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Review Symposium: Retrospective on the Work of Hendrik Hartog

Marital Consciousness and the Criminalization of Spousal Abuse

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HARTOG, HENDRICK. *Man and Wife in America – A History*. Cambridge, MA: Harvard University Press, 2002.

Criminal law's treatment of spousal violence oscillates between two different views. According to the first view, spousal violence is to be defined and prosecuted using generic titles such as assault or battery. According to the second, spousal violence constitutes a form of abuse—a terminology implying a background state of power or inequality that exists in spousal relationships, turning it into a distinct legal wrong. This Essay draws on Hendrik Hartog's account of nineteenth-century marital consciousness in Man and Wife in America*—which considers people's assumptions and expectations regarding rights and duties within marriage—to illuminate this contemporary debate and situate it within a larger inquiry concerning the residues of patriarchy in contemporary law and society. This analysis calls for a fresh normative assessment of the different views for proscribing spousal violence under contemporary criminal laws.*

INTRODUCTION

After centuries in which spousal violence—often referred to as domestic violence—was not prohibited by criminal laws and was even authorized as men's prerogative of chastising their wives (Siegel 1996), there is now a general consensus that spousal violence constitutes a crime. The discussion seems to have shifted from *if*, to *how*, best to tackle domestic violence through criminal laws. Common in this discussion has been to note the gap between the law-in-the-books and law-in-action, between the *de jure* criminalization of spousal violence and its, often, poor *de facto* enforcement, starting with police agencies and continuing with the courts, who have been blamed for applying a nonintervention policy guided by an ideology of family privacy (Pleck 1987). This Essay illuminates a different debate, which centers not on the deficient application of known legal rules but on the legal standards themselves. While spousal violence is obviously wrong, there is a deep controversy surrounding the type of wrongfulness involved in it. The debate has been most visible with respect to women who kill their abusers, and whether the criminal law should excuse their responsibility or

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mitigate their punishment under specific doctrines reflecting their unique situation (Dressler 2006; Dershowitz 1994). It has been no less crucial—though not always acknowledged—with respect to the very definition of domestic violence offenses, their labeling and grading vis-à-vis other types of proscribed violence (Tadros 2005). Without denying the differences between the two doctrinal contexts (the former relating to *defenses*, the latter to *offenses)* they both raise a similar question, namely, how should domestic violence should be conceptualized as a legal wrong under contemporary criminal laws.

Looking into existing laws and legal literature reveals a debate that oscillates between two different views: According to the first, domestic violence is to be defined and prosecuted as assault or battery—generic terms that were historically excluded from the familial context (due to patriarchal immunities) and are now being restored. According to the second, domestic violence should be understood as a form of *abuse*[1] —a terminology implying a background state of power or inequality that exists in spousal relationships above and beyond the violent act "in itself," exacerbating its effects and turning it into a distinct legal wrong. Arguably, victims of spousal abuse who kill their abusers ought to be judged under specific legal doctrines acknowledging the realities of spousal control, rather than be subjected to the stringent terms of generic criminal law defenses such as self-defense. While choosing between the two views would undoubtedly carry important effects in terms of legal theory and practice, the main purpose of this Essay is not to advocate one over the other but rather to explore specifically the abuse view, and to understand its underlying assumptions. It is my contention that while abuse as a term is commonly used (domestic abuse, child abuse, employee abuse) a legal theory of abuse is still in its infancy. Existing abuse literature, moreover, is largely ahistorical. This Essay turns to Hendrik Hartog's socio-historical account of nineteenth century marriage in the United States, as depicted in *Man and Wife in America*, to offer a fresh perspective on the contemporary legal theory of spousal abuse.

MARITAL LEGAL CONSCIOUSNESS IN NINETEENTH CENTURY AMERICA

Certainly, *Man and Wife in America* is not primarily a book about violence or abuse. Rather, it is a book about marriage as a legal institution consisting of rights, duties, and prerogatives, and about the complex ways in which people—men and wives as the title suggests—sometimes managed to escape or terminate marriage even back in the nineteenth century when it was often believed that virtually no such exits were possible. Yet, speaking of spousal violence as part of a larger consideration of marriage as a social institution is precisely what makes this book so useful for understanding spousal violence, and for conceiving its legal regulation not only historically but also at present.

