UNTANGLING MARRIAGE'S HIDDEN HISTORY: TWO VIEWS

NANCY F. COTT. *Public Vows: A History of Marriage and the Nation*. Cambridge, Mass.: Harvard University Press, 2000. Pp. 297.

HENDRIK HARTOG. *Man and Wife in America: A History*. Cambridge, Mass.: Harvard University Press, 2000. Pp. 408.

Reviewed by: Beverly J. Schwartzberg*

ABSTRACT

Two recent books, Nancy F. Cott's *Public Vows: A History of Marriage and the Nation* ("*Public Vows*"), and *Man and Wife in America: A History* ("*Man and Wife in America*") by legal historian Hendrik Hartog, unravel the often unstated assumptions about wives and husbands that are buried in public policy and jurisprudence, showing albeit in different ways the crucial role of nineteenth century legislators and courts in shaping cultural and political understandings of the family. While *Public Vows* develops an authoritative narrative of the relationship between marriage and government policy in the United States, *Man and Wife in America* suggests an even broader narrative, but its scope is, in fact, narrower: its case studies illustrate the complexities of marital identities, often focusing attention on the legal foibles of marriage cases to argue that marriage and marital status have demonstrated a good deal of flexibility in the American past. Although these books take very distinct approaches, they are complementary in arguing that historically heterosexual and monogamous marriage has been the unstated basis of order in the American state.

Historians of domestic relations and gender, family lawyers, and public policy analysts should rejoice with the arrival of two new books on closely related themes that further our under-

* Ph.D. candidate, History Department, University of California at Santa Barbara.

standing of the historical meanings of marriage in the United States. Like good detective stories, the two works unravel the often unstated assumptions about wives and husbands that are buried in public policy and jurisprudence, showing albeit in different ways the crucial role of nineteenth century legislators and courts in shaping cultural and political understandings of the family. Nancy F. Cott's newest work, *Public Vows: A History of Marriage and the Nation* ("*Public Vows*"),[1] develops an authoritative narrative of the relationship between marriage and government policy in the United States. Cott's work blends a generation of scholarship on gender and legal history with new research to present a compelling argument that monogamous heterosexual unions have formed an important component of American identity and governance from the 18th century to the present. In providing this perspective, Cott brings family history out of the home and properly places it in the state.

The title of the second work, *Man and Wife in America: A History* ("*Man and Wife in America*"),[2] by legal historian Hendrik Hartog, suggests an even broader narrative, but its scope is in fact narrower: its case studies illustrate the complexities of marital identities, often focusing attention on the legal foibles of marriage cases to argue that marriage and marital status have demonstrated a good deal of flexibility in the American past. Despite focusing on individual trials, Hartog returns each example to a broader public meaning about the relationship between marriage and the law.

Although these books take very distinct approaches, they are complementary in arguing that historically heterosexual and monogamous marriage has been the unstated basis of order in the American state. Cott stockpiles examples, often new and creative, to show this point convincingly. Hartog, on the other hand, while acknowledging the ironclad ideology of Christian monogamy, reveals how marriage practices could be fluid. Together these books significantly recast the historiography of American family studies, expanding the focus from sentimental ideology, oppressive realities, and cultural rhetoric to legal practice and experience and the tacit beliefs behind governmental

1. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000).

2. HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY (2000).

regulation. Along with other recent related works,[3] the new works by Cott and Hartog offer a view of American marriages that informs current debates over the definition and meaning of family in courts and society. The strength of both works lies in their creative use of evidence, which in Cott's work ranges from political theory to analysis of federal programs, and in Hartog's book includes trial records. Though their analyses read quite differently, the two works are best taken together, for Cott sees a broad picture and goes back to sketch the details that support it, while Hartog looks first at the details and then pulls out sometimes startling conclusions.

Public Vows provides a broad and much-needed overview of marriage as a part of public policy in the United States. In 9 succinct chapters, Cott's new book outlines the importance of monogamy in maintaining a stable political state, her argument moving from household to community to states and nation. Beginning with the notion of the well-ordered family within the worldview of early colonists, Cott develops a narrative that is nuanced by region, race, and ethnicity, drawing heavily on dominant political discourses, from the Enlightenment and Revolution through the present day. The central tenet of the book is that marriage has always been a key, if sometimes tacit, element of American government and public policy, and that as the power of the federal government has grown, so has the role of family in matters of public policy. Far from being a private concern, Cott argues, marriage always "participates in the public order."[4]

Cott begins by providing an "archaelogy of American monogamy" from the colonial experience through the American Revolution. In the 18th century, writers replaced the "organic" metaphor that compared parent and child to government and

3. *E.g.* NORMA BASCH, FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS (1999) (examining changes in American Divorce laws and the differing meanings and results of divorce for women and men in early America); NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982) (addressing equity courts as a means of redress for women in the nineteenth century); MICHAEL GROSSBERG, A JUDGMENT FOR SOLOMON: THE D'HAUTEVILLE CASE AND LEGAL EXPERIENCE IN ANTEBELLUM AMERICA (1996) (discussing the history of domestic relations law and jurisprudence over the course of the nineteenth century); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985) (providing a subtle reading of legal experience through one family's story of divorce and custody).

