

Review Symposium: Retrospective on the Work of Hendrik Hartog

Slavery, Freedom and Contract: Blurred Lines and Historical Resistance

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HARTOG, HENDRICK. *The Trouble with Minna: A Case of Slavery and Emancipation in the Antebellum North*. Chapel Hill, NC: The University of North Carolina Press, 2018.

Hendrik Hartog's The Trouble with Minna complicates the binary between freedom and unfreedom in American history by probing the mixture of slavery and contract in antebellum New Jersey's regime of gradual emancipation. This Essay argues that if Hartog's narrative is read for more general patterns—in addition to everyday lived experiences which Hartog emphasizes—it also reveals resistance to such line-blurring, and historical efforts to construct conceptual boundaries that would separate slave relations from capitalist ones. That resistance should assume a more central conceptual place within the current tide of historiographical emphasis toward blurred lines.

In the past few decades, important histories of the antebellum American North have effectively challenged the deep-seated American tendency to see in capitalist relations—particularly wage labor—and slavery, two diametrically opposed binaries of freedom and unfreedom. These historians have succeeded in denting the once, and perhaps still, dominant historical narrative which—in viewing market participation as synonymous with personal liberty—contended that the coercive nature of Northern slavery was antithetical to the emerging contract-based American capitalism.

Focusing mostly on the “freedom” side of this perceived dichotomy, these critical historians have blurred the lines of the free/unfree binary by showing how the “free” labor market was hardly that, as supposedly voluntarist, equitable, and consensual exchanges between two free agents in the marketplace were in fact dominated by asymmetrical power relations between employer and employee. Investigating the complex and varying gradations of freedom that existed in different work contexts, such studies uncovered the coercive sides of free labor by revealing an absence of significant market

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choice emerging from the economic desperation of marginalized groups as well as from legal technologies of control and compulsion in capitalist contractual culture.

In *The Trouble with Minna*, Hendrik Hartog has also set his eyes on undoing the long-running American tradition that has argued for, as he calls it, an “antonymic relationship between slavery and freedom” (2018, 6). But rather than focus on the coercive side of free labor, Hartog’s line-blurring has taken a novel tack by demonstrating how antebellum slavery in New Jersey was hardly the monolithic “unfreedom” we have come to accept. In Hartog’s telling, antebellum New Jersey legal culture is reconceived as an unstable, porous, nebulous, and messy regime in which slavery often bled into the “free” world of contract doctrine and practice, and contracts were frequently used to frame master-slave relations.

Hartog makes his case by uncovering everyday legal workings set against the often-overlooked process of gradual emancipation. As he rightfully notes, histories of abolition have often “been all about getting to its end point” (ibid., 59). As a result, we have tended to forget that for decades the free and enslaved people of New Jersey and other Northern states lived in a social, cultural, and legal middle ground in which slavery was both admonished and sustained, just as a capitalist contractual culture and wage labor relations were taking command.

Hartog argues that in the prolonged death throes of New Jersey slavery, one of its core principles was becoming undone: the perpetuity of enslavement. As the slavery-clock slowly ticked down to zero, Hartog shows how a novel, temporal aspect of New Jersey slavery came into being. “Something like contracts” emerged, Hartog argues, that fixed master-slave relationships into a defined, bounded, and finite time. “These were relationships that incorporated a particularized and temporally bounded ‘now,’” he continues, “a temporality that one ordinarily identifies with contractual freedom” (ibid., 9–10).

In tracing these complexities, *The Trouble with Minna* makes a robust addition to a historiographical field which ultimately reveals the historical coexistence and codependence of capitalism and slavery, a conclusion which also gains support, albeit in a different vein, from recent economic history on the “Cotton Kingdom” of the Deep South and the crucial role that slavery played in the rise of America capitalism.¹ Yet in this essay we argue that if Hartog’s narrative is read for more general patterns—in addition to the everyday lived experiences where Hartog’s main concerns lie—it reveals something else as well: many antebellum legal actors were resistant to this boundary-blurring, and were busy constructing conceptual boundaries that would insulate and separate slave relations from capitalist ones. As is suggested in the term “neo-abolitionist” which Hartog mentions as the source of the unfree/free binary, the conceptual wall between slavery and capitalism that many historians have sought to tear down was being built in the very abolitionist era they examine. While that resistance has not gone unnoticed by critical historians, including dominant voices who have led the charge of blurred lines, and while we do not reject the blurred line thesis which develops fundamental historical insights regarding the coercive nature and unfree origins of modern capitalism, we propose that on-the-ground historical resistance to blurriness should assume a more central, conceptual place within this tide of historiographical emphasis.

