that opponents of the Thirteenth Amendment argued that Africans were naturally suited to slavery and that, if released from white control, they would succumb to white vices); see also Zatz, *supra* note 36, at 944–45 nn.103–05 (observing that “[s]uch a view of sailors was hardly distant from, or less self-serving than, white Southern elites’ views of Black laborers,” and suggesting that *Robertson* excluded sailors from the class “of people for whom the Thirteenth Amendment’s ‘system of free labor’ was designed, free and equal citizens who could look after their own interests in the market”).

46. Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court’s Subversion of New Deal Labor Law*, 25 *BERKELEY J. EMP. & LAB. L.* 275, 284–85 (2004) (discussing punishments—including beatings, imprisonment, short rations, chaining, and gratuitously dangerous assignments—used by shipmasters to extract labor from seamen during the late nineteenth and twentieth centuries, and concluding that “the paternalism of modern shipboard labor relations was actually rather fraudulent”).

47. See, e.g., Thomas M. Franck, *Are Human Rights Universal?*, *FOREIGN AFF.*, Jan.–Feb. 2001, available at <https://www.foreignaffairs.com/articles/afghanistan/2001-01-01/are-human-rights-universal> (including *Robertson*’s holding, along with the quoted statement, among human rights violations that debunk the notion that Western civilization can lay claim to a long tradition of respecting human rights norms, in contrast to traditions of brutality and tyranny in Muslim and other societies).

efficient operation of which must depend largely, if not altogether, upon the fact and the manner of their performance of the duty assigned to them.”⁴⁸ This idea echoed the opinion of shipowners, who feared that any insubordination or lapse in discipline would imperil the safety of passengers, ship, and cargo.⁴⁹

Justice Brown, however, chose not to rely on the soldier-sailor analogy and, two decades after *Robertson*, the Court clarified that the exception for soldiers rested on entirely different grounds. In the *Selective Draft Law Cases* (1918), the Court upheld wartime military conscription against a Thirteenth Amendment challenge.⁵⁰ Chief Justice Edward Douglass White’s opinion for the Court distinguished involuntary servitude from “the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people.”⁵¹ On this theory, wartime military conscription differed from private employment both because the draftees served for the benefit of the entire nation (including themselves) not a private master, and because they were subject to the will not of a private master, but of a representative government in which they had a voice.⁵² Further, far from reflecting servility or slavishness, public service in a Republic was considered to be “noble,” an expression of patriotism and civic virtue.⁵³ None of these considerations applied to service in the employ of profit-seeking, private ship owners.

The question still remains: why single out seamen from other workers? Judging from their companions in *Robertson*’s exception—infants and lunatics—one might think that sailors were distinguished for their weakness. Indeed, *Robertson* was decided at the beginning of the so-called *Lochner* Era, a time when the Court generally selected for paternalistic treatment “groups it understood as weak,” a category that in-

48. Brief for the United States at 10, *Robertson v. Baldwin*, 165 U.S. 275, 288 (1897) (No. 334).

49. See, e.g., Emerson E. Parvin, *The Working of the Seamen’s Act*, 6 PROC. ACAD. POL. SCI. CITY N.Y. 113, 120 (1915).

50. *Arver v. United States*, 245 U.S. 366, 390 (1918).

51. *Id.*

52. As of January 1918, when the Court issued its ruling, men aged 21–30 were subject to the draft, and the voting age was 21. Selective Service Act of 1917, Pub. L. No. 65-12, 40 Stat. 76 (1917); see also ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 225 (2009). The draft age was lowered to 18 later that year, creating a disjuncture that would not be eliminated until 1970, in the midst of the Vietnam War. See *id.* at 226–27.

53. See *Arver*, 245 U.S. at 390; *Peonage Cases*, 123 F. 671, 681 (M.D. Ala. 1903) (distinguishing slavery and involuntary servitude from “the discharge of honorable public duties, which every patriotic citizen or subject owes to his government”); Koppelman, *supra* note 32, at 521.

cluded women and black peons.⁵⁴ There is reason to believe, however, that sailors might have been chosen for precisely the opposite reason. Seamen were notable not for weakness or ignorance, but for their toughness and high level of class consciousness. As of 1707, when Giuseppe Lorenzo Maria Casaregis penned the Latin text quoted by Justice Brown, the relations between ship captains and crew might actually have reflected a relatively benevolent form of feudal paternalism.⁵⁵ Long before *Robertson*, however, capitalism had displaced feudalism in the Atlantic maritime world, and the ship had become a “prototype of the factory” and a crucible of class struggle.⁵⁶ The conditions of shipboard employment, including shared hardship, periodic danger, mutual dependence of coworkers, racially diverse crews, and a sharp separation between officers and crew, fostered exceptionally strong class identification and relatively accepting attitudes toward crew members of other races and nationalities.⁵⁷ From an elite point of view, seamen as a group were dangerously independent. As recounted by Peter Linebaugh and Marcus Rediker, they formed the core of the “motley crews” that fueled what elites saw as a “many-headed monster” of laboring class and slave resistance.⁵⁸ The term “strike” entered the industrial lexicon in 1768, when seamen in Newcastle and London “struck (lowered down)” the sails of merchant ships and refused to resume work unless granted a wage increase. Days later, other trades “*struck*” and paraded with the sailors, not

54. Aziz Z. Huq, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351, 383, 386 (2001); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 52–53 (1991); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249, 255 (1987).