4. COTT, *supra* note 1, at 1.

governed, with an analogy that compared the structure of marriage to that of government.[5] The Enlightenment notion of marriage as a contract was widely accepted in the British colonies of North America, underscored by the idea that consent of the "governed" (or the wife) legitimized Christian marriage. "American revolutionaries," notes Cott, "used the analogy between familiar and governmental authority to reinforce ideals of contractualism and reciprocity as requirements for justice."[6] The structure of family government inherent in such consent might be hierarchical, drawing on the common law tradition of coverture, but it was nonetheless rationalized as reciprocal. The idea that the governed give consent to their government, and the government draws legitimacy and limited power from consent, is a key theme of the political ideology behind American independence. This theory held through the early republic, when the tempered love and responsibility of marriage was closely identified with the notion of the virtuous citizen.[7] In contrast stood the despotism of polygamy, a form of family governance that would remain reviled in American politics for many years to come.[8] The value of monogamy, and its central premise of consent, became naturalized as a self-evident, if sometimes deeply buried, political truth.

Although *Public Vows* focuses on national themes, Cott next analyzes community and local standards as exemplified by state laws through the 19th century. The author carefully points out the continued national interest in the family, most evident in the post-Revolutionary age through federal Indian policy, the goals of which included "[p]rohibiting polygamy, valuing premarital chastity, reorienting the sexual division of labor and property-ownership and consequent inheritance patterns."[9] Given the small powers of the central state, however, and the relatively diffused nature of population and state control, Cott analyzes community rules and understandings. Cott concludes that throughout the 18th and early 19th centuries, Americans and their governments were fairly tolerant of marriage-like unions, such as common-law or putative marriages, that may have fallen outside of legal requirements but still hewed to community standards about marriage. Separation, extralegal remarriage, self-di-

5. *Id.* at 15-17.
6. *Id.* at 15.
7. *Id.* at 20.
8. *Id.* at 23.
9. *Id.* at 26.

vorce, bigamy in the form of serial monogamy, and the like were tolerated, in part because of the variety of colonial and then state laws governing marriage and divorce.[10] Cott explores how and why states expanded divorce laws in the early republic and up to the 1860s. Divorce was a way of "perfecting" the marriage contract, not of making it weaker. Cott explains that, "[h]aving justified rebellion against government tyranny, many state legislators were convinced that an innocent, ill-used spouse's escape from intimate tyranny should likewise be possible."[11] Cott's work also draws on Basch[12] and Hartog (especially from the articles that comprise a good part of *Man and Wife in America*) to explain the ways in which federalism and informal marriage practices meshed. Cott attends to law and behavior particularly in the South, which has received less scholarly attention in the past.[13] This focus allows the author to examine the racist underpinnings of marriage law and community belief, and demonstrate how a network of state laws created "an American system" forbidding interracial marriage.[14] That is, the utilitarian and generous understandings of marriage implicit in community recognition of informal unions did not extend across racial lines. Neither slave unions nor interracial unions were afforded public (meaning political) legitimacy, even if recognized by smaller local communities.

Cott suggests that domestic life moved to the "national agenda" in the crisis decade of the 1850s. Here the book skillfully interweaves several narratives. Cott portrays the political connection between abolitionist ideas and notions of love and consent in marriage, wherein antislavery rhetoric focused on the ways in which bondage restricted slaves from the Christian benefits of matrimony.[15] In addition, the author draws a broader connection to the politics of free labor and Republican Party ideology in the 1850s, which saw "free labor to be as essential a characteristic of the nation as free choice of marital partner."[16] Here the author parallels freedom of choice in marriage to the era's politically powerful ideal of free white men's rights to contract for employment and control their own labor, as compared

10. *Id.* at 37-38.
11. *Id.* at 47.
12. *See* BASCH, *supra* note 3.
13. COTT, *supra* note 1, at 40-46.
14. *Id.* at 43.
15. *Id.* at 57-59.
16. *Id.* at 57.

to noncompetitive, restricted, and therefore corrupt slave labor. Another important piece of the story is the rise of the women's rights movement, which identified conditions of bondage in the institution of marriage itself, and stressed the importance of women's individual choice to marry or not, providing the first coherent critiques of coverture that resulted in legal changes such as legislation regarding married women's property.[17] Cott intertwines the story of antebellum "free lovers" and communitarians, who in arguing that "the institution of marriage corrupted love," threatened widely accepted norms.[18] The section concludes with the Republican pairing of the twin evils of polygamy and slavery, and the ways in which marriage was central to the rhetoric of union and disunion in the coming of the Civil War not just in the form of criticism of slavery, but of the very "self-divorce"[19] of the South from the Union.

