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## BOOK REVIEWS

### ON TRUST, LAW, AND EXPECTING THE WORST

INTIMATE LIES AND THE LAW. By Jill Elaine Hasday. New York, N.Y.: Oxford University Press. 2019. Pp. 294. \$34.95.

*Reviewed by Elizabeth F. Emens\**

A man says he will marry a woman, while he's secretly involved with someone else, just long enough to get her brother's kidney.<sup>1</sup> The couple sets a date, and the kidney transplant takes place. Riding home from the hospital, the groom-to-be announces the engagement is indefinitely postponed. A year later, he marries the other woman (p. 30).<sup>2</sup>

An American woman meets a Soviet man on a cultural exchange program and, after he professes his love and proposes, she marries him.<sup>3</sup> She spends the next three-and-a-half years working to help him immigrate to the United States, paying \$15,000 in expenses and dedicating approximately twenty hours per week to his immigration admin, delaying the completion of her doctorate and thus diminishing her income.<sup>4</sup> After her husband's successful immigration, she learns that he lied about

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<sup>1</sup> Complaint at 3–6, *Dahl v. McNutt*, No. C3-97-601906 (Minn. Dist. Ct. Sept. 26, 1997) (on file with the Harvard Law School Library).

<sup>2</sup> For additional information on this case, see *Dahl v. McNutt*, No. C3-97-601906, slip op. at 1–3, 12–13 (Minn. Dist. Ct. Jan. 21, 1998); *Man Took a Kidney, Broke a Heart but Won't Be Sued*, SEATTLE TIMES (Jan. 22, 1998), <http://community.seattletimes.nwsources.com/archive/?date=19980122&slug=2730146> [<https://perma.cc/C9CA-2GWL>].

<sup>3</sup> *Gubin v. Lodisev*, 494 N.W.2d 782, 783 (Mich. Ct. App. 1992).

<sup>4</sup> Although immigration admin can be time-consuming, twenty hours per week might sound excessive without these particulars: the Soviet government refused to grant him an exit visa, and she undertook a public advocacy campaign, becoming a spokeswoman for the Divided Spouses Coalition, an organization advocating for Soviets separated from their American spouses (pp. 80–81). See generally Isabel Wilkerson, *Group Working to Reunify Americans with Soviet Spouses*, N.Y. TIMES (July 26, 1987), <https://nyti.ms/29zDXf4> [<https://perma.cc/5MV4-D5ZG>]. “Admin” is the office-type work of life. See Elizabeth F. Emens, *Admin*, 103 GEO. L.J. 1409, 1419–21 (2015).

his feelings and intentions; he was merely using her as a conduit to legal immigration (pp. 80–81).<sup>5</sup>

An eighteen-year-old girl is in a debilitating car accident and spends the next two years recuperating in her parents' home.<sup>6</sup> During that time, she receives a \$63,000 settlement check from the driver of the car, which she entrusts to her father. Contrary to her mother's report that the money is "being held in an investment account for her benefit,"<sup>7</sup> the daughter learns later that her parents had spent \$30,000 on themselves — which was the entire sum remaining after paying for her medical bills and car (p. 180).<sup>8</sup>

These plaintiffs' accounts populate the pages of Professor Jill Hasday's *Intimate Lies and the Law* (pp. 30, 80–81, 180–81).<sup>9</sup> And like most of the plaintiffs discussed by Hasday, they lose in court.<sup>10</sup>

Not all of the book's plaintiffs deserve to win. Some of the cases invite debate. Consider the young woman whose parents spent the settlement from her car accident. Even by her account, she waited nine years after moving out before asking her parents about the money; her mother denies ever saying the funds were being held in an investment account; and her father says he understood the remainder after paying for her car and medical expenses to cover the reasonable costs of her room and board.<sup>11</sup> Debating these cases could make for lively Thanksgiving dinner conversation — or exam hypos in Torts or Contracts.

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<sup>5</sup> *Gubin*, 494 N.W.2d at 784 ("The plaintiff . . . devoted years . . . to bring[] him to the United States . . . after which he promptly abandoned all pretense of having desired a marriage relationship based upon love and affection. There is no other conclusion that can be drawn from this record than that the defendant's actions were a blatant and crass attempt to fraudulently induce the plaintiff to marry him for no other reason than to obtain . . . lawful entry into the United States.").

<sup>6</sup> *Hanna v. Sheflin*, 275 S.W.3d 423, 425 (Tenn. Ct. App. 2008).

<sup>7</sup> *Id.* at 428 n.5. Her mother denied ever saying this. *Id.* at 425, 428 n.5.

<sup>8</sup> *See id.* at 425.

<sup>9</sup> I have told the stories from the plaintiffs' perspectives. For more on this choice, see *infra* note 63; for some aggregate information about the plaintiffs in the book, see *infra* note 30.

<sup>10</sup> In *Dahl v. McNutt* (the kidney case), the Minnesota District Court dismissed all the claims except the brother–kidney donor's claim for lost wages and possible out-of-pocket costs of the surgery. No. C3-97-601906, slip op. at 22 (Minn. Dist. Ct. Jan. 21, 1998). In *Gubin v. Lodisev* (the Soviet immigration case), the Michigan Court of Appeals reversed the lower court, finding that the plaintiff couldn't sustain a separate action for fraud apart from her divorce action, where all financial considerations should be dealt with. 494 N.W.2d at 784–85. The court reduced the damages award of \$113,087 to \$76,687, *id.* at 785–86, and remanded for the lower court to determine whether the remaining \$76,687 could be "appropriately associated with a divorce action" instead of damages for fraud, *id.* at 787. And in *Hanna v. Sheflin* (the young woman whose parents spent her car accident settlement), the Tennessee Court of Appeals ruled that the three-year statute of limitations on a conversion suit could not be tolled to cover the subsequent ten-year delay because she failed to show that "her father took affirmative action to conceal her cause of action from her" and that "she could not have discovered her cause of action despite exercising reasonable diligence." 275 S.W.3d at 428.

<sup>11</sup> *See Hanna*, 275 S.W.3d at 425–27.

Hasday argues that many of these plaintiffs should, however, be winning or at least have a chance of winning. Which they would, she contends, if courts were treating these claims the same way courts treat deception by non-intimates (pp. 200–10). Courts not only dismiss cases involving intimate deception, sometimes overturning substantial jury awards in a plaintiff's favor, but also chide duped intimates for not being more savvy, for not being vigilant enough to detect the deception (pp. 49, 76, 181).<sup>12</sup> These courts seem to blame plaintiffs for trusting those they love. One woman, whose husband lied to her to hide his bigamy, financial misdeeds, and more, is quoted by Hasday as lamenting:

I trusted him, I believed in him, and yet I am branded 'stupid' for doing so. On top of losing everything I own and facing a future raising three children on my own, it is hard to know that society as a whole views me as some kind of fool. (p. 92)<sup>13</sup>

Trust emerges as a potent subtheme in the book, but one which is incomplete. In this Review, I turn squarely to the subject of trust, drawing on sources from psychology, philosophy, management theory, literature, and diverse areas of law. After exploring dimensions of trust, I build out a framework that combines *affective trust* (a feeling of safety) and *cognitive distrust* (a willingness to doubt and inquire), later reframed as *epistemic curiosity* (a drive to know<sup>14</sup>). Approaching intimate relationships with both affective trust and epistemic curiosity is no easy feat. An appreciation of this, I argue, helps us to understand better Hasday's proposals for reform, as well as to spur further legal innovations.

This Review has three parts. Part I aims to convey something of the breadth and interest of Hasday's fascinating new book, foregrounding the role of gender and beginning to touch the subject of trust. Part II delves briefly but widely into the theme of trust, which pervades the book and invites further examination. Part III presents a framework that combines affective trust and epistemic curiosity and applies this framework to illuminate and sort Hasday's proposals for reform; to critique a recent, dramatic change in the evidentiary treatment of marital confidences; and to devise a novel approach to prenuptial agreements. Throughout, this Review aims to engage and inspire the reader's own thinking. Together, we'll make it worth your time. Trust me.

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<sup>12</sup> For example, Hasday explains that "the Tennessee Court of Appeals blamed Hanna for not promptly investigating her father, faulting this trusting daughter for not devoting more 'care and diligence' to 'discovering her father's alleged conversion of the funds'" (p. 181) (quoting *Hanna*, 275 S.W.3d at 425).

<sup>13</sup> The author quotes MARY TURNER THOMSON, *THE BIGAMIST* 234 (2008).

<sup>14</sup> "Drive" here is meant colloquially, not technically, so it is not an embrace of one side of the debate in the social science literature about whether curiosity is "drive." See, e.g., Jordan Litman, *Curiosity: Nature, Dimensionality, and Determinants*, in *THE CAMBRIDGE HANDBOOK OF MOTIVATION AND LEARNING* 418, 418–19 (K. Ann Renninger & Suzanne E. Hidi eds., 2019).

## I. ESTABLISHING TRUST

*To my loved ones. You did not inspire me to write this book.*

— Jill Elaine Hasday, epigraph to *Intimate Lies and the Law*

*Intimate Lies and the Law* is thoroughly researched, analytically rigorous, and doctrinally pragmatic. The book is replete with fascinating narratives and legal puzzles. These are features a reader of Hasday's work has come to expect. An added bonus is the text's occasional humor, as in the epigraph.

The book should be of interest not only to those who study torts, contracts, and family law. This comprehensive treatment should also engage anyone interested in the psychology or sociology of intimacy. It may even invite readers who want to understand their rights and obligations — and what to watch out for — in their relationships.

This Part of my Review highlights several of the book's key contributions, describes its normative argument, and sets the stage for an examination of the theme of trust within and beyond intimate relationships.

A. *Practice, Prohibition, and Prescription*

*Intimate Lies and the Law* is a study of both the practice and the law of intimate deception. Hasday thus derives her definition of intimate deception from a combination of legal and extralegal sources. Her definition of "intimate" — meant to track how courts conceive of intimacy — "includes dates, sexual and/or romantic partners, and family members such as spouses, parents, and children" (p. 6); it excludes friends, therapists, and other professional relations. Hasday defines "deception" as "intentional acts or omissions . . . designed to make another person believe something that the deceiver himself does not believe to be true" (p. 7). Unlike her definition of "intimate," Hasday's definition of "deception" is not tied to the law; instead, it is rooted in social science literature (p. 7). Intimate deception, then, does not necessarily involve a legal wrong.

Defining deception independent of court findings is important to Hasday's aims in the book. She writes, "Adopting a consistent definition of deception that does not turn on whether a court has reached a legal judgment that the defendant deceived the plaintiff allows me to capture a fuller picture of how the law regulates intimate deception, including by denying claims" (p. 7). This definition foreshadows the book's concern with those who fall outside of the law's protection.

The central legal drama Hasday presents is courts' differential treatment of those who deceive their intimates and those who deceive anyone else. As Hasday writes, "[A]n overriding premise that courts have embraced in creating this body of law . . . [is] the assumption that people deceived within intimate relationships do not and should not have access to remedies that are available to people deceived in other contexts"

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(pp. 97–98). It is worth pausing over this statement, since it may be surprising. Courts treat deceived intimates *less* favorably, despite established norms that we should trust intimates *more*. We will return to this point. But first it is worth delving further into the question of who counts as an intimate in these decisions, now that it is clearer what is at stake.

The boundaries of intimacy in these cases do not neatly track common expectations: romantic and sexual relationships are inside the circle of intimacy, as are the relationships of children to parents; however, other relationships that we commonly consider intimate do not garner special treatment (that is, disfavor) in the courts. Thus, as Hasday presents these cases, courts permit parents to dupe their kids — even their adult kids — but not the other way around (p. 173). And siblings can't dupe each other without consequence (pp. 191–93). By contrast, romantic relationships are a prime site for deception that goes unremedied. And romantic relationships are defined very broadly. Intimate love, for purposes of courts' treatment of intimate deception, sweeps in people who barely know each other (pp. 158–59).<sup>15</sup>

The ultimate aim of the book is to map what is happening in the courts and to propose legal reforms. But before turning to the law, the book draws on wide-ranging sources to help the reader understand the context for these cases. Two chapters use social science to illuminate the *how* and the *why* of such deception (pp. 27–76). A third sets out the harsh consequences that can ensue (pp. 77–95). Then Hasday turns to the history and analysis of the law that governs this arena (pp. 97–195).

The reasons for courts' special treatment of intimate lies are multiple. The book offers a short history of the law of intimate deception, focusing on three changes that have shaped the legal landscape. One is shifting norms that mean courts look less favorably on cases rooted in subordinating attitudes, for instance, cases involving a plaintiff who is disappointed to learn the race of an intimate partner (pp. 116–24). According to Hasday, those claims have “virtually disappeared” (p. 121).<sup>16</sup>

A second change is the no-fault divorce revolution. According to Hasday, the decline of fault divorce decreased the number of intimate deception claims being brought — because proving fault was no longer important to getting a divorce — and also led some courts to be less sympathetic to intimate deception claims on the grounds that changing divorce laws expressed a policy against entertaining such arguments in court (pp. 128–33).

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<sup>15</sup> Hasday describes a case, for example, involving a woman who sought child support for a fake pregnancy after a brief sexual relationship resulting in financial losses and emotional distress, which a court referred to as the “messy aftermath that *all too often* follows casual sexual encounters and failed romances” and declined to involve itself in (p. 159) (quoting *Starr v. Woolf*, No. Co47594, 2005 WL 1532369, at \*6 (Cal. Ct. App. June 30, 2005) (emphasis added)).

<sup>16</sup> For further discussion, see *infra* note 127 and accompanying text.

The third, the decline of the so-called heart balm torts,<sup>17</sup> involves complex gender dynamics (pp. 110–16) and raises interesting questions about what stories people want to hear and whom they trust to tell those stories. This is the subject of the next section.

*B. The Rise and Fall of Intimate Deception Claims, or,  
Itchy Palms and Aching Hearts*

The fate of suits for breach of promise to marry might seem a rare context where the law of intimate deception is easy to explain: anti-heart balm statutes preclude the suits at issue. But as with the other narratives in the book, the legal story gets complicated in court. Courts have interpreted these anti-heart balm statutes so broadly that cases that have even a whiff of engagement inspire courts to refuse recovery (p. 110) — including cases where the parties were merely romantically involved but not engaged (p. 112); where the parties actually married, so no breach of promise to marry even occurred (pp. 111–12); and even where the alleged romantic partner was entirely fabricated through an elaborate ruse set up to deceive (pp. 110–11, 115–16).

The history here makes good reading, and Hasday is both engaging and parsimonious in the telling. Essentially, before the 1930s, these torts offered means for duped intimates to recover for their injuries (p. 101). Breach of promise to marry suits didn't require the jilted woman to prove whether the man deceived her about his intentions or merely changed his mind; either way she could recover (p. 101). From 1935 onward, states began passing laws to prohibit these tort suits — starting with Indiana and New York and, by the end of the twentieth century, including a majority of states (pp. 104–07).

Key campaigners included women. Roberta West Nicholson, Indiana's only female legislator, led the charge (p. 104). She “insisted that the women suing for breach of promise or seduction were fraudsters with fabricated claims designed to extract money from wealthy men” — hiding their “itching palms in the guise of aching hearts” (p. 105).<sup>18</sup> Nicholson urged other women to run for the state legislature to support her anti-heart balm bill, which, she asserted, “protected wives and feminine members of the family of men who suffered from the often unfounded blackmailing machinations of unscrupulous women” (p. 105).<sup>19</sup> According to Nicholson, “[S]elf-respecting women' did not bring heart balm actions” (p. 105).<sup>20</sup>

<sup>17</sup> Heart balm torts, as Hasday defines them, consist of four main causes of action: “breach of promise to marry, seduction, criminal conversation, and alienation of affections” (p. 100).

<sup>18</sup> The author quotes *Aching Hearts Are Itching Palms, Says Woman Legislator as Men Gallantly Pass “Love Bill,”* INDIANAPOLIS NEWS, Feb. 1, 1935, pt. 1, at 1 (internal quotation marks omitted).

<sup>19</sup> The author quotes *More Women for Assembly Asked,* INDIANAPOLIS NEWS, Feb. 13, 1935, at 2 (internal quotation marks omitted).

<sup>20</sup> The author quotes *Aching Hearts Are Itching Palms, Says Woman Legislator as Men Gallantly Pass “Love Bill,”* *supra* note 18, at 1.

The public apparently trusted Nicholson more than the plaintiffs she critiqued, although not everyone bought into these types of accounts (p. 106). Hasday has found no evidence to vindicate that trust (p. 105). Nor is evidence available to support the claims of New York State Senator John McNaboe, sponsor of the second anti-heart balm statute passed in 1935, that “the law was targeting ‘a tribute of \$10,000,000 paid annually by New York men to gold-diggers and blackmailers’ and . . . that ‘[n]ine out of ten recent breach of promise suits have been of the racketeer type’” (p. 107).<sup>21</sup>

As a woman crusader for laws banning heart balm torts, Roberta West Nicholson was neither unusual nor eccentric. Her politically varied female compatriots included, among others, Eleanor Roosevelt. “When she spoke in support of New York’s anti-heart balm bill a few days before the governor signed it into law,” Hasday recounts, “the First Lady told reporters: ‘I don’t think anyone who was really hurt would ever sue’” (p. 108).<sup>22</sup>

The campaigns against the heart balm torts reflected a convergence of interests<sup>23</sup> that may look, at least to modern eyes, bleak if not simply ugly.<sup>24</sup> Men who want to protect themselves or each other from women who might reasonably have a claim to recourse, on the one hand, converge with women who don’t want to associate with the kind of women so dependent on men (that is, so willing to admit their dependency and vulnerability) that they would bring a lawsuit for disappointed expectations of care and protection, on the other (pp. 107–10). The latter group aligns women concerned with sex equality and women concerned with morality in their shared suspicion of those women who dare to invite the state, and the public gaze, into their intimate lives.

The sense of women’s relative dependence is an uncomfortable thread, often surfacing in the opinions only subtly. Occasionally, though, disparagement of women’s injuries was more obvious. The case of *Gring v. Lerch*<sup>25</sup> is exemplary. *Gring* involved a woman whose fiancé discovered she was unable to perform the “sexual ‘duties of a wife’” due

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<sup>21</sup> The author quotes *Move Planned in 8 Other States*, N.Y. TIMES, Mar. 30, 1935, at 3 (alteration in original).

<sup>22</sup> The author quotes *Law Banning Heart-Balm Suits Wins Approval of First Lady*, WASH. POST, Mar. 26, 1935, at 2.

<sup>23</sup> Cf. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interest of whites.”).

<sup>24</sup> Even some contemporaries viewed it as such (p. 106) (quoting Indiana State Senator William Dennigan, an opponent of Nicholson’s anti-heart balm bill, as asking, “Do you mean to tell me you will help women by taking away their civil rights against philanderers and men who prey upon them?” (citation omitted)).

<sup>25</sup> 112 Pa. 244 (1886).

to “a physical incapacity” in the form of “an unusually ‘thickened hymen’” (p. 125).<sup>26</sup> In the court’s words,

A man does not court and marry a woman for the mere pleasure of paying for her board and washing. He expects and is entitled to something in return, and if the woman with whom he contracts be incapable by reason of a natural impediment of giving him the comfort and satisfaction to which as a married man he would be entitled, there is a failure of the moving consideration of such contract, and no court ought to enforce it by giving damages for its breach. (p. 125)<sup>27</sup>

Elsewhere the court observed, “It would be a fraud to sell a cow with such a defect without making it known to the purchaser. . . . He was entitled to have a wife capable of copulation in the usual way when he married her.”<sup>28</sup> In Hasday’s telling, *Gring* exemplifies one earlier thread casting women as property, whether as farm animals or as objects (p. 125).