55. Professor Tachau located the likely source of the quotation in a seventeenth century work. E-mail from Tachau, *supra* note 2 (identifying the source as GIUSEPPE LORENZO MARIA CASAREGIS, *DISCURSUS LEGALES DE COMMERCIO (LEGAL LECTURES ON COMMERCE)* 136 (1707)). She notes that the phrase appears in a sentence that analogized the ship captain’s authority to a set of relationships selected not for exceptionally strong authority, but for limitations on authority: “A master has no large jurisdiction over his ship, but only in his economic or disciplinary power, which extends [only] to light punishments, such as for correcting insolence . . . in the same way that the father has over his sons, the teacher over his students, and the lord over his servants and retinue.” *Id.* (interpreting CASAREGIS, *supra*, at 136). Indeed, it appears that “medieval shipboard life was dominated by norms of paternalism, reciprocity, and stability” which “often encouraged enduring and mutually supportive relationships between a seaman and his captain.” White, *supra* note 46, at 283.

56. See PETER LINEBAUGH & MARCUS REDIKER, *THE MANY-HEADED HYDRA: SAILORS, SLAVES, COMMONERS, AND THE HIDDEN HISTORY OF THE REVOLUTIONARY ATLANTIC* 150 (2000).

57. See MARCUS REDIKER, *BETWEEN THE DEVIL AND THE DEEP BLUE SEA* 110–11 (1989); W. JEFFREY BOLSTER, *BLACK JACKS: AFRICAN AMERICAN SEAMEN IN THE AGE OF SAIL* 96–100, 87–88 (1997); White, *supra* note 46, at 288–89. It should be emphasized that this tendency toward acceptance was limited; sailors of color were often treated with intolerance and brutality. See BOLSTER, *supra*, at 93–96.

58. LINEBAUGH & REDIKER, *supra* note 56, at 212–19, 221–26; see also Jesse Lemisch, *Jack Tar in the Streets: Merchant Seamen in the Politics of Revolutionary America*, 25 WM. & MARY Q. 371, 387 (1968).

only to win higher wages but also to protest the imprisonment of John Wilkes, a fearless critic of King George.⁵⁹ American sailors, described by one respectable observer as “wretches of a mongrel descent” including “African Blacks by Asiatic Mulattoes,” marched in the leading ranks.⁶⁰ Meanwhile, on the American side of the Atlantic, sailors struck and protested over impressment and other issues.⁶¹

Prosperous Americans sometimes supported the goals of such crowds, but usually joined the British in expressing their “Abhorrence” of unruly actions by sailors “and other persons of mean and Vile Condition.”⁶² In his successful defense of British soldiers involved in the Boston Massacre, John Adams knew that he could capture the sympathies of the jury by describing the crowd as a “motley rabble of saucy boys, negroes and molattoes, Irish teagues, and out landish jack tarrs.”⁶³ In southern ports, free black sailors refuted the natural inevitability of African slavery merely by moving about and conducting themselves like other free laborers.⁶⁴ Southern legislatures responded by passing “Negro Seamen’s Acts” requiring black sailors to remain shipboard while in port.⁶⁵ American courts and legislators also singled out sailors’ strikes for exceptionally harsh penalties. While other American strikers faced charges of labor conspiracy, typically punished with light fines, seamen could be prosecuted for desertion and even mutiny, which carried multiyear prison terms and, until 1835, the possibility of death.⁶⁶

The *Robertson* litigation had been organized by Andrew Furuseth, a leader of the Sailors’ Union of the Pacific.⁶⁷ Furuseth, a true believer in the Thirteenth Amendment (at least where the rights of white workers were concerned), rejected the Court’s ruling and launched a campaign to

59. See ANNUAL REGISTER, OR A REVIEW OF THE HISTORY, POLITICKS, AND LITERATURE FOR THE YEAR 1768, at 92, 107 (1768) [hereinafter ANNUAL REGISTER]. See generally Richard Sheldon, *The London Sailors’ Strike of 1768*, in ANDREW CHARLESWORTH ET AL., AN ATLAS OF INDUSTRIAL PROTEST IN BRITAIN 1750–1990, at 12–17 (1996).

60. See ANNUAL REGISTER, *supra* note 59, at 106–09, 113; see also LINEBAUGH & REDIKER, *supra* note 56, at 219–21.

61. Lemisch, *supra* note 58, at 387. Four of the eleven casualties at the Boston Massacre, including Crispus Attucks, were mariners. FREDERIC KIDDER, HISTORY OF THE BOSTON MASSACRE, MARCH 5, 1770, at 287–88 (1870).

62. Lemisch, *supra* note 58, at 387.

63. 3 JOHN ADAMS, LEGAL PAPERS OF JOHN ADAMS 266 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

64. See IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 215–19 (1981).

65. See, e.g., Philip M. Hamer, *Great Britain, the United States, and the Negro Seamen Acts, 1822–1848*, 1 J.S. HIST. 3, 3–28 (1935).

66. See Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113–14; White, *supra* note 46, at 290–91. American courts defined mutiny broadly to include even strikes that involved nothing more than a collective refusal to work, staged while the ship rested in port. *Id.* at 294–95.

