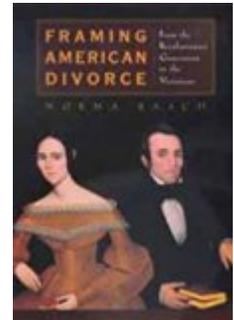


Norma Basch. *Framing American Divorce: From the Revolutionary Generation to the Victorians.* Berkeley: University of California Press, 1999. xii + 237 pp. \$29.95, cloth, ISBN 978-0-520-21490-3.



Hendrik Hartog. *Man and Wife in America: A History.* Cambridge, Mass: Harvard University Press, 2000. vi + 312 pp. \$29.95, cloth, ISBN 978-0-674-00262-3.



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Till Death Do Us Part?

In addressing the history of marriage and divorce in America, Hendrik Hartog and Norma Basch have raised the bar for legal historians to dizzying heights. At first glance, the books under review appear somewhat duplicative. Upon closer examination, however, they work beautifully, for they complement, and are in dialog with, each other. Indeed, it is fascinating to witness such fine historians examine some of the same sources, using different methodologies and bringing to the same material subtly disparate concerns. For an unusual intellectual treat, the two books should be read in tandem.

Man and Wife in America asks how nineteenth-century law shaped men and women's un-

derstanding of the meaning of marriage and their self-identities as husbands and wives. In answering this question, Hartog, professor of history at Princeton University, engages in a wide-ranging exploration of nineteenth-century law regarding husbands, wives, coverture, separation, divorce, bigamy, child custody, and judicial interpretation of the married women's property acts. Hartog's focus, however, is on separation -- a limbo between marriage and divorce -- as a starting place to explore the law of marriage. In the process, Hartog unpacks the myth that domestic relations law evolved, in a linear fashion, from feudal notions of the husband-headed household to modern companionate marriages. In doing so, Hartog offers a more complicated, less-easily categorized,

narrative. Yet throughout his book, Hartog remains deeply concerned with legal doctrine and the process by which it develops.

Framing American Divorce, in contrast, focuses on divorce and its changing societal acceptance. In exploring the social, political, theoretical, and religious contexts of divorce and the debates that it engendered, Basch, professor of history at Rutgers University -Newark, locates its changing symbolic meaning in the period from 1770 to 1870. In doing so, she too disrupts a progressive narrative of steady liberalization. She writes, "If there is an overarching story to be told here, it lies somewhere between the almost silent legitimation of divorce in the post-Revolutionary era and the militant contestations it elicited in the wake of the Civil War" (Basch, p. 4). *Framing American Divorce* is divided into three principal sections, in which Basch uses different "analytical lenses" to examine divorce. The first section examines the theoretical understanding and debates regarding divorce in the revolutionary period and in the mid-nineteenth century; the second section examines actual divorce cases and analyzes from the perspective of gender what it meant for men and women to go to court seeking a divorce. The final section examines how divorce was portrayed by newspapers and in popular literature and the different gendered themes that each medium created.

The two works differ in important ways. Basch is more consciously concerned with exploring the role of women, their power and agency, and the potential for divorce simultaneously to subvert and to sustain dominant gender constructions. She repeatedly states that she is trying to analyze and bring to the fore issues of gender even where historical actors attempted to obscure gender implications. Although certainly aware of and concerned with such issues, Hartog focuses to a greater extent on legal doctrine and how separating husbands and wives both shaped the law and how, in turn, the law shaped their own expecta-

tations and experiences. In doing so, Hartog repeatedly confronts and grapples with the diverse sites where the "law" can be located.

At the narrative heart of both of these works are stories -- some from literature, some from court cases, some from legislative debates -- of men and women, husbands and wives, fighting, suing each other, reconciling, of love found and love lost. Although based on stories of marital failure, there is something in both that we might hesitantly label "romantic." Yet neither book rests on these stories. Rather, what makes them remarkable is their artful blending of stories into wider and more theoretical narratives of change and continuity in the law of marital dissolution and the performative aspects of being husband and wife.

Both authors set their works within an extraordinarily transient nineteenth-century America -- an America in which husbands and wives, especially husbands, could disappear westward, leaving wives and old lives behind. At times, husbands intentionally abandoned families and at other times men set out to find new work and opportunity. As time and distance increased, new loves were found and previous lives and identities discarded. Husbands or wives might then seek a legal dissolution of the marriage, often in a distant western state with more liberal divorce laws. They might, however, also simply remarry, or live with a mate, presenting themselves to the community as married. Abandoned wives might claim the more acceptable status of widow. In a vast America where communication was difficult and record-keeping minimal, identity itself was malleable and numerous legal cases arose contesting the legal or extra-legal legitimacy of second marriages. Hartog devotes a chapter to bigamy, in which he argues that judges were more accepting of bigamy than of either divorce or separation. This acceptance of bigamy goes to the heart of Hartog's thesis, which is that the law, individuals, and society placed great importance on

marriage and the identity derived from being husband and wife.

