

Modernizing Wife Beating

How Reforms Can Perpetuate Injustice

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The surgeon general recently found that the single largest cause of injury to women in the United States is battering by husbands, ex-husbands, and lovers. Thirty-one percent of all women murdered in America are killed by their husbands, ex-husbands, or lovers. Law has played an important role in shaping these patterns of violence.

The Anglo-American common law once authorized the use of force in marriage. Feminist protest prompted reform of marriage law during the nineteenth century, but the law continued to condone violent conduct in marriage, even though it now deemed such conduct criminal.

As this essay will show, civil rights reform can breath "new life" into a body of status law, by pressuring elites to translate old doctrines into a more contemporary, and less controversial, social idiom. I call this kind of change in the rules and rhetoric of a status regime "preservation through transformation"; I will illustrate this dynamic in a case study of spousal assault law, as it evolved from a law of marital prerogative to a law of marital privacy.

The Right of Chastisement

Until the late nineteenth century, the Anglo-American common law defined marriage as an explicitly hierarchical relationship. A wife was obliged to serve her husband, and a husband, who acquired rights in his wife's labor and property, was subject to a reciprocal duty to support his wife and represent her within the legal system. A married woman was unable to contract or file suit without her husband's participation; he, in turn, was responsible for his wife's conduct—liable, under certain circumstances, for her contracts, torts, and even some crimes.

As master of the household, a husband could command his wife's obedience and subject her to corporal punishment, or "chastisement," if she defied his authority. In his treatise on the English common law, Blackstone explained that a husband could "give his wife moderate correction,"

[f]or, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer.

Blackstone's *Commentaries* played an important role in shaping American legal culture; and early American law treatises described chastisement as one of the husband's marital prerogatives. Records of chastisement law in America are scant, but cases in a number of states, particularly in the southern and mid-Atlantic region, recognized a husband's prerogative to chastise his wife.

By the middle of the nineteenth century, a variety of political and economic forces had begun to erode the common law of marital status in which the right of chastisement was situated. Two of the most powerful reform movements of nineteenth-century America, the movements against slavery and alcohol, gave rise to the first organized movement for women's rights. In 1848, when the "woman's rights" movement held its first convention, it denounced the law of marriage in a formal Declaration of Sentiments:

In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement.

During the 1850s, the woman's rights movement organized numerous conventions throughout the Northeast and Midwest, published newspapers, and conducted petition campaigns demanding suffrage and various reforms of marriage law.

By mid-century, state legislatures had begun to enact legislation that reformed the common law of marital status. Responding to feminist protest and a variety of other social forces, states adopted statutes that, by incremental degrees, modified the common law to give wives the right to hold property, the right to their earnings, and the rudiments of legal agency: the right to file suit in their own names and to claim contract and tort damages.

During this period, the right of chastisement was subject to two kinds of criticism. As the temperance movement protested the social evils of alcohol, it drew public attention to the violence that drunken husbands often inflicted on their families. The movement's conventions, newspapers, poems, songs, and novels featured vivid accounts of women and children who had been impoverished, terrorized, maimed, and killed by drunken men. Temperance reformers criticized the social conditions of family life in the name of protecting the sanctity of family life. Initially, however, temper-



ance activists preached one remedy for the family violence they so graphically depicted: prohibiting the sale of alcohol.

The woman's rights movement differed from the temperance movement both in its diagnosis of family violence and in the remedies it proposed. As woman's rights advocates attacked the hierarchical structure of marriage, they challenged the husband's authority over his wife, which the prerogative to chastise practically and symbolically embodied. The woman's rights movement thus broke with the temperance movement by depicting wife beating as a symptom of fundamental defects in the structure of marriage itself. As one of the movement's newspapers expressed it in the 1870s, domestic violence exposed the "fiction of Woman's protection by man" and thus demonstrated "the necessity that women should have increased power, social, civil, legal, political and ecclesiastical, in order to protect themselves."