67. WEINTRAUB, *supra* note 28, at 35–36.

overturn it through legislation.⁶⁸ It took nearly two decades, but the LaFollette Seamen's Act of 1915 repealed the statutory provisions that had been upheld in *Robertson*. Senator LaFollette celebrated his bill's enactment as a repudiation of the Court's ruling. "I rejoice that in the Providence of God I am permitted at last to hail you," he wired the Sailors' Union, "as free men under the Constitution of our country." The Thirteenth Amendment had become, he concluded, "a covenant of refuge for the seamen of the world."⁶⁹ The courts have not, however, followed Congress's lead on this point. As we have seen, the Supreme Court mentioned *Robertson* favorably in its most recent opinion on the Thirteenth Amendment.⁷⁰ And lower courts continue to cite *Robertson* as authority for rejecting Thirteenth Amendment claims brought by seamen.⁷¹

Outside Thirteenth Amendment jurisprudence, the notion that constitutional guarantees implicitly import time-honored, common law exceptions no longer retains much traction. At the time, Justice Brown drew the principle from the then-current jurisprudence of the Bill of Rights. "The law is perfectly well settled," he asserted, that the Bill of Rights was intended only "to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case."⁷² Although courts continue to

68. FORBATH, *supra* note 54, at 154–55 n.104. Furuseth defended his union's whites-only rule and urged the American Federation of Labor to authorize segregated unions. WEINTRAUB, *supra* note 28, at 112–13; 4 THE BLACK WORKER: A DOCUMENTARY HISTORY FROM COLONIAL TIMES TO THE PRESENT 5–6 (Philip S. Foner & Ronald L. Lewis eds., 1978).

69. WEINTRAUB, *supra* note 28, at 132 (quoting LaFollette). Further research would be necessary to determine exactly what LaFollette meant by this. The Act was eventually upheld under Congress's powers to regulate commerce and maritime matters (or, in the language of the Constitution, to enact legislation necessary and proper for the execution of the judicial power over admiralty). *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 39 (1943). At the time that LaFollette made his comment, however, it appeared that labor relations—even those concerning employees of carriers involved in interstate or foreign commerce—lay outside the scope of the commerce power. See *Adair v. United States*, 208 U.S. 161, 177 (1908) (striking down federal law prohibiting interstate carriers from discriminating on the basis of union membership, and defining "commerce" as "traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph, -indeed, every species of commercial intercourse among the several states, -but not that commerce 'completely internal, which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states'"). It is possible that LaFollette was referring to the Thirteenth Amendment as authority for the legitimacy of the end for which the maritime power was being exercised. Cf. George Rutherglen, *The Constitution and Slavery Overseas*, 39 SEATTLE U. L. REV. 695 (2016) (analyzing the Amendment's potential role in validating exercises of other powers). Or, he might have been expressing his own opinion that, apart from the question of what power would be relied upon to defend the Act in court, it in fact implemented the Amendment.

70. *United States v. Kozminski*, 487 U.S. 931, 944 (1988).

71. See, e.g., *Burke v. Mathiasen's Tanker Indus., Inc.*, 393 F. Supp. 790, 793 (E.D. Pa. 1975) (applying *Robertson's* exception for seamen and citing similar cases).

72. *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

cite this statement favorably,⁷³ they also feel free to ignore it, as two of Brown's own supporting examples illustrate. "Thus, the freedom of speech and of the press," he wrote, "does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation."⁷⁴ Since 1897, the Supreme Court has jettisoned each of those categorical exceptions, conferring considerable constitutional protection on common law libels and indecent speech.⁷⁵ In short, the notion of time-honored exceptions appears to function more as makeweight than principle.

III. THE FATE OF INFANTS AND WOMEN AFTER *ROBERTSON*

For a long time, *Robertson* did not attract much attention from courts or scholars. Aside from the exclusion of seamen, its exceptions appeared to be uncontroversial.⁷⁶ Then, in the early 1990s, scholars launched noteworthy challenges to *Robertson's* exception for parent-child relations and its implicit exception for women in intimate relationships.⁷⁷ And, in the last few years, some thoughtful judges have moved beyond the categorical exceptions to confront the problem of distinguishing domestic relations that constitute slavery or involuntary servitude from those that do not.⁷⁸ These cases could presage important advances in Thirteenth Amendment doctrine. In the typical involuntary servitude case (involving peonage, for example), there is a clear foil for the claimed coercion of labor: the system of free labor. But in the domestic abuse context, that baseline is not available.⁷⁹ In the recent child abuse and battering cases, courts have at last embarked on the project of developing a parallel concept of free domestic relations.

A. *Children Enslaved by Their Parents*

Parents enjoy plenary authority over their minor children, including the power to prevent them from departing the relationship. Yet nobody would contend that children generally suffer a condition of slavery pro-

73. See, e.g., *Hightower v. City of Boston*, 693 F.3d 61, 73 (1st Cir. 2012); *NRA v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 200 (5th Cir. 2012).

74. *Robertson*, 165 U.S. at 281.

75. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971) (indecent speech); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel).

76. In the years following *Robertson*, defenders of peonage argued that its exception should be extended to agricultural laborers, who could despoil an entire crop by quitting during the harvest. Courts rejected these contentions, however, and *Robertson* languished. Zatz, *supra* note 36, at 944–46 nn.103–14.

77. See Amar & Widawsky, *supra* note 31; McConnell, *supra* note 11.

78. See *infra* notes 104–114, 135–148 and accompanying text.

79. I am indebted to Noah Zatz for pointing this out.

hibited by the Thirteenth Amendment. What happens, however, if parents abuse and exploit their children as if they were slaves? In a 1992 article, Akhil Amar and Daniel Widawsky argued that the Amendment should apply. “Under ordinary circumstances,” they acknowledged, “parental custody does not violate the Thirteenth Amendment because, it is presumed, the parent exercises control over the child in the interests of that child.”⁸⁰ But when a parent “systematically” abuses and degrades his child in ways that are “not plausibly for the benefit of the child,” he violates the Thirteenth Amendment.⁸¹ The authors acknowledged *Robertson*’s dictum excluding parent–child relations from coverage but argued that it should be “refined” into a more sensitive test.⁸² “Although the *Robertson* dictum rested on immemorial custom, custom alone cannot be the sole test of the Thirteenth Amendment’s meaning, because the Amendment was designed to challenge longstanding institutions and practices that violated its core values of personhood and dignity.”⁸³ Accordingly, they called for “a test tailored to mark the subtle but all-important line between freedom and slavery in the specific case of children.”⁸⁴