This older way of speaking about women, Hasday explains, is later replaced by rhetoric endorsing women’s equality and independence (pp. 126–27).<sup>29</sup> Though salutary at a structural level, this change is at best mixed for individual plaintiffs, some of whom were surely benefiting from the pity or chivalry of courts toward their position as the weaker sex.

Women are the principal losers in this story. The plaintiffs who seek vindication in court for the lies that cost them money, time, and dignity are often women.<sup>30</sup> Hasday does not hide this fact. She adverts to it throughout, and the book’s cover features a bride and groom dressed in wedding garb, with his fingers crossed behind his back. But at key summary moments she embraces gender-neutral language, referring to “deceived intimates” and seeming to avoid pronouns (p. 202).<sup>31</sup> She acknowledges but treads lightly around the gendered dimensions of the story.

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<sup>26</sup> The author quotes *id.* at 245.

<sup>27</sup> The author quotes *id.* at 250.

<sup>28</sup> *Id.* at 249.

<sup>29</sup> One example Hasday cites for this changing rhetoric is the case of *Singh v. Singh*, 611 N.E.2d 347 (Ohio Ct. App. 1992), in which the Ohio Court of Appeals denied a man recovery in the name of rejecting the oppressive regime of arranged marriages (pp. 127–28). This case did not evidence the particular gender dynamic I describe in the text, as this suit involved a man whose recovery was denied.

<sup>30</sup> A superficial count of the cases Hasday discusses finds that women make up sixty-four percent of the plaintiffs in the cases where Hasday gives enough detail to discern the gender of the plaintiff and that cases in which a woman sues a man make up sixty-seven percent of the cases with enough detail to discern the gender of both the plaintiff and the defendant. This count excludes the parentage cases involving a deceiver lying to a partner about being the parent and the criminal cases because the prosecutor there (the state) is genderless. Cases with both female and male plaintiffs or co-defendants are also not included in the count. My thanks to Julia Oksasoglu for performing this tally. Note that there is of course no reason to assume that these represent the landscape of all cases filed or decided in any given period; it merely gives a sense of the gender breakdown in the cases Hasday includes and discusses in sufficient detail.

<sup>31</sup> Hasday explains that “[l]egal acknowledgement and legitimation of such arguments — after a long history in which the law discounted and dismissed the claims of deceived intimates and

Many male plaintiffs populate these pages as well,<sup>32</sup> so Hasday consciously chooses not to foreground the theme of gender (p. 7). This is understandable, but the whole dilemma also highlights an interesting point about gender and authorship: the book looks quite different if gender is the headline. (Imagine a book called *Deceived Women and the Law* — or even *Gender, Lies, and the Law* — rather than *Intimate Lies and the Law*.) And the author of such a book arguably looks different — more emotional, more partial, less serious, perhaps even, to some readers, less trustworthy.

In *Price Waterhouse v. Hopkins*,<sup>33</sup> the Supreme Court described the pressure to be masculine and feminine at the same time as “an intolerable and impermissible catch 22.”<sup>34</sup> As Professor Kenji Yoshino has suggested, though this bind may be unfair, it is far from unusual.<sup>35</sup> This is the bind that many women (and non-women) confront regularly: if they are working or performing in a professional sphere designed for men or evaluated by men, they may be judged by masculine standards of performance while also being expected to maintain certain standards of femininity. The Court makes this bind sound impossible but, despite its unfairness, one way or another, many people (often women) manage this bind effectively.<sup>36</sup> Those presenting feminist ideas perhaps face a parallel bind, one that Hasday, like many writers before her, has navigated successfully.

### C. A Paradox of Prevalence?

The gender frame might lead us to expect courts to dismiss these claims of intimate deception as trivial. This is indeed what Hasday had anticipated finding in her study:

I began this project suspecting that courts might deny remedies to deceived intimates out of a belief that intimate deception is insufficiently important to merit judicial concern. But judges deciding intimate deception cases often appear convinced that this regulatory arena is vitally important. More specifically, judges seem to think that it is crucial to govern intimate deception in ways that maintain and reinforce current norms and practices in courtship, sexual relationships, and marriage. (p. 157)

By Hasday’s account, courts view these matters not as too trivial to address but, in a sense, as too important. And, she adds, with her subtle humor, “Courts are intent on upholding the status quo in intimacy,

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blamed them for being duped — can be important to plaintiffs whose injuries are taken seriously and whose deceivers are held accountable. Such recognition can also be uplifting to deceived intimates who never sue” (p. 202; *see also* pp. 6, 87).

<sup>32</sup> *See supra* note 30 (discussing the gender makeup of the cases).

<sup>33</sup> 490 U.S. 228 (1989).

<sup>34</sup> *Id.* at 251 (plurality opinion).

<sup>35</sup> *See* KENJI YOSHINO, *COVERING* 157 (2006) (describing “[t]he plurality’s Catch-22 theory” as “naïve”).

<sup>36</sup> *Id.*

although they never quite explain why the status quo is worth protecting so fiercely if deceit is as common in intimate relationships as judges assume" (p. 157). Court decisions seem to Hasday to rest on the importance of protecting people's ability to lie without consequence to their intimates — a practice some courts suggest is widespread (p. 156).<sup>37</sup>

The wide-ranging and interesting data in the book's chapters on the social science of deception support the perception that such deceit is common. Two interrelated threads may help us to understand courts' reactions to these cases: First, people generally subscribe to a "truth default,"<sup>38</sup> assuming what they're told is true (pp. 53–54). Second, romantic relationships frequently involve deception — on the front end, when people lie to lure others into relationships; and in the middle and back end, when people lie to keep others in relationships or to cover their violation of monogamy norms (pp. 28–32).<sup>39</sup>

Perhaps courts' rejection of such claims, then, stems from the ubiquity of the deceit. Its frequency may normalize it, making it almost invisible to courts. An invisibility account seems plausible on its face but would not explain the harsh words courts apply to those betrayed by their intimates.<sup>40</sup> Perhaps, then, judges push these cases out of court because they don't want to see the possibility of such deception in their own intimate lives. This explanation could help answer for courts' criticism of plaintiffs. This is a familiar dynamic: outsiders shunning and judging harshly those who fall prey to any common calamity, wanting to distance themselves.

Writing in a different context, I used the term *paradox of prevalence* to describe the social norms surrounding nonmonogamy.<sup>41</sup> The starting point of that piece was a puzzle at the beginning of this century: even while same-sex marriage was being hotly debated, most everyone on both sides of the political spectrum agreed that multiparty relationships

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<sup>37</sup> As Hasday describes it, "Judges start by presuming that deceit *pervades* romance, sex, and marriage, and they contend with little — if any — explanation that courts should accordingly protect *commonplace* intimate deception from legal redress" (p. 156) (emphasis added).

<sup>38</sup> Hasday uses the phrase "truth bias" to describe this concept (pp. 53–54). I use the more common phrase "truth default." See sources cited *infra* note 68.

<sup>39</sup> Hasday explains that "deceit can be central to intimate relationships and can secure crucial benefits for deceivers" (p. 28).

<sup>40</sup> See *supra* note 12. Another interesting gloss on these cases would draw on the recent work of Roseanna Sommers finding that the commonsense lay perception of consent is that it is compatible with fraud. See Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. (forthcoming 2020) (manuscript at 5) (on file with the Harvard Law School Library). Fascinating as this finding is, it wouldn't help explain why courts treat intimate deception differently from non-intimate deception — nor would it answer for courts' criticism of those duped by their intimates.

<sup>41</sup> Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 284 (2004) (arguing that a "paradox of prevalence" governs our legal and social norms surrounding nonmonogamy).

were beyond the pale.<sup>42</sup> Those on the political right used the spectre of polygamy to threaten a parade of horrors that would follow from lifting the sex restriction on marriage; those on the left agreed such a parade would be horrible but disputed the link to same-sex marriage.<sup>43</sup> The sweeping opposition to multiparty relationships seemed all the more puzzling given that, based on any available statistics, nonmonogamy in the form of adultery was fairly common.<sup>44</sup> If nonmonogamy was so common, why would people so roundly oppose open, honest, consensual nonmonogamy — sometimes called “polyamory”? This I called a paradox of prevalence.<sup>45</sup> I suggested that the pervasiveness of nonmonogamy meant that open polyamory was all the more threatening, as it forced people to confront the risk of something in their own lives that they didn’t want to see.<sup>46</sup>

At an individual level, this dynamic is akin to homophobia,<sup>47</sup> or, more generally, the psychological phenomenon of *projection*, in which people attribute their own unwanted feelings onto others.<sup>48</sup> But the paradox of prevalence takes into account fears about one’s relationship — rather than one’s internal self — fears that are stirred up by awareness of the statistical probability of betrayal.

A similar dynamic may help fuel distrust of women and others who bring claims of intimate deception. Courts, anti-heart balm campaigners, and others may prefer to distance themselves from the possibility of deception, so statistically common, by shunning those who try to bring it to light.

This is an interesting hypothesis and may well capture part of the dynamic at work in these cases. The next section contemplates a more practical problem for the courts.

#### D. Trusting Courts

Judges contemplating complaints of intimate deception must face this concern: the possibility that allowing these suits will open the courts to complicated cases brought by disappointed lovers seeking revenge through the legal system.

This concern lies at the intersection of two lines of argument. The first argument relates to the difficulty of determining fault. The heart balm torts have been criticized on the same basis that fault-based divorce was

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<sup>42</sup> *Id.* at 279–83.

<sup>43</sup> *Id.* at 279–80.

<sup>44</sup> *Id.* at 297–300.

<sup>45</sup> *Id.* at 284.

<sup>46</sup> *Id.*

<sup>47</sup> *See id.* at 345–46 (discussing homophobia).

<sup>48</sup> *See, e.g.,* ANNA FREUD, 2 THE EGO AND THE MECHANISMS OF DEFENCE 122 (Cecil Baines trans., rev. ed. 1966); SIGMUND FREUD, THE ORIGINS OF PSYCHO-ANALYSIS 111 (Maria Bonaparte, Anna Freud & Ernst Kris eds., Eric Mosbacher & James Strachey trans., 1954).

criticized: it can be very hard to discern who is the wrongdoer in an intimate relationship (pp. 107, 130–31).<sup>49</sup> This critique of the heart balm torts could apply more broadly to claims for deception in the intimate sphere as well. As others have observed, where the frame of a relationship is intimacy, complex dynamics shielded from the public eye are likely to be not only present but central (p. 49). Of course, courts decide all kinds of difficult matters, so this is not to say such resolution is impossible, or to assert any definite conclusion about it. The point is merely that such a concern is a reasonable one, grounded in related debates.

The second argument dovetails with the first: though a legal regime helps to shape spheres of human interaction through both intervention and non-intervention, the right to bring a civil suit is a powerful weapon that one individual can wield against another, whether or not the suit is successful. Appreciating this argument requires taking a step back to understand the frame better.

In principle, dismissing suits for intimate deception is a form of regulatory influence, just as vindicating such suits is a form of regulatory influence. In either case, the law is structuring human relationships, either by effecting a legal entitlement to be free from intimate deception or by effecting a legal entitlement to deceive an intimate without consequence. Important scholarship on the regulatory state has illuminated the reality that both government action and inaction structure our lives and our rights.<sup>50</sup> This work has informed writing, for instance, about the ways that the state structures and shapes who forms intimate relationships with whom<sup>51</sup> — including by declining to remedy the legacy of race-based redlining of neighborhoods (and implementing federal benefits programs in ways that shape who can afford which neighborhoods);<sup>52</sup> or by declining to enforce federal disability law's requirement that public accommodations be accessible to people with disabilities.<sup>53</sup>

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<sup>49</sup> See, e.g., Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1296–97 (1998) (critiquing fault-based divorces).

<sup>50</sup> See, e.g., RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 197 (2008); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 888–90 (1987).

<sup>51</sup> See, e.g., RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 119 (2001); Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 FORDHAM L. REV. 2787, 2788 (2008); Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1311 (2009).

<sup>52</sup> See, e.g., IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH CENTURY AMERICA* 10–13, 142–72 (2005); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 177–93 (2017); Samuel Nye Winslow, *A House Is Not a Home for Everybody: Ameliorating the Effects of America's Racially Discriminatory 20th Century Housing Policies* (Sept. 21, 2019) (unpublished manuscript) (on file with the Harvard Law School Library).

<sup>53</sup> Emens, *supra* note 51, at 1380–81, 1392–93.

If only some people can live or travel or dine in some spaces, then only those people will meet, connect, fall in love, and marry.<sup>54</sup> Even though law does not affirmatively tell us whom to marry, law does shape our choices in this most private sphere.

When reading *Intimate Lies and the Law*, I was persuaded that our legal system is in a similar way regulating the sphere of intimate deception. By declining to vindicate suits brought by individuals deceived by their intimates, courts are protecting one vision of intimate relationships. As Hasday writes, in a passage quoted earlier, “[J]udges seem to think that it is crucial to govern intimate deception in ways that maintain and reinforce current norms and practices in courtship, sexual relationships, and marriage” (p. 157). And later, she observes that “the law always and inescapably regulates our intimate lives, whether courts side with plaintiffs or defendants in litigation over injuries stemming from intimate deception” (p. 211).

This is right. And yet it does not fully capture the practical significance of an alternative *civil* regime in which individuals can more readily bring the power of the state to bear on each other by filing lawsuits. The act-omission distinction may be a philosophical fallacy and thus a “moral heuristic” in principle.<sup>55</sup> But in the context of civil suits, the ability to file a lawsuit is a powerful weapon that does not exist if such a suit is disallowed or discouraged.

The context of government regulation is different, in much the way that civil rights law made through impact litigation spearheaded by organized coalitions of advocates is different from civil rights law made through self-initiated suits filed by particular aggrieved plaintiffs.<sup>56</sup> When writing about intimate discrimination, I implicitly recognized this divide, as I urged regulatory reforms to the structural and background features that shape our intimate lives, but rejected the idea of allowing new individual lawsuits to remedy the problem.<sup>57</sup> I drew on the teaching of Professor Robert Ellickson — who used to tell his students (of which I was one) that “love triangles” are “much overrepresented” in the cases that make it to court<sup>58</sup> — to argue that “widely authorizing discrimination-based heartbalm lawsuits would be truly perverse, as it would invite nearly every love triangle into court without even the need for a nexus with an independent legal issue.”<sup>59</sup> The multifarious costs

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<sup>54</sup> *Id.* at 1379–82.

<sup>55</sup> See Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556, 1581–85 (2004).

<sup>56</sup> See William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1624–26 (1997).

<sup>57</sup> Emens, *supra* note 51, at 1383–85.

<sup>58</sup> *Id.* at 1384 & n.351 (citations omitted) (quoting Ellickson).

<sup>59</sup> *Id.* at 1384.

of litigation would of course prevent many such suits, as I noted there<sup>60</sup> and as Hasday also observes when offering her arguments against this kind of “floodgates” reasoning (pp. 212–13).<sup>61</sup> What I failed to mention is that the mere threat of litigation can itself be a powerful weapon, and one which bears few if any of those costs.

Thus, one further reason these plaintiffs may lose is a concern from courts about limiting access to the weaponry of civil suits. This suggests the need for a limiting principle on any reform meant to expand access to such remedies. In Part III, I will present a framework that is reflected in several of Hasday’s proposals for reform — and that can also offer such a limiting principle.

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Gender is a significant theme in *Intimate Lies and the Law*, as this Part has highlighted. But this is far from a story about courts refusing to recognize only women’s injuries in law. Men get duped and denied remedies as well. Recall the brother of the disappointed bride who gave his kidney so his sister would “never want for anything.”<sup>62</sup> The bride’s brother, John Dahl, went through an excruciating experience. The man needing a kidney (Richard McNutt) had been dating Dahl’s sister (Dorothy Zauhar), but had grown colder to her when the hospital concluded she was medically prohibited from donating a kidney.<sup>63</sup> On meeting Zauhar’s brother, McNutt warmed up again — eventually persuading Dahl to be the donor.<sup>64</sup> After the surgery, Dahl had an adverse reaction to morphine and endured a painful recovery with no painkillers.<sup>65</sup> Although McNutt promised Dahl a life insurance policy in his name, the policy was never delivered.<sup>66</sup> And other cases involve men whose losses do not depend on women’s harms (pp. 141, 158–59, 217), so they cannot be explained away through a gender-by-association story.

A central problem for Mr. Dahl and his sister plagues these cases: how much should you ask an intimate to substantiate their story, and how much inquiry or research should you conduct to verify or challenge

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<sup>60</sup> *Id.* at 1384 n.351 (citing Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1139–51 (2008)). It is worth noting too the inequities that would result from limiting cases through litigation costs. See source cited *infra* note 208 and accompanying text. Hasday recognizes these concerns about access to justice, while observing that they are not unique to this context (p. 212).

<sup>61</sup> Hasday also believes that the number of cases will be limited because of the embarrassment associated with bringing such suits and the limits of a civil regime that prioritizes physical and financial injuries over emotional ones (pp. 212–13).

<sup>62</sup> Complaint at 4, *Dahl v. McNutt*, No. C3-97-601906 (Minn. Dist. Ct. Sept. 26, 1997) (on file with the Harvard Law School Library) (quoting defendant Richard H. McNutt).

<sup>63</sup> *Id.* at 3. As elsewhere, these facts are as represented by the plaintiff, since most of these plaintiffs lose as a matter of law.

<sup>64</sup> *Id.* at 4.

<sup>65</sup> *Id.* at 5.

<sup>66</sup> *Id.*

it? We're not very good at detecting lies (p. 52).<sup>67</sup> Our truth default is adaptive, argues Professor Timothy Levine, because we couldn't function very well if we spent our time doubting and researching everything anyone ever told us.<sup>68</sup> And yet, Hasday reveals, the law expects us to do precisely that in our intimate relationships. These questions of trust, and expecting the worst, are the subject of Part II.

## II. TRACING DIMENSIONS OF TRUST AND DISTRUST

*One cause for wariness about legal arguments faulting deceived intimates for being overly trusting is that the law governing deception outside of intimacy is often more protective of the credulous — recognizing that such people are more likely to be duped, essentially by definition. . . . The law often views the fact that a deceiver preyed on a trusting person as a strike against the deceiver, not his exoneration.*

— Jill Elaine Hasday (p. 50)<sup>69</sup>

Hasday diagnoses a legal regime that expects intimates to anticipate the worst. Trusting your intimates, who then later deceive you, leads to disappointment in love, and then disappointment again in court. Hasday argues for a new regime that would instead vindicate the losses of those individuals who trust their intimates, at least to the degree that non-intimates' losses are vindicated when their trust is disappointed (p. 197, 200). She proposes a rebuttable presumption in favor of treating intimates who bring claims based on deception the same way as non-intimates bringing similar claims (p. 200).

Hasday's sympathies are plainly with the deceived. More broadly, she prefers a legal regime that supports and rewards trust among intimates:

No one should be faulted or legally penalized for acting as an ordinary person would and trusting his intimates. Both human psychology and social norms push us toward such trust, and faith in our intimates can help foster human flourishing, caregiving, cooperation, and social bonds. The law should neither expect nor desire the end of trust within intimacy (p. 231).

Trust is thus an important theme here. Hasday does not foreground the term, though, and therefore does not define it.

How one defines trust depends on the focus, as trust encompasses vastly different phenomena. Dimensions include the *object* of the trust

<sup>67</sup> Hasday describes the “[v]olumes of social science research spanning decades [that] find that the odds that a person will accurately assess whether a speaker is being honest or lying hover only slightly above chance” (p. 52).

<sup>68</sup> See, e.g., Timothy R. Levine, *Truth-Default Theory (TDT): A Theory of Human Deception and Deception Detection*, 33 J. LANGUAGE & SOC. PSYCHOL. 378, 378–79 (2014); see also MALCOLM GLADWELL, TALKING TO STRANGERS 53–106 (2019).