The role of marriage as national policy picks up steam in the second half of the 19th century, according to Cott. Cott attributes much of this change to the effect of the Civil War, and particularly to the ending of slavery. With the collapse of the slave system, which for economic as well as ideological reasons never acknowledged slave unions as legal or allowed enslaved men and women a chance to wed under the laws of the states or territories in which they lived, the federal government and the states saw opportunity and challenge. "Reinforcing [African American] male responsibility for work and family through marriage seemed so important not only to secure economic support for the emancipated population, but also to turn ex-slaves into citizens."[20]

Cott also wisely incorporates other narratives that stimulated the interests of the federal government in marriage during the second half of the 19th century, including issues of citizenship and suffrage for black men and all women, the debate over the postbellum Civil Rights Act, the growing power of the federal judiciary, Congressional debates and restriction over Mormon polygamy, and Civil War pension policy. Along the way, the narrative traces the legal history of marriage as status as well as con-

17. *Id.* at 63-68.

18. *Id.* at 68.

19. *Id.* at 76.

20. *Id.* at 82. For a further understanding of slave marriages in the legal and public policy context, from which Cott's discussion in this area is partly based on, see AMY D. STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998).

tract.[21] The momentum builds with a chapter on the late 19th century, set in the context of a national divorce and marriage reform movement, and the increased telling of "private" divorce and marriage stories such as the Richardson-McFarland murder case and the Beecher-Tilton scandal in the sensational press. The increased pace of the antipolygamy crusade in Congress and elsewhere tied into the national demands for uniform standards. Federal policy required Indians "to adopt monogamy as 'the law of social life,'"[22] and, at the same time, the antiobscenity campaign of Anthony Comstock grew from a desire to contain sexuality with the confines of marriage, a private institution freighted with tremendous public significance.[23] Cott creates a persuasive argument that these policies and cultural shifts created a new federal interest in and regulation of the family. The late 19th century is portrayed as an era of crackdown, when monogamy was explicitly valorized and nonconforming views marginalized by the concerted efforts of religious reformers and the growing power of the national state. Cott points to increased morals prosecutions in states and localities, where "community pragmatism that had allowed leeway for individuals' waywardness (while respecting formal marriage) seemed to be crumbling."[24]

Cott's argument substantially expands previous historians' assessments of marriage, and the broad view is commendable. The late 19th century did present a window when, for a variety of reasons, family regulation became a federal issue. This nationalization of domestic concerns, however, was not the result of a single conspiracy. Domestic law remained within the purview of the states, and it would be interesting to see how state shifts in family policy matched (or did not match) new Congressional or other national interventions. It would be wise to underscore the specific concerns that led the federal government — often reluctantly and tentatively — into the province of the home. While the Freedmen's Bureau represented unprecedented government involvement in the business of American families, its experiments and policies were short-lived (and widely resented by many besides former Confederates).[25] A follow-up showing how

21. COTT, *supra* note 1, at 101.

22. *Id.* at 123 (footnote omitted).

23. *Id.* at 124-26.

24. *Id.* at 126-27.

25. For a general overview of the Reconstruction period and the beginning of the Southern Redemption, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988).

the constitutions of new post-Reconstruction states dealt with marriages among former slaves would have been helpful to Cott's narrative.

Likewise, Civil War pension policies did offer "regulation" of the family, but at first as a means of providing incentives for enlisting soldiers.[26] As the system grew after the war, so did controls on family, especially wives', behavior, but this shift occurred within the context of pensions as a system of patronage that was rife with fraud. The desire to control family behavior grew out of vigilance against deceit, although implicit assumptions about gender roles and marriage underscored this policy. Negotiations over the definition and meaning of family stemmed from local diversity and the variety of state regulations under federalism, and can be seen as an inevitable part of the 19th century concern with the realm of contract as well as a form of social control.

In cataloging federal policies that touched on marriage, however, *Public Vows* misses land policy (except as it dealt with Indians), an example that demonstrates that while assumptions about family may have undergirded legal understandings, the role of marriage in national policy became evident only on an ad hoc basis. As with pension policy, the Department of the Interior had to adjudicate matters dealing with marriage, desertion, and legal widowhood in administering, in particular, the Homestead Act.[27] Homestead claims, like pensions, involved a careful negotiation of contract between the individual and the federal government, and in these contracts, marital status often came into play. Cott is correct in identifying that such questions of marital status signaled the involvement of the nation in marriage and the meaning of family, although such may have been inevitable in the broadening power of federal government and its control of delegating wealth and territory to individuals or family units.

After establishing this baseline of great change in the national culture and government, *Public Vows* takes on a significant new discussion on marriage, immigration, and the meaning of citizenship, once again demonstrating its inclusiveness and broad thinking on issues surrounding marriage. In its most lengthy section on a single topic, revealing the most original research, *Public*

26. *See* Megan J. McClintock, *Civil War Pensions and the Reconstruction of Union Families*, 83 J. OF AM. HIST 456 (1996).