The notion that the Thirteenth Amendment has anything to do with parental child abuse might seem counterintuitive to some, but Amar and Widawsky presented a straightforward case. In answer to the obvious objections, they contended:

[A] person can be a Thirteenth Amendment “slave” whether or not she is a minor; whether or not the ‘master’ is a blood relation of the “slave”; whether or not she has African roots; whether or not the enslavement takes the form of forced “labor”; and whether or not the enslavement is officially sanctioned by state law.⁸⁵

None of these claims appear to be especially controversial. The Thirteenth Amendment liberated not only adult slaves but also child slaves, many of whom were owned by their biological fathers.⁸⁶ Nobody doubts that the Amendment prohibits the enslavement of any person, regardless of race.⁸⁷ And few would contend that the Amendment freed only slaves who provided services recognized as economically valuable in the legal

80. Amar & Widawsky, *supra* note 31, at 1364.

81. *Id.* at 1377.

82. *Id.* at 1374.

83. *Id.*

84. *Id.*

85. *Id.* at 1365.

86. *Id.* at 1367.

87. *Id.* at 1368 (citing, *e.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1872)) (“[W]hile negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter.”).

marketplace, and not those who provided intimate personal services including the gratification of their masters' sexual and sadistic desires.⁸⁸ Finally, it is generally accepted that the Amendment applies to private as well as state action.⁸⁹ These claims do not *compel* the result favored by Amar and Widawsky (such clarity is rarely to be had with regard to an abstractly worded provision like the Thirteenth Amendment), but they certainly make a *prima facie* case.

Richard Posner, however, has rejected the argument on the slippery slope ground that Amar and Widawsky's methodology "would make the Constitution a cornucopia of new rights." He contends that Amar and Widawsky read the term "slavery" metaphorically, and "[t]o treat constitutional terms metaphorically is . . . to remove any textual check on constitutional interpretation."⁹⁰ Posner is not wrong that the term slavery is often used metaphorically, as for example when we "call an executive a 'slave' of his job."⁹¹ But Amar and Widawsky were not writing metaphorically. The 1865 edition of Webster's Dictionary defined slavery as the "condition of a slave; the state of entire subjection of one person to the will of another," and slave as a "person who is held in bondage to another; one who is wholly subject to the will of another; one who has no freedom of action, but whose person and services are wholly under the control of another."⁹² Children are wholly under the control of their parents, and thus would appear to fall within the literal definition of slavery. We nevertheless exclude them from the category because we assume that parents require services and impose discipline in the context of a caring, family relationship. As Amar and Widawsky point out, parents do not (and did not at the time of the Thirteenth Amendment's enactment) enjoy an "absolute vested right in the custody" of their children; instead, the law conditioned (and conditions) custody on the parents acting in the

88. Amar & Widawsky, *supra* note 31, at 1370; *see also* United States v. Kaufman, 546 F.3d 1242, 1260–61 (10th Cir. 2008) (rejecting defendants' argument that the Thirteenth Amendment applies only to "work that was economic in nature," citing Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403, 405 (1993) for the proposition that "many slaves were in fact the victims of sadism and torture rather than being put in the fields[,] . . . and yet they were surely covered by the core of the Thirteenth Amendment," and Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 796, 811 (1993), for the observation that "the context of coerced prostitution, which involves compelled sexual chores, surrounds the Thirteenth Amendment's prohibition against forced labor."

89. The Civil Rights Cases, 109 U.S. 3, 20 (1883); United States v. Kozminski, 487 U.S. 931, 942 (1988).

90. RICHARD A. POSNER, *OVERCOMING LAW* 214 (1995).

91. *Id.* at 212.

92. NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* 1241 (1865); *see also* JOSEPH E. WORCESTER, *A DICTIONARY OF THE ENGLISH LANGUAGE* 1352 (1860) (defining slavery as the "state of absolute subjection to the will of another; the condition of a slave; servitude; bondage").

interest of the child.⁹³ Far from indulging in fanciful metaphors, then, Amar and Widawsky merely suggest that certain forms of child abuse not only fall within the literal definition, but also should be recognized as Thirteenth Amendment slavery. Where a parent “systematically” abuses and degrades her child to such an extent that her conduct is “not plausibly for the benefit of the child,” she loses the benefit of the parent–child exception to the literal definition of slavery.⁹⁴ As an example, Amar and Widawsky offer the facts of *DeShaney v. Winnebago County Department of Social Services*, in which a young child suffered disabling brain injuries from a series of beatings inflicted by his father over a period of at least fifteen months.⁹⁵ They conclude that in that situation, where the parent had repeatedly used his child as a thing, “a punching bag,” the standard was satisfied.⁹⁶

Not only metaphor but also analogy figures in Posner’s critique. He contends that a case of child abuse could “just as readily be analogized” to a violent mugging as to chattel slavery. He asks whether the plight of an abused child is “more like that of the mugging victim or more like that of a slave on a cotton plantation in Mississippi in 1850?”⁹⁷ Posner poses this question rhetorically, apparently assuming that the mugging analogy is at least equally plausible. But is it? Putting aside possible quibbles with his formulation (for example, why not analogize to a *child* slave on a cotton plantation *owned by the child’s father?*), I would submit that a child suffering abuse of the type targeted by Amar and Widawsky bears a considerably closer resemblance to the plantation slave than to a mugging victim. Like the slave, the abused child endures long-term and plenary control by a master. By contrast, the mugging victim suffers momentary physical domination in a single encounter. Also like the Mississippi slave, the abused child is compelled to provide valuable services to her master, whether in the form of labor, gratification of sexual or sadistic desires, or provision of the innumerable psychological satisfactions that can flow from the domination of a human being. Even a child whose service consists of passively absorbing abuse also serves the master by eating, sleeping, and reproducing herself as a target. By contrast, the

93. Amar & Widawsky, *supra* note 31, at 1375–76 (quoting *United States v. Green*, 26 F. Cas. 30, 31–32 (Story, Circuit Justice, C.C.D.R.I. 1824) (No. 15,256)); *see also* Upham, *supra* note 32.