<sup>69</sup> In the ellipsis span, Hasday cites to *United States v. Brown*, 147 F.3d 477, 480–82, 487 (6th Cir. 1998); *United States v. Jackson*, 95 F.3d 500, 507–08 (7th Cir. 1996); 139 CONG. REC. 27,645 (1993) (statement of Sen. Orrin Hatch); *id.* at 18,057–59 (statement of Sen. Orrin Hatch) (p. 50 n.4).

(who or what is being trusted); the relevant *time* (whether trust concerns a positive or predictive matter); the *scope* of the trust (whether trust is absolute or qualified<sup>70</sup>); the *direction* of the trust (whether it is unidirectional or multidirectional); and the *content* (the what of the trust<sup>71</sup>). To understand the last, consider that you might trust someone to drive you somewhere, but not fly you to the same destination; one person to remove your tooth, but not to prepare your taxes.<sup>72</sup>

Definitions that reflect the *object*, *time*, and *directional* dimensions are, for example, “the mutual confidence that no party to an exchange will exploit the other’s vulnerability”<sup>73</sup> and “choosing to risk making something you value vulnerable to another person’s actions.”<sup>74</sup> Both of these definitions seem to focus on the relationship to one other person, with an eye toward future behavior. By contrast, the following definition from Esther Perel demonstrates that trust can also be a more foundational orientation of the individual: “Trust is also our ability to live with what we will never know.”<sup>75</sup>

Perel’s definition also begins to point toward a central division I explore here: the cognitive (thinking) as opposed to the affective (feelings). Set against two rubrics along the time dimension, aspects of the affective and the cognitive can be mapped as follows:

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<sup>70</sup> Cf., e.g., Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U. L. REV. 531, 534–35 (1995).

<sup>71</sup> This is related to a form of trust sometimes called “confidence.” See, e.g., Michael Siegrist, *Trust and Risk Perception: A Critical Review of the Literature*, RISK ANALYSIS (forthcoming 2020) (manuscript at 4), <https://doi.org/10.1111/risa.13325> [<https://perma.cc/TX4J-QJ3W>] (“[C]onfidence is based on past experiences or evidence suggesting that future events will occur as expected.”).

<sup>72</sup> These examples were inspired by Adam Grant, *How to Trust People You Don’t Like*, *Work-Life with Adam Grant* at 05:56, TED (March 2018), [https://www.ted.com/talks/worklife\\_with\\_adam\\_grant\\_how\\_to\\_trust\\_people\\_you\\_don\\_t\\_like](https://www.ted.com/talks/worklife_with_adam_grant_how_to_trust_people_you_don_t_like) [<https://perma.cc/6M4B-SDCK>].

<sup>73</sup> Charles F. Sabel, *Studied Trust: Building New Forms of Cooperation in a Volatile Economy*, 46 HUM. REL. 1133, 1133 (1993).

<sup>74</sup> CHARLES FELTMAN, *THE THIN BOOK OF TRUST* 7 (2009) (emphasis omitted).

<sup>75</sup> Aly Weisman & Kristen Griffin, *A Relationship Expert Explains “the Most Important Element in a Relationship,”* BUS. INSIDER (Jan. 5, 2016, 10:40 AM), <https://www.businessinsider.com/most-important-thing-in-relationships-2016-1> [<https://perma.cc/QZ2Y-RYQD>] (quoting Esther Perel).

Table 1: Matrix of Two Central Aspects of Trust

	Cognitive	Affective
Positive	A belief in the current facts as given	A feeling of safety and security in a particular environment or relationship in this moment
Predictive	A belief that things will turn out ok	An emotional security that things will turn out ok

The aim at this point is not to select among these definitions or dimensions, but to set the stage for inquiry into the nature and meanings of trust. Trust, as we shall see, presents particular puzzles for the work of lawyers and researchers, as well as among intimates.

To set up the framework I offer in Part III, this Part traces several themes and excavates important perspectives on both trust and distrust, including what builds trust; which sources we should trust; who gets to trust and be trusted; who is expected to distrust; and, finally, what kind of trust is expected of romantic partners. This Part reaches far beyond the realm of intimate deception or even of intimate relationships. The aim here is to delve broadly into the subject of trust, both to begin to understand this rich field and to lay the groundwork for the framework presented in the next Part and its application to Hasday's proposals and other legal contexts.

#### A. *Who Believes the Universe Is a Friendly Place?*

*The most important decision we make is whether we believe we live in a friendly or hostile universe.*

— attributed to Albert Einstein<sup>76</sup>

The quotation in the epigraph came into my mind while reading Hasday's *Intimate Lies and the Law*. I remembered hearing it attributed to Einstein in more than one yoga class. The words are recited in that context, I gather, not to suggest the possibility of an alien invasion. Rather, these words — assigned to a figure widely trusted for his brilliance — invite the listener to cultivate trust in place of anxiety or worry.<sup>77</sup>

<sup>76</sup> Liz Sterling, *Is It a Friendly Universe?*, HUFFPOST (June 17, 2012, 9:18 AM), [https://www.huffpost.com/entry/positive-thinking\\_b\\_1590903](https://www.huffpost.com/entry/positive-thinking_b_1590903) [<https://perma.cc/3JAF-ZA9V>]. For more on the attribution, see *infra* notes 78–79 and accompanying text.

<sup>77</sup> Trust here is meant more in the affective sense of feeling safe, rather than the ideological sense of, for instance, believing in a just world. Cf. Roland Bénabou & Jean Tirole, *Belief in a Just World and Redistributive Politics* 1–2, 24–26 (Nat'l Bureau of Econ. Research, Working Paper No. 11208, 2005), <https://www.nber.org/papers/w11208.pdf> [<https://perma.cc/89SZ-27AD>] (proposing a model distinguishing an “American” equilibrium with high belief in a just world, motivation to work, and

Remembering this line led me to question whether it was really said by Einstein. And then to ask the reference librarians if they could find the source of the quotation — whether from Einstein or elsewhere.<sup>78</sup> They sent back two conclusions: the line is frequently attributed to Einstein, and yet the source is almost certainly not Einstein. (For those who are interested, this was most likely the poet and philologist F.W.H. Myers's answer to a question, possibly asked by Matthew Arnold, about what question he'd most like answered.<sup>79</sup>) This is far from the only wrongly attributed quotation-from-yoga-class.<sup>80</sup>

How does it feel to be the person at the yoga class seeking to debunk the quotation attributions? Not great. This is generally not why you came to yoga: to feel skeptical and doubting. Yet it happens to the best of us. (And perhaps this response is apt, although unpleasant, when what's offered is untrue.)

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laissez-faire policies, from a "European" equilibrium characterized by skepticism about whether effort is rewarded, less motivation to work, and a more robust welfare state; and drawing on the distinction between affect and belief); Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030, 1030 (1978) ("Individuals have a need to believe that they live in a world where people generally get what they deserve.").

<sup>78</sup> I framed my question as, "Would it be possible to find the source of this line attributed to Einstein?"

<sup>79</sup> One retelling is as follows:

An interesting story has been told of the friendship of Matthew Arnold, the English poet and critic, and F.W.H. Myers, the philosopher and spiritualist. They had been conversing about man's place in the universe, when suddenly Arnold turned to Myers and asked, "If you were permitted to ask one question of the Sphinx, with the assurance that a correct answer would be given, what question would you ask?" After a moment's reflection Myers replied, "I should ask, 'Is the universe friendly?'"

J. SUTHERLAND BONNELL, FIFTH AVENUE SERMONS 1 (1936). Whether or not this is Matthew Arnold is subject to doubt, even from Bonnell, who wrote, "Whether this anecdote be true or not I cannot say. Frankly, I have my doubts about many of these tag ends of biography." *Id.*

Another source is EMIL CARL WILM, THE PROBLEM OF RELIGION 114 n.1 (1912):

A friend proposed to the late F.W.H. Myers the following question: "What is the thing which above all others you would like to know? If you could ask the Sphinx one question, and only one, what would the question be?" After a moment's silence Myers replied: "I think it would be this: Is the universe friendly?"

Thank you to Marty Witt and especially to Nam Jin Yoon for a deep dive to try to find the source of this line.

<sup>80</sup> Another is the line frequently misattributed to Holocaust survivor Viktor Frankl: "Between stimulus and response there is a space. In that space is our power to choose our response. In our response lies our growth and our freedom." *See, e.g.*, Victor E. Frankl Quotes, BRAINYQUOTE, [https://www.brainyquote.com/quotes/viktor\\_e\\_frankl\\_160380](https://www.brainyquote.com/quotes/viktor_e_frankl_160380) [<https://perma.cc/8PVB-3D9C>] (misattributing the quote to Frankl). It looks like that line is possibly from self-help author Stephen Covey, or maybe from an unidentified book he once saw in Hawai'i, or from some other source — but in any case not from Frankl. *See* Franz J. Vesely, *Alleged Quote*, VIKTOR FRANKL INSTITUT, [https://www.univie.ac.at/logotherapy/quote\\_stimulus.html](https://www.univie.ac.at/logotherapy/quote_stimulus.html) [<https://perma.cc/V3EM-T45V>] (noting that the quotation is attributed to Frankl and referring readers to Stephen Covey's account of finding the quote in an unidentified source); *see also* *Between Stimulus and Response There Is a Space. In That Space Is Our Power To Choose Our Response*, QUOTE INVESTIGATOR (Feb. 18, 2018), <https://quoteinvestigator.com/2018/02/18/response> [<https://perma.cc/22FM-GP5R>].

I suspect that many readers of this Review know something about what it's like to be the resident debunker. Lawyers, academics, and those training to be lawyers and academics have a special relationship to distrust. Lawyers are often expected to be the people in the room who anticipate and guard against or neutralize the bad things that might happen. And academics are researchers who dig to get to the bottom of things, rather than trusting the first explanation or claim they encounter. Trust seems like a good thing, but the special need for distrust for both lawyers and researchers highlights the virtues, in some contexts, of distrust.

*B. Trust and the Inner Researcher, or, Self-Trust*

*The other terror that scares us from self-trust is our consistency; a reverence for our past act or word because the eyes of others have no other data for computing our orbit than our past acts, and we are loath to disappoint them. . . . A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. . . . Speak what you think now in hard words and to-morrow speak what to-morrow thinks in hard words again, though it contradict every thing you said to-day.*

— Ralph Waldo Emerson<sup>81</sup>

Researchers and scholars must distrust superficial answers. And they must be prepared to do the work to reach further. This raises the question of which facts to trust and how to decide — and whom to tell. Strenuous research and reporting may also require a certain kind of trust, then: in the researcher's own methods, observations, and conclusions.

To trust one's own perceptions sometimes involves a radical rejection of the facts or norms accepted by others or even one's earlier self (as in the epigraph from Emerson). We might think here of Galileo's finding that the sun revolves around the earth — or of those who call out forms of injustice that have gone unseen or unchallenged. A dramatic example of a researcher trusting her own perceptions and risking reputational consequences comes from Barbara Ehrenreich, in her 2016 book *Living with a Wild God*.<sup>82</sup> Trained as a scientist,<sup>83</sup> Ehrenreich is best known

<sup>81</sup> RALPH WALDO EMERSON, *Self-Reliance* (1841), in *NATURE AND SELECTED ESSAYS* 175, 182–83 (Penguin Classics 2003). He continues: “Ah, so you shall be sure to be misunderstood.’ — Is it so bad then to be misunderstood? Pythagoras was misunderstood, and Socrates, and Jesus, and Luther, and Copernicus, and Galileo, and Newton, and every pure and wise spirit that ever took flesh. To be great is to be misunderstood.” *Id.* at 183.

<sup>82</sup> BARBARA EHRENRICH, *LIVING WITH A WILD GOD* 115–16 (2016) [hereinafter EHRENRICH, *WILD GOD*].

<sup>83</sup> On her Ph.D. in cellular immunology from Rockefeller University, see, for example, Lucy Rock, *When Do You Know You're Old Enough to Die? Barbara Ehrenreich Has Some Answers*, *THE GUARDIAN* (Apr. 7, 2018, 6:01 PM), <https://www.theguardian.com/lifeandstyle/2018/apr/07/barbara-ehrenreich-natural-causes-book-old-enough-to-die> [https://perma.cc/2WYN-BFW2].

for hard-hitting journalism like *Nickel and Dimed*,<sup>84</sup> which was based on her three-month experiment living on minimum-wage jobs like waitress, hotel maid, and healthcare aid, among others.<sup>85</sup> Ehrenreich has described herself as “a myth buster by trade.”<sup>86</sup>

In *Living with a Wild God*, Ehrenreich recounts her experience as a young person in the desert seeing what appeared to be a vision of everything in flames.<sup>87</sup> She buried these memories for decades, not risking others’ reactions.<sup>88</sup> “For most of the intervening years,” she writes, “my general thought has been: If there are no words for it, then don’t say anything about it.”<sup>89</sup> What she says next begins to convey her self-consciousness about sharing this kind of experience, her appreciation of the norms she was violating and expectations she was disappointing: “Otherwise you risk slipping into ‘spirituality,’ which is, in addition to being a crime against reason, of no more interest to other people than your dreams.”<sup>90</sup> For many years, she distrusted her readers and protected her status as a trustworthy narrator by hiding parts of her experience.

Although she kept these memories to herself, Ehrenreich saved the contemporaneous journals in which she described them, out of some sense that her inner researcher must stay true to the events as she experienced them — she couldn’t destroy the facts as they came to her.<sup>91</sup> The book recounts her decision finally to expose these memories to the world, despite the doubts she would face, not only of her story but of her self. She chose to risk losing her readers’ trust in favor of her own perceptions.<sup>92</sup>

Even the boldest of thinkers may choose not to risk his reputation by sharing ideas he trusts but expects the world will not. Jeremy Bentham’s writings about same-sex sex are a relevant example. Bentham couldn’t figure out any reason, under a principle of utility, for punishing sex with a person of the same sex.<sup>93</sup> But he declined to share his writings on the

<sup>84</sup> BARBARA EHRENRICH, *NICKEL AND DIMED* (2001).

<sup>85</sup> *Id.* at 9.

<sup>86</sup> *Fear of Falling: The Inner Life of the Middle Class* at 68:12, BOOKNOTES (Oct. 8, 1989), <http://www.booknotes.org/Watch/9435-1/Barbara-Ehrenreich.aspx> [<https://perma.cc/QX5M-CUYW>].

<sup>87</sup> EHRENRICH, *WILD GOD*, *supra* note 82, at 115–16.

<sup>88</sup> *Id.* at 119.

<sup>89</sup> *Id.* at 115–16.

<sup>90</sup> *Id.* at 116.

<sup>91</sup> *Id.* at 122–24. For the words she found for the experience, see *id.* at 116.

<sup>92</sup> This does not appear to have happened, from a survey of prominent reviews, but one finds amidst them hints of what Ehrenreich might reasonably have feared. See, e.g., Dwight Garner, *Believe It or Not, a Skeptic’s Journey*, N.Y. TIMES, (Apr. 15, 2014), <https://nyti.ms/1eGV0Wf> [<https://perma.cc/L78N-QR4H>] (asserting that “this book contains some of her loopy writing”).

<sup>93</sup> See Jeremy Bentham, *Paederasty* (1785), in *Offences Against One’s Self: Paederasty, Part 1*, 3 J. HOMOSEXUALITY 389, 389 (Louis Crompton ed., 1978), and *Jeremy Bentham’s Essay on “Paederasty,” Part 2*, 4 J. HOMOSEXUALITY 91, 93 (Louis Crompton ed., 1978). Note that Bentham defines “paederasty” here as simply an “impropriety” involving sex with “an object of the proper species but the wrong sex.” Bentham, *Paederasty, Part 1, supra*, at 389.

subject — declining even to include them among the papers to be published on his death — knowing how discrediting they would be not only to him personally but also to the other causes on which he wrote.<sup>94</sup> Despite keeping these views private, Bentham did not destroy the manuscripts on the subject, trusting the value of his own ideas and preserving them for a future generation. And those writings did in fact find a receptive, even enthusiastic audience, centuries later.<sup>95</sup>

This is of course sometimes why those who write do so. Those whom writers trust to listen and connect with their perceptions may be at some distance across time and space — a distance the written word can travel.<sup>96</sup> The prospect of words traveling, the possibility that they will last, is also one reason why writing can be hard. A form of self-trust may be useful here too. In her paeon to “shitty first drafts,” Anne Lamott explains why she writes them: “For me and most of the other writers I know, writing is not rapturous. In fact, the only way I can get anything written at all is to write really, really shitty first drafts.”<sup>97</sup> By “writing without reining myself in . . . almost just typing, just making my fingers move,” she says, on a given day the writing itself can get her past doubt — “because by then I had been writing for so long, I would eventually let myself trust the process.”<sup>98</sup> Trusting the process is, for Lamott, an avenue to self-trust.<sup>99</sup>

In the epigraph, Emerson warns that expectations of consistency can undermine self-trust.<sup>100</sup> Because others expect sameness, the tendency is to tell an identical story again and again — to stick, as they say, to the script. Emerson’s observation is supported by recent work suggesting

<sup>94</sup> Bentham wrote of himself, in a précis of a project he imagined writing on the subject someday: [S]o it has happened, it has failed in his way to have been already, in a certain degree, useful to mankind: he is in a way to be still more so: and, in case of his being known to be the author of such a work, there is no saying to what a degree Every prospect of his future usefulness might, in his instance, be destroyed.

Elizabeth Francis Emens, William Beckford: Sexuality and Reputation 32 (2000) (unpublished Ph.D. dissertation, University of Cambridge) (on file with the Harvard Law School Library) (quoting University College London Bentham papers, Box 161A, fol. 14iii).

<sup>95</sup> The third and fourth volumes of the *Journal of Homosexuality* published some of these writings by Bentham in 1978. See Bentham, *supra* note 93.

<sup>96</sup> For example, about the poem “To Pi Ssu Yao” by Tu Fu, Czeslaw Milosz writes, “Reading this poem I reflect upon the obstinacy of artists. Whence comes our passion, our zeal, in working at the risk of possible loss? Is this only ambition, or a bond with people who might come after us, some kind of love?” A BOOK OF LUMINOUS THINGS 181 (Czeslaw Milosz ed., 1998). Milosz was reflecting, presumably, on these lines from Tu Fu: “Our poems will be handed / Down along with great dead poets’ / We can console each other. / At least we shall have descendants.” Tu Fu, *To Pi Ssu Yao*, in KENNETH REXROTH, ONE HUNDRED POEMS FROM THE CHINESE 15 (1971).

<sup>97</sup> ANNE LAMOTT, BIRD BY BIRD: SOME INSTRUCTIONS ON WRITING AND LIFE 22 (1994).

<sup>98</sup> *Id.* at 24–25.

<sup>99</sup> *Id.* at 112 (“You need to trust yourself, especially on a first draft . . .”).

<sup>100</sup> See *supra* p. 1981.

that “predictability enhances trust.”<sup>101</sup> What builds trust, as a psychological matter, may therefore discourage candor. Emerson urges readers instead to speak their truth, though it changes with time.

We are living in a moment when the question of whom and what to trust — what sources, both public and private — is especially fraught. I recently tried an online experiment involving a game to accomplish what the authors of the study call “pre-bunking.”<sup>102</sup> The game teaches users how to create “fake news” and rile up energy and support among followers.<sup>103</sup> The authors report that, after playing the game, people are better able to detect fake news.<sup>104</sup> In a sense, the game teaches distrust; in another sense, perhaps, it teaches users how to trust themselves over the hype.