1. E.g., Beckert 2014; Beckert & Rockman 2016; Baptist 2014; and see a critical review of the literature in Zakim 2018.

If slave and market relations were not as different as we once thought, why did antebellum legal culture consistently try to insist that they were? The main purpose of our essay is to trace the creation of slave/market boundaries, yet we also offer one solution to the key question of why. In so doing, we lean heavily on an important intervention in Hartog's book, which recovers an aspect of slavery that has, in recent years, been overlooked: the duties and the obligations of the slaveholder to the slave. As with Hartog's own narrative surrounding a slave called Minna, much of our argument will focus on the slaveholder's "duty of care." This will help us observe a key gulf between slave and capitalist labor that legal actors of the era had no inclination to bridge. For while the duty of care remained an inherent part of the master-slave relation, it was steadfastly kept away from the relation between capitalist and employee, perhaps due to dangers and limits that such social obligations were perceived to place on capitalist development.

THE TROUBLE WITH MINNA

The Trouble with Minna is, in Hartog's words, "a study of contractual behavior and of contract doctrine" (ibid., 8). It traces the story of a slave called Minna—more on this below—and multiple shorter socio-legal contractual encounters in New Jersey's regime of gradual emancipation. We build on these details to flesh out the boundaries that were erected between slavery and capitalism in the antebellum Northeast. While Hartog stresses the incoherent mixing of slave and market contractual relations and sees such a mixture as the paradox at the heart of his history (ibid., 10), his account also makes plain the legal distance and cultural gulf that was maintained between master-slave relations and labor-contractual ones. To the extent that slavery and capitalism fed into one another, in their legal lives historical actors were busy negating just that.

To clarify the history of boundary-making, we propose to think of the legal regime that Hartog describes through two complementary levels: core and periphery. At the *core* lay formal master-slave relations which included not only the slaveholder's right to dominate, control, or sell his human chattel as he pleased but also his duty of care. Attention to that duty of care reveals that the core relations were not contractualized. In fact, certain tendencies toward contractualization that had existed in colonial and early America were blocked in the first decades of the nineteenth century, just as market relations were coming to the fore. The fact that the core social relations between master and slave were not contractualized in this era reflects, in our opinion, the perceived gulf, maintained through cultural-legal practices, between slave and market relations.

As Hartog recovers in its variability and richness, surrounding the uncontractualized formal core of slavery lay a *periphery* in which contractual discourse, analysis, and practice—involving slaveholders, employers, freed slaves, servants, apprentices, property owners, and others—was prominent. Nevertheless, the contractual periphery too was geared toward boundary maintenance: it was predominately mobilized to maintain a certain bounded distance between market and slave relations.

THE CORE: MASTER-SLAVE RELATIONS

What exactly was the trouble with Minna? In 1822, at a time of gradual emancipation in New Jersey during which only those born before 1804 remained enslaved for life, Elizabeth Haines rented a slave by the name of Minna for a term of almost four years from one Henry Force. Yet four years later Force refused to take Minna back. As a result, she remained in Haines' home and under her care, even though she was, according to Haines, a drunk, blind, "worthless" worker. For ten years after the lease had ended, Haines took care of Minna, with Force repeatedly refusing to assume responsibility, which finally led to Haines' suit for compensation. She eventually lost this suit, an outcome we discuss below, but not at first, and not with ease.

With the Minnas of history, masters wanted out, but found themselves under a legal duty of care. This duty was inherent to the legal construction of slavery, yet incongruent with the capitalist contractualization of labor relations. Derived from a status-based society with fixed positions, permanent hierarchies, and traditional social obligations, "duty" is not a word that appears much in the working vocabulary of capitalist societies. As a result, the duty of care caused antebellum legal actors to place a wedge between slave and capitalist labor, as "free" labor was understood to include not only the (supposed) freedom to choose one's employer but also to be cast aside during economic downturns by one's employer. In stressing the duty of care, we are not seeking to revive some romanticized, Genovesian, "paternalist" approach to slavery, nor imply any effective protection or proper caring for slaves. Slavery, including the New Jersey variety, was often brutal, exploitative, oppressive, and violent. Nevertheless, questions regarding legal obligation which Hartog brings to the fore remain critical in order to uncover the key schisms in historical consciousness between slave and market labor.