The book works on two different levels to portray marriage and people's perceptions of it in nineteenth century America. The first describes marriage in a way that is largely compatible with contemporary notions of what it meant to be married in

1. The California Penal Code provides an example for a statutory definition that uses the term abuse, instead of battery or assault. California Penal Code § 13700.

nineteenth century America, and of course, it meant two vastly different things for men and for women. By marriage, "a host of property rights, obligations, losses, gains, immunities, exemptions, remedies, and duties had come into one's life" (93), though the allocation of those legal entitlements was famously asymmetrical between men and women. "By marriage," "a wife became a feme covert" (93)—a woman covered over by her husband. While the doctrine of coverture was guided by an ideal of unity between a husband and wife, it was the wife's legal capacities that were consolidated into her husband's, and it was the husband who, through marriage, gained full ownership of his wife's personal property and real estate. In exchange, the husband was bound to support his wife (115). So much for the first level. The second level, speaking more to perceptions of marriage and married people than to the legal rights they formally possessed, is less intuitive, or even provocative (Mintz 2001). To begin with, Hartog claims that, although women were subordinated to men, they were never things (125) and were not similar to slaves (93). They, rather, held a separate identity, separate from that of husbands, obviously, but also separate from that of unmarried women (118). Moreover, a husband's power and authority within marriage was not unlimited. A wife's duty to obey her husband was conditioned on his good conduct as a ruler (53) and American courts of the early republic, unlike their English counterparts, largely abandoned the common law doctrine that allowed men to physically discipline their wives (105). This, of course, is not to say that men were routinely judged for domestic violence in nineteenth century America, let alone criminally punished for such behavior. The times were times of transition (218) and pioneering feminist activism, yet transitions take time. Even when traditional prerogatives were being questioned, prohibitions against violence were still structured around, and confined to, notions of excessiveness and cruelty (105) rather than comprehensively banning all types of husbandly violence. Courts, in any case, were not quick to intervene in the criminal law.[2]

Hartog's focus, however, is not on the progression or stagnation of black letter statutes or case law but rather on people's perceptions of marital rights and duties, which he describes as much less determinate and much more conflicted than one would have imagined. Affording a rich description of what I refer to as *marital consciousness*, Hartog particularly shows how both men and women tended to adhere to inherited notions of patriarchy even if certain aspects of them had already been altered by the positive laws of their time. Particularly, and contrary to common views in contemporary scholarship, he suggests that women's adherence to patriarchal norms should be understood neither in terms of psychological weakness nor of structural asymmetry of power but rather of submission to, and respect for, religious or historical normative orders outside and beyond positive laws.

Take for example Abigail Bailey, a turn of the nineteenth century woman who was physically abused by her husband, and who ultimately divorced him. More than celebrating Abigail's successful exit from an abusive relationship, the point of Hartog's careful reading of her memoir is to tell the story of her tormented and delayed decision to leave. He attributes the delay not to Abigail's weakness but rather to her moral

2. Hartog, however, challenges the assumption that court rulings masked coherent ideological (and patriarchal) attitudes (Hartog 2000, 4).

character, as manifested in her attempt to manage a complex web of conflicting duties and inconsistent normative orders. If she was submissive, Hartog suggests, she submitted not only, perhaps not even mainly, to her husband but to higher norms guiding both him and her, portraying a decision to leave on her part neither as powerful nor as powerless, but mostly as tricky (54). As Hartog points out, under contemporary discourse Abigail would easily be described as a victim, "her delay a measure of victimization" (41) but such a response overlooks Abigail Bailey's own perspective, under which a decision to halt before leaving is crucial for her sense of moral identity. For one thing, although she thought of herself as being under the control of her husband, her relationship with him was only secondary to her relationship with God, whose will she strived to follow. Figuring out what God wanted her to do was a difficult task, though. While wifely obedience was generally expected, it was also clear that under certain circumstances "the habit of obedience would no longer be a virtue" (44).

Moreover, although her husband's misconduct gave her "immediate right to live apart from him" or even "an obligation to act immediately on that right," a decision to leave was complex considering the perception of marriage as a relationship for life, promising the permanent union of two souls (53). Such aspirational visions nurtured people's imaginations, expectations, and perceptions of their rights and duties within marriage, notwithstanding both protestant theology and Anglo-American legal theory's declarations that marriage was (merely) a civil contract. Mentioning these sentiments, Hartog does not deny that marriage in the nineteenth century was a hierarchical and asymmetrical legal order, obviously according more power to men than to women. What he contests is the common historiography of women as helpless victims and of people in general as being either on the side of the powerful or the powerless.