Of course, self-trust can also lead a person astray. Hasday observes that self-deception is probably the most common form of deception (p. 9). As one example, people rarely believe themselves to harbor racial bias; instead, they trust their own biases.<sup>105</sup> This brings us to the subject of identity’s role in trust and distrust.

*C. Who Gets to Trust and Be Trusted, or,  
The Role of Power and Identity*

*[W]hen we came to the United States, my mother said . . . you cannot trust white people. . . . [E]very time you drive your car, you’re trusting everybody around you.*

— Claudia Rankine<sup>106</sup>

Growing up as a privileged white child, I was raised not to trust and also to trust, in a combination I found confusing. I grew up in a home with an alarm system, but when we vacationed in the woods during the summer we regularly left cabin doors unlocked, even at night. I then perplexed my family, at a certain age, by wanting to lock the doors in summer. Too many horror movies involving cabins in the woods had

<sup>101</sup> Roy J. Lewicki & Barbara Benedict Bunker, *Developing and Maintaining Trust in Work Relationships*, in *TRUST IN ORGANIZATIONS* 121 (Roderick M. Kramer & Tom R. Tyler eds., 1996).

<sup>102</sup> *Fake News “Vaccine” Works: “Pre-Bunking” Game Reduces Susceptibility to Disinformation*, EUREKALERT (June 24, 2019), [https://www.eurekalert.org/pub\\_releases/2019-06/uoc-fno62119.php](https://www.eurekalert.org/pub_releases/2019-06/uoc-fno62119.php) [<https://perma.cc/8SYU-JZMF>].

<sup>103</sup> *Id.*

<sup>104</sup> Jon Roozenbeek & Sander van der Linden, *Fake News Game Confers Psychological Resistance Against Online Misinformation*, 5 *PALGRAVE COMM.* 1, 7 (2019).

<sup>105</sup> Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 *GROUP DYNAMICS* 101, 111–12 (2002) (reporting on the gap between implicit bias and reported levels of explicit bias).

<sup>106</sup> *Claudia Rankine: How Can I Say This So We Can Stay in This Car Together?*, ON BEING WITH KRISTA TIPPETT (Jan. 10, 2019), <https://onbeing.org/programs/claudia-rankine-how-can-i-say-this-so-we-can-stay-in-this-car-together-jan2019> [<https://perma.cc/R2C5-U9N2>].

planted images in my dreamscape. *Why*, I wondered, *wouldn't you just lock them?*

In recent years, I have begun to see the appeal of unlocked doors even if I still lean on locks. Open doors are inviting. As Carl Sandburg writes, "An open door says, 'Come in.' / A shut door says, 'Who are you?'"<sup>107</sup> Perhaps even more, presuming that those who enter pose no threat, and can be trusted, may be comforting — as is the belief that no one unwanted would ever try to enter. There is a leap of faith that can feel good to take, when you don't lock your doors, when you don't take precautions. If you can do it.

Yet some of us are denied the privilege of trust.

Professor Patricia Williams famously recounted a racialized experience of trust and distrust in apartment hunting. While co-teaching Contracts, she and a white male colleague, Professor Peter Gabel, each went looking for a sublet, which "inevitably" turned into "a discussion of trust and distrust as factors in bargain relations."<sup>108</sup> Williams was surprised by Gabel's trust of strangers:

It turned out that Peter had handed over a \$900 deposit in cash, with no lease, no exchange of keys, and no receipt, to strangers with whom he had no ties other than a few moments of pleasant conversation. He said he didn't need to sign a lease because it imposed too much formality. The handshake and the good vibes were for him indicators of trust more binding than a form contract. At the time I told Peter he was mad, but his faith paid off. His sublessors showed up at the appointed time, keys in hand, to welcome him in.<sup>109</sup>

Williams, by contrast, in a "rush to show good faith and trustworthiness" to the "friends who found [her] an apartment in a building they owned," had "signed a detailed, lengthily negotiated, finely printed lease firmly establishing [her] as the ideal arm's-length transactor."<sup>110</sup>

For Williams, the formalities were not superficial or precautionary. They were the foundation of trust:

I was raised to be acutely conscious of the likelihood that no matter what degree of professional I am, people will greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational, and probably destitute. Futility and despair are very real parts of my response. So it helps me to clarify boundary; to show that I can speak the language of lease is my way of enhancing trust of me in my business affairs.<sup>111</sup>

That boundary seems to solidify Williams, to ground her, in support of her own as well as the other's trust.

<sup>107</sup> CARL SANDBURG, *Doors*, in THE COMPLETE POEMS OF CARL SANDBURG 654 (1970).

<sup>108</sup> PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 146 (1991).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 147.

<sup>111</sup> *Id.* (citation omitted).

Williams observed that she and Gabel were seeking similar outcomes with opposite approaches:

We both wanted to establish enduring relationships with the people in whose houses we would be living; we both wanted to enhance trust of ourselves and to allow whatever closeness was possible. This similarity of desire, however, could not reconcile our very different relations to the tonalities of law.<sup>112</sup>

A history of racialized interactions meant that for Gabel a lack of formalities signaled trust — layers of extralegal constraints were on his side<sup>113</sup> — whereas for Williams the legal formalities seemed the best chance of overcoming distrust. Formalities seemed a pathway to being trusted, as well as to building mutual trust.

Legal formalities may be better than a handshake for those lacking the social privilege of informal enforcement, as Williams observes, but those formalities nonetheless offer scant protection in many contexts, leading to well-documented community-wide distrust. Consider, for example, blue-on-black police encounters.<sup>114</sup> In discussions of police violence and killings of people of color, scholars may reach for some scaffolding. Warnings, someone will propose, are an answer — perhaps warnings will enable communication during police encounters, dialogue about threat and consequences.<sup>115</sup> Perhaps warnings will prevent so many senseless deaths. Others contend that warnings offer no such scaffolding.<sup>116</sup> And yet textured ethnographic work suggests that “situational trust” in police may exist,<sup>117</sup> even in communities whose relation

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<sup>112</sup> *Id.*

<sup>113</sup> Cf. Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 685 (1986) (“In rural Shasta County, California, residents . . . typically look to informal norms to determine their entitlements in animal trespass situations.”); Rose, *supra* note 70, at 537–41 (describing the view that trust may be supported by a lack of formalities or monitoring).

<sup>114</sup> See, e.g., Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 238 & n.28 (2008); Tom R. Tyler, *Policing in Black and White: Ethnic Group Differences in Trust and Confidence in the Police*, 8 POLICE Q. 322, 332–33 (2005); see also Sandra Susan Smith, *Race and Trust*, 36 ANN. REV. SOC. 453, 456, 458 (2010).

<sup>115</sup> See, e.g., Ian Ayres & Daniel Markovits, *Ending Excessive Police Force Starts with New Rules of Engagement*, WASH. POST (Dec. 25, 2014), <http://wapo.st/1xISkvp> [<https://perma.cc/UG82-6URB>].

<sup>116</sup> See, e.g., Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 2015 (2019); see also Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Need It, How We Got It — And What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 177–78 (2007).

<sup>117</sup> Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 LAW & SOC'Y REV. 314, 316 (2016).

to the law is characterized as “legal estrangement,”<sup>118</sup> and that reforms may be built upon this.<sup>119</sup>

Claudia Rankine, author of the prose-poem *Citizen*,<sup>120</sup> which gave narrative voice to racial microaggressions (and macroaggressions), recounts her mother telling her, after their family moved to the United States from Jamaica, “you cannot trust white people.”<sup>121</sup> Rankine observes, however, that we all need trust to go about our daily lives: “[E]very time you drive your car, you’re trusting everybody around you.”<sup>122</sup> She therefore keeps searching for some words to help us begin to communicate. “I spend a lot of time thinking about, how can I say this so that we can stay in this car together, and yet explore the things that I want to explore with you?”<sup>123</sup>

\* \* \*

The disparate access and racialized impediments to trust remain a pressing and unresolved problem in the middle of this discussion of trust and the law. The subject also points toward a lacuna in the frequent public rhetoric about increasing trust: scholars and politicians of many stripes have sought ways to build trust in the police in predominantly African American neighborhoods.<sup>124</sup> But as Professor Onora O’Neill sagely reminds us, “Trust is valuable only when directed to [objects] that are trustworthy.”<sup>125</sup> How much good — or rather, how much bad — is done by persuading people to trust an authority that does not warrant their trust? Institutions must become trustworthy before people are asked to trust them.<sup>126</sup>

In the intimate realm, Hasday tells us that courts are no longer sympathetic to racial disappointment in intimacy as grounds for a lawsuit (pp. 121–24).<sup>127</sup> And Hasday, in proposing that courts become generally

<sup>118</sup> Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2066 (2017).

<sup>119</sup> *Id.* at 2126–49.

<sup>120</sup> CLAUDIA RANKINE, *CITIZEN: AN AMERICAN LYRIC* (2014).

<sup>121</sup> *Claudia Rankine: How Can I Say This So We Can Stay in This Car Together?*, *supra* note 106.

<sup>122</sup> *Id.* (emphasis added).

<sup>123</sup> *Id.*

<sup>124</sup> *See, e.g.*, Bell, *supra* note 118, at 2058–59 (discussing this literature, with special reference to PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 9–11 (2015)).

<sup>125</sup> Onora O’Neill, *Linking Trust to Trustworthiness*, 26 INT’L J. PHIL. STUD. 293, 293 (2018); *see also* Russell Hardin, *The Street-Level Epistemology of Trust*, 21 POL. & SOC’Y 505, 512 (1993).

<sup>126</sup> *Cf., e.g.*, Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 367–68 (2001) (“The key to creating trust is to act in ways that community residents will experience to be fair. . . . If authorities use fair procedures, their motives are judged to be more trustworthy.”).

<sup>127</sup> *Cf.* Camille Gear Rich, *Contracting Our Way to Inequality: Race, Reproductive Freedom and the Quest for the Perfect Child*, 104 MINN. L. REV. (forthcoming 2020) (manuscript at 6–7, 57).

more sympathetic to claims of intimate deception, is not urging a revival of these suits. Getting courts out of the business of bolstering civil suits grounded in racial subordination is progress. But pulling the law that supports discrimination out of these areas is likely to have limited impact in actually supporting interracial intimacy, given the multiple ways that our relationships are shaped by legal architecture, as discussed earlier. The legal *architecture of intimacy* factors into interracial trust both within and beyond intimate relationships.<sup>128</sup>

*D. Who Must Build Trust and Manage Distrust*

*We believe, when we let ourselves, that there are things we can trust, people we can care for, words we can say in earnest.*

— Jedediah Purdy<sup>129</sup>

The previous section has pointed to the difficulty of trusting and being trusted — and the differences among people, across identity and social role, in both. With that recognition as backdrop, the epigraph from Professor Jedediah Purdy turns us toward the possibilities for trust, the human longing for it. And this section briefly considers the special role of lawyers in acting as agents for important forms of trust as well as distrust.

Lawyers are required to distrust the facts as given — or at least not merely trust them. When a death penalty lawyer listens to her client, for example, she cannot accept everything said at face value. Under ABA guidelines, effective and vigorous representation requires the lawyer to listen and investigate thoroughly,<sup>130</sup> which may mean interviewing certain witnesses despite a client's request to the contrary.<sup>131</sup> Transactional lawyers must also anticipate the worst. They take the

<sup>128</sup> See Emens, *supra* note 51, at 1393–96 (discussing the “architecture of intimacy”).

<sup>129</sup> JEDEDIAH PURDY, *FOR COMMON THINGS*, at xv (1999). Purdy is writing in a different context, and the preceding lines are these: “I do not believe that, even when it is strongest, irony has convinced us that nothing is real, true, or ours.” *Id.*

<sup>130</sup> AM. BAR ASS'N, *GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES* guideline 10.7 (2003) [hereinafter ABA GUIDELINES], *reprinted in* 31 HOFSTRA L. REV. 913, 1015 (2003); *see also* AM. BAR ASS'N, *SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES*, *reprinted in* 36 HOFSTRA L. REV. 677, 689 (2008).

<sup>131</sup> ABA GUIDELINES, *supra* note 130, guideline 10.7, at 1015 (“The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.”); *id.* commentary to guideline 10.7, at 1021 (“Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case.” (citation omitted)). As noted there, “in capital cases, the mental vulnerabilities of a large portion of the client population compound the possibilities for error.” *Id.* commentary to guideline 10.7, at 1017. I thank Alexis Hoag for this point.

deal struck by the principals, think up what could go wrong, and create language to address those possibilities.

More generally, the livelihood of many lawyers might be said to depend on distrust. This likely contributes to the stereotypes and negative attitudes toward lawyers. In the words of one non-lawyer, a world of perfect trust might well mean “the elimination of mountains of paperwork and half the legal profession.”<sup>132</sup>

Alongside these expectations of distrust, lawyers are also required to build trust. They must build relationships with clients, facilitate negotiations with hostile parties, persuade judges to believe their arguments, work in teams to achieve common goals in litigation, corporate law, and other domains — to name a few examples of ways lawyers need trust.<sup>133</sup> Professor Susan Sturm has persuasively diagnosed the tension between these two demands on lawyers — to investigate skeptically and to build trust — as a lawyering paradox.<sup>134</sup>

Lawyers may at times have the capacity to act as agents of both trust and distrust on behalf of their clients.<sup>135</sup> They may be able to build affective bridges across conflict, where the client’s history and emotions preclude even the trust necessary to sit in the same room with an adversary. And a lawyer may also be able to prevent emotions from hindering the ability to inquire, to ask, to investigate, to look for the facts behind the drama (positive or negative).

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<sup>132</sup> SHIMON APISDORF, ROSH HASHANAH YOM KIPPUR SURVIVAL KIT 73 (1992) (“Imagine a world where contracts didn’t have to be signed. Where a person’s word was ‘as good as gold’ and a handshake was a done deal. Imagine if people actually lived with that kind of trust in one another. Imagine the integrity. Beyond the elimination of mountains of paperwork and half the legal profession, it would be a different world.”); see also Rose, *supra* note 70, at 531 (“Lawyers do not have much of a reputation for fostering trust. We insist that ordinary people get everything down on paper, thereby sowing seeds of discord and suspicion . . .”).

<sup>133</sup> See, e.g., Jay Quam, *Adversarial Advocacy: Too Much Adversity Can Hurt You*, BENCH & B. MINN., Apr. 2011, at 22, 24; Dana A. Remus, *Reconstructing Professionalism*, 51 GA. L. REV. 807, 848–51 (2017); Gretchen Viney, *Using the Fee Agreement to Build Client Rapport*, WIS. LAW., Nov. 2013, at 11, 13; Paul R. Williams & Christin Coaster, #*Lawyeringpeace: The Role of Lawyers in Peacebuilding*, 22 ILSA J. INT’L & COMP. L. 493, 497 (2016). Lawyers may also conceive of building trust as not merely instrumental but as central to the relational aspect of zealous advocacy. See generally Remus, *supra*, at 849–50. I thank Colleen Shanahan for this point.

<sup>134</sup> Susan P. Sturm, *Lawyering Paradoxes: Making Meaning of the Contradictions* 20–34 (Columbia Pub. Law Research Paper No. 14–6432, 2019), [https://scholarship.law.columbia.edu/faculty\\_scholarship/2579](https://scholarship.law.columbia.edu/faculty_scholarship/2579) [<https://perma.cc/5SXH-E3SQ>].

<sup>135</sup> See, e.g., Susan Bryant & Jean Koh Peters, *Reflecting on the Habits: Teaching About Identity, Culture, Language, and Difference*, in TRANSFORMING THE EDUCATION OF LAWYERS 349, 365 (Susan Bryant, Elliott S. Milstein & Ann C. Shalleck eds., 2014) (describing the interplay between the “methodological doubt” and “methodological belief” lawyers need to practice); cf., e.g., Jennifer Arlen & Stephan Tontrup, *Does the Endowment Effect Justify Legal Intervention? The Debiasing Effect of Institutions*, 44 J. LEGAL STUD. 143, 175–76 (2015) (suggesting that shifting responsibility to agents — such as lawyers — can help individuals engage in transactions that their emotions may otherwise prevent them from engaging in).

Think again of John Dahl and his sister Dorothy Zauhar who brought suit against the man who accepted Dahl's kidney donation, while engaged to Zauhar, then promptly cancelled the wedding. Brother and sister were both alleging a painful betrayal — emotionally for each, in different ways, and physically for Dahl.<sup>136</sup> The need to build trust as well as gather facts would be — or should be — apparent to a lawyer meeting with these plaintiffs. As Hasday reports, individuals whose intimates have lied to them in consequential ways often report the challenge of trusting again (p. 91).<sup>137</sup> “Many people have stressed how devastating losing trust in a deceitful intimate can be,” she writes (p. 90). In one victim's words, a betrayal can be “trust-shattering” (p. 90).<sup>138</sup>

*E. Mythic Trust, or, “Trust . . . Then Jump”*

*Do you trust me? . . . Then jump!*

— Aladdin<sup>139</sup>

How did the plaintiffs in *Dahl v. McNutt*,<sup>140</sup> Dorothy Zauhar and her brother, end up in this predicament? The affections of Zauhar's fiancé, Harvard-educated businessman Richard McNutt, had fluctuated over time, as discussed earlier.<sup>141</sup> Once a kidney donation from her brother looked promising, they set a date for the wedding.<sup>142</sup> Consider Zauhar's position. Could she have said to McNutt at this point, *Yes! I'll marry you!*, while also allowing herself to think, *Is it possible you're proposing to marry me just because you want a kidney from me or my brother?*

Several psychological heuristics — mental shortcuts — could inhibit Zauhar's ability to detect McNutt's apparent deceit. The *truth default*, mentioned earlier, means people tend to assume others are telling the truth (pp. 53–54).<sup>143</sup> *Confirmation bias*, Hasday notes, leads people to assimilate new information to existing narratives or beliefs (p. 53). In addition, because of *optimism bias*, people tend to expect that good things rather than bad will happen to them.<sup>144</sup> (What happens to the

<sup>136</sup> Again, these facts follow the plaintiffs' version. See *supra* note 9.

<sup>137</sup> Hasday recounts one man's description of “the cruel dilemma confronting deceived intimates after the truth emerges: ‘On the one hand, we've learned some very difficult but valuable lessons about trusting others. But, the negative side is that too much distrust can prevent us from ever developing a loving relationship again’” (p. 91).

<sup>138</sup> The author quotes BONNIE EAKER WEIL, *FINANCIAL INFIDELITY* 148 (2008).

<sup>139</sup> ALADDIN: THE COMPLETE SCRIPT (compiled by Ben Scripps), <http://www.fpx.de/fp/Disney/Scripts/Aladdin.txt> [<https://perma.cc/9WM9-9ZU2>].

<sup>140</sup> No. C3-97-601906, slip op. (Minn. Dist. Ct. Jan. 21, 1998).

<sup>141</sup> See *supra* p. 1976.

<sup>142</sup> Complaint at 5, *Dahl*, No. C3-97-601906 (on file with the Harvard Law School Library).

<sup>143</sup> See note 38 and accompanying text.

<sup>144</sup> See, e.g., TALI SHAROT, *THE OPTIMISM BIAS*, at xi–xvi (2011). Hasday doesn't discuss optimism bias, but does note that existing research “suggest[s] that people are more likely to believe

plaintiffs in this case, if their account is to be believed, would be quite a bad thing to imagine was happening.)

