

Review Symposium: Retrospective on the Work of Hendrik Hartog

What Makes Hartog Hartog: Introduction to a Symposium on the Work of Dirk Hartog

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The essays in this symposium on the work of Dirk Hartog encompass meditations on legal positivism and the histories of slavery, civil rights, and women's rights as well as contemporary analyses of spousal abuse and the dependency of adult children. That wide range of subjects, approaches, and concerns might be puzzling were it not for the wide substantive, methodological, and theoretical range in Hartog's own oeuvre. Hartog's work has been so generative for other scholars because of his simultaneous engagement with history and law, with fact and theory, with the whole sweep of the nineteenth century and the most minute detail of a person's life. In describing in this introduction what makes Hartog Hartog, I emphasize the unique blend of professional commitments and personal sensibilities he brings to his work: the sensitivity with which he approaches history; the humanity with which he treats his historical subjects; the dexterity with which he analyzes the law; and the sophistication with which his human and legal stories yield up jurisprudential insights. I also, respectfully, disagree with Hartog himself on the essence of his work. Where he laments that he exists in a "muddle in the middle"—writing histories of a problematic "inbetweenness"—I see him as making the messy lived reality of legal history cognizable to modern reader. His work reveals the simultaneity of multiple and overlapping legal regimes as they shaped and were shaped by the human needs of real people.

In his response to the essays in this symposium on his scholarship, Dirk Hartog reflects upon the "dizzying array of purposes" to which the authors put his work (2019, 534). He sees that variety as both a puzzle and a source of anxiety—about his own work and the state of legal history.

I find the puzzle somewhat puzzling, as the breadth of these essays seems clearly to stem from the breadth of Hartog's own scholarly profile. He has written four books and numerous articles that on first glance share only the temporal space of the nineteenth century and a slight preference for the mid-Atlantic. They range from the transformation of the legal status of New York City in the eighteenth and nineteenth centuries (1993); pig-keeping in the streets of nineteenth-century New York City (1985); marriage and escape from marriage in the era of coverture (2000); the strategies used to ensure one's care in a world before government support for the aged (2012); and, most recently, slavery and freedom in New Jersey during the decades of gradual emancipation (2018).

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These works are the collective product of a scholar who takes his interests where he finds them. Nor is Hartog finished with new projects pushing in new directions—he is in the midst of exploring the steamboat litigation that resulted in the canonical 1824 case of *Gibbons v. Ogden*, a history of the cultural idea of property and exclusion in America, and a book on “legal history as a pastime” (2018). No doubt, equally idiosyncratic projects will follow.

It is no surprise, then, that Hartog’s work should inspire a symposium like this one, with its wide array of subjects, approaches, and concerns. Roy Kreitner (2019) reflects on Hartog’s famous nineteenth-century pigs and their lessons for positivism and legal pluralism. Eli Cook and Anat Rosenberg (2019) write about the relationship between slavery and freedom in the antebellum United States. Ely Aaronson and Arianne Renan Barzilay (2019) discuss the history of both African American civil rights and women’s rights. Shelly Krecizer-Levy (2019) analyzes the return of adult children to their parents’ homes in the wake of the 2008 economic recession. And Galia Schneebaum (2019) explores contemporary legal frameworks for spousal abuse. It is not merely the subjects of these essays that vary so widely, but also their motivating questions and theoretical and methodological preoccupations. Kreitner explores jurisprudential and theoretical issues at the heart of both legal scholarship and law itself. Cook/Rosenberg and Aaronson/Barzilay offer largely historiographical insights—with the former revising historical approaches to slavery and the latter to civil rights and women’s rights. And both Schneebaum and Krecizer-Levy illuminate contemporary legal issues by bringing history to bear.

This brings me to the anxiety. The variety in these essays raises questions for Hartog about what legal history is and what it does. More personally, it prompts him to ask what kind of “legal historian” he is and what his work does as “legal history.” Those are big and important questions, but they are not the ones this symposium prompts for me. What I find most notable about both Hartog’s work and the work he inspires is not how it fits into a single discipline, but how it operates simultaneously across many scholarly registers. (One might even say that trying to flatten Hartog into a single scholarly dimension would be an utterly un-Hartogian project.) That is not at all to say that Hartog’s oeuvre lacks coherence. Despite the wide range of his interests—and the even wider range of the scholarship he has generated here and elsewhere—what Hartog writes is undeniably Hartog.¹ It is rather to say that what makes Hartog Hartog is to be found not in some singular approach to “legal history” but in his simultaneous engagement with history beyond law and law beyond history, with fact and theory, with the whole sweep of the nineteenth century and the most minute detail of a person’s life. That is why so many scholars can take what he has written in so many disparate directions.