27. James Muhn, *Women and the Homestead Act: Land Department Administration of a Legal Imbroglio, 1863-1934*, 7 W. LEGAL HIST. 283 (1994).

Vows carefully traces the significance of monogamous marriage in immigration policy. The story begins with the Page Act, restricting the immigration of Chinese prostitutes in 1875, and then winds through the growing thicket of immigration legislation and court rulings on the citizenship of the spouses of noncitizens.[28] Here Cott effectively combines elements brought up earlier in the book, such as the spectre of racial mixing and the cultural importance of love (versus coercion) in marriage choice, and updates them to the late 19th and early 20th century context.

Cott achieves the foregoing in a mere 150 pages, and turns the rest of the book over to a discussion of the complications of the 20th century, when old notions of civic virtue and domestic governance, of the morality and politics of marriage, were altered forever. The importance of marriage and the unity of husband and wife became more visible in the economic sphere during the 20th century, particularly as women's suffrage erased some of the political meanings of coverture and male representation of the family. From the growth of the "family wage" ideal to the rise of mothers' pensions and the eventual development of a Social Security policy that drew on the notion of the male provider, economic understandings of marriage became the invisible structure on which its political and national importance rested. Cott writes, "[t]he shape and spirit of social policy in the United States were fatefully ordained by the Social Security Act's inherent differentiation between the male citizen-husband-provider and the female citizen-mother-dependent."[29] Here Cott draws on recent research on the welfare state, including the ways in which family aid once again permitted governments to undertake moral surveillance of domestic life, particularly of women. She intertwines the controversies over the sexualization of popular culture and changing mores, using legal evidence to discuss the complex ways in which society altered its understandings of monogamy, morality, and the unity of wife and husband.

Cott concludes with a World War II and postwar history that underscores the still vital but shifting public role of marriage. After describing how in wartime the state, corporations, and individuals used the rhetoric of marriage and family — Betty Grable pinups in this telling become less a representation of sex and more a reminder of marriage, "the home comforts and the re-

28. COTT, *supra* note 1, at 132-55.

29. *Id.* at 176.

wards of fatherhood"[30] — Cott begins to explain the nation as we now know it, a place where understandings of the public and political significance of marriage combine in complex ways with our belief in the home as a private realm. Cott details how courts began to undo the racial restrictions of the past,[31] how the increasing presence of women in the workforce affected economic understandings of the family,[32] and how federal tax policy encouraged commitment to a husband-dominated economic domestic model.[33] This chapter points to a significant Supreme Court case, where the dissent's compelling argument that Mormon polygamy should be recognized as marriage marked a shift in our national understanding of marriage.[34]

Cott delineates the familiar story of the 1960s: the general loosening of the connection between monogamy and sexual morality, and the ways in which feminists returned to the language of consent and contract.[35] Economic, social, cultural, and legal factors contributed to the shifts that liberalized domestic life, changes that have not gone unchallenged, particularly from the Christian right. Perhaps, suggests Cott, marriage has been "disestablished" from the nation — while the values behind the 19th century political significance of marriage may still exist, many of the national (if not community) structures that protected the special status of Christian monogamy have faded.[36] Yet debates on national policy over marriage remain, Cott points out, particularly in light of demands to create legal status for same-sex unions. The rhetoric of monogamy and marriage remains with us through 1990s welfare "reform" and beyond. Marriage remains elusive as a part of public identity, but no less crucial to it. Such public meanings of marriage, suggests Cott at the end of her book, have put remarkable constraints — no less strong for being, at times, almost invisible — on the liberty that is seen as underscoring the privacy of choice in marriage.

In *Man and Wife in America*, Hartog offers a quirkier, more episodic, and no less significant view of marriage and history. Where Cott presents a compelling overview and a clear political

30. *Id.* at 187.
31. *Id.* at 184-85.
32. *Id.* at 185 and 204.
33. *Id.* at 191-93.
34. *Id.* at 194 (citing to Cleveland v. United States, 329 U.S. 14, 24-29 (1946) (Murphy, J. dissenting).
35. *Id.* at 209.
36. *Id.* at 212-13.

message, Hartog presents case histories that demonstrate the murkiness of broad categories and definitions. *Man and Wife in America* avoids trying "to explain how 'we' got from there to here," but rather seeks "an imagined dialogue" with the past that "quer[ies] the assumption that to know law (past or present) is to know the source of our present miseries and difficulties."[37] Whereas Cott's work uses social history to create a broad political narrative, thus successfully bridging the gap between two methods and schools that often discuss their conclusions in different terms, Hartog's revels in the juicy storytelling inherent in social history, presenting a good deal of entertainment for the reader. Although Cott has published several important articles related to this new book,[38] the book itself is a synthesis; Hartog's book represents a partial reworking of 4 articles that have appeared over the past decade,[39] and adds additional case studies. His introduction warns readers thinking they will see something similar to Cott's work that his emphasis is different. As he notes, "this is a book about American separations" and about how women and men "made a law of marriage" from these separations.[40]

Through these stories Hartog abandons a preconception of marriage as a socially monolithic and always permanent relationship between man and woman, and develops a more nuanced view of marriage as a place of possibility, of shakiness and separation, of potential "exits" as well as of structure. As such, this analytical strategy creates a persistent terrier of a book that grabs on to an idea and shakes it around to great delight and discovery. Each chapter can stand alone, and indeed, the challenge lies in putting together and making sense of the varying themes.