In addition to these and other heuristics, trusting in a romantic context is shrouded in a kind of narrative mythology, vividly rendered in the classic Disney movie *Aladdin*,<sup>145</sup> quoted in the epigraph. Early in the movie, a near stranger holds out his hand to Princess Jasmine and asks, “Do you trust me?”<sup>146</sup> She hesitates at first, saying, “What?”<sup>147</sup> The stranger, Aladdin, repeats the question, “*Do you trust me?*”<sup>148</sup> “Yes,” she says, taking his hand, as they stand at a precipice.<sup>149</sup> “Then jump!” he calls out, as they jump down many stories to (what turns out to be) a safe landing.<sup>150</sup> Aladdin’s invitation to trust him is repeated again later.<sup>151</sup> Each time, she trusts.<sup>152</sup> Each time, that moment of trust builds their romance.<sup>153</sup>

What if Princess Jasmine had responded, *Let me talk to my lawyer first?* Or, *Let me hire a private investigator to check out if you’re really who you say you are.* Investigating your intimates and prospective intimates, Hasday points out, is terrifically hard, as a practical matter (pp. 59–64). It is also normatively discouraged by cultural understandings of romance and love,<sup>154</sup> as *Aladdin* showcases, reflecting a mythology of love and “blind trust”<sup>155</sup> as intertwined. Trust-then-jump represents

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deception that flatters them, deception that is designed to ingratiate, and/or deception that they want to believe is true” (p. 54 (citation omitted)).

<sup>145</sup> ALADDIN (Walt Disney Pictures 1992).

<sup>146</sup> ALADDIN: THE COMPLETE SCRIPT, *supra* note 139.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (emphasis added).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> The film arguably warrants a close reading beyond the scope of this Review, but a few notes follow: Aladdin also deceives Jasmine, pretending to be a prince to get past a rule that says the princess must marry a prince. (At first we might say he actually becomes a prince, through the magic of the genie which is real within their fictional world, but when she begins to ask him questions about his identity, he then builds up lies about himself to support the genie’s magic.) When she finds out about his fabrication, she is angry. But then he saves her again, and they convince the sultan to change the law so that, ultimately, they can in fact marry. Moreover, Jasmine deceives Aladdin, as well, from the first moment they meet, when she is disguised as a commoner. So deception and moving past it is a dance they both lead, though he for much longer.

<sup>154</sup> Questioning others’ truthfulness is also disliked and discouraged by social norms more generally. See, e.g., Rose, *supra* note 70, at 540.

<sup>155</sup> I put “blind trust” in quotation marks to mark it as a phrase with a history and to signify concern with its use of blindness as a metaphor. Disability metaphors typically draw on a long history of negative stereotypes and ignorant assumptions about what the actual disabilities entail. For further discussions, see generally JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 30–40 (1993); Elizabeth F. Emens, *What’s Left in Her Wake: In Honor of Adrienne Asch*, HASTINGS CTR. REP., Mar.–Apr. 2014, at 19, 20; Rachel Cohen-Rottenberg, *Doing Social Justice: 10 Reasons to Give up Ableist Language*,

love as “a leap of faith.”<sup>156</sup> The anti-rational quality of this leap is accentuated in the Broadway version of *Aladdin*, where Princess Jasmine inserts one further phrase in her response to Aladdin’s invitation to trust: “I’m not sure why,” she observes, “but . . . yes.”<sup>157</sup>

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Though hard numbers are elusive, existing data suggest that relatively few people sign prenuptial agreements.<sup>158</sup> This is unsurprising. Prenups address what happens if the marriage fails, and those on the brink of marriage don’t want to plan for failure. But declining to recognize that marriage exists “under the shadow of divorce” means taking a significant risk.<sup>159</sup>

The eyes-wide-shut approach to big decisions may be a recipe for the kinds of disappointment Hasday’s book catalogues.<sup>160</sup> And yet a feeling

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HUFFPOST (June 10, 2014, 6:58 PM), [https://www.huffpost.com/entry/doing-social-justice-thou\\_b\\_5476271](https://www.huffpost.com/entry/doing-social-justice-thou_b_5476271) [<https://perma.cc/JN3H-6NCX>].

<sup>156</sup> The phrase “leap of faith” — commonly (and perhaps erroneously) thought to be coined by Søren Kierkegaard writing in a very different context, see Richard Schacht, *Kierkegaard on “Truth is Subjectivity” and “The Leap of Faith,”* 2 CANADIAN J. PHIL. 297, 306 (1973) — has arguably become a cliché about romantic love. See, e.g., Maureen Lee Lenker, *All the Rom-Com Clichés We Love in Netflix’s Falling Inn Love*, ENT. WKLY. (Aug. 30, 2019, 12:30 PM), <https://ew.com/movies/2019/08/30/rom-com-cliches-falling-inn-love> [<https://perma.cc/T5VE-NAFR>] (“Romance is often about taking a leap of faith — for another person or possibly yourself.”).

<sup>157</sup> *A Whole New World Lyrics — Aladdin*, ALL MUSICALS, <https://www.allmusicals.com/lyrics/aladdin/awholenewworld.htm> [<https://perma.cc/RB3M-L6W9>].

<sup>158</sup> This is stated tentatively because definitive data on this point are lacking. Some sources say very few people sign prenups, citing a figure of five percent, but without a verifiable empirical source. See, e.g., Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 891 (1997); see also Gary Belsky, *Living by the Rules*, MONEY (May 1996), [https://money.cnn.com/magazines/moneymag/moneymag\\_archive/1996/05/01/212090/index.htm](https://money.cnn.com/magazines/moneymag/moneymag_archive/1996/05/01/212090/index.htm) [<https://perma.cc/C573-EPC9>] (stating that approximately 50,000 prenuptial agreements are signed each year). Other sources say that prenups are increasing in some populations, for instance among millennials, or among those entering second marriages; one professional organization reports that sixty-two percent of matrimonial lawyers surveyed in 2016 reported an increase in prenups, but without attempting to estimate a base rate in the population. *Prenuptial Agreements on the Rise Finds Survey*, CISION PR NEWSWIRE (Oct. 28, 2016, 10:32 AM), <https://www.prnewswire.com/news-releases/pre-nuptial-agreements-on-the-rise-finds-survey-300353444.html> [<https://perma.cc/PA99-QY62>]; see also Susan Shain, *The Rise of the Millennial Prenup*, N.Y. TIMES (July 6, 2018), <https://nyti.ms/2IYhSWo> [<https://perma.cc/B2TF-SMRA>]; Geoff Williams, *The Pros and Cons of Prenups*, U.S. NEWS & WORLD REP. (Aug. 3, 2018), <https://money.usnews.com/money/personal-finance/family-finance/articles/2018-08-03/the-pros-and-cons-of-prenups> [<https://perma.cc/5QCL-2L73>].

<sup>159</sup> Jeannie Suk Gersen, *What “Divorce” Understands About Marriage*, NEW YORKER (Oct. 16, 2016), <https://www.newyorker.com/news/news-desk/what-divorce-understands-about-marriage> [<https://perma.cc/JF6K-Q8BJ>].

<sup>160</sup> Note that this mythic norm of “trust then jump” entails complex gender dynamics, which warrant more involved discussion than this Review allows. It is worth noting, though, that the norm is not necessarily symmetrical along the directional dimension of trust. Norms for women seem to involve more expectations of unquestioning trust, whereas a certain archetypal vision of male love involves jealousy that may entail suspicion rather than trust. See, e.g., Victoria E. Collins & Dianne C. Carmody, *Deadly Love: Images of Dating Violence in the “Twilight Saga,”* 26 AFFILIA

of trust seems vital to forward motion on such occasions. The next Part suggests a framework for navigating this tension.

### III. TRUSTING WITH EYES WIDE OPEN

*O, love's best habit is in seeming trust*

— William Shakespeare<sup>161</sup>

In this Part, I offer a pathway through the competing values of trust and distrust, drawing strengths from each to propose a combination of affective trust and cognitive distrust or curiosity. I then apply this framework to *Intimate Lies and the Law*, using it to evaluate Hasday's proposals for reform and present a further refinement of the central normative argument. Next, I apply the framework to a recent legal development relevant to intimate relationships: the New Mexico Supreme Court's decision to abolish the marital confidences privilege. Lastly, I apply the framework of trust and curiosity to devise a new approach to prenuptial agreements.

#### A. Mapping Trust

*I have no special talents, I am only passionately curious.*

— Albert Einstein (for real this time)<sup>162</sup>

Trusting too much, too freely, is dangerous. Unpacking that problematic phrase “blind trust” helps us understand the danger. The phrase implies trust that is ignorant. A person engaging in blind trust is closing her eyes to reality, declining to see the facts before her. Blind trust is stupid trust. (This example nicely shows the problem with common disability metaphors; they often reflect or contribute to erroneous stereotypes, like the idea that blind people are stupid.<sup>163</sup>) The central point here, though, is this: intelligent living requires distrust.

And yet failing to trust is arguably more dangerous. Ours is a social world. No man is an island.<sup>164</sup> The basics of life in modern society

382, 388 (2011) (finding twenty-nine of thirty-one instances of jealousy in the *Twilight* book series to be jealousy by male characters directed at the female protagonist). More egalitarian visions of romantic love seem instead to emphasize trust on both sides, however.

<sup>161</sup> WILLIAM SHAKESPEARE, *Sonnet 138*, in THE YALE SHAKESPEARE: SHAKESPEARE'S SONNETS 69 (Edward Bliss Reed ed., 1923).

<sup>162</sup> “Ich habe keine besondere Begabung, sondern bin nur leidenschaftlich neugierig.” Letter from Albert Einstein to Carl Seelig (Mar. 11, 1952), <http://www.library.ethz.ch/en/Ressourcen/Digitale-Bibliothek/Einstein-Online/Princeton-1933-1955> [https://perma.cc/4PTP-57WW]. With thanks to Nam Jin Yoon for locating the letter and Professor Adam Tooze for confirming the translation.

<sup>163</sup> See *supra* note 155.

<sup>164</sup> JOHN DONNE, *Meditation XVII*, in DEVOTIONS UPON EMERGENT OCCASIONS, AND SEVERAL STEPS IN MY SICKNES 193, 195 (D.A. Talboys ed., Oxford 1841) (1624); see Annette Baier, *Trust and Antitrust*, 96 ETHICS 231, 235–36, 241 (1986).

require coordination on both a small and large scale.<sup>165</sup> And this is especially true in intimate relationships, which generally involve a degree of caregiving and interdependency. In our lives, major and minor outcomes depend on relationships, which depend on trust.<sup>166</sup>

We thus need some measure of both trust and distrust. Professor Edna Ullmann-Margalit has observed that trust and distrust are not precise opposites.<sup>167</sup> They need not necessarily be so. What we need, I would venture, are asymmetrical aspects of each.

We would do well to combine *affective trust* with *cognitive distrust*. Although the distinction commonly drawn between feeling (affective) and thinking (cognitive) is inadequate if not entirely artificial,<sup>168</sup> these categories provide a useful heuristic to organize and describe experience, as this section will show.

Affective trust is emotional trust. This is the feeling state of connection, of safety.<sup>169</sup> Affective trust for another person is feeling safe in their presence, in their concern for you. If the trust is mutual, then the other person also feels safe with you. You can trust a physical space (as in, *I feel safe here*). And affective trust need have no direct object at all. A person can simply feel trusting (as in, *I feel the universe is a friendly place*). A general state of affective trust might well be understood as the opposite of anxiety. And an “act of trust” may be an act rooted — in reality or aspirationally — in the feeling of safety with another, an emotional security that the person will protect rather than exploit or harm you in your vulnerability.

Cognitive distrust, by contrast, is mental inquiry. This is an active state of inquiring into the facts, to find the truth. Cognitive distrust means declining to take things for granted — not accepting the superficial presentation of reality. This means embracing what is true over what you want to believe.<sup>170</sup> The poet Galway Kinnell writes, “Whatever / *what is* is is what / I want. Only that. But that.”<sup>171</sup> Cognitive distrust involves

<sup>165</sup> See, e.g., Rose, *supra* note 70, at 531–32.

<sup>166</sup> See, e.g., Hardin, *supra* note 125, at 507.

<sup>167</sup> Edna Ullmann-Margalit, *Trust, Distrust, and In Between*, in *DISTRUST* 60, 61–62 (Russell Hardin ed., 2004).

<sup>168</sup> See, e.g., MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 34 (2001) (“[T]he cognitive elements are an essential part of the emotion’s identity, and of what differentiates one emotion from other emotions.”); see also *id.* at 19–294 (setting out a “cognitive-evaluative” view of emotions); cf., e.g., George F. Loewenstein et al., *Risk as Feelings*, 127 *PSYCHOL. BULL.* 267, 270–71 (2001) (“[F]eelings about risk and cognitive risk perceptions often diverge, sometimes strikingly.” *Id.* at 271.).

<sup>169</sup> Cf., e.g., ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* 47–53 (1988).

<sup>170</sup> This is not to say that what is true is necessarily found through the cognitive. Indeed, a certain kind of thinking can get in the way of other kinds of knowledge, for instance, somatic knowledge. See, e.g., LAMOTT, *supra* note 97, at 110–15.

<sup>171</sup> GALWAY KINSELL, *Prayer*, in *COLLECTED POEMS* 343, 343 (2017).

facing reality, not hiding from it. And if the truth is not apparent once you open your eyes to it, then cognitive distrust also means a readiness to dig to the bottom of things, to find what's really there.

The two in combination overlap with what Professor Carol Rose describes as *semi-rational trust* — “a trust that asks for assurances and monitoring.”<sup>172</sup> But disaggregating the emotional feeling of trust from the cognitive thinking of trust (or distrust) enables a departure from the hierarchy of real and unreal trust that Rose sets up. For Rose, characterizing the common view, “‘real’ or ‘true’ trust is a kind of confidence that does not even ask for good grounds” and so “there is no such thing as rational trust.”<sup>173</sup> Her semi-rational trust — which is “a *doubting* or *suspicious* trust” — “is something *less than* this ‘real’ trust.”<sup>174</sup> By contrast, I want to propose that emotional trust and cognitive trust exist on equal footing and can be present or absent in various combinations.

The stories in *Intimate Lies and the Law* suggest the importance of the combination of affective trust and cognitive distrust. With this pairing, people can do the *cognitive* inquiring into the bad things that could happen and how to address them — while *emotionally* not going through the anxious suffering of feeling unmoored. Stepping up to inquire need not require abandoning a feeling of safety.

To represent a client or conduct a negotiation, a lawyer needs to anticipate what might go wrong and to guard against it. Yet a lawyer who approaches these tasks with affective distrust may reduce the prospect for collaboration through emotional contagion,<sup>175</sup> among other burdens. Thus, affective trust combined with the cognitive distrust could be a path forward in negotiations — and in getting to sleep at night. Here, one can do the right amount of due diligence as a cognitive matter — which (sometimes) requires anticipating bad things that might happen, thinking about what should be done to guard against them, and doing the right amount of those things — but without the affective worry.

One difficult question is whether it's possible to hold these two positions — affective trust and cognitive distrust — at the same time. Keats tells us that “Negative Capability” — which has often been interpreted to mean the ability to hold two conflicting ideas in productive tension<sup>176</sup> — is characteristic of the “Man of Achievement,”<sup>177</sup> but what

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<sup>172</sup> Rose, *supra* note 70, at 535.

<sup>173</sup> *Id.* at 534.

<sup>174</sup> *Id.* at 535 (third emphasis added).

<sup>175</sup> *Cf.*, e.g., Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 430–35 (2006) (explaining emotional contagion and citing sources).

<sup>176</sup> Nathan Comfort Starr, *Negative Capability in Keats's Diction*, 15 KEATS-SHELLEY J. 59, 59 (1996).

<sup>177</sup> In Keats's original description, negative capability is a bit different: “*Negative Capability*, that is, when a man is capable of being in uncertainties, mysteries, doubts, without any irritable reaching after fact and reason.” Letter from John Keats to George & Thomas Keats (Dec. 22, 1817), in *THE*

about the rest of us? Some encouragement may be found in the *content* dimension of trust discussed earlier: if we don't trust everyone for all things, then even in the closest of relationships, there are some areas already characterized by a lack of trust. For instance, a poet might trust her husband to cook dinner but not to edit her work.

Even if we can begin to find avenues to support the prospect of a dynamic tension between affective trust and cognitive distrust, the mere *word* distrust seems to cut against the feeling of trust. An alternative and better frame for cognitive distrust, then, may be curiosity.

Curiosity might be understood as a warm version of cognitive distrust. Empirical and philosophical writings on curiosity identify multiple subspecies. William James, among others, has divided the world of curiosity into "two instinctive types."<sup>178</sup> The first is a kind of sensory-seeking excitability.<sup>179</sup> The second is the important one here: "scientific (i.e., cognitive) curiosity"<sup>180</sup> — or what James described as "the impulse toward completer knowledge."<sup>181</sup> In this type of curiosity, "the actual ways humans conceive of objects act as stimuli and sensitize them to knowledge gaps, which, when resolved, result in feelings of pleasure and facilitate the storage of scientific knowledge."<sup>182</sup> In James's words, "The philosophic brain responds to an inconsistency or a gap in its knowledge, just as the musical brain responds to a discord in what it hears."<sup>183</sup> Similarly, John Dewey described intellectual curiosity as the "interest in problems provoked by the observation of things and the accumulation of material."<sup>184</sup> Empirical investigation confirms that curiosity does appear to comprise several subspecies,<sup>185</sup> including cognitive curiosity or what Professor Daniel Berlyne called, in his classic article on the subject,

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COMPLETE POETICAL WORKS OF KEATS 277 (Boston, Houghton Mifflin Co. 1899). The pervasiveness of the interpretation I give in the body text signals the perceived elusiveness of the quality so understood as well.

<sup>178</sup> Thomas G. Reio Jr. et al., *The Measurement and Conceptualization of Curiosity*, 167 J. GENETIC PSYCHOL. 117, 119 (2006) (citing WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY (Dover Publications 1950) (1890) [hereinafter JAMES, PRINCIPLES]); see also WILLIAM JAMES, TALKS TO TEACHERS ON PSYCHOLOGY AND TO STUDENTS ON SOME OF LIFE'S IDEALS 24–25 (Dover Publications 1962) (1899) [hereinafter JAMES, TALKS TO TEACHERS] (describing the two types in lively terms).

<sup>179</sup> See JAMES, TALKS TO TEACHERS, *supra* note 178, at 24–25; Reio et al., *supra* note 178, at 119.

<sup>180</sup> Reio et al., *supra* note 178, at 119.

<sup>181</sup> JAMES, TALKS TO TEACHERS, *supra* note 178, at 24.

<sup>182</sup> Reio et al., *supra* note 178, at 119.

<sup>183</sup> 2 JAMES, PRINCIPLES, *supra* note 178, at 430.

<sup>184</sup> JOHN DEWEY, HOW WE THINK 33 (1910) (emphasis omitted).

<sup>185</sup> See, e.g., George Loewenstein, *The Psychology of Curiosity: A Review and Reinterpretation*, 116 PSYCHOL. BULL. 75, 77–78, 83 (1994); Litman, *supra* note 14, at 422–24.

“epistemic curiosity.”<sup>186</sup> More recently, epistemic curiosity has been defined as “the motive to seek, obtain and make use of new knowledge.”<sup>187</sup>

Epistemic curiosity has become the focus of a growing field of social scientific inquiry — a site of great curiosity, it might be said. And it has been subdivided into two types: “interest” and “deprivation” curiosity.<sup>188</sup> Interest curiosity involves “a desire for new information anticipated to increase pleasurable feelings of situational interest.”<sup>189</sup> This type is “associated with an open, positive approach towards learning, implying a broadly optimistic outlook regarding new discoveries”<sup>190</sup> — or, as vividly rendered by Professor Judson Brewer, “that wide-eyed wonder that draws us to explore.”<sup>191</sup> Deprivation curiosity, by contrast, involves “striving to fill bothersome knowledge-gaps.”<sup>192</sup> Such states “are theorized to resemble a ‘need-like’ condition, involving unpleasant feelings of tension and perplexity, which increase until satisfactorily resolved”<sup>193</sup> — in other words, “that restless need to know itch.”<sup>194</sup> Although deprivation curiosity has been described as more “closed,” compared to interest curiosity, the two forms of epistemic curiosity are correlated,<sup>195</sup> and both involve an active engagement in information seeking.

