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Coverture and Dignity: A Comment

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This short comment challenges efforts to expand the notion of a dignity taking to traditional legal structures, like those identified with "coverture." It suggests that the inequalities of gender oppression are better understood as forms of "slow violence." It also suggests how difficult it is to imagine and to institute remedies for wrongs rooted in long histories and in powerful structures of socialization.

Bernadette Atuahene's *We Want What's Ours: Learning from South Africa's Land Restitution Program* (2014) explores a compensatory regime generated by the afterlife of the South African apartheid regime. It explains and justifies (and critiques) the legislation and administrative structure enacted to undo and to remedy the dignity-taking actions of white Afrikaners who had robbed black and mixed-race African community members of their lands. Does that compensatory regime—shaped by the explicit understanding that compensation has to remedy a loss of dignity, as well as remedying economic harms—offer a useful model to repair or redress a wider range of injustices?

Might, for example, Atuahene's notion of a "dignity taking" be usefully applied to the experiences and the constrained legal lives of married women who had become "feme coverts" across the many generations of Anglo American legal culture? Did "coverture," the archaic legal category through which Anglo American husbands once gained control of their wives' properties, produce "dignity takings"? And as a result, should there be an equivalent to a land restitution program, of the sort that Atuahene describes in her book, to undo the badges and incidents of coverture?

I answer all those questions in the negative. The opportunity to reflect on coverture through the lens of "dignity takings" leads me to the conclusion that dignity takings offers the wrong lens. The goal of undoing the historically constructed and reproduced badges and incidents of gender inequality—and of similarly systemic and societal wrongs—I believe requires a different inquiry, one less focused on any particular transactional legal event, one that is more attuned to the routine socializations of inequality in everyday life, to habituated patterns of subordination. It seems to me that the language of dignity and of dignity takings stands in the way of the project of finding redress for those distinctive and continuing wrongs.

Of course, I am just a historian, and like many historians I take the injustices of the past for the most part as givens, or as my subjects. In my work as a historian,

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I learn about injustices, and I explore them as the landmarks of the foreign countries (the pasts) that I study. But I have no particular expertise in how evils of the past should be accounted for and compensated for today. I have a conventional historian's bias in favor of remembering evil, not forgetting, and a more general, perhaps less conventional learned sense or intuition that there are few if any modern societies or cultures that are not founded on oppression and inequality, on evil and violence and injustice. Those biases and intuitions leave me both committed to the necessity of public conversations about reparations, while also skeptical of the utility or effectiveness or the political plausibility of many proposed remedies proposed as compensation for the evils of the past. I believe in affirmative actions; I believe that affirmative actions find their justification in changing but continuing and long-standing structures of oppression and inequality. Yet, I am also uncertain when or whether or how many affirmative actions ultimately make up—compensate—for the wrongs of the past.

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Why does it not make sense to think of coverture as producing a dignity taking? By a dignity taking, Atuahene means to mark the moral and political need to compensate, not just for the immediate economic loss of land and wealth, but also for the loss of "dignity" that resulted from that taking. What were the takings that required remediation in the form that Atuahene describes? They were the extraordinary acts by which ancestral and vested familial properties were taken from black communities and transferred to white settlers as expressions of the apartheid policies of the white Afrikaner government in the generations before 1989. They were discrete but extraordinary acts of expropriation.[1]

Coverture, too, began in a knowable and (at least in the life course of young women and men) an extraordinary moment. What or when was that moment? It was the moment of marriage. It was marriage that would become, under this framework, the singular event, the foundation for compensation, if such a foundation could be found anywhere. As Blackstone (1976, 1:*443–45) put it, in the paradigmatic and canonical passage in his *Commentaries*: "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything; and is therefore called . . . a *feme covert*."

So, within the Anglophone common law world, where coverture was the rule until sometime in the late twentieth century, was the act of marriage in its nature a dignity taking?[2] The question is not a crazy one. Indeed, it suggests a perspective that many historians and legal analysts have adopted. For many of them, coverture seemed to be defined by the notion that marriage covered over the "being" of a

1. Atuahene here follows the analysis of Carol Rose (2000).

2. Note that many other legal cultures have equivalents to the familial property relationships identified with the concept of coverture, but for purposes of this short comment, I focus on Anglo American coverture.