94. The literal definition carves out no exception for parent-child relationships, perhaps because the condition of slaves and the condition of children have not always been so distinct. *See, e.g.,* *People ex rel. O’Connell v. Turner*, 55 Ill. 280, 285 (1870) (recounting that in ancient Rome, the law “gave fathers the power of life and death, and of sale, over their children,” but observing that “[i]n this age and country, such provisions would be atrocious”) (quoted in Amar & Widawsky, *supra* note 31, at 1375).

95. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 191–94 (1989).

96. Amar & Widawsky, *supra* note 31, at 1378.

97. POSNER, *supra* note 90, at 213.

mugging victim cannot be said to provide service in the normal sense of the word.⁹⁸ On these criteria of enslavement—control and compelled service—the plantation slavery analogy would appear considerably more compelling than the mugging analogy.

Jamal Greene offers another slippery slope objection: that Amar and Widawsky's proposal would force judges to address complex issues outside the parent-child relation, for example "numerous instances of common criminal behavior, apprenticeships, workplace harassment, domestic abuse among adults, and not an insignificant number of judicial clerkships."⁹⁹ The final example suggests that this statement might be intended more as humor than as serious argument. But suppose we were to take it seriously. Amar and Widawsky's proposal applies only to a relationship, that of parent and child, that is legally and practically structured to ensure one person's total control over another. None of Greene's examples share that feature, and he gives us no reason to believe that the slope between the actual issue under discussion (systematic, sustained abuse not plausibly for the benefit of a child) and the feared results (Greene's examples) is actually very steep or slippery. Admittedly, we might slide down to certain kinds of domestic abuse among adults, but then—as discussed below—there might be good reason to go that far.¹⁰⁰

Although critics worry that Amar and Widawsky's proposed doctrine would be difficult to apply, it actually comports with an apparently straightforward and workable body of case law developed in similar cases. Inmates of psychiatric hospitals, for example, have challenged hospital work requirements on Thirteenth Amendment grounds. Although some inmates are, like children, subject to a degree of control that falls within the literal definition of slavery, we do not generally consider them to be slaves because they are in custody for their own benefit. However, inmates may establish a Thirteenth Amendment violation if they can show that a work requirement is "devoid of therapeutic purpose"—a standard that bears a close resemblance to Amar and Wildawsky's "not plausibly for the benefit" of the child.¹⁰¹ A similar standard has been ap-

98. See, e.g., WEBSTER, *supra* note 92, at 1206 (defining service as the "act of serving; the occupation of a servant; the performance of labor for the benefit of another, or at another's command; attendance of an inferior, or hired helper, or slave, &c, on a superior, employer, master, or the like"); WORCESTER, *supra* note 92, at 1314 (defining service as "[t]he act of one who serves; labor or duty performed for, or at the command of, a superior").

99. Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1743 (2012).

100. See *infra* Part II.B.

101. *Jobson v. Henne*, 355 F.2d 129, 132 (2d Cir. 1966) (sending mental patient's claim of involuntary servitude to trial on the ground that a program of mandatory chores for mental patients might be "so ruthless in the amount of work demanded, and in the conditions under which the work must be performed, and thus so devoid of therapeutic purpose, that a court justifiably could [find] involuntary servitude"); see also *Weidenfeller v. Kidulis*, 380 F. Supp. 445, 450-51 (E.D. Wis.

plied in cases involving high school community service requirements (constitutional as long as the requirement is “educational” and “not exploitative”)¹⁰² and compelled child labor in a religious camp (illegal “involuntary servitude” where the children were compelled to perform “extra services . . . that accrued to defendants’ personal benefit”).¹⁰³ In short, Amar and Widawsky have proposed what appears to be a workable and tested standard.

In a pair of recent cases, two panels of the Sixth Circuit Court of Appeals implicitly rejected *Robertson*’s blanket exceptions for parent–child and guardian–ward relations. In *United States v. Toviave*, the court overturned the forced-labor conviction of a man who had used systematic and brutal beatings to compel four minor relatives, including his younger sister, to perform domestic chores and occasionally babysit for his girlfriend and relatives.¹⁰⁴ In its statement of facts, the court noted that “Toviave was not always cruel,” that he took the children on family trips, bought them sports equipment, hired an English tutor, created extra homework assignments for them, and required them to study regularly on pain of the same harsh punishments that he used to extract services.¹⁰⁵ The court cited *Robertson* for the proposition that the Thirteenth Amendment does not abrogate “the right of parents and guardians to the custody of their minor children or wards,” but did not rely on such a sweeping exception.¹⁰⁶ Instead, the court focused more specifically on the parent’s “right to make his child perform household chores.”¹⁰⁷ The use of extreme force, by itself, could not transform a parent’s exercise of this right into the crime of “forced labor.”¹⁰⁸ By contrast, a parent would violate the statute if she subjected her child to “paradigmatic forced labor, such as prostitution, forced sweatshop work, or forced domestic ser-

1974) (mental patients may state a cause of action for violation of the Thirteenth Amendment if they establish that they were compelled to work and “that the work they performed was not therapeutic”); *United States v. Kaufman*, 546 F.3d 1242, 1248–49 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 1013 (2009) (upholding conviction of doctor for subjecting mental patients to involuntary servitude where there was evidence that their farm labor and participation in sexual activities had no therapeutic value); Lauren Kares, Note, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL L. REV. 372, 395 (1995).