Chastisement's Demise

Decades of protest by temperance and woman's rights advocates, combined with shifting attitudes toward corporal punishment and changing gender mores, worked to discredit the law of chastisement. By the 1870s, no judge or treatise writer in the United States would defend the chastisement prerogative.

When wife beaters were charged with assault and battery, judges refused to entertain the claim that a husband had a legal right to strike his wife; instead, judges pronounced chastisement a "quaint" or "barbaric" remnant of the past and allowed the criminal prosecution to proceed. Thus, in 1871 the Alabama Supreme Court upheld the prosecution of an emancipated slave charged with beating his wife, declaring, "The wife is not to be considered as the husband's slave. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law." Several state legislatures enacted statutes specifically prohibiting wife beating; three states even revived corporal punishment for the crime, providing that wife beaters could be sentenced to the whipping post. All American authorities now characterized wife beating as a criminal assault.

Nevertheless, as the Alabama case might suggest, prosecution of wife beaters in this era was directed at the poorest and most vulnerable elements of society. After the Civil War, wife beating emerged as a "law and order" issue, reflecting anxieties about race and class relations as well as gender roles. Authorities described wife beating as a practice of the "vicious classes," depicting the wife beater as a deviant character, whose criminal or licentious propensities authorities needed to control. Statistics on arrests and convictions for wife beating during the last decades of the century demonstrate that criminal assault law was enforced against wife beaters only sporadically, and then most often against African Americans and immigrant ethnic groups.

The reforms of the 1870s did not mark the beginning of more fundamental change. During the ensuing century, the American legal system continued to tolerate violence in marriage as it did not in other relationships. In this period, judges crafted a new body of doctrines than condoned violent conduct in marriage, even though the law now deemed such conduct criminal.

Modernization of Marital Violence Law

What social understandings did repudiation of chastisement doctrine express? It seems clear enough that nineteenth-century jurists were uncomfortable with the overtly hierarchical conception of marriage that chastisement reflected. In 1870, a prominent family law treatise offered this account of the prerogative's demise:

In a ruder state of society the husband frequently maintained his authority by force.... But [in recent times] the wife has been regarded more as the companion of her husband; and this right of chastisement may be regarded as exceedingly questionable at the present day. The rule of love has superseded the rule of force.

As the treatise explained it, a husband was no longer entitled to chastise his wife because, with changing conceptions of marriage, a husband was expected to rule his household by love rather than force.

But courts embraced this more modern, affect-based understanding of the marriage relationship without quite relinquishing the view that a husband had authority over his wife. Instead, by the Reconstruction era, jurists began to reason about the husband's marital authority in the idiom of companionate marriage. In this period, courts that had repudiated the chastisement prerogative began to grant husbands accused of wife beating immunity from criminal and civil prosecution. Courts rationalized this new body of immunity rules by invoking concepts of affection and privacy associated with companionate marriage. Thus, jurists abandoned the language of hierarchy and began to employ the language of interiority (both emotional and spatial) to justify the new body of doctrine governing violence in marriage.

To appreciate this transformation in the rules and rhetoric of marital violence law, it is helpful to examine the 1868 case of *State v. Rhodes*. In *Rhodes*, the North Carolina Supreme Court declined to enforce an assault and battery charge against a man who assaulted his wife. The court repudiated the chastisement prerogative but then granted the wife-beating husband immunity from prosecution, justifying this new immunity policy in the rhetoric of affective privacy:

[H]owever great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bedchamber. ... Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive. ... But when trifles are taken hold of by the public, and the parties are exposed and disgraced, and each endeavors to

justify himself or herself by criminating the other, that which ought to be forgotten in a day, will be remembered for life.

As the court summed up the doctrine six years later in a much-quoted opinion: "If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."