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wife and gave all her autonomous power to her husband. By the middle of the nineteenth century, some feminists—women's rights activists—talked in that way, took the metaphor literally, and, even more, connected it to a radical Christian Protestant critique of structures (like marriage) that interposed an authority figure like a husband between a Christian (the wife) and God's word and personhood. Coverture, as an inevitable consequence of marriage, implicitly infantilized women, kept them from being recognized as autonomous adults, and several historians and legal analysts continue today to argue for the salience of coverture as what might be called a "dignity taking." They regard what law reform should accomplish is an undoing of this legal status. The analogy to the remediation of a dignity taking seems an obvious one. The burden of law reform was how to undo coverture, so that the dignified wife would be revealed and reinstated (Kerber 1980, 1992; Salmon 1986; Clark 1990; Cott 2001).

And yet, framed in that literal a way, it also seems absurd to characterize marriage as a "dignity taking." Loss of dignity is not what marriage accomplished in the lives of women.[3] Unless we were to reduce most young women's expressed sentiments to false consciousness, there is no way to make marriage into a dignity taking. From the marriage plots of novels and plays (later on films) and songs and prayers and poems and letters and diaries, across several centuries, marriage fulfilled a young woman's destiny. It was, so much of the culture declared, including the words of young women entering into marriage, what a young woman sought. It was a source of dignity, certainly as compared to the lack of dignity that accompanied marriagelessness. It involved an entry into adulthood and adult dignity. Not a taking of dignity. And coverture was of a piece with—or, rather, an inevitable piece of—that transition.

There was danger that accompanied marriage. The wrong man, the wrong family, a host of horrible contingencies and dangers and oppressions lurked, including the potential for violence. A married woman could through several circumstances be robbed of her dignity. The law and the religious and legal and political cultures lacked remedies for the wrongs that could and did occur to women who "made" the wrong marriages, and by the nineteenth century many young US and British women understood those risks and evaluated them as they thought through what they regarded as their free decision whether or not to marry. They knew the law well enough. They knew that coverture was real and, in the absence of divorce as a socially acceptable and/or as a legal possibility, they understood that marriage had consequences that were difficult to escape from or to mitigate. They were choosing to put themselves into a relationship in which they became dependent on a husband. Some few made the conscious choice not to marry, but much the larger number made the choice to marry, as a decision they understood was theirs to make (Macfarlane 1986; Clark 1987; Rothman 1987).

Marriage was neither a taking; nor did it produce a loss of dignity. It was a singularly important event in a life, although for many women and men, it would be a repeated event. But it was also the antithesis of an "extraordinary taking." It was, to the contrary, a predictable—perhaps, the most predictable—and overdetermined

3. My thinking about dignity has been shaped by conversations with Mary Anne Case.

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event in a life, prescribed by the religious culture and produced and reinforced naturally through generations of socialization. It might have been of singular importance in any particular life. But it was hardly—or hardly ever—extraordinary, in the sense that Atuahene and Rose mobilize the adjective.

Coverture was one of marriage's legal consequences, a very important and an inevitable legal consequence, at least for the daughters and sons of the propertied, but it was not routinely understood as a taking. Few young women knew themselves as possessors who were losing estates and lands. They had been living within a father's household. Then they lived within a husband's household. At no point would many have been living independently, in knowing possession of their own properties.[4]