More generally, the overarching rubric of epistemic curiosity, like cognitive distrust, suggests an orientation toward learning rather than assuming. The term *curiosity* connotes a more positive affect than does the term *distrust*, so it seems more apt for pairing with *affective trust*. Moreover, the descriptor *epistemic* admits of more types of knowledge than does *cognitive*, so it better captures the forms of knowing people need to protect themselves.<sup>196</sup>

<sup>186</sup> D.E. Berlyne, *A Theory of Human Curiosity*, 45 BRITISH J. PSYCHOL. 180, 180 (1954). There is a rising tide of research on curiosity that may, before long, spur evolution in the current typology. See, e.g., Celeste Kidd & Benjamin Y. Hayden, *The Psychology and Neuroscience of Curiosity*, 88 NEURON 449, 457 (2015) (“[W]e anticipate that, although useful in the past, Berlyne’s categories will be replaced with other, differently formulated subtypes and that these newer ones will be motivated by new neural and developmental data.”).

<sup>187</sup> Marco Lauriola et al., *Epistemic Curiosity and Self-Regulation*, 83 PERSONALITY & INDIVIDUAL DIFFERENCES 202, 202 (2015).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* (emphasis omitted).

<sup>190</sup> *Id.* at 203.

<sup>191</sup> Judson Brewer, *Curiosity: Our Superpower for Everything from Breaking Bad Habits to Discovering Life*, DR. JUD (Sept. 24, 2019), <https://drjud.com/curiosity-superpower> [<https://perma.cc/MX2W-D3S5>].

<sup>192</sup> Lauriola et al., *supra* note 187, at 202.

<sup>193</sup> *Id.* at 203.

<sup>194</sup> Brewer, *supra* note 191.

<sup>195</sup> See, e.g., Litman, *supra* note 14, at 422–23.

<sup>196</sup> Note that, by introducing the terminology of *curiosity* to include the pursuit of information that might have some consequences, my usage seems to be in some tension with work that frames curiosity as wholly intrinsically motivated. See, e.g., Nick Chater & George Loewenstein, *The Under-Appreciated Drive for Sense-Making*, 126 J. ECON. BEHAV. & ORG. 137, 145 (2016) (“Curiosity, by definition, refers to intrinsically motivated seeking after information . . . where the

Returning to the theme of trust and intimate relationships, then, I want to propose a framework that combines *affective trust* and *epistemic curiosity*. What I think the law should encourage is the ability for individuals to feel safe and build bonds rooted in that feeling of safety, while also remaining open to and curious about information that could affect their well-being. Whether legal regimes can directly engender trust or curiosity is an unanswered empirical question, but current knowledge about epistemic curiosity can help evaluate which regimes are better situated at least to enable or support affective trust and epistemic curiosity in intimate relationships.<sup>197</sup>

Before applying this framework to Hasday's proposals and other contexts, I want to conclude by noting a geographical and gendered dimension to curiosity. Though we often think of curiosity as a positive quality or orientation or feeling,<sup>198</sup> curiosity has not been encouraged or praised in equal measures across identities.<sup>199</sup> Our celebrated portrayals of curiosity tend to be masculine, "able-bodied and quintessentially mobile" — bearing markers of "colonial and other unequal power relations."<sup>200</sup> The image of the European explorer, a lone man seeking out new lands in a dominating stance, is just one of Western culture's "problematic symbols of curiosity and models for curious endeavours."<sup>201</sup> By contrast, icons of female curiosity include Eve and Pandora<sup>202</sup> — a rather stark contrast.<sup>203</sup> Only some forms of curiosity are normative; our so-called natural curiosity is celebrated selectively. Though the pages that follow will not delve into this, a topic that warrants further examination is the differential need for encouraging curiosity, across identities.

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The rest of this Part identifies some possible directions for enabling affective trust and epistemic curiosity through law, beginning with Hasday's proposals for reform.

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information we are 'curious' about has no implications for our evaluation . . . of our lives."). In later parts of the discussion, I also bring in curiosity that is more open-ended, *see infra* p. 2015, but I view curiosity as capacious enough to include both.

<sup>197</sup> *See infra* sections III.C, pp. 2007–11, and III.D, pp. 2011–16.

<sup>198</sup> Richard Phillips, *Space for Curiosity*, 38 PROGRESS HUM. GEOGRAPHY 493, 493 (2014) ("In education and creative industries, ordinary workplaces and everyday life, [curiosity] is portrayed as a good thing, worthy of encouragement and support.").

<sup>199</sup> *See id.* at 502–03.

<sup>200</sup> *Id.* at 502.

<sup>201</sup> *Id.*

<sup>202</sup> *See, e.g.*, Gila Ofer & Joshua Durban, *Curiosity: Reflections on Its Nature and Functions*, 53 AM. J. PSYCHOTHERAPY 35, 37–38 (1999) (discussing, inter alia, the Greek myth of Pandora's box).

<sup>203</sup> *Cf.* Robert F. Blomquist, *Law and Curiosity*, 81 UMKC L. REV. 837, 839 (2013) ("Too much curiosity has been viewed by some thinkers as a type of intemperance — a vice from the virtue of *temperance* — related to excessive sensuality, cruelty, and an inordinate desire for things of the world.").

### B. Hasday's Proposals

[A] human interest and a semblance of truth sufficient to procure for these shadows of imagination that willing suspension of disbelief. . . .

— Samuel Taylor Coleridge<sup>204</sup>

Hasday's proposals implicitly reflect the framework of supporting both affective trust and epistemic curiosity. This section draws out this feature of the book, through several examples, and then uses the framework to question and refine two aspects of her normative prescription.

1. *Proposals Supporting Affective Trust.* — Hasday argues for reforms that would protect those duped by their intimates from the harsh consequences they currently face. Principally, she argues for better aligning of the law of intimate deception with the law governing non-intimate deception: "Judges are more likely to make wise decisions if they start with a rebuttable presumption that the law will provide remedies for deception within an intimate relationship when redress would be available for an equivalent example of deception outside of intimacy" (p. 200). Thus, under Hasday's approach,

[P]laintiffs who can establish all the elements of a claim for fraud, misrepresentation, battery, intentional infliction of emotional distress, or the like — but were deceived by an intimate rather than a stranger . . . [ — will be presumed able to] pursue their claims without regard to whether they were intimates of the defendants when deceived. (p. 204)

Hasday's reasons for supporting this approach include securing compensation to plaintiffs for their injuries and helping to deter intimate deception in the first place (p. 199).

As Hasday explains, some onlookers are skeptical about the injuries and reasons that duped intimates may sue.<sup>205</sup> But she suggests there are a meaningful number of legitimate cases of financial as well as emotional harm, in which plaintiffs sue in order to try "to secure at least partial compensation through money damages . . . notwithstanding the judiciary's present hostility to such claims" (p. 201).

Hasday recognizes that the law's power to deter intimate deception is limited: "I do not believe that the law could ever completely deter intimate deception and would never promise that the incidence of intimate deception would decline by a certain amount if courts adopt my proposed approach" (p. 201). She recognizes "[m]yriad factors [that] constrain the law's ability to deter," such as deceivers' ignorance of the law

<sup>204</sup> SAMUEL TAYLOR COLERIDGE, 2 *BIOGRAPHIA LITERARIA; OR, BIOGRAPHICAL SKETCHES OF MY LITERARY LIFE AND OPINIONS* 2 (2d ed. London, William Pickering 1847) ("In this idea originated the plan of the *Lyrical Ballads*; in which it was agreed, that my endeavours should be directed to persons and characters supernatural, or at least romantic; yet so as to transfer from our inward nature a human interest and a semblance of truth sufficient to procure for these shadows of imagination that willing suspension of disbelief for the moment, which constitutes poetic faith.")

<sup>205</sup> See *supra* pp. 1968–69.

and a belief that their intimates wouldn't sue them (p. 201). Nonetheless, Hasday argues, law has a role to play:

[E]ven a few well-publicized damage awards could jolt some people into worrying about whether deceiving their intimates could trigger legal liability, or simply cause some deceivers to reassess the wisdom and justness of their actions. Judicial victories for deceived intimates are especially likely to attract widespread media coverage and popular notice given the cultural fascination with intimate deception. (p. 201)

Under the “availability heuristic,”<sup>206</sup> such media attention to recoveries by duped intimates might well be remembered. And for those whose deception “involves sustained planning over time” — of which the kidney case is a striking example — the potential for deterrence seems quite real (p. 201).

If law can help create compensation for the material consequences of being duped, that might support particular plaintiffs in their ability to trust again, something that can be difficult after a dramatic breach.<sup>207</sup> More broadly, the prospect of a safety net — a pathway to compensation for financial and other injuries sustained — makes trusting a safer proposition for everyone (or, rather, for everyone who has the money and time for civil litigation<sup>208</sup>). A financial reward may fail to remedy an emotional injury, but it can quite literally compensate for financial or other material harm.<sup>209</sup>

Others of Hasday's proposals attempt to compensate victims or reduce deception in particular areas, for instance, by adding penalties for the harms of deception by those who perpetrate sham marriages (p. 229). Recall the woman who devoted half her work week for years to trying to bring her Soviet husband to the United States, only to learn after his successful arrival that he was merely using her to emigrate.<sup>210</sup> The effects on her career and her time could have been compensated and, even if he was judgment proof when he arrived, the U.S. legal system has evolved mechanisms for restitutionary relief meted out over time that could have provided her with some measure of fiscal and emotional relief for these injuries. Hasday also notes that “the federal government

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<sup>206</sup> See, e.g., Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 208 (1973) (“A person is said to employ the availability heuristic whenever he estimates frequency or probability by the ease with which instances or associations could be brought to mind.”).

<sup>207</sup> See *supra* note 137 and accompanying text.

<sup>208</sup> See, e.g., Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1536–37 (2016).

<sup>209</sup> A concern may of course be raised about crowding out, which merits more discussion, but should not undercut the overarching point ultimately made here: receiving material compensation for material harms makes trusting a safer proposition. On crowding out, see, for example, Kristen Underhill, *When Extrinsic Incentives Displace Intrinsic Motivation: Designing Legal Carrots and Sticks to Confront the Challenge of Motivational Crowding-Out*, 33 YALE J. ON REG. 213, 219–24 (2016).

<sup>210</sup> See *supra* notes 3–5, 10 and accompanying text (discussing *Gubin v. Lodisev*, 494 N.W.2d 782 (Mich. Ct. App. 1992)).

could reduce the incentives to deceive citizens into sham marriages for immigration purposes by increasing the opportunities for legal immigration that are open to people who are not closely related to United States citizens,” but does not hold out for an “overhaul” of the current immigration system (p. 228). She observes the oddity, however, of the current immigration system’s applying identical penalties to “[s]omeone who entered a sham marriage in cahoots with a willing accomplice” and to “someone who duped an unwitting citizen into a marriage that the citizen believed was genuine” (p. 228). At the very least, she suggests, the limited resources for enforcement should be expended on “pursuing cases where the citizen was duped” (p. 228).

2. *Proposals Supporting Epistemic Curiosity.* — Hasday not only proposes mechanisms to protect intimates’ sense of safety or comfortable gullibility, but also offers proposals that would better allow intimates to protect themselves. Of particular relevance to the framework I am suggesting, Hasday recommends creating multistate registries of certain public records, so that people are better able to investigate their intimates (pp. 231–32).

Hasday diagnoses a quandary surrounding investigating your intimates: on the one hand, courts treat people (often women<sup>211</sup>) like fools for falling prey to deceptive partners (p. 123);<sup>212</sup> on the other hand, the law also makes it exceedingly difficult to investigate an intimate partner (pp. 64–76). This isn’t just an accidental artifact of laws seeking to protect everyone from the prying eyes of strangers or commercial entities. Instead, Hasday argues, lawmakers passing anti-investigative laws “repeatedly recognized and appreciated that a substantial proportion of the investigations they were impeding would involve intimates” (p. 64). Finding the wherewithal to doubt intimates — to evince cognitive distrust or epistemic curiosity — is hard enough. Rather than supporting the curious impulse, though, the law makes things even harder for anyone willing to inquire into the truth.

Hasday’s proposed registries aim not to compromise privacy protections but to make public information about relevant intimate matters more readily available. The law should make it easier for intimates to learn whether they are being deceived when such facilitation can be accomplished without jeopardizing privacy, liberty, or security (pp. 231–32). Given the difficulty of investigating an intimate, Hasday suggests “consolidat[ing] at least some public records and mak[ing] them more

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<sup>211</sup> On the gender dimensions, see *supra* Part I, pp. 1966–77.

<sup>212</sup> One example that Hasday describes is a case in which the court “sent [the Indian male plaintiff] off with a version of the admonishment that courts frequently deploy when rejecting an intimate deception claim, advising [him] that he should have conducted a more thorough premarital ‘investigation’ to determine whether marrying [the female defendant] would be consistent with the caste system’s tenets” (p. 123) (citing *Pavel v. Navitlal*, 627 A.2d 683, 688 (N.J. Super. Ct. Ch. 1992)).

accessible,” such as “a centralized registry recording all marriages and divorces in the United States” and “bigamy convictions” (pp. 231–32).

This reform would help to enable the investigations that might grow from glimmers of cognitive distrust or epistemic curiosity. Because the reform would lower the administrative burdens to conducting such an investigation, pursuing the inquiry wouldn’t require such sustained and robust doubt.<sup>213</sup> Recent work in cognitive science suggests that curiosity is enhanced by knowledge gaps when an individual perceives they have the “skills, expertise, and resources needed to resolve the uncertainty.”<sup>214</sup> Whereas a knowledge gap that appears more difficult or impossible to resolve may lead to anxiety and diminished curiosity.<sup>215</sup> Making information more readily available may not only enable, but also enhance, curiosity.

Moreover, if these investigations became easier, norms might shift as to whether such inquiries are appropriate or even expected — as opposed to their current status, among some, as unusual or even paranoid.<sup>216</sup> With the rise of internet dating, inter alia, in other communities investigating an intimate has already become expected or encouraged<sup>217</sup> — and there, such a registry would facilitate access to reliable sources of information. Knowing that sources are solid may also support affective trust, a feeling of safety, alongside enabling curiosity.

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<sup>213</sup> On the role of administrative burdens in discouraging or thwarting certain actions, see, for example, PAMELA HERD & DONALD P. MOYNIHAN, *ADMINISTRATIVE BURDEN* 15–41 (2018); Emens, *supra* note 4, at 1451–54; Nir Eyal, Paul L. Romain & Christopher Robertson, *Can Rationing Through Inconvenience Be Ethical?*, 48 HASTINGS CTR. REP., Jan.–Feb. 2018, at 10, 10.

<sup>214</sup> Matthias J. Gruber & Charan Ranganath, *How Curiosity Enhances Hippocampus-Dependent Memory: The Prediction, Appraisal, Curiosity, and Exploration (PACE) Framework*, 23 TRENDS COGNITIVE SCI. 1014, 1018 (2019) (citations omitted).

<sup>215</sup> *Id.* at 1017; see also *id.* at 1018. Note, however, that the latter citation may be referring more to what’s termed “trait curiosity,” which is a persistent feature of an individual, than to “state curiosity,” which is our subject here.

<sup>216</sup> For a few examples of the popular view that a person who investigates their partner is paranoid or controlling, see Jenna Birch, *Is It Ever OK to Read Your Partner’s Texts and Emails?*, HEALTH (June 7, 2018), <https://www.health.com/relationships/should-you-snoop-on-partner> [<https://perma.cc/UH8M-H5E3>] (“Snooping won’t solve your relationship problems . . . . If you cannot trust your partner, you either need to ‘take a serious look at your own insecurities or admit to yourself that you are with someone you do not trust . . . . If you have to ask to see your partner’s texts or email, you have crossed a line.” (quoting clinical psychologist Mary Lamia)); Andrea Bonior, *20 Signs Your Partner Is Controlling*, PSYCH. TODAY (June 1, 2015), <https://www.psychologytoday.com/us/blog/friendship-20/201506/20-signs-your-partner-is-controlling> [<https://perma.cc/F6TD-LYLF>] (“Perhaps he or she checks your phone, logs into your email, or constantly tracks your Internet history, and then justifies this by saying they’ve been burned before, [or] have trust issues . . . . It’s a violation of your privacy, hand-in-hand with the unsettling message that they have no interest in trusting you and instead want to take on a police-like presence within your relationship.”).

<sup>217</sup> See, e.g., Alyson Krueger, *The Best Ways to “Research” Someone You Meet Online*, FORBES (Apr. 30, 2014, 12:21 PM), <https://www.forbes.com/sites/alysonkrueger/2014/04/30/the-best-ways-to-research-someone-you-meet-online> [<https://perma.cc/FZ8D-3SF9>]; see also *Study: How Single Americans Research Each Other Before Dates*, JDP (Oct. 2018), <https://www.jdp.com/blog/study-online-dating-statistics> [<https://perma.cc/5VFX-C8SG>]. The latter study is on point, but its conclusion should be considered in light of the source: a company that specializes in screening people.

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3. *A Proposal that Runs Counter to Trust.* — One secondary solution Hasday offers fails the test of trustworthiness, or threatens to do so. She floats as “worth serious consideration” (p. 224) the idea that, in order to claim parenthood on a birth certificate, a person should have to take a DNA test so that they would know whether they are a genetic parent and so adult children would later have access to this information (pp. 221–26). If implemented, she suggests, this policy would help prevent people (typically women) from lying to other people (typically men) about parentage (p. 221).

Hasday presents this registration idea as a kind of stopgap proposal because deception over parentage is one area where Hasday wants to deny remedies for intimate deceivers; she views the potential damage to children — to have the person thought to be their parent suing for the damage of having been so thought — to outweigh the presumed-parent’s interest in the suit for deception (pp. 221–23). A DNA registry would compensate for this exception to broader remedies for victims of intimate deception by providing some prophylaxis. Under such a system of DNA registration, a “man would know before embarking on the life-altering work of parenting a child whether he was that child’s biological father,” such that it would “protect that child from later shocks and disruptions” (p. 222).

Hasday tries to make this DNA registry neutral between men and women, and between same-sex and different-sex couples, in the sense that anyone can register on the birth certificate once the testing is done (p. 221). She proposes that, under the regime, “once a genetic parent agreed that someone without genetic ties to the child should be named as a legal parent on the birth certificate, genetics could not subsequently be a reason to privilege the genetic parent over the nongenetic parent in legal proceedings” (p. 222). But as I read Hasday, such a rule is not neutral. Under the regime she contemplates, it sounds as though parents must undergo genetic testing at the moment of the child’s birth, and one (genetic) intending parent will have the legal power to decide whether the other (nongenetic) intending parent is listed on the birth certificate. Such a regime not only treats couples with a mix of genetic and nongenetic parents differently than couples where all parents are genetically related to the child, but also assigns greater power to one parent in some couples.<sup>218</sup>

Hasday also seems to put more trust in the authorities of science and law than is currently warranted. For example, some work suggests that DNA testing may not be as reliable a determinant of parentage (and

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<sup>218</sup> Hasday does not directly say that a genetic parent would have the legal authority to grant or deny parenthood to the other, but I infer some kind of authority from the phrase beginning “once a genetic parent agreed” quoted above (p. 222).

much else) as people tend to imagine.<sup>219</sup> Hasday implies, however, that “quality control” challenges could be overcome “with sufficient money, time, and commitment” (p. 225). In addition, law and regulations cannot, at least not yet, safeguard privacy and prevent misuse and manipulation of genetic information (p. 225). Hasday suggests that protections such as “requir[ing] testing facilities to destroy the samples after using them” and “regulat[ing] testing facilities to safeguard against mistakes” could assuage privacy and quality control concerns (p. 225). Unless or until the system proves trustworthy, though, nobody should be forced to trust it — especially not individuals in the throes of becoming parents, one way or another, and preparing to take a child home from the hospital or other site of arrival.