If mobility and space provided the geographical landscape, federalism provided the legal background to domestic relations law as each state created its own laws of divorce and marriage. Various states' divorce laws conflicted with one another, with states such as New York allowing for divorce in only the most extreme circumstances and states such as Indiana becoming nineteenth-century divorce havens. Both authors explore the long-standing practice of heading west to procure a divorce that the development of the railroads only accelerated. Each state also had the discretion to recognize divorces and marriages that occurred in other states and Hartog provides a complicated but accessible chapter, analyzing the twist, turns, and development of courts determining whether to recognize foreign divorces and treatise writers trying to make some sense of the developing law.

Yet this diverse patchwork of state legislation and state court cases creates tremendous complexity in writing a history of nineteenth-century divorce. In a methodological note (Hartog, pp. 315-316), Hartog writes that he primarily reviewed appellate cases from New York and California with a sampling of Delaware and Wisconsin law, as well as virtually all legal commentary on divorce and marriage from the nineteenth century. He writes that he did not rely on county court records and that his conclusions need to be tested in other jurisdictions using other sources. Hartog's reliance on appellate cases raises some concern that he inadvertently may have obscured issues of class. For a case to be appealed, one would assume that the parties had the financial resources to do so, that the dispute concerned enough money to make an appeal worthwhile, and that both parties cared about the outcome of the case. For such reasons, the cases that he examines may not be representative.

Hartog's use of appellate cases, which focus on resolving legal questions rather than factual disputes, also provides a different flavor to his work than Basch's exploration of county divorce records in New York County, New York, and Monroe County, Indiana, with their much more mundane concerns. Basch's investigation leads her to conclude that most divorces were ex-parte, with one spouse long departed -- unaware of and perhaps unconcerned with the case's outcome. Perhaps most important, the examination of these records demonstrates that women filed the majority of suits.

Basch concludes that divorce was a woman's remedy for a failed marriage and possible abandonment; abandonment was a male remedy. Indeed it is fascinating to think about the possibility that nineteenth-century courts were places to which women turned for help, whereas men relied upon self-help. This complicates historians' understanding of nineteenth-century courts as male sites. Combining a gender analysis with a class analysis, Basch further discovers that women who fared best financially were those who already had some means of financial independence. Divorce functioned to free such a woman from her husband's claim to her wages and property. Yet Basch recognizes that the majority of divorcing women faced poverty.

Although Hartog's work tends to ignore class, he is particularly attuned to the broader issues of how law is created and how it metamorphosizes, issues with which Basch is not particularly concerned. For Hartog, the "law" is constantly in flux and contested, making legal mega-narratives specious. Hartog rejects the school of jurisprudence that views law as covert political theory, seeking to "reveal the masked ideological assumptions and goals of the judges" (Hartog, p. 4). Instead, he views law as less coherent in which all the players -- judges, attorneys, juries, treatise writers, case-book editors, academics, litigants, and social critics -- are in constant dialogue with one another,

making and re-making the law. Indeed what Hartog finds so unique in American law is the willingness of legal participants to experiment and improvise.

Yet if some of the most brilliant moments in Hartog's work come from his sophisticated jurisprudential arguments, the uniqueness of Basch's work lies in her analysis of the cultural and political understanding and ramifications of divorce. Basch sets the ground for American divorce with the closure of the American Revolution, arguing that divorce, revolution, self-government, and political liberty were inherently connected. Basch writes, "No sooner, it seems, did Americans create a rationale for dissolving the bonds of empire than they set about creating rules for dissolving the bonds of matrimony" (Basch, p. 21). Where the legitimacy of the new state rested upon consent, so too did marriage; where the Revolution severed a sacred contract, so too did divorce. In this post-revolutionary period, women gained an unprecedented ability to end marriages and Basch argues that at least some of the founding generation, such as Thomas Jefferson and Thomas Paine, supported liberal divorce laws as a crucial component of American liberty.