The concern for privacy that appears in this North Carolina case, as well as in the case law of several other southern states, does not seem to have played a significant role in the development of criminal law in the late nineteenth century—perhaps because criminal prosecution of wife beaters during this era was focused on controlling men of the "lower classes"—men whose privacy needs were scarcely recognized, much less protected, by those in power. But privacy-based reasoning about domestic violence did shape the development of private law in the late nineteenth century, playing a key role in the law of intentional torts as it emerged from reform by the married women's property acts. It was in the law of torts that privacy-based reasoning about marital violence flourished, before returning to shape the criminal law during the early twentieth century.

Interspousal Torts?

To determine the implications of wife beating under the law of intentional torts, courts had to interpret the marriage reform legislation whose enactment the woman's rights movement had advocated. Among the many rights these laws gave a married woman was the right to file suit without her husband's joinder and the right to collect tort damages for injuries to her person and property. Under these reform statutes, could a wife now bring a tort suit against a husband who assaulted her and collect money damages?

Regardless of whether a husband beat, choked, stabbed, or shot his wife, all courts that heard such tort claims initially rejected them. In 1877, for example, the Supreme Court of Maine ruled that a woman could not recover tort damages from her ex-husband for an assault that took place during their marriage. The court denied that a husband had a right to chastise his wife, yet announced that it would be "poor policy for the law to grant the remedy asked for in this case" because "[t]he private matters of the whole period of married existence might be exposed by suits." It then quoted

the opinion of the North Carolina Supreme Court in *Rhodes* that recommended drawing “the curtain,” shutting out the public gaze, and leaving the parties to “forget and forgive.”

When the U.S. Supreme Court construed the District of Columbia’s married women’s property act in 1910, it invoked both a “privacy” and a “domestic harmony” rationale for interspousal tort immunity. The Court asserted that Congress had not intended to give spouses the capacity to sue each other; it then observed that allowing intramarital suits would “open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander and libel” and questioned whether “the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony.” By the early twentieth century, numerous state supreme courts had barred wives from suing their husbands for intentional torts, typically on the grounds that “the tranquility of family relations” would be disturbed. (The doctrine of “interspousal tort immunity” survived well into the twentieth century, and still remains law in some states today.)

As the North Carolina Supreme Court observed:

[The law] presumes that acts of wrong committed in passion will be followed by contrition and atonement in a cooler moment, and forgiveness will blot out it out of memory.

In short, laws that protected relations of domination were justified as promoting relations of love.

“Family” Courts

By the beginning of the twentieth century, this new mode of reasoning about marital violence traveled from tort law to the criminal law. During this period, cities began to establish special domestic relations courts staffed by social workers to handle complaints of marital violence; by 1920 most major cities had such courts. The family court system sought to decriminalize marital violence.

The underlying theory of this special court system, a New York City judge explained, was that “domestic trouble cases are not criminal in a legal sense.” The new court system developed procedures that provided informal immunity to wife beaters. Rather than arrest or punish those who assaulted their partners, the judge and social workers urged couples to reconcile, providing counseling designed to preserve the relationship whenever possible. Battered wives were discouraged from filing criminal charges against their husbands, urged to accept responsibility for their role in provoking the violence, and encouraged to remain in the relationship and rebuild it rather than attempt to separate or divorce. In this “therapeutic” framework, physical assault was not viewed as criminal conduct; instead it was viewed as an expression of emotions that needed to be adjusted and rechanneled into marriage.

Not until the late 1970s did the contemporary women’s movement mount an effective challenge to this regime. Today, after nearly two decades of protest activities and law suits, there are shelters for battered women and their children, new arrest procedures for police departments across the country, and even federal legislation making gender-motivated assaults a civil rights violation. Even so, battering by intimates remains the largest cause of injury to women in the United States today.

Despite profound changes in the laws and mores of marriage, Americans still reason about wife beating in terms of privacy. O. J. Simpson invoked this tradition in 1989 when he shouted at police

“If no permanent injury has been inflicted, ... it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.”

