

## Book Review: *Intimate Lies and the Law* by Jill Elaine Hasday

by Julie Saffren\*

Jill Hasday's *Intimate Lies and the Law* (Oxford University Press 2019) is a surprising and revelatory book. It is not what I would consider a typical or traditional domestic violence book, though the themes of victimization, emotional and physical harm, coercion and power dynamics in relationships are all present within it. Instead, this is a work of scholarship that dives deep into previously unexplored legal territory — how the law treats those who have been harmed through the deception and misrepresentation perpetrated by their intimate partners or close family members. More correctly put, *Intimate Lies and the Law* explores the lack of legal remedies afforded to victims of this pervasive harm. Hasday believes the way current law functions serves not only to protect and enable deceivers, but possibly even to incentivize harmful deceptive behavior because deceivers can get away with it. This should change and this book can start that conversation.

Professor Hasday is uniquely equipped to tackle this “first of its kind” topic. She has taught at University of Minnesota Law School since 2005, where her courses include Family Law, Constitutional Law, and Sex Discrimination. She also runs the Public Law workshop, which brings nationally recognized scholars to the University of Minnesota to present their current work on public law topics. *Intimate Lies* is her second book; her first, *Family Law Reimagined* (Harvard University Press 2014) is another thoroughly researched work. In it, she tackled the entire Family Law canon. She challenged the assumptions that underlie the workings of Family Law and found them out of step with the problems modern families experience; incomplete in terms of which kinds of families are best served; and inconsistent in their results. Her online cv says her third book is in progress, with

the intriguing title *We the Men: How Erasing and Denying Women's Struggle for Equality Perpetuates Inequality*. After 2020, where we dealt concurrently with the monumental loss of Justice Ruth Bader Ginsburg and the Trump administration's efforts to roll back and demonize education about critical race theory, we are going to need immersive and authoritative writing like *We The Men* promises to be.

Hasday's books and articles are universally well-regarded and comprehensively researched; however, her superpower seems to be a form of scholarship that thoroughly explores and exposes the unexamined. She draws connections we otherwise could not see. She possesses the ability to illuminate, through readable and relatable examples, key premises that underlie the behavior of courts across the nation and she adeptly pinpoints their historic roots. Nor is she shy about exposing the illogical inconsistencies, for example, where the law narrowly interprets some intimate relationships while broadly interpreting others, or how courts are failing to explain why people get such differential treatment.

She said in interviews that her decision to write about deception in intimate relationships came about as a result of her years teaching Family Law. There, she often saw instances where intimates caused enormous harm through deception. She noted perpetrators were usually able to get away with it. Her research for this book went far beyond cases and statutes. She read memoirs written by those who were deceived. They described their shame in being duped by someone they loved or thought they knew; their difficulties ever trusting again; the enormous financial, physical, and emotional injuries they suffered; the employment, educational, and familial opportunities they lost and can never regain. These memoirs shared a common refrain that was the court's revictimizing response: you should have known better.

While one failed lawsuit may not make very interesting reading,

hundreds and hundreds of them, looked at together and looked at over time, paint a vivid and compelling picture of current law's inadequate response to the serious and often egregious harms that are being perpetrated with regularity. Indeed, it is the commonplace nature of deception in relationships that contributes to the failure of law to provide adequate redress. Hasday's scholarship is a massive contribution for anyone looking to develop and explain the need for evidence-based and non-discriminatory law reform and I hope it will be used for that purpose. It's all there.

### What Is Deception?

Notwithstanding the well-known tropes that “people lie about sex all the time” or that “men have been seducing women for millennia based on deception,” it helps to understand what Hasday means by deception, which can arise in dating relationships, marital relationships or familial relationships. The definition is broad, and includes both acts and omissions. The act of telling a lie is making a statement you know is false but you want the other side to believe is true. Lying, as we all know, is extremely common. Also common is the deliberate omission. Hasday notes the deliberate omission may have more advantages to an intimate deceiver than telling an outright lie, in terms of ease of its recollection, more difficult discoverability, the rationalization it provides, and the plausible deniability once the omission is discovered. People deceive intimates about a vast number of things, including but not limited to fidelity; sexual history; paternity of a child; marital status; wealth; assets and debts; their health; religion; race; immigration status; and employment. These deceptions concern important matters that go to the existence of a relationship between people or that would affect the choices people would make had they known the truth.

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### What Motivates Deceivers?

Deception is common because of the benefits people can capture as a result of it. Hasday developed an interesting taxonomy of motivations deceivers possess, complete with shocking and sad examples of the lengths to which a deceiver will go. Here are some of her key categories.