Nor was coverture often understood as producing a loss of dignity. Famously, or infamously, Blackstone described coverture as making "the female sex" a "favorite" of English law. By the mid nineteenth century, feminists and others sometimes derided this passage as cynical, but I do not think Blackstone intended it cynically or ironically. Behind Blackstone's "So great a favorite" phrase lay a problematic understanding of the constitutive role of a legal relationship like that of coverture. In contrast to Atuahene's apartheid South Africa, where the taking of property directly constituted and produced the immiseration and the demoralization and the subjugation that was the goal of the white Afrikaner regime, the consequences of becoming a "feme covert" were, at best, complex and contradictory. Here are a few of those consequences: coverture would give a married woman in early modern England or the United States some protection from creditors. It would make her unable to testify for or against her husband. It would require her husband to "represent" her in any number of transactions with public and private actors and institutions. It might mean that she was more remediless against the sexual violence of her husband than she would have been otherwise, although one should not overstate the remedies against sexual violence that would have been available to any woman within the legal culture. But it also meant that she was entitled to share in his wealth and his bounty (Hartog 2000a, 93–166).

Between the seventeenth century and the early twentieth century, treatise writers and legalists analytically separated coverture and its consequences from marriage, producing treatises and a thick body of doctrinal law. That doctrinal law was concerned, in the first place, with how husbands managed family properties and dealt with creditors and others, but it also became a field within which wives and husbands bargained with one another. Even as coverture "covered over" the wife, it also produced situations within which she and her husband bargained with one another "in the shadow" of coverture over the resources that had once, at least theoretically, belonged to her. Institutions like the "jointure" developed. A wife would

4. Obviously, that would be less true of widows and older women who married or remarried. For them, legal institutions offered a few mechanisms—equitable estates in the early modern world, married women's property acts beginning in the nineteenth century—that allowed them some occasional protection against the consequences of coverture. However, even for them, it is hard to find evidence that many thought of marriage as a "taking" of their own property. Rather, and perhaps ironically, many understood themselves as working to conserve paternal family properties. See, for example, the story of Harriet Douglas Cruger in Hartog (2000a, 167–92).

receive compensation for agreeing to allow her husband to convey property that he managed as a consequence of coverture or that was burdened with her "dower" rights. Husbands needed to pay off their wives, and they did so (though often reluctantly and resentfully) (Hartog 2000a, 146).

At least in the male legalist imagination, the disabilities of coverture—the need for a husband to stand in for the wife in most legal circumstances—were necessitated because a married woman would necessarily (inevitably) fall under the physical coercion of her husband. By requiring him to represent her, the legal order could avoid having to deal with a spurious and illusory assertion of female autonomy. The law could deal with and manage directly the man, who would, in any case, be controlling the situation, whatever it was. Behind that imaginative construction, lay a sexist (one might call it a testosterone-driven) belief in the unchanging prelegal and primordial fact of male sexual violence and power, along with a characteristic Enlightenment faith that laws like those identified with coverture could modestly manage that fact. Laws like those identified with coverture could discipline male violence and reduce its incidence, in part by recognizing where physical power actually lay. A wife could be a "favorite" of the law because the law took seriously her "natural" subordination and physical weakness and created institutions that mitigated the effects of her subordination, in part by recognizing their reality (see Hartog 2000a, 164–92; 2000b).

In any case, for women living in the legal culture of early modern England and the United States, the central contrast was between unmarried and married women, not between men and women. And between the married and the unmarried, dignity belonged to the married. Indeed, it may be one of the most important (and least studied) markers of the modern world—markers of our time as compared to any number of pasts—that it has become possible to be an unmarried woman in the world today and to live one's life with dignity, that is, with almost as much dignity as possessed by a married woman (Hartmann 1987).

And as any search of the nineteenth-century American case records reveals, many, perhaps most, invocations of coverture in the courts would be at the behest of married women seeking protection or security or resources. Women, or at least many married women, were advantaged by the apparent strictures of coverture. There are too many varied situations to summarize here, but those invoking coverture would include many separated wives being sued by creditors or suing to require husbands to support them, to provide for their "necessaries." Or a wife would invoke coverture to avoid the effects of an otherwise harmful legal consequence. A wife who was being sued by tenants on her property for failing to fulfill a legal duty would assert her coverture as an excuse, leaving the tenants remediless, given the absence of the husband. Or in innumerable incidents, the complexities of coverture combined with rules requiring rigid enforcement would create the conditions for formalist manipulation by wives or by their lawyers. The absence or the presence of a signature, the formal need for a separate judicial examination of the wife before many transactions could be carried out, the apparent legal and equitable concern to make sure the wife's "interests" were being protected, such incidents of coverture offered a large field for manipulation (Hartog 2000a, 93–166).