The duty of care made the master-slave relation incompatible with New Jersey's contractualizing labor culture. This point is borne out by Hartog's account of the legal regulation of promissory manumissions, whereby owners promised slaves their freedom at a future date, sometimes with additional terms for the period of labor. According to Hartog, promissory manumissions narrowed or obscured the distinction between slavery and wage labor. This is because promissory manumissions brought into slave relations the "now-ness" of contract: they transformed slavery into a relation bounded in time, as opposed to the perpetual quality of (slave) property.²

Yet there is another side to manumission, also revealed by Hartog, that undermines the mixing of slavery and contract during this period: manumissions had been a familiar part of the legal landscape of New Jersey in the late eighteenth century. Arguably, manumissions were part of masters' property rights, and so, as Hartog notes, were understood as unidirectional acts (gift of freedom, or abandonment). At the turn of the nineteenth century, however, the New Jersey "slave code" of 1798 formalized the process and brought it under stringent regulation, essentially delegating "private" acts of manumission. Judicial interpretation soon sealed this process by clarifying that informal acts of promissory manumission *would have no effect*. With this formalization, the legal ability to

2. This history is particularly interesting because it is not about cash self-purchase, which was the dominant question in the South but never in New Jersey (see respectively, Gross and de la Fuente 2013; Hartog 2018, 110).

contractualize the master-slave relation was greatly diminished. Revealingly, just when slavery's meaning was becoming threateningly unstable, and a contractual understanding of manumission was gaining resonance over a property-based one, New Jersey legislators and courts went out of their way to ensure those blurry lines would remain stark boundaries. As one judge who solidified this understanding suggested, slavery was not just something that master and slave could temporally alter with a promise, for it was "an entire thing" (ibid., 72).

Shedding the duty of care was likewise met with resistance in the early nineteenth century with New Jersey's refusal to assume care responsibilities for slaves. Limitations on promissory manumission were motivated in part by the fear that freed slaves would become a public burden. Hartog's account of the regime of overseers of the poor shows the lengths to which the state went in resisting care responsibilities, placing and re-placing them in the hands of the slaveowners. As Christopher Tomlins has argued:

Cases arising out of controversies over the eligibility of indigent former slaves and their descendants for relief from their town of residence . . . invariably turned upon an explicit comparison between the legal obligation of masters to attend to the welfare of their slaves and the absence of any such obligation toward free laborers . . . Slaves . . . were the responsibility of their masters. Free persons, in contract, were to be supported, if left destitute, by the community (Tomlins 1993, 335).

In 1824, the New Jersey Supreme Court held the state responsible for a pauper slave whose master had disappeared, a situation not addressed by legislation. While this may appear to mark the erosion of a master's unavailing duty of care, the decision is revealing of quite the opposite—the lengths to which a master would have to go—essentially disappear outside state borders—to get out of the master-slave relation.

To the extent that public responsibility for "free" individuals who fell by the wayside was beginning to be seen as part of the capitalist state structure—and Hartog indeed recounts how capitalist dislocations put pressure on the traditional local systems of poor relief—the refusal to afford such relief to unfree slaves speaks to efforts to draw boundaries between slave and capitalist relations.

THE PERIPHERY: SLAVES IN CONTRACTUAL LIFE

All this is not to say that contract did not play a significant role in shaping the contours of slavery or that manumissions did not have real effects. *The Trouble with Minna* traces in extensive detail myriad questions of contract, involving promissory manumissions alongside other contractual issues implicating slavery. These threads make up the periphery: various socio-legal relations surrounding the formal master-slave core. That broader terrain, we argue, despite the mixture of slavery and contract, predominantly supported the view we see at the core: the master-slave relation as an "entire thing," at a marked cultural distance from the emergent regime of contractual labor.

Most directly, stories in the periphery reveal how limitations on promissory manumissions were reinforced. For example, Hartog examines the racist presumption of slavery based on color, created by New Jersey courts in the midst of gradual emancipation. That presumption arose in contexts outside master-slave relations, that is, in the periphery. In *Morse v. Gibbons*, which created it, the presumption operated in a dispute about the liability of a boat-owner for the escape of a slave on one of his boats; yet, as Hartog shows, the court also took the opportunity to clarify that the presumption could not be overturned by an informal manumission. A different opportunity to delimit manumission was in a suit for a child-slave, where it was decided that a promise to free the child together with her slave parents would not hold.