- First is the **linchpin** motivation. The deceiver often correctly identifies that deception is necessary, and, but for deception, the relationship would not be formed or intimacy would not continue. Some deceivers are happy to eventually reveal the deception in order to end the relationship when they have gotten what they wanted, like the engagement that was broken two days after the fiancé obtained a kidney from his fiancée's brother.
- A **gateway** deception is a route to obtaining benefits one would not otherwise be entitled to. This could include deceiving in order to obtain immigration, Social Security or health care benefits from the unsuspecting partner; and the book is full of these examples.
- The **con artist** is an archetype many courts find familiar — the person who lies for a living, who marries multiple women and strips them of their assets. Media accounts of the exploits of the con artist contribute to creating this singular narrative (the “sweetheart swindler” or the “portly playboy”). Hasday is dismayed that courts fall for this false distinction and provide remedies if harms are caused by a clearly criminal con artist while treating differently equally severe harms caused by a serial deceiver.
- Deception by **mastery and control** appears most related to the domestic violence perpetrators whose lies and deceit are part of their arsenal of harmful behaviors to maintain power and control. These may include lying about things in order to deliberately erode their victims' sense of what is real.
- **Paternalistic** deception is exemplified by lies that are supposedly in the interests of the deceived, e.g., “for their own good.” One example

is never telling your child they were conceived by donor sperm. The adult child who learns and is betrayed and emotionally harmed by such deliberate omission about his or her fundamental existence has no legal recourse for his or her emotional distress. Hasday asks whether this creates a *de facto* parental prerogative towards deceiving a child, since with respect to adult children, no such reciprocal prerogative exists to permit them to deceive their parents. Many legal remedies are available protecting parents against harm by adult children.

- Deception from **subordination** may also be familiar to those who work with domestic violence survivors. Here, the deception is in response to the control of the abuser and may take the form of secreting away family funds in order to be able to spend them in an autonomous way. Later in the book, Hasday offers interesting suggestions as to how this form of deception can be reduced.

### Why Does Deception Work?

Here, Hasday explores both social science and social norms to explain the behaviors of unfortunate victims of deception. We live in a society that values and encourages trust in relationships. Consider the state's interests in the formation of stable families, reconciliation efforts, and fiduciary duties. At the same time, the state discourages investigation of one's intimate partners, typically on grounds of privacy. A court may say “you should have known,” but this belies the fact that a wide array of civil and criminal laws exist that prohibit the kind of investigation that would be necessary to discover deception early enough in the process to prevent substantial harm. In fact, the policy objectives of laws established to deter such investigations were specifically developed with knowledge that users would include intimates and with a stated goal to limit such use. While it is true that an abuser who surveils his wife and discovers her infidelity could take matters into his own hands and harm her, it is equally true that a victimized wife has little ability to discover the range of a partner's deceptive conduct through phone recording, spyware or records access.

Hasday makes clear she does not wish to remove these protective

privacy limits which are needed. Instead, she wants courts to recognize how current law presents substantial barriers to discovering deception, including but not limited to: state and federal laws that prohibit and penalize opening someone else's mail; HIPAA protections that keep medical records secret; accessing income tax records without consent; or obtaining address information from driver's license databases. Thus, when a court assumes a deceived victim should have been able to discover the deception, that assumption is fatally flawed. Burden-shifting to the intimate partner that he or she should have known better lacks a basis for how that individual might actually discover what is necessary for self-protection.

Note that this is in stark contrast to the way courts treat the victim who was duped by a stranger's phone scam. Credulous victims are eligible for legal relief for trusting the stranger over the phone asking them to send money. Why are these victims more worthy of legal protection for their trusting nature toward a complete stranger and those trusting spouses practically considered at fault in the harm that befell them? Hasday is concerned that our courts act to discourage deceived intimates from even thinking themselves as injured, as though intimate deception is a fact of life we must all accept, even when the harms that result from it can be egregious.

### Harms From Deception

Harms run the gamut from financial harm, lost economic opportunities, extreme emotional distress, and a myriad of physical harms from contracting disease to abortion, miscarriage or even suicide.

It is true that not all intimate deception goes unaddressed by the court, and financial injury is an area of harm most courts understand. Family law may offer remedies in a divorce action for breaches of the fiduciary duties spouses owe to each other. However, this is an area where the court's ability to correct the inequity created by a discovered deception by a spouse hinges upon the victim spouse's ability to discover the breach and prove it to the court's satisfaction. Many

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economic harms from intimate deception are not taking place within a marital relationship so there is no fiduciary duty involved. Harms arise within non-marital relationships and if these are deemed intimate by the court, that will typically foreclose one's ability to bring a civil lawsuit. Hasday's examples show that courts are repeatedly willing to cast a wide net to define a relationship as intimate. Once they do, victims lose the ability to seek legal remedies.