The innovation Hasday contemplates would seem poised to diminish affective trust, the feeling of safety, for some people entering this central relationship together. Moreover, it isn’t enabling curiosity or inquiry; it is forcing information on people who may not want it. For example, some gay men will mix sperm so that they do not know from birth who is genetically related to a child they parent together.<sup>220</sup> If Hasday’s proposal requires them and the child to engage in genetic testing to establish who has genetic links at the time of birth, someone now has (possibly imperfect) information that those parents wanted no one to have. Preventing deception is not worth the bold and invasive experiment Hasday contemplates.

Ultimately, Hasday raises multiple concerns about a genetic registry, and she does not fully endorse this proposal. As noted earlier, she merely suggests it is “worth serious consideration” by lawmakers (p. 224). So perhaps Hasday is also less than fully trusting of its merits.

4. *Using the Framework to Refine Hasday’s Central Proposal.* — The framework of affective trust and epistemic curiosity also helps build a firmer foundation for Hasday’s central proposal, and offers a narrower way to expand the scope of redress for intimate deception. Hasday

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<sup>219</sup> See, e.g., Carl W. Gilmore, *Challenging DNA in Paternity Cases: Finding Weaknesses in an Evidentiary Goliath*, 90 ILL. B.J. 472, 474–75, 492 (2002); Peter Aldhous, *The Danger of Unreliable Paternity Tests*, NEW SCIENTIST (Dec. 1, 2010), <https://www.newscientist.com/article/mg20827893-200-the-danger-of-unreliable-paternity-tests> [<https://perma.cc/S2FH-G9DQ>]. But see Adam Rutherford, *How Accurate Are Online DNA Tests?*, SCI. AM. (Oct. 15, 2018), <https://www.scientificamerican.com/article/how-accurate-are-online-dna-tests> [<https://perma.cc/Y2H4-Y2A7>] (“When it comes to ancestry, DNA is very good at determining close family relations such as siblings or parents . . .”). On other concerns about DNA testing relevant to this discussion, see, for example, Alondra Nelson, *The Social Life of DNA: Racial Reconciliation and Institutional Morality After the Genome*, 69 BRIT. J. SOC. 522, 532–33 (2018).

<sup>220</sup> See, e.g., Dana Berkowitz & William Marsiglio, *Gay Men: Negotiating Procreative, Father, and Family Identities*, 69 J. MARRIAGE & FAM. 366, 378 (2007); Dean A. Murphy, *The Desire for Parenthood: Gay Men Choosing to Become Parents Through Surrogacy*, 34 J. FAM. ISSUES 1104, 1117 (2013) (describing this practice as “intentional unknowing”).

argues that, rather than so commonly denying redress for intimate deception, courts should adopt a presumption of treating intimate deception just like any other deception.

This seems sensible enough. And yet this proposal is vulnerable to the critique, discussed earlier,<sup>221</sup> that it would open the courts to a flood of cases. And more than just a numerical problem, which perhaps should be overcome if the change were warranted on the merits, the proposal must respond to the concern about courts trying to determine who is at fault when a conflict between intimates concerns the stuff of their intimacy. As the critics of fault-based divorce have argued, determining fault in an intimate relationship is exceedingly difficult.<sup>222</sup> Moreover, the proposal leaves open the question of how courts are to know when the presumption of equal treatment for intimate deception is overcome, outside of cases involving subordinating norms related to race or gender.<sup>223</sup>

The framework I present offers a way to navigate both of these dilemmas. Under the framework, cases that concern the courts should be those in which one party has *used* the affective trust created or sustained through intimacy to overcome or subdue the other party's epistemic curiosity about a matter of life, liberty, or property. That is, when one party's sense of emotional safety is exploited to create a loss beyond the relationship itself, courts should be prepared to intervene.

By way of illustration, all the cases set out at the start of this Review would have some prospect of recovery under this framework. The woman in *Gubin v. Lodisev*<sup>224</sup> whose Soviet husband married her for citizenship was duped into substantial labor, affecting her professional career, to support his immigration case.<sup>225</sup> The young woman in *Hanna v. Sheflin*<sup>226</sup> whose parents said they had invested her car accident recovery when they had actually spent it, lost the money and, perhaps, the chance to recover the money because of the time lapse facilitated by

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<sup>221</sup> See *supra* section I.D, pp. 1973–78.

<sup>222</sup> See, e.g., Scott & Scott, *supra* note 49, at 1296–97.

<sup>223</sup> Hasday discusses several scenarios when courts should overcome the presumption, such as “when granting redress would inflict significant injury on a blameless third party or when telling the truth would have placed the deceiver or a third party in imminent physical danger” (p. 227; see also p. 207). In her earlier discussion of the historical movement away from race-based claims of intimate deception, see *supra* notes 16 and 127 and accompanying text, and gender-subordinating norms explicitly animating these cases, see *supra* p. 1970, Hasday has already suggested that she would not want intimate deception cases to succeed where they rely on subordinating norms.

<sup>224</sup> 494 N.W.2d 782 (Mich. Ct. App. 1992).

<sup>225</sup> *Id.* at 784.

<sup>226</sup> 275 S.W.3d 423 (Tenn. Ct. App. 2008).

their lies.<sup>227</sup> Lastly, in *Dahl v. McNutt*,<sup>228</sup> the brother who gave up his kidney would clearly have a case that affective trust was manipulated to stem epistemic curiosity by him or his sister or both. Whether his sister would have a viable claim would depend on whether she had meaningful losses beyond the disappointment of a failed relationship.

As signaled by this last example, various cases would not be heard in court under this framework. A suit alleging a breach of promise to marry would be dismissed, even if the promisor knew he was lying rather than merely changing his mind, in the absence of some material consequence beyond the loss of, or damage to, the relationship itself — as would a case of adultery.<sup>229</sup> By contrast, bigamy would be actionable as a civil suit for intimate deception because the duped partner would be deprived of the legal status of spouse.<sup>230</sup>

That this framework would apply to the three cases at the start of this Review does not mean that all these plaintiffs — or those like them — would necessarily win. Nor does it mean the cases will be easy to resolve. But this refinement of Hasday's proposal offers a way to parse which cases of intimate deception should receive a full and fair trial, rather than being dismissed as beyond the purview of the courts: those cases in which an intimate trades on the affective trust of the other, to compromise the epistemic curiosity (or cognitive distrust) of the other, resulting in losses beyond the relationship itself.<sup>231</sup>

By offering parties the possibility of compensation in such cases, under Hasday's proposal or this variation on it, courts will better support affective trust, allowing intimates to rest more safely in their relationships, because the material consequences of being duped are not as great — as discussed earlier.<sup>232</sup> And courts will also be supporting epistemic curiosity, because pursuing an inkling that an intimate has lied may well lead to a firmer answer and material compensation in the courts, in at least some circumstances. Curiosity may ultimately be rewarded by more than just disappointment.

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<sup>227</sup> *Id.* at 425. Since she waited some time before asking for the money, the additional time lapse may not have mattered, but this would presumably be an argument she would make, which might get some traction.

<sup>228</sup> No. C3-97-601906, slip op. (Minn. Dist. Ct. Jan. 21, 1998).

<sup>229</sup> Hasday describes cases of breach of promise to marry and adultery (pp. 101–04). Note that Hasday does not argue for repeal of the anti-heart balm statutes, so many breach of promise to marry cases would also be unsuccessful under her proposed regime.

<sup>230</sup> Hasday discusses cases of bigamy (pp. 163–65).

<sup>231</sup> And indeed, this proposal may not alter many outcomes beyond Hasday's proposal, since hers piggybacks on the law of non-intimate deception and so some harm beyond the relationship may be effectively required there as well.

<sup>232</sup> See *supra* section III.B.1, pp. 1999–2001.

The framework set out here also helps to illuminate two other legal contexts: a recent innovation in the law of evidence; and a novel approach to prenuptial agreements. The final two sections consider each in turn.

*C. Jettisoning Trust: Spousal Privilege in State v. Gutierrez*

*The fact that nothing you say to your spouse can be used against you in a court of law makes me feel safe.*

— Elie Mystal<sup>233</sup>

In the month after Oxford published *Intimate Lies and the Law*, the New Mexico Supreme Court issued a landmark decision. With the ruling in *State v. Gutierrez*,<sup>234</sup> New Mexico became the only state with no form of spousal privilege.<sup>235</sup> The question of whether to exclude evidence based on spousal privilege is complicated, and this short section does not attempt a full weighing of the values and costs at stake. But an attention to the need for both affective trust and epistemic curiosity adds an overlooked element to the debates.

In the law of evidence, the spousal privilege comprises two quite different privileges: testimonial and marital confidences. Under the testimonial privilege, a person may refuse to testify, or be prevented from testifying, against a spouse.<sup>236</sup> Under the marital confidences privilege, a person may exclude testimony about communications made privately between spouses during a marriage.<sup>237</sup> A majority of states and the

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<sup>233</sup> Elie Mystal, *New Mexico Abolishes Spousal Privilege and I Have No Idea Who to Talk to About That*, ABOVE THE LAW (Sept. 6, 2019, 11:46 AM), <https://abovethelaw.com/2019/09/new-mexico-abolishes-spousal-privilege> [<https://perma.cc/Q2UB-S5AV>].

<sup>234</sup> No. S-1-SC-36394, 2019 WL 4167270 (N.M. Aug. 30, 2019).

<sup>235</sup> *Id.* at \*21 (Vigil, J., concurring in part and dissenting in part).

<sup>236</sup> See, e.g., RUTTER GROUP PRACTICE GUIDE, FEDERAL CIVIL TRIALS & EVIDENCE 8:3740; Michael H. Graham, *Husband-Wife Privilege: Testimonial*, in 4 HANDBOOK OF FEDERAL EVIDENCE § 505:1 (8th ed.); *Marital Privilege*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/marital\\_privilege](https://www.law.cornell.edu/wex/marital_privilege) [<https://perma.cc/9NJ4-MNTJ>]. There are variations across the fifty states as to whether the privilege applies to civil cases, criminal cases, or both; whether it applies only during a marriage or also after a marriage has ended; and which spouse(s) are able to prevent testimony. All states recognize exceptions for civil suits between spouses and cases where one spouse commits a crime against the other. See Memorandum from Zane Muller to Elizabeth F. Emens (Jan. 18, 2020) (on file with the Harvard Law School Library) [hereinafter Muller Memorandum] (compiling current law of testimonial and marital privileges in all fifty states).

In most of the states that recognize the testimonial privilege, and in the federal courts, the right lies with the witness spouse, who may waive the privilege over the defendant spouse's objection. See Muller Memorandum, *supra*; see also *Trammel v. United States*, 445 U.S. 40, 53 (1980) (setting out the testimonial privilege rule in federal courts). In some states, however, the privilege is held by only the defendant spouse or by both spouses. See, e.g., ARIZ. REV. STAT. ANN. § 13-4062 (2009) (granting the privilege exclusively to the defendant spouse); KY. R. EVID. 504(a) (granting the privilege to both spouses); see also Muller Memorandum, *supra*.

<sup>237</sup> As with the testimonial privilege, there is variation across jurisdictions in who holds the privilege and whether it applies in civil cases, criminal cases, or both. See Muller Memorandum, *supra*

federal courts recognize the testimonial privilege, though a sizable number have affirmatively abandoned it and others have limited its scope.<sup>238</sup> Prior to *Gutierrez*, all fifty states, the District of Columbia, and the federal courts recognized the marital confidences privilege in some form.<sup>239</sup>

New Mexico eliminated the testimonial privilege nearly forty years ago.<sup>240</sup> With *Gutierrez*, New Mexico also became the first state to end the marital confidences privilege.<sup>241</sup> In the eponymous case, *Gutierrez* had revealed a secret to both his first wife and his second wife, which he sought to suppress at his trial.<sup>242</sup> The secret was that he murdered his first wife's uncle, a few months after she told *Gutierrez* that the uncle had raped her repeatedly.<sup>243</sup> *Gutierrez* told her "not to worry about anything anymore," and later he came home agitated, showed her the body, and involved her in looking for a bullet casing he'd left there.<sup>244</sup> After their divorce, he ended up telling his second wife, after his parents repeatedly stated that they would "send him away for the rest of his life."<sup>245</sup> Ultimately *Gutierrez* and his second wife separated as well, and *Gutierrez* was indicted thirteen years after the murder.<sup>246</sup> At his murder trial, *Gutierrez* sought to exclude both women's testimony about his confessions, and on appeal the New Mexico Supreme Court decided to abolish the marital confidences privilege.<sup>247</sup>

Chief Justice Judith Nakamura's majority opinion reviewed several arguments for and against the privilege, including the position that protecting marital confidences supports privacy and autonomy, as well as encourages communication between spouses.<sup>248</sup> The opinion concluded, however, that the opposing arguments won the day.<sup>249</sup> Among other reasons, the court was not persuaded that the privilege makes any

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note 236. In some cases, marital confidences are not admissible regardless of the wishes of the parties. R. Michael Cassidy, *Reconsidering Spousal Privileges After Crawford*, 33 AM. J. CRIM. L. 339, 366–67 (2006).

<sup>238</sup> Cassidy, *supra* note 237, at 364–65 ("Thirty one states and the District of Columbia recognize the adverse testimonial privilege [as of 2006]. Nineteen states have abandoned this privilege entirely . . ." (citation omitted)); see also Muller Memorandum, *supra* note 236.

<sup>239</sup> Cassidy, *supra* note 237, at 365–66 (noting that, as of 2006, "[a]ll fifty states and the District of Columbia recognize a privilege for confidential communications between spouses" (citation omitted)); *United States v. Brock*, 724 F.3d 817, 820–21 (7th Cir. 2013) (discussing the federal marital confidences privilege); see also Muller Memorandum, *supra* note 236.

<sup>240</sup> Richard A. Gonzales, *Evidence*, 11 N.M. L. REV. 159, 175 (1980–1981).

<sup>241</sup> *State v. Gutierrez*, No. S-1-SC-36394, 2019 WL 4167270, at \*21 (N.M. Aug. 30, 2019) (Vigil, J., concurring in part and dissenting in part); *id.* at \*1 (majority opinion).

<sup>242</sup> *Id.* at \*1 (majority opinion).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at \*4–8.

<sup>249</sup> *Id.* at \*8.

practical difference in whether spouses communicate, because people don't know about the privilege<sup>250</sup> and because they don't go to court very often.<sup>251</sup> "Spouses communicate openly with one another due to the 'trust they place in the loyalty and discretion of each other,' not because the privilege shields their communications from future disclosure in court."<sup>252</sup>

Two justices dissented from the ruling. Justice Charles Daniels agreed with the change, but objected to the court's decision on institutional grounds.<sup>253</sup> Justice Barbara Vigil, by contrast, dissented on the merits.<sup>254</sup> Her opinion began one of its sections by quoting *Obergefell*<sup>255</sup>: "Marriage 'fulfills yearnings for security, safe haven, and connection that express our common humanity.'"<sup>256</sup> This sounds in our notion of affective trust, as does some of the commentary following the decision: "[T]hat spousal privilege just seems like a thing that gets to the heart of keeping the state out of your life. The fact that nothing you say to your spouse can be used against you in a court of law *makes me feel safe*."<sup>257</sup> Justice Vigil's dissent argued: "As a solemn vow of unity, marriage creates for many a sacred space to share oneself with a chosen other. That

<sup>250</sup> *Id.* at \*6 ("One of its principal weaknesses is that it rests on two untested assumptions: that (1) married people know the privilege exists, and (2) they rely on it when deciding how much information to share." (citing 1 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 86, at 523 (7th ed. 2013))). Chief Justice Nakamura continued, noting that "[c]ritics argue 'that there is no empirical evidence to support [these] factual assumptions.'" *Id.* (second alteration in original) (quoting 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., 25 FEDERAL PRACTICE & PROCEDURE: EVIDENCE, § 5572, at 532 (1989)).

<sup>251</sup> *Id.* ("Additionally, most people are unlikely to alter their behavior based on the privilege because most people seldom appear in court and do not tailor their conversations around what may or may not be privileged.")

<sup>252</sup> *Id.* (quoting BROUN, *supra* note 250, § 86, at 523).

<sup>253</sup> *Id.* at \*21 (Daniels, J., concurring in part and dissenting in part) (concluding that "a change to an evidence rule, particularly a significant change unnecessary to a dispositive outcome in litigation before us, should be handled through our established rules process, with input from the rules committee, with input from the larger legal community, and with input from the state we serve"). Since our subject is intimacy, it is perhaps worth noting that Justice Daniels apparently died two days after writing this opinion, and some of his language suggests a fond farewell to his colleagues. Eugene Volokh, *N.M. Abolishes Marital Communication Privilege, Based in Large Part on Feminist Arguments*, VOLOKH CONSPIRACY (Sept. 14, 2019, 5:10 PM), <https://reason.com/2019/09/14/nm-abolishes-marital-communication-privilege-based-largely-on-feminist-arguments> [<https://perma.cc/7AYT-ZXWW>].

<sup>254</sup> *Gutierrez*, 2019 WL 4167270, at \*16 (Vigil, J., concurring in part and dissenting in part).

<sup>255</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>256</sup> *Gutierrez*, 2019 WL 4167270, at \*17 (Vigil, J., concurring in part and dissenting in part) (quoting *Obergefell*, 135 S. Ct. at 2599).

<sup>257</sup> Mystal, *supra* note 233 (emphasis added). The argument continues, "I'd argue that the confines of one's relationship is where the expectation of privacy is the strongest. I don't have to know how it works to know, and justifiably rely upon the fact, that when I fantasize with my spouse the six people I'd like to see die in a structure fire, that's not going to come back on me if one of those people ends up falling down an elevator shaft in our building." *Id.*

space should remain free from state intrusion and compulsion that would demand one spouse to reveal the intimate secrets of the other.”<sup>258</sup>

The gender dimensions of this case are interesting, and they feature explicitly in the majority opinion. Chief Justice Nakamura mentioned, among other arguments, that the privilege has been used to shield domestic abusers.<sup>259</sup> As the dissent from Justice Vigil pointed out, however, New Mexico’s spousal privilege already had an exception for domestic violence.<sup>260</sup> Chief Justice Nakamura also observed that most defendants who invoke the privilege, even today, are men, using it to prevent women from betraying their confidences.<sup>261</sup>

Her concern with men preventing women from revealing their secrets is typical in its focus on the ex post scenario, where secrets have already been revealed, and the question is how to handle them. What is overlooked are the gender implications of whether the secrets are shared in the first place.

Courts commonly assume that men tell their wives their misdeeds.<sup>262</sup> *He must have told her* — is an implicit if not explicit refrain. Reading *Intimate Lies and the Law* casts a spotlight on how often he *doesn’t* tell her. Moreover, it’s not so surprising that courts aren’t as inclined to say, *She must have asked him if he did it*. We do not assume that women ask their mates the hard questions. We do not encourage them to do so. “*Trust . . . then jump!*” is our romantic myth instead.

Gutierrez did reveal the secret of his crime to both his first wife and his second wife.<sup>263</sup> The first time was to seek wife #1’s help with the cover-up.<sup>264</sup> The second was also not whispers across a pillow. Instead, overhearing an argument between Gutierrez and his parents led wife #2 to ask.<sup>265</sup> Nonetheless, she did ask, and he did tell.<sup>266</sup>

Evincing curiosity about this kind of bad news is no easy feat. The growing literature on information avoidance is spotlighting just how much people feel they do not want to know bad news.<sup>267</sup> Such inklings

<sup>258</sup> *Gutierrez*, 2019 WL 4167270, at \*17 (Vigil, J., concurring in part and dissenting in part).