What makes Hartog Hartog, then, is the unique blend of professional commitments and personal sensibilities he brings to his work: the sensitivity with which he approaches history; the humanity with which he treats his historical subjects; the dexterity with which he analyzes the law; and the sophistication with which his human and legal stories yield up jurisprudential insights. Hartog moves—fluidly but also restlessly—

1. The main exception is *Public Property and Private Power* (1993), which differs from much of Hartog’s work. As he put it, it was written in a more “state-centered, public-policy-oriented legal history” tradition than his other work (Welke 2009, 639).

from the historical to the historiographical, from the concrete to the abstract, from the methodological to the theoretical.

Hartog is first and foremost a historian. He uncovers the past to reveal worlds different from the ones we know. He takes enormous care to tell stories of real people and their real lives, in and out of the law. His stories are often difficult to read, as he is a deeply empathetic and astute chronicler of human misery and suffering. But they are not without hope or pleasure. Hartog's archival research reveals the surprising steps people take, often with the assistance of the law, to alleviate their suffering. Hartog manages to suspend first his twentieth- and now his twenty-first-century assumptions to identify and then artfully describe what life looked like during the "very long nineteenth century"—how people felt and thought, and how they managed to wrest some small power, victory, transformation, or dignity out of the most desperate straits (2019). Much of the pleasure in Hartog's work is his own, the joy he takes in finding the "surprise, irony, paradox" in history (Welke 2009, 653). His sheer pleasure in discovery jumps off the page, makes all that misery bearable, and leaves the reader nodding with epiphanies at the same time she shakes her head at the varieties of human suffering Hartog relates.

Indeed, the humanity with which Hartog endows his subjects is, in my view, the most distinctive and remarkable aspect of his work. Some twenty years ago, I heard Hartog speak on a conference panel about the scholarly process. One of his fellow panelists, a legal anthropologist, had described the joys of collaboration. During his turn, Hartog said something along the lines of, "I too think of my scholarship as collaboration, but I collaborate with dead people." To collaborate with historical subjects is to endow them with humanity, to respect them, and to conceive of their agency in a far deeper and more meaningful way than most historians mean by that term. That Hartog understands himself in conversation with his historical subjects, that he sees it as his duty—as a collaborator—to depict them honestly and with empathy is essential to his work. They are real people to him, who love and lose and suffer and strive, often in the most undignified ways. His efforts to understand them both endow them with dignity and remind us of our own frailty.

This is messy stuff. In Hartog's hands, life is messy, the law is messy, history is messy. Hartog loves that messiness. He wallows in it and highlights it. The laws of marriage and coverture were less determinate than anyone had previously known. Wives stayed or they left, marriages endured or they ended, power was distributed unevenly, with legal gaps exploited and conflicts erupting both within a given marriage and across the entire legal regime. When the younger and able-bodied took care of the older and failing, the human messes were daily, hourly, constant, and the intricacies of the law offered inconstant and unpredictable opportunities for both sides to claim, reclaim, dispute, and disavow promises made and broken.

This interest in life as lived, not as rationalized retrospectively, means that Hartog is far less interested than many historians in change over time. The histories Hartog relates can be, and sometimes have been, described as transitional, as about transformation. How did pig-keeping become illegal in New York City? How did the elderly find care as new, enticing, and distant economic opportunities opened up for the young people in their lives? How did slaves and slaveowners negotiate the complexities of slavery and freedom in the transition from one to the other during gradual emancipation?

But that is not how I read the work, nor, Hartog suggests in his response, how he reads it. With the exception of his first book, *Public Property and Private Power* (1993), which describes a radical transition from one mode of governance to another in New York City, Hartog is far less interested in change over time than in the messiness of any given time. Hartog describes himself as “emphasizing the space between A and B,” and he sees that “inbetweenness” as potentially problematic—resulting from “a defect of character or of imagination or of legal understanding” (2019, 541).

Rather than seeing either transitions or gaps in Hartog’s work, I see simultaneity. Hartog shows how A and B (and even C and D and E) coexisted, fought for dominance, interacted with one another, and offered up resources that real people used to try to make their real lives worth living. The question he asks in “Pigs and Positivism” (1985), the question that lays the groundwork for the legal pluralist insights he offers there, is how pig-keeping could be both simultaneously allowed and prohibited, declared illegal and remain legally in existence. The question in *The Trouble with Minna* (2018) is how slavery existed amidst contractual relations and how the two regimes interacted and transformed one another. The book “is not a history of how New Jersey evolved from a regime of chattel slavery to one of universal freedom. . . . It represents, rather, an effort to reconstruct core features of everyday life within a legal regime just as mysterious (but perhaps no more so than) our own,” treating “slavery as a contingent and uncertain relationship nestled within a much broader terrain of unsettled relationships” (2018, 5).²