In 2012, Illinois' highest court took the unanimous position that a multi-year relationship conducted almost entirely online that defrauded a woman out of more than \$10,000 was an intimate relationship that precluded recovery for fraudulent misrepresentation or other torts. See **Bonhomme v. St. James**, 2012 IL 112393, 970 N.E.2d 1 (2012). Paula Bonhomme was unsuccessful pursuing tort claims against Janna St. James, who for many months utilized a number of different online aliases to make Bonhomme believe she was in a relationship with a man named Jesse. St. James extracted money and gifts from Bonhomme. When Bonhomme wanted to meet Jesse in person, St. James cruelly "killed off" Jesse and then introduced herself as his sister in order to continue the deception and extraction of funds from Bonhomme, who suffered extreme distress and accumulated large therapy bills. Despite meeting all five elements necessary under Illinois law for a tort claim of fraudulent misrepresentation, the court deemed the relationship "intimate" and denied Bonhomme redress, despite the fact that Jesse was a fictional creation of St. James!

The court stated:

When all is said and done, what lies beneath this case is two private persons engaged in a long-distance personal relationship. To be sure, it was a personal relationship built wholly on one party's relentless deceit, but it was a purely personal relationship nonetheless. Indeed, all of the hallmarks of ordinary human relationship are present: correspondence, conversation, intimacy, trust, mutual beneficence, emotional support, affection, disappointment, and even grief. And just

as importantly, there is absolutely nothing of the commercial, transactional, or regulatory at work. Plaintiff and defendant were not engaged in any kind of business dealings or bargaining, and the veracity of representations made in the context of purely private personal relationships is simply not something the state regulates or in which the state possesses any kind of valid public policy interest.

2012 IL 112393, \*27.

Hasday certainly questions whether the relationship was truly non-commercial given that St. James had the motive to extract money with Bonhomme and achieved that objective. (I question which relationship the court was even talking about, Paula and Jesse or Paula and Jesse's sister, both of whom — as St. James knew — were fictional. This result is shocking in terms of the lengths the court went to find a relationship existed. No dissent saw St. James for the con artist she undoubtedly was. But **Bonhomme v. St. James** is instructive. It illustrates a relatively easy solution to the problem of intimate deception. It is not to create a new cause of action. Rather it is simply to specifically include intimates as those who may seek redress in the courts if they can meet the elements of a tort claim that would be available to any victim deceived by a non-intimate.

### So Why Do Courts Routinely Prohibit Intimates From Seeking Redress for Deception?

There are historical roots in the answer to this question. In the late 19th and early 20th centuries, "heartbalm actions" were available at common law. These included (1) breach of promise to marry, which often carried the attendant harms of social stigma, loss of virginity, and possibly pregnancy as well as (2) the tort of seduction, accomplished by way of persuasion. Seduction claims could be brought by the father of the unmarried woman, since he may be required to support her longer once she is not "marriageable" due to the stigma of being jilted or a possible pregnancy out of wedlock. Both torts recognized the gendered nature of marriage as an option on which women depended. However, starting in 1930s, and championed by the first female legislator in Indiana,

legislatures across the nation began enacting "anti-heartbalm statutes" that specifically prevented causes of action based on intimate deception. Without evidence, legislators enacted these prohibitions to protect men from being victimized by "gold-diggers." In circular logic, it was claimed that any woman who did bring a heartbalm action must be a gold-digger because no self-respecting woman would do so.

Unfortunately, anti-heartbalm laws have held fast for decades and run deep. Even though they reflect societal norms about women that would be unrecognizable to us today, courts still rely on them in 21st century decisions. Perplexingly, some modern day tort cases have been rejected and grossly mischaracterized as attempts to revive "breach of promise to marry" actions, *even when the parties were married*. This occurred in a 2004 California case when a defrauded spouse sought relief upon discovering she had married a felon who had deceived her about his wealth and job history. She never would have transferred substantial assets to him had she known the truth he hid from her, including his long criminal record which included an attempt to murder his first wife. See **Summers v. Renz**, 2004 WL 2384845 (Cal. Ct. App. Oct. 26, 2004).

### Important Policy Proposals

Hasday concludes her study by proposing law reform. First is to establish a rebuttable presumption that courts will treat intimate deception claims the same as they treat non-intimate claims. This would be a huge advance in the protection of the victimized. It would remove the shield that currently protects perpetrators and fails to hold them accountable. It would more properly shield the victims of intimate deception, as long as they can make their case.