HISTORICAL LEGAL CONSCIOUSNESS AND CONTEMPORARY CRIMINAL LAWS

The main response found in contemporary literature to the question "what is being abused" in spousal domestic violence, is that domestic violence results in a unique psychological harm, vulnerability, or trauma suffered by the victim, conceiving her indeed as someone not merely assaulted but rather abused. Hartog's analysis provides a juxtaposition to the common argument that abuse is psychological, suggesting instead that it can be anchored in legal consciousness. To see the contribution of his analysis, we have to look specifically into the gap between formal legal rights or duties and people's perceptions of them.[3] Particularly, he finds that even when violence was formally unauthorized, women did not always protest against it. Hartog's point in exposing this gap is not that women were passive but rather to locate abuse in a broad normative context. If women did not protest or leave abusive relationships, or if their

3. As Grossman points out, Hartog emphasizes "neither the abstract governing law, nor the private emotions and values, but their points of intersection" (Grossman 2003, 1615).

exists were delayed—this was, at least in part, due to the respect they paid to marriage as a stable normative order, legitimized as much by religious and traditional legal norms—by what Hartog refers to as an "inherited vision of what it was to be married" or "a legal vocabulary continuous with a long patriarchal tradition" (39)—as by the positive laws of their time.

Apart from its contribution to the legal history of marriage (Regosin 2002), this description affords a new framework for considering domestic violence as abuse under contemporary criminal laws. Inspired by *Man and Wife in America*, I suggest that what is being abused in domestic violence instances is, first, the continuous normative power of marriage as a stable and durable institution, exerting obligations of loyalty, devotion, and constancy one does not easily forsake, and second, the continuous normative power of patriarchy as a legal regime in which wives think of themselves as subjected to the authority and government of husbands. Being captured in a violent relationship is a central feature of the abuse view under contemporary laws, influencing both the offense and the defense. What the abuse view takes into account, and the assault view does not, is that the beatings are continuous over long periods of times and that victims often find it very difficult to escape the abusive relationship (Herring 2012, 228; Tadros 2005, 128).

Particularly for the defense, a prominent position in contemporary law and legal literature is that a woman's capture in an abusive relationship is fundamentally psychological, possibly leading to learned helplessness and battered woman syndrome (Walker 2016). But in and of itself, this psychological understanding is deprived of context, and can be profitably augmented by socio-historical accounts. The willingness to criminalize domestic violence must be explained by reference to the history of marriage as a hierarchical and aspirational social institution. Moreover, in criminalizing spousal violence as abuse, the law acknowledges the continuous power of marriage as a normative order, even if people's assumptions regarding their duties and obligations are no longer in accord with contemporary formal legal norms. If historical prohibitions of domestic violence considered abuse as the excessive or cruel use of valid patriarchal power, contemporary prohibitions consider abuse the exploitation of the remnants, or shadows, of past patriarchal powers within people consciousness, even if such powers were formally abolished.[4]

What might be the implications of adding the historical dimension to the analysis of why spousal violence should be seen as abuse? First, it affords a reflexive understanding of criminal law debates and practices (Farmer 2016, 35): the assault view and the abuse view may be understood as two different ways in which contemporary criminal laws treat the past. Considering spousal violence as assault refers to the present in terms of complete rupture, or full liberation or emancipation from past social hierarchies, conceptualizing spousal relationships as egalitarian, and applying the general prohibition against violence as in any other context. Considering spousal violence as abuse invokes

4. This interpretation is therefore relevant also in cases involving cohabitation or common law marriage, which are not formal marriage. The idea here is that some kind of patriarchal imagination survived into contemporary spousal relationships even if they only mimic formal marriage and even if patriarchy was abolished as a formal legal regime.

a different understanding of how we move from past to future (or present). It assumes that the past is not easily discarded, and conceives of the abolishment of patriarchy as more evolutionary than revolutionary. The abuse view, moreover, privileges the contemporary understandings of the historically unprivileged, and assigns contemporary criminal law institutions the role of acknowledging past historical wrongs, or possibly even redressing them.

The descriptive account calls for a normative evaluation as well, although a full consideration of normative questions is beyond my scope here. Following the descriptive analysis, we are able to frame a new normative question regarding the criminalization of spousal violence: is it appropriate for the criminal law to reflect and acknowledge within its norms the shadows of past patriarchal norms? My opinion is it is not. My analysis shows what are the residues, or the wide context—historical and social—to which the legal system lends an ear when it criminalizes spousal violence as an abuse offense. It is this very understanding that lets me argue that the criminal law is not the correct place for such considerations. Hartog shows that in the nineteenth century, wives were not powerless but were not equal to men. As opposed to the nineteenth century, the legal norm today is different—women are, and should be, fully and completely equal to men. I believe criminalization should reflect this position just as clearly.[5] Hence, any admittance of the shadows of patriarchy into the criminal law will, in my view, not redress the inequalities of the past but is at serious risk of perpetuating them. It will not help women but instead will likely harm women's agency and equality and thus should be avoided.

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5. Modern criminal law's assumptions of human agency are essentially aspirational rather than empirical (Schneebaum and Lavi 2014, 152).

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