Promissory manumissions and other contracts with slaves had realities outside courts. The notable point about the “social life” of contracts is that they were mobilized to pull black people back into slavery, revealing resistance to blurring slavery’s boundaries. To give one example, Hartog traces the contractual ups and downs of one Cato Richards, who had been manumitted by law (by moving to New York), but then coerced by his previous owner into a “contract” of renewed slavery, then assigned, again contractually, to another businessman, then redefined, contractually, as an employee. Why that last bit? To avoid the duty of care. We are in the informal zone, where the legal implications remain obscure, particularly in the space between New Jersey and New York, but the everyday reality revealed is of contractual tools inside New Jersey in the service of enslavement.

Slave relations were set apart from capitalist relations in other ways too. Enticement is an important instance: when a black person left the service of one white man for another, the difference between suing under the 1798 statute, and suing for loss of service in enticement, marked the slavery/wage labor boundary (here too, fortified soon after gradual emancipation began, in an 1809 New Jersey Supreme Court decision). Hartog highlights the way that legal analogies obscured the boundary. Yet, there are two points to observe about the process. First, the obscuring made compensation for an absconding free black person closer to slavery, rather than bringing slavery closer to wage labor. Second, throughout the period, the two routes were not only kept formally separate, but analogies were met with discursive resistance.

The broad pattern of what we defined as the periphery is the frustration of freedom through contractual tools, which undermined and confused the implications of gradual emancipation. The pattern is yet another reminder that contract, as a general category, is no measure of freedom. It is also a reminder that while the wage contract is a capitalist form of organizing labor, contract as a general category is not necessarily capitalist, hence the periphery of multiple contracts supported the core, where slavery’s distance from market imperatives was reiterated.

Our reading of the core and periphery might appear to resonate with parallel legal developments in the South.³ But in New Jersey, where they must be read within the legal framework of gradual emancipation, there is good reason to view developments as an implicit construction of slavery’s relation to an emergent capitalism.

3. In manumission law and more broadly in a pressure to align race with slavery (e.g., Johnson 1997).

MINNA AGAIN

In 1836 Haines went to court to ask that Force pay for the costs of Minna's care. A jury awarded damages, but a few years later, the New Jersey Supreme Court reversed the decision. The reversal claimed that Haines had voluntarily decided to take care of Minna. Since no contract had been made between Haines and Force on this matter, she deserved no compensation. What of Force's duty toward Minna? In centering the legal issue on the doctrine of quasi-contract, rather than the duty of care, the reversal ignored that question.

The jury which had first awarded Haines the money, as well as the dissent in the New Jersey Supreme Court, presented a version of slavery based not on market imperatives but social obligations and fixed duties. As Hartog explains, these Jacksonian Americans believed that Force had "failed to do what he was legally and morally obligated to do as a slaveholder in nineteenth century New Jersey" (*ibid.*, 17). According to one dissenting judge, it was "inherent in the relationship of master and slave, based both on statute and natural law, that a master must care for his or her slave, especially when the slave was disabled or ill" (*ibid.*, 30–31). As Hartog explains, this was a worldview in which certain obligations and privileges emanated not from contractual promises but rather from one's inherent position in the hierarchy of society. As the dissent put it, "imperious duty imposes the obligation upon him" (*ibid.*, 31).

The majority differed, and went on to discuss the absence of contract between the parties. Hartog reads the case as representative of the era of gradual emancipation, in which contract and slavery coexisted. The crucial insight for him is that while *Force v. Haines* was a case about slave care, it nevertheless dealt with this question solely through the lens of contract doctrine, with slavery as transparent background.

Yet, set against the schisms we have highlighted, the case also reveals something else: the majority judges refused to give validity to the duty of care, which was an inherent part of the historical relation of slavery. *Force v. Haines* might be viewed as reminder that for dominant antebellum legal actors, slavery, with its social duties, fixed statuses, and hierarchical obligations—was an institution whose logic had to be eliminated for capitalist paradigms of fully fledged, market-based social relations to emerge. If market relations contained their own un-freedoms, it is nonetheless important that historical actors distanced them from those of slavery. While *Force v. Haines* was, in our proposed vocabulary, part of the periphery—contractual life outside the core—it managed to touch the core. Conceptually, while it had historical roots in slavery, we might see the case as part of slavery's uprooting.

The separation of slave and market relations, in Minna's case and in others, was often shaped by fears of social duty which informed ideas of capitalist freedoms. In-depth legal history helps reveal *perceptions* of incompatibility between slavery and capitalism that might help explain why, as industrial, wage-based capitalism began to emerge, antebellum northern slavery came to a—gradual and messy—end. Hartog's work on this era, and his shifting of the historical spotlight on to issues of duty and care, serves as a crucial step toward answering this still open and critical question.

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