By intensely focusing on divorce, Basch is able to extract nuances that Hartog's broader narrative does not. For example, Basch closely examines legislative petitions for divorce. In doing so, she derives two important conclusions. First whereas the grounds upon which courts could grant divorces were often limited, early nineteenth-century legislatures were not so limited and may have provided a sort of safety valve. Yet wealth and political power were often a prerequisite for securing a successful legislative divorce. In the Jacksonian period, legislative divorces began to be viewed with suspicion as circumventing the rule of law and providing legislative favoritism to those with wealth and power. Yet Basch also discovers that at times entire commu-

nities became involved in petitioning a legislature for a couple's divorce. These community petitions demonstrate that divorce was often literally a public affair, collapsing the distinction between public and private, and demonstrating that a court-focused adversarial narrative was not the only way in which the story of divorce unfolded.

Hartog might argue that Basch's focus on divorce fails to reveal how marital disruption was lived and experienced, for he argues that separation not divorce was central to the way in which couples responded to unhappy unions and the law, in turn, responded to them. Yet, the law seldom recognized a status of separation. Rather as Hartog theorizes, separation was a couple asserting its freedom in the interstices of law and that "[e]nough people separated so that separation became the crucial practice through which the legal culture of marriage in America developed" (Hartog, p. 32). Hartog emphasizes that whether or not the law recognized separation, courts were powerless to force unhappy couples to live together as man and wife. Thus, Hartog points to a complicated dialectical relationship between the ways in which people lived and the development of legal rules. In doing so, he closely examines the legal questions invoked by separations such as whether such couples were still legally bound by their marital duties and identities. Hartog is at his best when he is able to maintain the complexity and tension between law and the material conditions of lived lives. In this space of ambiguity, Hartog's creativity as a legal scholar and historian is astounding.

As Hartog deftly demonstrates, at the heart of separation lurked coverture. Coverture was the legal fiction through which the law viewed a wife's identity as legally merged into her husband's. A married woman could not contract in her own name and her property, including wages, became her husband's. She could not testify against her husband or bring suit in her own name, and she was considered to have the same

domicile as her husband. In return, a husband was legally responsible for the support and debts of his wife. Hartog presents a complicated picture of coverture in which he refutes what he considers to be the dominant narrative of coverture shaped by nineteenth-century feminists who, he subtly argues, failed to see the complexities in the ways in which coverture was employed in actual cases. Hartog discovers that some women and their lawyers used coverture to their own advantage. Hartog writes, "Indeed, one of the oddities of studying lawsuits between separated wives and husbands is the discovery that wives -- or their lawyers -- so often claimed coverture as a right, against the contrasting claims of husbands that their wives had become competent and capable legal individuals who ought to be held responsible for their own debts" (Hartog, p. 38). Some women also used coverture, in some cases long after husbands had died, and in others in concert with debt-ridden husbands, to avoid creditors and void transfers of property. This analysis of how women themselves used coverture is very different from that presented in recent works by historians such as Linda Kerber who present the practice of coverture as thoroughly disabling for women.[1]

Indeed, underlying the theoretical justification for coverture was the idea that it protected women. Assuming that unequal power between husbands and wives preexisted the law, supporters of coverture argued that it provided protection for wives who were too weak not to succumb to the demands of their husband. Thus, such supporters argued, if a wife retained her own property, a husband, through force of will or even violence, would coerce her to relinquish such property. Instead, the law made her property his and also placed upon the husband the duty to support her. Within this context, could a wife enter into a separation agreement with her husband if she did not have the power to contract? Was a husband still required to support her? Did she have the right to legally hold separate property, or was the separation agreement invalid and presumptively

void due to coercion? As Hartog points out, there was no single answer to any of these questions, and courts as well as treatise writers were divided as to the validity of separation agreements. Hartog also re-frames these questions to ask why couples and their lawyers continued to enter into separation agreements when courts so often rendered such contracts void. Hartog even discovers that lawyers repeatedly drafted the same covenants that courts had earlier refused to uphold. Hartog thus raises the important question of how court-made law is put into effect, or ignored, by the practicing bar.

In framing his narrative of coverture, Hartog is implicitly critical of nineteenth-century feminists who viewed coverture as an unqualified evil and who treated Blackstone's commentary on coverture and the merger of husband and wife as if it represented reality. Basch, in contrast, presents a more sympathetic and complex view of nineteenth-century feminists, whom she does not view as a monolithic group. Rather she identifies pro-divorce feminists such as Elizabeth Cady Stanton and anti-divorce feminists such as Elizabeth Packard. Pro-divorce feminists argued that through marriage a woman essentially became a slave to her husband, stripped of her legal identity. For them, divorce represented female liberation. Anti-divorce feminists argued that the protection offered through marriage was crucial, economically and socially, for women.