In addition to giving victims access to more complete legal remedies for intimate deception, Hasday supports regulations that help remove the incentives to deceive. Preventing deception before it happens is better than having to litigate once harm has already occurred, and discovering deception sooner is a way to reduce potential harm. Her suggestions would engage federal and state

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legislators as well as key third parties. They include:

- Revising immigration law to permit victims of sham marriages to sue in federal court for money damages;
- Modifying tax law to ensure the spouse who earns the majority of income gets the tax advantage for filing married as long as it is shown both spouses have access to joint marital funds;
- Establishing a searchable centralized registry recording all marriages and divorces in the U.S., including bigamy convictions, if any;
- Requiring banks to obtain mutual spousal consent before a joint asset is used as collateral;
- Requiring mortgage companies to obtain mutual spousal consent before real estate transactions that involve jointly owned assets;
- Requiring credit card companies to obtain mutual spousal consent before opening any account for which both spouses are held jointly

liable. A spouse who did not consent in advance to the creation of the account, would not be liable for the charges if a dispute arose;

- Requiring credit card companies to offer separate monthly credit card statements via email to each spouse.

### Conclusion

This book makes a strong and comprehensive argument that courts are failing victims by not providing a legal remedy when intimate deception causes harm. It is clear from Hasday's meticulous research that victims are routinely denied access to the legal relief non-intimates routinely receive. It is also clear that situating a deceived intimate on the same legal playing field as a deceived non-intimate is a matter of fundamental fairness. It would not open the floodgates for frivolous litigation because tort cases would only advance if the victim met the elements of the tort, just as non-intimate victims must do.

Courts should recognize that current operation of law does more to protect deceivers than it does to help

actual victims. This should be untenable to judges. Legislators and those who evaluate proposed legislation can and should use *Intimate Lies and the Law* as an evidence-basis for law reform in their jurisdictions. This includes placing reasonable requirements on the different third-party actors who are often unwittingly involved in deceptions causing great economic harm.

Finally, our legal community, from law schools to bar associations to victim advocacy groups, has an important role to play helping bring about these changes. This book is well positioned to disrupt what may have been seen as the "common sense" view that civil courts should stay out of intimate matters. Legal relief for deception harms should not be limited to financial or commercial transactions between "strangers." It is time for a robust discussion on opening the courthouse doors to deceived intimates, removing existing incentives to deception and helping such deceptions become discoverable before more serious harm to victims takes place. ■

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provides certain procedures when an employee is arrested for domestic violence. The policy permits suspension, demotion, or other disciplinary action when the employee is "convicted" and a third conviction results in the termination of employment. Bolling was never convicted of domestic violence, but he was charged with domestic violence at least eight times during his career. In June of 2018, Bolling was charged with domestic violence after he drove to his girlfriend's house in his work vehicle, got into an argument with her, pushed through a locked door, and punched her in the face. Bolling left the scene and his girlfriend called the police. The police documented her injuries and, although she said she did not want to prosecute, the police obtained a warrant for Bolling's arrest for Domestic Violence Assault. The next morning, the Fire Chief placed Bolling on administrative leave until a city investigation could take place. The Fire Chief, believing that the city had the authority to terminate Bolling immediately, allegedly advised Bolling to resign in order

to keep from losing all of his benefits. Bolling submitted a letter of resignation effective immediately. A month later, the domestic violence charge against Bolling was dismissed.

Bolling brought four claims against the City. Count I alleged a due process violation, Count II alleged that Bolling was not compensated for overtime under the Fair Labor Standards Act, Count III alleged a breach of contract claim because Bolling was not compensated for accrued annual leave or sick leave, and Count IV alleged that Bolling, a Black man, was terminated based on his race in violation of 42 U.S.C. § 1981. The defendant City of Montgomery moved for summary judgment on all claims, arguing that there was no genuine dispute as to any material fact, entitling defendant to judgment as a matter of law. Bolling conceded that summary judgment was appropriate as to Count II, but argued that the City's motion for summary judgment should be denied as to all other claims.

#### The District Court Determination.

The U.S. District Court for the Middle District of Alabama first determined that the City's motion for summary

judgment "is due to be denied on Count I (due process)." The City conceded that Bolling had a property interest in continued employment that could be removed only by affording him due process. The City argued, however, that Bolling voluntarily resigned from his position, so his due process claim was moot. Bolling countered that he was constructively discharged. While resignations are presumed to be voluntary, this can be overcome by a showing that the employer forced the resignation by coercion or duress. Resignations can be voluntary even where the only alternative to resignation is facing possible termination for cause, except "where the employer actually lacked good cause to believe that grounds for termination ... existed." Here, there was "substantial evidence that the City did not have cause under its own policies to terminate Bolling, such that the threats that he would be terminated were false." The department policy on domestic violence reflects that a charge of domestic violence is insufficient for termination, and the charge

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