Hartog fortunately resists the common traps historians have encountered in dealing with legal evidence. Drawn to the rich narratives available in trial records, historians who have used le-

37. HARTOG, *supra* note 2, at 5.

38. *See, e.g.*, Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 AM. HIST. REV. 1440 (1998).

39. Henry Hartog, *John Barry's Custodial Rights: Of Power, Justice, and Coverture*, *in* JUSTICE AND POWER IN SOCIOLEGAL STUDIES 166 (Bryan G. Garth & Austin Sarat eds., 1997); Henry Hartog, *Abigail Bailey's Coverture: Law in a Married Woman's Consciousness*, *in* LAW AND EVERYDAY LIFE 63 (Austin Sarat & Thomas R. Kearns eds., 1993); Henry Hartog, *Lawyering, Husbands' Rights, and 'the Unwritten Law' in Nineteenth-Century America*, 84 J. OF AM. HIST. 67 (1997); Henry Hartog, *Martial Exits and Expectations in Nineteenth-Century America*, 80 GEO. L.J. 95 (1991).

40. HARTOG, *supra* note 2, at 1.

gal documents and narratives have most often drawn on them for their detailed and revealing demonstrations of domestic life. This technique can be used well, as in Grossberg's overarching work, *Governing the Hearth*, which mines rich trial and appellate court records to trace trends in American jurisprudence, identifying its increasingly patriarchal role in family law and practice, as well as the growth of independent legal identities for family members.[41] Other scholars have been less skillful in using these sources. Using divorce cases and documents remaining from trial courts to discuss the meaning and state of American marriage at specific points in time, some scholars have thereby offered various narratives of the shift from patriarchal to companionate values, from hierarchically-ordered unions fixed in tradition to more modern-seeming marriages based on affection and egalitarian interchange between husband and wife.[42] The work of these scholars in the 1980s and early 1990s demonstrates how women and men in late 19th century divorce courts exemplified behaviors and marital expectations that have a high social value: obedience, chastity, and financial responsibility are contrasted with failure to support, infidelity, and other misbehavior. Such analysis, however, ignores the significance of performance in court: the narratives created by wives and husbands are less unmediated truths than performances couched in terms that lawyers, judges, and communities might recognize and reward.

Hartog's aim is to make sense of the law of American marriage during the "long 19th century," which he stretches from the 1790s to the 1950s — perhaps a bit longer than most historians would venture. Much of the work focuses on the negotiation of duties and rights, particularly the meanings of coverture. He addresses this large topic not through statutes and statutory change, or through an analysis of the changing significance of common law, but rather through an analysis of case law and legal treatises. This method demonstrates how policy was carried into action, and how the messiness of the real world led judges to form flexible and pragmatic understandings of law to match the flexible and pragmatic practices of the people who appeared in their

41. *See* MERRIL D. SMITH, BREAKING THE BONDS: MARITAL DISCORD IN PENNSYLVANIA, 1730-1830 (1991); ELAINE TYLER MAY, GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA (1980); ROBERT L. GRISWOLD, FAMILY AND DIVORCE IN CALIFORNIA, 1850-1890: VICTORIAN ILLUSIONS AND EVERYDAY REALITIES (1982).

42.

courtrooms. His main road into the law of marriage travels through the places where marriages break off from traditional expectations. For instance, Hartog uses examples of marital separation to explore the meanings of "husband" and "wife," a technique that has several benefits. First, it allows the work to acknowledge the large terrain of marital behavior, including separations, self-divorce, and sequential remarriage and bigamy, that never came into contact with the legal system. Second, the cases themselves provide entertaining, engaging models that demonstrate human behavior and human folly at the same time they provide insight into the common law, equity practices, and changes in 19th century statutes. Hartog is a critical reader who knows the danger of ignoring the performative aspects of legal narratives. The book never loses sight of the individuality of the stories it tells, and this method serves to bolster Hartog's contention that husbands and wives molded the very law and legal experience that shaped their behaviors.

Chapter one, for example, focuses on a single case that has been persistently published in modern casebooks. In the case of *McGuire v. McGuire*,[43] the court denied the wife assistance in obtaining the "necessities" of life from a stingy husband, on the grounds that such a decision was entirely private.[44] This decision elicits a variety of reactions, including despair at the still-oppressive nature of marrital relations in the mid 20th century. Hartog uses *McGuire* to point to the ever-present significance of marital separation in the law. He identifies a fundamental paradox: because they lived together, decisions about proper support were to be made in the household, but had the McGuires lived separately, Mrs. McGuire's demand for "necessities" might have been granted.[45] Implicit in this decision was the notion that if Mrs. McGuire truly felt oppressed, she could have left the marriage.[46] The world of separation, in the long 19th century, was exactly the marital sphere in which courts were likely to intervene, and exactly the sphere in which scholars can identify the meanings of marriage. "Paradoxical[ly]," notes Hartog, "separation invented marital rights."[47]

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43. 59 N.W.2d 336 (Neb. 1953).