102. *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 460 (2d Cir. 1996), *cert. denied*, 519 U.S. 813 (1996). For other examples, see Kares, *supra* note 101, at 395.

103. *United States v. King*, 840 F.2d 1276, 1281 (6th Cir. 1988) (upholding conviction of religious cult leaders for compelling children to work where “force was utilized by the defendants to compel extra services from the children that accrued to defendants’ personal benefit”).

104. 761 F.3d 623, 624, 630 (6th Cir. 2014).

105. *Id.* at 624.

106. *Id.* at 626 (internal quotations omitted).

107. *Id.* at 625–26.

108. *Id.* at 626–27.

vice.”¹⁰⁹ Why did the children’s household chores and babysitting not amount to “forced domestic service”? Because those tasks were “not beyond the bounds of what a guardian can reasonably expect from his child.”¹¹⁰ This standard of reasonableness takes the inquiry far beyond *Robertson*’s categorical exception and begins the project of distinguishing, as Amar and Widawsky put it, “legitimate (‘family’) and illegitimate (‘slavery’) forms of parental control.”¹¹¹

The *Toviave* court did not factor *Toviave*’s caring side into its reasoning or standard, but another panel of Sixth Circuit judges later restated *Toviave*’s holding to emphasize that consideration: “We held that [the forced labor statute] did not proscribe the defendant’s conduct in *Toviave* because ‘it has always been true that parents can make their children perform [household chores],’ and the evidence showed that the defendant was otherwise concerned about the minors’ well-being.”¹¹² This standard differs from Amar and Widawsky’s (“domination and degradation not plausibly for the benefit of the child”),¹¹³ but not by much. It exempts abuse that is too brutal to be plausibly for the benefit of the child, but that is deployed to compel household chores and other tasks that a parent or guardian “can reasonably expect from his child” so long as the parent or guardian is “otherwise concerned about the minors’ well-being.”¹¹⁴ Under this standard, child abuse does not become a Thirteenth Amendment issue unless the parent or guardian either compels services beyond those that can reasonably be expected (involuntary servitude), or inflicts abuse in the context of a relationship where she does not otherwise show concern for the minor’s well-being (slavery—treating the child as a thing, a chattel). Assuming that children cannot reasonably be expected to serve as providers of sexual or sadistic pleasure, this would seem to capture the cases that most concern Amar and Widawsky. At the same time, it would avoid the necessity for courts to inject the Thirteenth Amendment into cases involving ordinary child abuse.

B. Women Reduced to Involuntary Servitude

Unlike children, adult women enjoy the formal legal freedom to escape from abusive relationships. Joyce McConnell has argued, however, that some men batter their female partners into a condition of involuntary servitude prohibited by the Thirteenth Amendment. Her claim is a nar-

109. *Id.* at 626.

110. *Id.*

111. Amar & Widawsky, *supra* note 31, at 1377.

112. *United States v. Callahan*, 801 F.3d 606, 619 (6th Cir. 2015) (second set of brackets in original).

113. Amar & Widawsky, *supra* note 31, at 1377.

114. *Toviave*, 761 F.3d at 626; *Callahan*, 801 F.3d at 619.

row one. She contends that “women who are coerced through physical violence or threats of physical violence to provide services they do not choose to provide” can make out a constitutional violation if the violence is administered “repeatedly” and “over a period of time, including the degradation and isolation of the woman being battered.”¹¹⁵ This type of abuse, she points out, falls within even the narrow definition of involuntary servitude stated by the Supreme Court in *United States v. Kozminski*.¹¹⁶ The batterer effectively nullifies the victim’s formal right to depart by deploying violence and threats of violence against her, her children, and other loved ones with the objectives of inflicting psychological terror, isolating the victim from family and friends, enforcing economic dependency, and breaking down the victim’s will to resist.¹¹⁷

However, as noted above, *Kozminski* also reaffirmed *Robertson v. Baldwin*, albeit in dictum.¹¹⁸ *Robertson* did not specifically mention the husband–wife relation, but—as McConnell observes—“it is reasonable to conclude that, like the parent and 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.”¹¹⁹ Moreover, the Amendment’s framers, ratifiers, and early enforcers repeatedly denied that it would interfere with the husband’s dominion over his wife.¹²⁰ Members of Congress did hold that the Amendment reached the domestic sphere, but mainly to guarantee the right of the freedmen to the same sovereignty over their wives and children as was enjoyed by white men.¹²¹

According to some, this kind of history should conclude the inquiry. Justice William Rehnquist, for example, once opined that “if ever

115. McConnell, *supra* note 11, at 208 n.8, 229.

116. *Id.* at 208 n.8.

117. *Id.* at 234–39.

118. *United States v. Kozminski*, 487 U.S. 931, 944 (1988).

119. McConnell, *supra* note 11, at 216–17. McConnell found no cases involving Thirteenth Amendment claims by battered women, apparently indicating that attorneys read *Robertson* to preclude them. She compared the facts of battered women’s cases brought under other theories with “judicially recognized cases of involuntary servitude” and concluded that the former were distinguished by “the intimate origin of their relationships and not the degree or nature of the coercion or the services they provided.” *Id.* at 209.

120. STANLEY, *supra* note 23, at 57; VORENBERG, *supra* note 45, at 194–95; McConnell, *supra* note 11, at 216; VanderVelde, *supra* note 26, at 454.