Some argued that indissoluble marriages controlled male sexual urges and protected women as they lost physical attractiveness. At the heart of this debate, as in the debate over coverture, was a question of women's need for protection versus female agency and autonomy. Indeed, it would be fascinating to explore how this argument played out in terms of coverture and whether there were feminists (as opposed to individual female litigants) who supported coverture.

Basch and Hartog both examine mid- to late nineteenth-century trials involving the rich and

famous. Hartog is primarily interested in criminal cases in which a husband killed his wife's lover. The "unwritten law" provided that a husband would not be charged with murder, if the husband found the couple in flagrante and acted in the heat of passion. Yet in each of the cases Hartog examines, the husband was acquitted of murder even though the facts indicated that the murder was pre-meditated. Hartog views these series of cases as providing a window through which to glimpse changing understandings of gender and marriage, and his analysis of trial transcripts is a fascinating study of how defense lawyers construct arguments. Hartog views these cases as reflecting the uncertainty of male marital authority at a time when wives were gaining public rights. Hartog writes, "In each trial, opening and closing defense speeches made the same claims: that the lover deserved to die, that the husband was defending the home against an intruder, that he was doing what any natural husband would do" (Hartog, p. 224). Perhaps most interestingly and again returning to the theme of female agency, male lovers were portrayed as "scoundrels" and the wives were almost invisible -- depicted as weak, vulnerable to seduction, and incapable of true consent. As Hartog recognizes, in defense attorneys' words and hands, these rebellious women were robbed of volition.

In contrast, Basch finds that in famous divorce cases, which often involved allegations of a wife's adultery, women played leading roles and newspapers not only covered the trials but also produced popular pamphlets that pruriently focused upon the female litigant. Although these women's behavior often violated Victorian gender norms, the narratives that attorneys and the press wove cast these leading ladies as innocent victims wrongly accused of adultery by a vindictive spouse. Indeed, for a husband to make such an accusation demonstrated to juries that he was not a gentleman and that perhaps his word could not be trusted. Basch insightfully writes that as long as the female litigant was viewed as devoid of

agency and oppressed by her husband or the legal system, popular sympathy, which presupposed female chastity, rested with her. Thus Hartog's murder cases and Basch's adultery cases hinged on portraying women as lacking volition. This dominant narrative of female victimhood masked a more subversive narrative of female agency.

Although these books pour forth a myriad of intellectual riches, some important omissions exist. Hartog does not sufficiently explore issues of class and race, and one wonders whether this is in part due to the sources upon which he relied. Although Basch is much more attuned to class, she likewise does not adequately explore race. Yet both authors drop a number of fascinating hints regarding race, slavery, and marriage. Although it is well-known that slaves could not legally marry, Hartog discovers that in New York slaves were in fact allowed to marry, and he presents an interesting story of a child born to a slave parent (Hartog, pp. 129-130), but he does not fully explore the implications of slave marriage. Likewise Basch briefly explains (Basch, pp. 48-49) that South Carolina's divorce prohibition was related to slavery and the difficulty the legislature may have foreseen in allowing even adultery as a ground for divorce in a slave society but again this complicated and potentially subversive story is not pursued. In addition, given Hartog's exploration of marital self-identity, coverture, and the role of contracting women, one would have liked to see him build upon Amy Dru Stanley's research on freedwomen and how newly emancipated women who married were then subject to coverture, which removed their ownership of their own wages.[2.] Given the authors sensitivity to the manner in which the legal and extralegal were intertwined in both marriage and its dissolution, one might have expected that Basch and Hartog would have paid more attention to slave marriages, which may not have been recognized in law but nonetheless occurred, and how these extralegal marriages and dissolutions affected societal understandings of marriage. Indeed, such issues seem

to be key parts of the nineteenth-century story of marriage and its dissolution. Finally, neither author addresses how immigration may have affected marriage and divorce as people constantly moved across borders and brought with them different understandings of marriage.[3] Despite these omissions, which we can hope that these authors might address in future works, both *Framing American Divorce* and *Man and Wife in America* deserve to become classics of legal history.

Notes

[1]. See Linda K. Kerber, *No Constitutional Right to be Ladies* (New York: Hill and Wang, 1998).

[2]. Amy Dru Stanley, *From Bondage to Contract, Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (Cambridge: Cambridge University Press, 1998).

[3]. Historian Pamela Haag discusses the legal and social responses to women immigrating to the United States for the purpose of entering into arranged marriages. See Pamela Haag, *Consent: Sexual Rights and the Transformation of American Liberalism* (Ithaca, N.Y.: Cornell University Press, 1999).

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