44. *Id.* at 342.

45. HARTOG, *supra* note 2, at 10.

46. *Id.* at 12.

47. *Id.* at 37.

Hartog portrays 19th century domestic law as a complex ecological system, where states set the rules for entering and exiting marriages, often taking ideas from each other, always interacting. In contrast to Cott, who identifies a developing federal interest in marriage during much of Hartog's long 19th century, Hartog mainly dismisses federal interest in marriage as public policy. Still, he writes, the Constitution did offer 3 important federal limits on states' reserved powers to regulate marriage, focusing on contracts, takings, and most importantly, the full faith and credit clause.[48] The last had a major impact on marriage and particularly divorce rulings, where the decentralization of the federal system created a world where a person might be seen as married in one state, divorced in another, or a bigamist in a third. In 19th century America, where tremendous mobility — social, but more importantly, geographical — was a significant reality, the possible contradictions of a decentralized marital regime were quickly turned into real contradictions with which courts had to deal. Hartog carefully describes how courts delicately balanced legally recognized forms of marriage with what individual couples considered marriage, sometimes regardless of the constraints or expectations of law. In this sense, *Man and Wife in America* represents a true achievement. Many social historians have used legal records, but accepted without question the formulaic language that plaintiffs and defendants adopted in court. Hartog points out that the identities of husbands and wives that emerged from such performances were often far from individuals' understandings of their own status and power within the marriage, as well as irrelevant to the basic issues underlying individual court decisions.

Hartog's baseline case establishes an 18th century understanding of marriage. Reiterating the story of Abigail Bailey,[49] which may be familiar to students of American women's history, the case demonstrates the ways in which a religious married woman considered obedience a fundamental element of her marriage. After years of an abusive relationship, culminating in her husband's incestuous relationship with their daughter, Abigail Bailey finally comes to believe that her husband's misconduct justifies not the end of her marriage, nor the end of her role as a

48. *Id.* at 17-18.

49. *Id.* at 40-62 (referring to ABIGAIL ABBOT BAILEY, RELIGION AND DOMESTIC VIOLENCE IN EARLY NEW ENGLAND: THE MEMOIRS OF ABIGAIL ABBOT BAILEY (Ann Taves ed., Indiana University Press 1989) (1815)).

wife, but rather living apart from her husband. She does not expect a divorce, or an end to the marriage, but rather a permanent separation. In rereading her case, Hartog stresses not the empowerment of the wife or her challenge to patriarchy, but a religious woman's response to a moral threat. Thus he establishes, through a case of separation, the cultural and religious significance of a wife's traditional role, submissive obedience that nonetheless came with rights and privileges as part of the exchange of the marriage contract. That Abigail Bailey did eventually receive a divorce is not, he suggests, testimony to her desire to end the marriage, but rather the only means through which she could preserve her identity as a good wife.[50]

Chapter Three, "Early Exits," demonstrates not only how couples worked outside the law to end their marriages, but the various ways in which men and women used American federalism, the very multiplicity of state regulations on domestic relations, to seek ends to unsuccessful marriages, and, most often, create fresh beginnings in new, if not necessarily legal, nuptial unions. Hartog describes the 3 powers of exit: divorce, agreements for separate maintenance, and bigamy. The first power was divorce, most familiar to 20th century readers, and a topic of substantial historical research in and of itself. In 19th century American law, divorce was intended to preserve the innocence of a spouse who had been wronged, and was seen more as a criminal proceeding than as part of the state's regulation of marriage. The very scent of collusion was enough to dismiss a complaint; voluntary divorce was not the point of the law.[51] These stringencies, of course, did not prevent Americans from using the law in all sorts of instrumental ways to achieve their own goals, and Hartog points to some of these means in later chapters. The second exit was an agreement for separate maintenance, in which a husband (generally) provided financial resources to a separated wife, a form of contract that persisted despite endless rulings against its validity. Such contracts were not an alternative to divorce, although 20th century viewers may believe so. Indeed, separation contracts, suggests Hartog, demonstrate how separated spouses continued to perceive themselves as married. The very terms of a marriage, implicit and unstated within the private world of the household, were often made clear only in the de-

50. *Id.* at 40-44.
51. *Id.* at 64-47.

lineation of duties and rights that appeared in such agreements. For example, "a husband's marriage rights often came into their full felt flowering only at the time of separation."[52] A third exit, and one often overlooked, was abandonment and remarriage, or, in more technical terms, bigamy. Bigamists were far less likely to be scoundrels maintaining multiple households than serial monogamists, who sought remarriage after leaving a failed previous marriage. Although bigamy was a crime throughout the states, judges preferred to presume a legitimate marriage, even when made by partners who were legally not legally permitted to remarry. One's rights and responsibilities as a spouse, suggests the author, came less from the law than from the day-to-day "public assumption of a relationship of rights and duties."[53] In a practical way, the institution and practice of marriage rested on marital identities, on men becoming husbands and women becoming wives, rather than marital identities being determined by marital law.