121. Senator Jacob Howard, for example, counted among the essential rights of freemen, guaranteed by the Amendment, “the right of *having* a family, a wife, children, home.” CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (emphasis added); *see also* CONG. GLOBE, 38th Cong., 2d Sess. 120 (1865) (“The slave could sustain none of those relations which give life all its charms. He could not say my home, my father, my mother, wife, my child, my body.”) (statement of Rep. Cresswell); VORENBERG, *supra* note 45, at 194–95. This was also the view of most freed men. *See* STANLEY, *supra* note 23, at 48 (“In claiming the right to rule their wives, freedmen expressed the entrenched southern view that governing a household of dependent persons was a birthright of free men . . .”).

there were an area in which federal courts should heed the admonition of Justice Holmes that ‘a page of history is worth a volume of logic,’ it is in the area of domestic relations.”¹²² It may be, however, that the field of domestic relations poses difficult challenges for any interpretive methodology that centers on history. For those who value original meaning because it indicates democratic will or consent, it might be a problem that women were excluded from the Congresses that proposed the Amendment, the state legislatures that ratified it, and the electorates that selected both.¹²³ For those who seek determinate meaning, there is the difficulty that meaning is determined by context, and the context reflects prevailing power relations including patriarchy.¹²⁴ For those who value history because tradition embodies the genius or ethos of the American people, it seems unlikely that the patriarchal doctrines of male authority and separate spheres would be among those “traditions from which [the country] developed” as opposed to “the traditions from which it broke.”¹²⁵ For those who include judicial precedent in their concept of history (or who value theoretical and jurisprudential consistency), there is the existence of a large body of Fourteenth Amendment jurisprudence built on the principles of gender equality and reproductive freedom notwithstanding original expected applications to the contrary.¹²⁶

Moreover, it is possible that history is not as hostile to Thirteenth Amendment protection for women’s rights as might first appear. “We

122. *Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting) (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

123. Annaleigh E. Curtis, *Why Originalism Needs Critical Theory: Democracy, Language, and Social Power*, 38 HARV. J.L. & GENDER 437, 444 (2015).

124. As Curtis explains, the contemporary meanings of legal terms were inevitably shaped by the same field of power that produced and was reflected in exclusions from political participation. *Id.* at 446. Thus, the “decision to enforce the original meaning of a text without critical insight is not a neutral decision. Rather, it will often be tantamount to endorsing an oppressive history masked in common language.” *Id.* at 459.

125. The quoted language is from Justice John Marshall Harlan’s influential dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961). See Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 443 n.50 (2014) (observing that Joseph Bradley’s concurrence in *Bradwell v. Illinois*, which approved a state law excluding women from the legal profession on the ground that men and women appropriately occupy “separate spheres,” has functioned as a “negative precedent” in cases involving women’s rights); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (affirming the constitutional right to terminate a pregnancy, reasoning in part that the state cannot impose “its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture”).

126. As Jack Balkin points out, consistent reliance on original expected application would render a very large number of Supreme Court rulings invalid. Moving forward, the question whether to overturn or retain each such ruling would hinge on the highly indeterminate, explicitly policy-based doctrine of *stare decisis*. Thus, what began as a quest for principled consistency would end in a patchwork of theoretically correct and incorrect rulings shaped by unconstrained judicial policy judgments as to whether any particular incorrect ruling should be retained for reasons of *stare decisis*. JACK M. BALKIN, *LIVING ORIGINALISM* 8–9 (2011).

often envision the hallmark of slavery's inhumanity as the slave picking cotton under the overseer's lash," observes Dorothy Roberts. "[But as] much as slaves' forced labor, whites' control of slave women's wombs perpetrated many of slavery's greatest atrocities."¹²⁷ As Roberts and others have made clear, these atrocities concerned not only the wombs of enslaved women, but also their entire bodies as vehicles for breeding and pleasure.¹²⁸ Pamela Bridgewater points out that these abuses were prominent among the evils of slavery targeted by antislavery advocates.¹²⁹ She proposes that, taking this history into account, the Amendment should be read to prohibit not only the coercion and exploitation of labor, but also reproductive and sexual abuse.¹³⁰ Relying on similar evidence, McConnell argues that the term "involuntary servitude" outlaws physical coercion of services generally—whether sexual, reproductive, or productive—in intimate relationships.¹³¹ Mary Ann Case and Alexander Tsesis further suggest that, as feminist abolitionists asserted at the time and the Supreme Court later affirmed, "throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes."¹³² Examples include the married women's property acts, denial of married women's right to sue in court, occupational exclusions that applied to single as well as married women, denial of the right to vote, and vulnerability to domestic abuse.¹³³ "One need not accept this argument categorically and argue," observes Case, "that all marital and filial relations are called into question by the Thirteenth Amendment to make the case that some are."¹³⁴

127. DOROTHY ROBERTS, *KILLING THE BLACK BODY* 45 (1997).

128. *Id.* at 25–45; *see also* PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 216–36 (1991); Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11, 12–29 (2001) (recounting abuses and describing legal protections for the perpetrators); McConnell, *supra* note 11, at 217–18 n.52 (providing a lengthy list of sources documenting abuses); Judith K. Schafer, *Sexual Cruelty to Slaves: The Unreported Case of Humphreys v. Utz*, 68 CHI.-KENT L. REV. 1313 (1993) (suggesting that the true extent of sexual abuse was deliberately hidden by courts).

129. Bridgewater, *supra* note 128, at 31–39; *see also* Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1711 (2012) (recounting abolitionist women's critique of slavery's impact on women).

130. Bridgewater, *supra* note 128, at 40.

131. McConnell, *supra* note 11, at 218–20; *see also* Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 466–67 (1995) (suggesting that the experience of slave women should "teach us that intimate association between men and women does not in and of itself guarantee respect and protection").