It is not easy to write such histories of simultaneity. Where Hartog sees absences, gaps, and defects, I see layers, overlaps, and otherwise indecipherable cross-currents made visible by Hartog’s own abundance of character, imagination, and legal understanding. Making simultaneity cognizable requires tolerance for mess and chaos and the ability to domesticate the same for a modern reader without losing either the foreignness or the complexity of another time. It requires suspending knowledge of ultimate outcomes, assuming the position and perspective of particular actors in contingent historical circumstances, and maintaining faith in both the improvisational capacity of everyday people and the plasticity of the law.

Hartog’s interest in everyday people is at the heart not only of his own scholarship but of his methodological influence within the field of legal history and beyond it. The history Hartog tells is made possible by the methodological approach he helped innovate and articulate. Hartog was a key figure in shifting American legal historical methodology from top-down to bottom-up. Both his own histories and the history he called upon others to pursue looked not at the authoritative documents produced by legal elites but at the law as understood and deployed by regular people in their everyday lives. “Pigs and Positivism” embraced and extolled “a definition of law as an arena of conflict within which alternative social visions contended, bargained, and survived” (Hartog 1985, 934–35).

2. It seems hardly a coincidence that most of Hartog’s work engages the long nineteenth century, a time that—despite any number of internal transformations—he treats as largely continuous within itself. Though he “like[s] a world that’s sort of chaotic,” that period has a “manageable quantity of messiness that [he] can deal with” (Welke 2009, 645).

If “Pigs and Positivism” structures what many scholars have taken the enterprise of doing legal history to be, “The Constitution of Aspiration and the Rights that Belong to Us All”—published two years later—has structured much of the last three decades of constitutional history in the United States (Hartog 1987). There, Hartog described “constitutional history as an arena of struggle between contending and changing normative orders” (1026) that incorporates “the relations between official producers of constitutional law, and those who at particular times and in particular circumstances resisted or reinterpreted constitutional law” (1033). Anchoring a volume dedicated to constitutional consciousness in everyday life, that approach has gone from aspiration itself to an idea so deeply entrenched as to be normative. The essay became a lodestar for generations of socio-legal historians. It still is (Goluboff 2013).

It should hardly come as a surprise that Hartog’s combination of historical sensitivity and methodological innovation produces major historiographical interventions. Hartog has reshaped the historical literature on each of the subjects he has handled. He shows that nineteenth-century people did not understand the public/private distinction that structured the rise of New York City as scholars had assumed prior to his book (Ebner 1984; Frug 1984; Katz 1984). Where scholars depicted coverture as a totalizing hierarchical regime, he discovered the play in the joints of the law, the ways it allowed for escape even as it seemed to require stasis and control (Grossman 2001; Ginzberg 2001). Where few had considered how courts approached issues implicating the elderly, Hartog identified a host of nineteenth- and twentieth-century cases through which to explore caregiving dynamics before the advent of the modern social safety net (Dubler 2013; Cahn 2015; Roberts 2015). Where scholars have long presumed a stark dichotomy between slavery and freedom, Hartog is part of a new wave of historians revealing the porousness and interdependence of the two (Gross 2006; Johnson 2013).

Finally, for all of his commitments to the everyday and all of his attention to human stories, Hartog could hardly be described as hovering too close to the ground. He engages as intensely with legal theory and jurisprudence as with the details of everyday life. As he relates in his essay here, the same intellectual currents that enabled his methodological experimentation simultaneously sharpened his theoretical instincts. The instant canonical status of “Pigs and Positivism”—whose title alone carries the reader from the grit of social reality to the erudition of theory—was the beginning but hardly the end of that engagement. In Hartog’s work, the questions of what law is, how it operates, what makes it legitimate to whom and under what circumstances and vice versa abound. These are essential jurisprudential questions, and they are essential to Hartog’s scholarship and to our understanding of it.

To return to where we began—to people and their humanity—Hartog’s form of legal pluralism operates most acutely at the individual level. In describing the law as an arena of conflict, Hartog is interested not in some schematic history in which great forces or groups contend with one another for a grand historical prize. The conflicts that preoccupy Hartog and drive his work are both legal and intensely personal, conflicts in which individuals struggle to make sense of their worlds and get what they want and need—freedom from slavery, escape from an unhappy marriage, care in old age. What makes legal pluralism so powerful and so productive in Hartog’s hands is that it is not

only a methodological approach and a jurisprudential claim. It is also the essence of the human condition.

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