The next 2 chapters outline these identities. In the first chapter, entitled "Being a Wife," the author tackles the topic of coverture in a new way. Marriage transformed a single woman into a new being, a wife. The change involved the loss of control over certain public and legal rights, such as property and the right to contract, but a gain of a new identity that was both social and legal.[54] Nineteenth century feminists, and many who have followed, pointed out the oppressions of both the lost control and the new identity.[55] Hartog suggests that 19th century feminist definitions were not nuanced, but his reading from contradictory examples biases the reading in another way. Still, this book does not pretend to be a systematic tract on the philosophies of marriage. Marital unity was an important part of the rhetoric of wifedom, but the concept of a wife being one with her husband was a common law inheritance that had less practical application than one might think. Everywhere, courts challenged marital unity as a practical concept while acknowledging its social power. Coverture, the manifestation of this unity, was not as complete a principle as its critics would argue.[56] Wives maintained their personal identities, and were not considered "things" in most courts

52. *Id.* at 86.
53. *Id.* at 92.
54. *Id.* at 93-135.
55. *Id.* at 131-34.
56. *Id.* at 103-22.

and in the American legal tradition.[57] Hartog's examples come from the fringes of marriage, the points where things fall apart, so he inevitably reads coverture as a fragile thing. Still, he acknowledges that coverture "transformed women into wives and . . . constructed and legitimated a structure of power within marriage."[58] So too did the definitions of a husband's powers, although the author's examples lead him to stress the limits and the ways that practical experience made such powers into part of the dialogue between husband and wife. One of these powers, possession of a wife, which Hartog portrays not as a right but as part of the marital identity, was usually visible only in 19th century prosecutions for criminal conversation.[59] The husband's role as representative of his wife and of the union is another power which Hartog again represents as complex, contested, and intertwined with domesticity and identity.[60] The power to govern within the family is a third power, portrayed not as an absolute right but as a private exchange within a marriage.[61] He also outlines a husband's needs and duties, many of which were private and outside the realm of a court except in cases of separated spouses.

Hartog's vivid descriptions of cases generally trace the influence of important treatise writers like Joel Prentiss Bishop, Chancellor Kent, and others. Hartog is careful to avoid attributing large trends to an omnipotent judiciary or other large, unseen forces. The author instead points out that rulings are often best understood, in their ad hoc nature, as solutions to particular problems. He also provides a new focus on husband's rights and responsibilities, one that fills out the picture of 19th century domestic law as it is being redrawn by legal historians. The second half of the book analyzes the nature of coercion and husband's economic rights; the negotiation of custody rights, tracing the assumption of father's rights through the circuitous rulings in a single case; and the court's acceptance of an unwritten right, based on self-defense, of a husband to kill a wife's lover in an unpremeditated fashion. This last chapter, which focuses on 3 famous mid-century cases, describes lawyers' narratives to juries and

57. *Id.* at 125.

58. *Id.* at 135.

59. *Id.* at 137-42.

60. *Id.* at 142-49.

61. *Id.* at 149-55. The raw power of coercion Hartog treats in a following chapter.

their strategies to capitalize on notions of male honor as well as male marital rights such as "ownership" of a wife. Other writers have looked at the same cases through gendered analysis, and Hartog's version tells only part of the story, although a significant part that treats the performance of trial lawyering as a serious topic.

The volume ends up close to the beginning. Building on themes established on the chapter on "exits," Hartog poses some broader conclusions about "The Geography of Remarriage" in Chapter Nine. Quickly reviewing the public and intellectual debate over divorce in the middle of the 19th century, the chapter moves to a practical, more upspoken understanding of marital breakup. Individual men and women, he suggests, did not refer to popular rhetoric over divorce;[62] instead, they sought practical ways to get out of bad marriages and enter new ones. Rarely were these men and women prosecuted, but rather society and the courts developed "ways not to talk about bigamy."[63] The chapter delves into a discussion of the law of domicile. Technically, a wife's domicile was that of her husband.[64] But as in so many other examples in this narrative of 19th century marriage, practical and judicial understandings of this doctrine weakened its force considerably. Courts ruled, for example, that wives could not be expected to go into the "wilds" or other unreasonable places, thereby controverting earlier understandings of a wife's role.[65] The real test of legal domicile, however, came with the rise of "foreign divorces," granted to one party in a state different to the one in which the couple had resided during marriage. States that easily granted such divorces became known as "divorce mills" in late 19th century America, and presented a wide range of cases that tested appellate courts' interpretation about legal residences. Hartog ably treads the murky waters here, outlining the shifts in Anglo-American interpretations, the war between conservative and liberal commentary, and the individual cases as well as practical means through which disputes were addressed. Here he returns to a discussion of the Constitution's "full faith and credit" provision, addressing the ways in which states recognized — or refused to recognize — divorces granted in other jurisdictions. By the end of the long 19th cen-