132. Case, *supra* note 125, at 442 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality)); Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1661–62 (2012).

133. Case, *supra* note 125, at 442–43; Tsesis, *supra* note 132, at 1661–68.

134. Case, *supra* note 125, at 443.

In the recent case of *United States v. Marcus*, the district court rejected the notion that the forced labor statute, enacted under authority of the Thirteenth Amendment, does not reach a “domestic, intimate relationship.”¹³⁵ Glenn Marcus and a woman named Jodi entered into a consensual relationship involving bondage, discipline, sadism, and masochism (BDSM).¹³⁶ Jodi agreed to serve as Marcus’s slave, in which role she submitted to sado-masochistic sex, performed household chores, and worked on Marcus’s BDSM website.¹³⁷ Marcus gradually escalated his demands and inflicted more brutal punishments. In October 1999, Jodi announced that she wanted to leave. Marcus responded by brutally torturing her and threatening that, if she left, he would send pictures to her family and the media.¹³⁸ The relationship continued until August 2001, after which the frequency and extremity of Jodi’s interactions with Marcus declined.¹³⁹ Marcus was convicted of forced labor and filed a motion to set aside his conviction.¹⁴⁰

The forced labor statute makes it a crime to knowingly obtain the “labor or services” of another person by certain forms of coercion including physical restraint and threats of serious harm.¹⁴¹ Marcus argued that Jodi’s work did not constitute “labor or services” under the statute because it transpired in the context of an “intimate, domestic relationship.”¹⁴² District Judge Allyne R. Ross rejected this argument both as to Jodi’s household chores and her work on Marcus’s website. She noted that Jodi’s chores and website work clearly fell within the dictionary definitions both of labor (an “expenditure of physical or mental effort especially when fatiguing, difficult, or compulsory”) and services (“useful labor that does not produce a tangible commodity”).¹⁴³ She then rejected Marcus’s slippery slope argument that the dictionary definitions would encompass ordinary domestic abuse, reasoning that “§ 1589 requires a link between the physical restraint or threats of serious harm and the obtaining of labor or services.”¹⁴⁴ Accordingly, the court saw “no reason why the existence of a domestic partnership between two individuals should preclude criminal liability if one person knowingly uses ‘threats of serious harm to, or physical restraint against, that person or another

135. *United States v. Marcus*, 487 F. Supp. 2d 289, 304 (E.D.N.Y. 2007), *vacated on other grounds*, 538 F.3d 97 (2d Cir. 2008), *reversed and remanded*, 560 U.S. 258 (2010).

136. *Id.* at 292.

137. *Id.* at 293–94.

138. *Id.* at 296–97.

139. *Id.* at 297.

140. *Id.*

141. 18 U.S.C. § 1589 (2012).

142. *Marcus*, 487 F. Supp. 2d at 299.

143. *Id.* at 300.

144. *Id.* at 303.

person,' to obtain labor or services."¹⁴⁵ Judge Ross did not address the question whether Jodi's coerced participation in BDSM sex constituted "labor or services," but she did respond to Marcus's slippery slope argument that applying the dictionary definitions would turn rape into a forced labor offense:

The court recognizes that, in certain circumstances, a sexual act may constitute a labor or service. However, the court fails to see how the forced sexual act endured by a rape victim falls within the ordinary meaning of the phrase "labor or services," as defined by the court in this opinion.¹⁴⁶

We might speculate that Judge Ross was envisioning a one-shot rape in which the victim was physically invaded but not forced to provide sexual services. By contrast, repeated rape in the context of an intimate relationship would entail, at a minimum, the victim providing the services of consuming nourishment, sleeping, and otherwise maintaining herself for the perpetrator's use while refraining from reporting his crimes to the authorities.

On appeal, the Second Circuit Court of Appeals summarized Marcus's arguments for excepting intimate domestic relations and expressed agreement "with the district court's well-reasoned opinion that these arguments are without merit."¹⁴⁷ The court then, however, proceeded to discuss only Jodi's work on the website, which—as Judge Ross had noted below—was sufficient to sustain the conviction.¹⁴⁸ Neither Judge Ross nor the Second Circuit panel mentioned *Robertson* or the Thirteenth Amendment. Both did, however, apply the forced labor statute to services extracted in the context of an intimate domestic relationship that began on a consensual basis—considerable progress beyond *Robertson*'s blanket exception.

CONCLUSION

Slavery was but one of many hierarchical relations, including parent-child, husband-wife, master-apprentice, and master-servant, that arose within the legally constructed household. The Thirteenth Amendment's prohibition on slavery and involuntary servitude, which contained no explicit domestic exception, inevitably raised the question whether domestic service relations other than chattel slavery would be affected. The Supreme Court's 1897 opinion in *Robertson v. Baldwin* limited the

145. *Id.*

146. *Id.* at 313 n.10.

147. *United States v. Marcus*, 628 F.3d 36, 44 (2d Cir. 2010).

148. *Id.* at 45.

Amendment's reach, but its blanket exceptions appear anachronistic today. In the dimension of class, *Robertson* denied Thirteenth Amendment protection to an entire category of workers based on an unsupported judicial determination that they lacked intelligence and responsibility, and therefore belonged in the domestic sphere of natural subordination. In the dimension of gender, it stripped women and children of protection in domestic settings based on common law notions that have since been repudiated in other areas of law. Although the Supreme Court has never questioned *Robertson*, scholars have suggested "refinements," and some lower courts have applied statutory prohibitions on involuntary servitude to protect women and children in domestic contexts. These developments may presage the rejection, explicit or implicit, of *Robertson*'s categorical boundary between the public sphere of class and the private sphere of gendered domesticity.