The point was, to put it most directly, that marriage was understood as a privileged status. Marriage endowed a wife, gave her a dignitary identity. Coverture was one of the consequences of that privilege, of the dignities that came with marriage. For women, coverture accompanied marriage; inevitably so, if there was property in the marriage. And it accompanied the dignities and privileges of marriage. The sources of that privilege were rooted in the legal culture, in the religious culture, and in experiences of everyday life, marked linguistically and semantically in many ways. Coverture was enmeshed with the sustained and sustaining faith that the reproduction of generations should occur within marriages and that the way to produce that social good was by making it better to be married than to be not or never married, particularly when children were involved.

It is, as a result, not surprising that as late as the 1970s and 1980s, as the remaining concepts of what had been coverture were being overthrown for both constitutional and cultural reasons, and as divorce became a routine part of family law, leading mainstream feminist organizations still spent much of their time and political capital protecting the interests of married or once married propertied women. They worked to distinguish the married or formerly married from unmarried welfare mothers, even as they struggled to make core elements of the welfare state—including health insurance and social security and pension structures—acknowledge those married or once married propertied women as separate rights-bearing individuals. Even in the midst of an individualistic near-revolution against compulsory marriage, it was beyond their imagination to make common cause with a welfare rights movement filled with the unmarried. Dignity would remain with the married (Kahn 2015).

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My point is, I hope, obvious. Beyond the inapplicability of the term "dignity taking" to the notion of coverture lies a larger question: How ought one to think about the continuing harms and shaping inequalities—what might be called the slow violence of historically legitimated gender oppressions and subordinations (Nixon 2013)? What forms of repair or restitution are possible or plausible, if any, for those nondignitary takings?[5]

I do not mean to deny that there are not some harms that can be identified with discrete acts and moments, with extraordinary takings that produced subordination. For those harms, as Atuahene demonstrates brilliantly, it may be that the notion of compensation for a dignity taking offers a fruitful analytic framework. But

5. In this context, we should not find it surprising that the ordinary oppressions of family structure within the several racial and ethnic cultures of South Africa, both past and present, do not rise to more than fleeting consciousness in *We Want What's Ours*. The patriarchal structures of kinship and customary law are acknowledged in one passage in the book, but they are there understood as conforming to what might be called a natural "logic." To pay too much attention to them would have distracted Atuahene and her interviewees and interlocutors from the need to focus on the political necessities and the political logics of racial reparations. It might be added that when the antiapartheid activist, Albie Sachs, was in exile in England, and he turned his attention to the legal construction of sexism in Britain, he focused not on the legal structures of coverture, but on the implicit male beliefs (Sachs and Wilson 1978).

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how we deal with inequalities produced and reproduced through manifold legal acts that built on one another and that made subordinations natural and invisible is obviously a very different matter. And we should be aware that the immediate and the noisy may cover over the slow and the silent.

If one reads the best work on what is today awkwardly identified as slave reparations, the moral claim for reparations in the present comes less from the historic fact of enslavement, more from the failure and the inadequacies of the undoing of slavery—of an uncompleted emancipation—and from the many generations that followed of subordination and ghettoization. I think the analogy for gender is similar. In both instances, there may be less to gain from a focus on the singular transaction that lay behind the historical event that produced apparent legal inequality—the slave market, the Middle Passage, becoming a wife—than there would be from an exploration of the routinized everyday experiences through which injustice and inequality was naturalized and made normal and inevitable. The focus should be on the present tense—of lives subject to policing and surveillance and legalized violence and racial profiling and stunted educational and economic opportunities—that continue to produce and to reproduce endlessly changing forms of inequality and demoralization and injustice (see Coates 2014).

It is the presence of past injustices in the present that should be our concern, even as we know that the present incorporates several pasts with multiple historical trajectories.

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