62. *Id.* at 247.
63. *Id.* at 249.
64. *Id.* at 17.
65. *Id.* at 125, 262, 267.

tury (or at least by the 1950s), Hartog concludes, most states ignored the question.[66] "Divorce mills" were tacitly recognized as providing a needed "safety valve" for unhappy unions, and divorces became a common step before remarriage.[67] Too great a focus on divorce cases, however, obscures that for most individuals, "remarriage was the goal" and that even if the law prohibited them from remarrying, men and women would act as if married and if caught, would use lawyers and legal means, such as divorce, to argue for legitimacy.[68] Once again, Hartog highlights the important, and often neglected, phenomenon of extralegal remarriage in the American past.[69]

Hartog draws the reader back into the 19th century just as modern understandings begin to creep up. Readers need to remember that the 19th century was an age when marriage was considered a "necessity."[70] Early in the book, Hartog refers to historians' discussions of increasing "companionate" values in marriage as a "scholarly chestnut,"[71] which he wisely avoids for nearly three hundred pages. Indeed, one of the pleasures of Hartog's work is the clever way in which it avoids the questions of and conclusions about companionate ideology that have permeated so much writing on 19th century romance and marriage. Here, at the end of the book, however, he returns to this hoary explanation to explain that the search for marital happiness, not the desire for freedom, motivated husbands and wives to remake their lives.[72] While this goal may have been true for some, Hartog's evidence shows that there is so much more to marriage, including economic demands, expediency, migration, and geographical mobility, child care and custody, and the desire for stability in old age. One important facet of the book is, in fact, the way that it bypasses rhetorical debates with real histories and observations based on observing actual cases that document prac-

66. *Id.* at 248, 275-76, 279-80.

67. *Id.* at 277.

68. *Id.* at 283.

69. *Id.* at 282-86.

70. Certainly, of course, marriage was not universal, as the literature on single women, bachelors, and "roving" men demonstrates. *See* HOWARD P. CHUDACOFF, THE AGE OF THE BACHELOR: CREATING AN AMERICAN SUBCULTURE (1999); JOANNE J. MEYEROWITZ, WOMEN ADRIFT: INDEPENDENT WAGE EARNERS IN CHICAGO, 1880-1930 (1988); WALKING TO WORK: TRAMPS IN AMERICA, 1790-1935 (Eric H. Monkkonen ed., 1984); LEE CHAMBERS-SCHILLER, LIBERTY, A BETTER HUSBAND: SINGLE WOMEN IN AMERICA: THE GENERATIONS OF 1780-1840 (1984).

71. HARTOG, *supra* note 2, at 3.

72. *Id.* at 286.

tices in which ideology mattered relatively little — or at least practices in which the persistent musings of diarists, newspaper editors, etiquette writers, and the words of infatuated lovers themselves did not reflect what happened in the long run.

The finale returns to casebooks and the ways in which lawyers have come to understand the law and history of "man and wife." Hartog returns to the question of whether states really restricted coverture, especially through statutory revisions such as married women's property laws as portrayed, for example, in casebooks, and concludes that they did not. By the middle of the 20th century, casebooks reflected new ideas and customs within the old. Only here does he begin to discuss the topic of Cott's work: marriage as public policy. "Public policy," Hartog suggests, is another name for control of individual freedoms in marriage, but it is not a control that can be traced to any long-standing tradition. Rather, it is a new term that leaves out the old meanings of a two-sided contract that once invoked responsibility, obligation, and reciprocity.[73] He again refers again to a positive reading of coverture, one that may invoke the ire of some scholars. Still, many 19th century meanings of marriage remain in the law and in practice. Hartog concludes that despite the changes of the past fifty years, we "remain gripped by a sense of the centrality of marriage for an adult life."[74] Nevertheless, as Hartog's examples very powerfully show, men and women used law in their own lives, and in their pragmatic and "strategic" use of courts and lawyers helped change the nature of marriage itself.

Standing as individual works, these new books by Cott and Hartog present original thinking on domestic law and family history. Cott's work tends toward political history, providing a way to integrate marriage into a broader narrative about government and policy. Hartog's book, on the other hand, leans toward legal history, showing innovations in reading trial materials that will shape the work of social historians and legal historians alike. While their messages sometimes mesh, the dramatic differences in approach, conclusions, and thinking provide grist for further historical analysis and research. Both appreciate an undercurrent of informal marriage practices, however, and both demonstrate the overwhelming public and national concern for marriage during the late 19th century. Cott places marriage into

73. *Id.* at 302.

74. *Id.* at 311.

a more complex public terrain by separating the histories of marriage and domestic life, while Hartog demonstrates the complicated legal fashion in which they were intertwined.