Thus, judges seeking to explain the modified structure of marital status law increasingly drew upon gender concepts of the industrial era to explain the law of marriage in more contemporary and socially credible terms. Rather than represent marriage in the biblical discourse of “one flesh,” as a relation that “merged” wife into husband, courts instead discussed marriage as it was understood in nineteenth-century America: as a companionate relationship based on an affective bond that flourished best in a sphere separate from civil society.

With this shift to privacy talk, a husband’s marital prerogatives could be preserved in new juridical form—as legal immunities. Once courts ceased to rely on the rhetoric of marital unity and began to discuss marriage in the language of privacy and affect, they no longer had to explain the law of marriage as enforcing relations of hierarchy. Instead, courts could explain the law of marriage as preserving the altruistic ethos of the private realm.

who had responded to his wife's call for help: "This is a family matter. Why do you want to make a big deal out of it when we can handle it?" The Chief Justice of the U.S. Supreme Court invoked this discourse of the private when he objected to provisions in the new Violence Against Women Act that create a federal cause of action for gender-motivated violence. The bill's "broad definition of criminal conduct is so open-ended, and the new private right of action so sweeping," Justice Rehnquist complained, "that the legislation could involve the federal courts in a whole host of domestic relations disputes."

Preservation through Transformation

It has been well over a century since any American court recognized a husband's prerogative to inflict corporal punishment on his wife. Yet far-reaching reforms in the law of marriage have not eradicated the legacy of the chastisement prerogative. As regulation of marital violence reveals, civil rights reform does not necessarily abolish a body of status law. Instead, civil rights reform can modernize the rules and rhetoric through which status relations are enforced and justified. I call these changes in the structure of a status regime "preservation through transformation."

The U.S. Surgeon General found that battering of women by husbands, ex-husbands, and lovers remains the single largest cause of injury to women in the United States today.

Civil rights agitation plays a key role in modernizing status law. For example, abolitionist protest (and a civil war) contributed to the modernization of racial status law during the Reconstruction Era, just as woman's rights protest contributed to the modernization of gender status law during this same period. If successful, protest of this sort will draw the legitimacy of a status regime into question and so bring pressure on lawmakers and other legal elites to cede status privileges. Elites will initially defend status privileges within the traditional rhetoric of the regime; but because this rhetoric is now socially contested, they will begin to search

for new reasons to justify such status privileges as they choose to defend.

As reform of the common law marital status rules illustrates, this process of ceding and defending status privileges will result in changes in the constitutive rules of the regime and in its justificatory rhetoric—with the result that, over time, status relationships will be translated from an older, socially contested idiom into a new, more socially acceptable idiom.

Modernization of a status regime may well bring about perceptible, even significant, changes in status relations. For example, we can assume that African Americans were better off under a regime of Jim Crow than a regime of chattel slavery, certainly in terms of dignitary values, and possibly in terms of their material welfare as well. Similarly, we can assume that married women were better off under a regime of formal and informal immunities for wife beating, certainly in terms of dignitary values, and possibly, in terms of their material welfare as well.

There is, however, one way in which members of each group were indisputably worse off: in their capacity to achieve further, welfare-enhancing reform of the status regime in which they were subordinated. Once racial status law and marital status law were reformed in the Reconstruction Era, each status regime gained substantially in legitimacy. As each regime was translated from contested rules and rhetorics into more contemporary rules and rhetorics, each was again "naturalized" as just and reasonable, in significant part because each was now formally and substantively distinguishable from its contested predecessor: Each could be justified in terms of social values that were distinct from the orthodox, hierarchy-based norms that characterized its predecessor (slavery, marriage) as a regime of mastery.

Considered from this perspective, we can see that civil rights reform may alleviate certain dignitary or material aspects of the inequalities that subordinated groups suffer; but we can also see that civil rights reform may enhance the legal system's capacity to legitimate residual social inequalities among status-differentiated groups. In short, efforts to dismantle a status regime may cause it to change in ways that ultimately prolong its life.