<sup>259</sup> *See id.* at \*8 (majority opinion).

<sup>260</sup> *Id.* at \*17 (Vigil, J., concurring in part and dissenting in part) (“The Majority’s argument that the spousal communications privilege cannot be justified on privacy grounds without ignoring the private pain of domestic violence victims itself ignores that New Mexico has abrogated the spousal communications privilege in cases where one spouse is accused of inflicting harm on the other.” (citations omitted)).

<sup>261</sup> *Id.* at \*7–8 (majority opinion).

<sup>262</sup> *See, e.g.*, *United States v. Corchado-Peralta*, 318 F.3d 255, 258 (1st Cir. 2003). I thank Daniel Richman for this point.

<sup>263</sup> *Gutierrez*, 2019 WL 4167270, at \*1.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *See, e.g.*, Gerd Gigerenzer & Rocio Garcia-Retamero, *Cassandra’s Regret: The Psychology of Not Wanting to Know*, 124 PSYCHOL. REV. 179, 193 (2017); Russell Golman, David Hagmann &

of curiosity may need whatever encouragement they can get. And, as discussed earlier, recent empirical work suggests that people's curiosity is increased by the prospect of actually getting an answer to a query.<sup>268</sup> In addition, knowing that your spouse *could* tell you their secrets, and feel those secrets are as safe with you as with their lawyer, could help support affective trust, a feeling of safety.<sup>269</sup>

Taken together, these points present one more argument on the side of preserving the marital confidences privilege. Though deciding whether the privilege is justified goes beyond the scope of this Review, the need to build affective trust and epistemic curiosity supplies one more reason to wish the justices had paused to read Hasday's latest book, released one month earlier, before making New Mexico the first state to abolish the marital confidences privilege.

#### D. Trust . . . and Ask: Prenup Wrappers

*Why do so many couples opt for the same vows?*

— Betsey Stevenson and Justin Wolfers<sup>270</sup>

Whatever else it might do, a marital confidences evidentiary privilege will do nothing for partners who are not, or not yet, married — many of whom populate the pages of *Intimate Lies and the Law*. This section considers an innovation to support affective trust and epistemic curiosity among the not-yet-married.

Most marrying couples don't appear to sign prenuptial agreements, as noted earlier.<sup>271</sup> The mythology of "trust . . . then jump" seems incompatible with the standard agenda of the prenup: to plot a pathway through divorce. Suggesting a prenup therefore makes a person sound less serious about marriage or commitment.

Professor Gary Becker once proposed a solution to this dilemma: mandatory prenups.<sup>272</sup> If everyone has to sign a prenup, then the fact

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George Loewenstein, *Information Avoidance*, 55 J. ECON. LIT. 96, 96–97 (2017); Cass R. Sunstein, *Ruining Popcorn?: The Welfare Effects of Information*, 58 J. RISK & UNCERTAINTY 121, 125–27 (2019); see also Caroline J. Charpentier, Ethan S. Bromberg-Martin & Tali Sharot, *Valuation of Knowledge and Ignorance in Mesolimbic Reward Circuitry*, 115 PNAS, at E7255 (2018) (finding, inter alia, that reward systems in the brain lead humans to choose ignorance about unfavorable future outcomes).

<sup>268</sup> See *supra* p. 2002.

<sup>269</sup> Cf. Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2115 (1995) (making a related point about the testimonial privilege).

<sup>270</sup> Betsey Stevenson & Justin Wolfers, *Couples Should Negotiate Their Marriage Vows*, N.Y. TIMES (Aug. 17, 2012, 12:32 PM), <https://www.nytimes.com/roomfordebate/2012/01/20/the-gingrich-question-cheating-vs-open-marriage/couples-should-negotiate-their-marriage-vows> [<https://perma.cc/4KVD-2QSF>].

<sup>271</sup> See *supra* note 158 and accompanying text.

<sup>272</sup> Gary S. Becker, *Why Every Couple Should Sign a Contract*, BLOOMBERG (Dec. 29, 1997, 12:00 AM), <https://www.bloomberg.com/news/articles/1997-12-28/why-every-married-couple-should-sign-a-contract> [<https://perma.cc/T8Y6-UJ38>].

of doing so would convey nothing about a person's intentions — beyond what is said in the prenup itself.<sup>273</sup> And of course a prenup could clarify, in a separate property state, that all property is shared and that partners plan to take care of each other, should divorce occur, contrary to the usual self-protective, individualistic vision of prenups.<sup>274</sup> Prenups can also be limited by so-called *sunset clauses*, shifting partners into the state defaults after a period of years once they know each other better.<sup>275</sup> For better or worse, though, the resistance to mandatory anything in this country makes Becker's proposal unlikely to take hold.

This leads to the question whether, instead of becoming mandatory, prenups could become more appealing. Writing prenups could be part of designing a life together, of making affirmative and positive commitments. Prenups could be more like marriage vows — and thus writing them might be more like a wedding than a divorce.

We might call these aspirational documents “prenup wrappers.”<sup>276</sup> The name comes from the tool of “exam wrappers,” informal self-assessment forms completed by students after taking an exam or upon receiving it back.<sup>277</sup> An exam wrapper encourages a student to be curious about their practices and performance to date and intentions for the future; in a sense, then, exam wrappers aim to encourage a student's curiosity about substance and process, alongside the formal evaluation of an exam grade.<sup>278</sup>

A prenup wrapper would, similarly, couple informal inquiry with the formal legal apparatus of an enforceable prenup. It might cover, for instance, any of the following: *general aspirations* (such as the kinds of things typically found in wedding vows); *daily intentions* (such as how partners aim to treat each other or appreciate each other in a routine way<sup>279</sup>); *roles and responsibilities* (such as how partners intend to divvy up household labor, which could be “customized” and more or less detailed, or which could use an off-the-rack model like “gender equity” or “relational” roles<sup>280</sup>); *shared values* (such as agreements about

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<sup>273</sup> See *id.*

<sup>274</sup> See, e.g., LAURIE ISRAEL, THE GENEROUS PRENUP 12–15, 41–54 (2018); Laurie Israel, *How to Mediate a Prenuptial Agreement*, IVKDLAW (2017), <http://ivkdllaw.com/how-to-mediate-a-prenuptial-agreement> [<https://perma.cc/9W28-62TB>].

<sup>275</sup> *A Sunset Clause Can Test a Marriage*, WEINMAN & ASSOCIATES (May 20, 2016), <https://www.weinmanfamilylaw.com/blog/2016/05/a-sunset-clause-can-test-a-marriage.shtml> [<https://perma.cc/LW2B-7BEH>].

<sup>276</sup> I thank Ian Harris for the thoughtful question that sparked this idea of prenup wrappers.

<sup>277</sup> E.g., Sarah J. Schendel, *What You Don't Know (Can Hurt You): Using Exam Wrappers to Foster Self-Assessment Skills in Law Students*, 40 PACE L. REV. 154, 161–62 (2020).

<sup>278</sup> *Id.*

<sup>279</sup> Cf. STAN TATKIN, WIRED FOR LOVE 98–101 (2012).

<sup>280</sup> These terms come from Professor Barbara Stark's proposal for “marriage proposals” in which partners claim their model going in to the marriage, with legal consequences. Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CALIF. L. REV. 1479, 1528–29 (2001).

monogamy<sup>281</sup> or parenting); *hard times* (such as plans for challenging events that might arise, like job loss); *questions for inquiry* (such as a record of questions asked of themselves and each other pre-marriage, from the existential to the mundane to the probing<sup>282</sup>); or *process intentions* (such as an agreement on process if they disagree or one or both are contemplating separation). Wholesale versions would be available, but of course partners could choose to customize and do more, less, or something other than this list of possible elements.

The prenup wrapper would be conceived with the understanding that change would occur, which is one reason not to attempt to make the wrapper legally enforceable. “Lifestyle clauses” in prenups — which integrate some of the items proposed here *within* the four corners of a prenup — are often unenforceable, and even in states that enforce them, their enforcement is unpredictable.<sup>283</sup> Another reason, then, not to include them in the prenup itself is so partners avoid the cost of paying a lawyer to review these items.<sup>284</sup> Moreover, these lifestyle clauses tend to be framed more in terms of prohibitions and consequences — for instance, limits on how much weight a spouse can gain<sup>285</sup> — rather than in any more affirmative vision of shared values or intentions.

The prenup wrapper is similar in some ways to, for instance, a “letter of intent” to designated guardian(s) that a parent writing a will might complete.<sup>286</sup> Such a letter is unenforceable, but a trusts and estates lawyer might recommend it as a vehicle for communicating the child’s needs and the parents’ aspirations for the child’s care. A lawyer might therefore provide a version with blanks to help the client complete the process. The prenup wrapper is different, however, in the present purposes it may serve for those who create it.

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<sup>281</sup> See, e.g., *Lifestyle Clauses and Marital Agreements*, FROST & BECK PC (Mar. 19, 2014) <https://www.frostbecklaw.com/blog/2014/03/lifestyle-clauses-and-marital-agreements.shtml> [<https://perma.cc/J8WU-VW9U>].

<sup>282</sup> For ideas for these kinds of questions, see generally, for example, SUSAN PIVER, *THE HARD QUESTIONS* (2000), or, more playfully, GREGORY STOCK, *THE BOOK OF QUESTIONS* (2013).

<sup>283</sup> See, e.g., *Lifestyle Clauses and Marital Agreements*, *supra* note 281; see also Debra Cassens Weiss, *No Cheating! Lifestyle Clauses Gain Popularity in Prenups*, ABA J. (June 5, 2013, 12:00 PM), [http://www.abajournal.com/news/article/no\\_cheating\\_lifestyle\\_clauses\\_gain\\_popularity\\_in\\_prenups](http://www.abajournal.com/news/article/no_cheating_lifestyle_clauses_gain_popularity_in_prenups) [<https://perma.cc/ZD3E-QR6A>]; *What’s a Prenuptial “Lifestyle” Clause?*, MARVEL & WONG, PLLC (Feb. 21, 2018), <https://www.mwfamilylaw.com/blog/2018/02/whats-a-prenuptial-lifestyle-clause.shtml> [<https://perma.cc/X9YY-T7QA>].

<sup>284</sup> Of course this is not necessarily a plus for the lawyers.

<sup>285</sup> See, e.g., Monica Mizzi, *Should You Add a “Lifestyle Clause” to Your Prenup? (Or Are They Just for Celebrities?)*, HUFFPOST (July 22, 2016, 12:18 AM), [https://www.huffpost.com/entry/should-you-add-a-lifestyle-clause-to-your-prenup\\_b\\_5790889e4bo9208b5f1876](https://www.huffpost.com/entry/should-you-add-a-lifestyle-clause-to-your-prenup_b_5790889e4bo9208b5f1876) [<https://perma.cc/ZW8H-3LV6>].

<sup>286</sup> See, e.g., Kate Moss, *Letter of Intent: A Way to Communicate Your Wishes into the Future*, TEX. SCH. FOR BLIND & VISUALLY IMPAIRED, <http://www.tsbvi.edu/seehear/archive/intent.htm> [<https://perma.cc/QKX7-68XP>].

Various authorities, from lawmakers and legal scholars to mental health professionals and religious advisors, have encouraged partners contemplating marriage to engage in big conversations or premarital counseling.<sup>287</sup> What distinguishes prenup wrappers is that the extralegal conversation is wrapped around — “braided” with<sup>288</sup> — the legal inquiry, rather than constituting a separate event, on the one hand, or an actual component of the formal legal prenup, on the other.<sup>289</sup> The aim would be to support both epistemic curiosity and affective trust.

The formal legal prenup is commonly seen as an emblem of distrust — not even of curiosity, however defined. As one commentator put it, “*If you want a prenup, you don’t want marriage.*”<sup>290</sup> To combine its creation with a process of setting out affirmative aspirations may

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<sup>287</sup> See, e.g., FLA. STAT. § 741.0305 (2014) (reducing the marriage license fee by \$32.50 if couples engage in premarital counseling with a qualified psychologist, social worker, therapist, or religious institution representative); Matthew J. Astle, *An Ounce of Prevention: Marital Counseling Laws as an Anti-divorce Measure*, 38 FAM. L.Q. 733, 741–743 (2004) (discussing the history of premarital counseling legislation and arguing that more states should follow Florida’s approach of incentivizing premarital counseling as a means to lower divorce rates); Nicole Licata, Note, *Should Premarital Counseling Be Mandatory as a Requisite to Obtaining a Marriage License?*, 40 FAM. CT. REV. 518, 521–25 (2002) (noting the prevalence of premarital counseling programs in religious institutions and arguing that because premarital counseling has significant policy benefits, including reducing the likelihood of divorce, it should be required prior to obtaining a marriage license); Amanda Kepler, Marital Satisfaction: The Impact of Premarital and Couples Counseling 14–18 (2015) (unpublished M.S.W. clinical research paper, St. Catherine University), [https://sophia.stkate.edu/cgi/viewcontent.cgi?article=1472&context=msw\\_papers](https://sophia.stkate.edu/cgi/viewcontent.cgi?article=1472&context=msw_papers) [<https://perma.cc/4X6S-F7DU>] (collecting studies concluding that premarital counseling provides significant benefits to couples); Caroline Sweatt-Eldredge, *Do You Really Need Premarital Counseling?*, PSYCHOL. TODAY (June 14, 2017), <https://www.psychologytoday.com/us/blog/the-connected-life/201706/do-you-really-need-premarital-counseling> [<https://perma.cc/6HPQ-D9HL>] (“Studies reveal that premarital counseling is an effective tool to use as you begin your married life. Researchers have discovered that it is a helpful way to improve your communication and conflict management skills while increasing your overall relationship quality and satisfaction.”).

<sup>288</sup> Cf. Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377, 1383 (2010) (“The contract combines formal and informal methods of enforcement through a process we term ‘braiding.’ This technique builds trust, and problem solving capacity more generally, by interweaving formal and informal terms in ways that respond to the uncertainty inherent in the innovation process.” (citations omitted)).

<sup>289</sup> This braiding feature also distinguishes prenup wrappers from the “marriage contracts” that Lenore Weitzman has written about — though Weitzman’s work could offer interesting ideas for topics to be covered in prenup wrappers; in addition, those who wanted to create legally enforceable contracts in lieu of state marriage might also want to create nonenforceable wrappers to cover topics beyond what they wanted (or could get) enforced. See LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* 417–58 app. (1981) (finding that intimate contracts were more egalitarian than traditional marriage roles, while acknowledging the notable limits and selection bias in the study design); see also Lenore J. Weitzman et al., *Contracts for Intimate Relationships: A Study of Contracts Before, Within, and in Lieu of Legal Marriage*, 1 ALTERNATIVE LIFESTYLES 303, 311–13 (1978) (describing intimate contracts).

<sup>290</sup> W. Bradford Wilcox, *If You Want a Prenup, You Don’t Want Marriage*, N.Y. TIMES (Apr. 5, 2013, 3:25 PM), <https://www.nytimes.com/roomfordebate/2013/03/21/the-power-of-the-prenup/if-you-want-a-prenup-you-dont-want-marriage> [<https://perma.cc/6JG5-ESDX>].

make the prenup more palatable — thus supporting epistemic curiosity in the form of an active stance toward the problem of what-if-the-worst-happens.<sup>291</sup> More substantively, the prenup wrapper encourages interpersonal curiosity<sup>292</sup> at a moment when its opposite — “trust . . . then jump” — is celebrated and mythologized. This may help prepare for challenging times ahead by confronting some of those challenges with eyes wide open now.<sup>293</sup>

Moreover, the process of learning about each other and communicating about past, present, and future may help to build connection and deepen the relationship in the present moment.<sup>294</sup> The openness associated with interest curiosity, that subspecies of epistemic curiosity, may be cultivated by such dialogue.<sup>295</sup> A prenup wrapper might even contain questions the parties intend to ask at particular intervals, or some other process for cultivating genuine curiosity about one another.<sup>296</sup> Relationships vary, and only some marrying couples would opt for this approach. But for those who do, the prenup wrapper could support affective trust as well as truthful exchange.<sup>297</sup> *Trust . . . and ask.*<sup>298</sup>

<sup>291</sup> Cf., e.g., Becker, *supra* note 272; Stevenson & Wolfers, *supra* note 270 (making the case for individualized marriage contracts outside the context of a prenup as a means of strengthening marriage and communication).

<sup>292</sup> Cf., e.g., Karl Fleischmann, *Marriage by Contract: Defining the Terms of the Relationship*, 8 FAM. L.Q. 27, 29–31 (1974).

<sup>293</sup> See *id.*; cf. DEWEY, *supra* note 184, at 26 (“The exercise of thought is, in the literal sense of the word, *inference* . . . . It involves a jump, a leap, a going beyond what is surely known . . . . The very inevitableness of the jump, the leap, to something unknown, only emphasizes the necessity of attention to the conditions under which it occurs so that the danger of a false step may be lessened and the probability of a right landing increased.”).

<sup>294</sup> See, e.g., Arthur Aron et al., *The Experimental Generation of Interpersonal Closeness: A Procedure and Some Preliminary Findings*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 363, 363–64, 366–67 (1997); see also Mandy Len Catron, *To Stay in Love, Sign on the Dotted Line*, N.Y. TIMES (June 23, 2017), <https://nyti.ms/2sXmYoG> [<https://perma.cc/BH8J-5S6J>].

<sup>295</sup> Cf. Brewer, *supra* note 191; Litman, *supra* note 14, at 422.

<sup>296</sup> See *supra* note 282 and accompanying text (discussing questions partners might ask one another).

<sup>297</sup> In this Review, the focus has been on gaining information for defensive reasons — to protect against harms due to deception, the subject of Hasday’s book — but building curiosity may serve affirmative or aspirational purposes in a relationship as well. Time may play a role in which form of curiosity is most valuable. Early on, a defensive curiosity may be more important — hence the appeal to some of sunset clauses in prenups, *A Sunset Clause Can Test a Marriage*, *supra* note 275 — but over time cultivating interest curiosity may become more valuable. Genuine curiosity about a partner tends to diminish after the “explore, discover” stages common in the “initial phases of romantic relationships.” Todd B. Kashdan et al., *Curiosity Protects Against Interpersonal Aggression: Cross-Sectional, Daily Process, and Behavioral Evidence*, 81 J. PERSONALITY 87, 96 (2013). Not only does that initial “explore, discover” phase pass with time; other factors also push against interest curiosity in a long-term relationship, including pressures to conform to a partner’s expectations or confidence in their knowledge (*How did I not know you whistle?*) or a partner’s wants or sensitivities (*But you like going to visit my family, right?*). On some of the values of curiosity in relationships, see, for example, *id.* at 89–90, 98. Credit for the whistling reference goes to MARY OLIVER, *The Whistler*, in OUR WORLD 85, 85 (2007).

<sup>298</sup> For many, this calls to mind the Russian saying, “Trust, but verify,” or “Doveryai no proveryai,” made famous in U.S. circles by President Ronald Reagan’s fondness for it. See, e.g.,

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Happy prenup wrappers and spousal testimonial privileges illustrate the uses of considering affective trust alongside epistemic curiosity, but they help only those who marry or contemplate marriage. Hasday's central proposal, however, reaches more broadly. If courts begin presuming that intimate lies be treated the same as other lies, trusting gets safer across relationship types — as safe as trusting can be, that is. And these cases can be usefully cabined by limiting successful claims of intimate deception to those cases in which one partner parlays affective trust to overcome epistemic curiosity and engage in self-dealing. Such a legal regime should support affective trust and epistemic curiosity in intimate relationships without flooding the courts with disappointed lovers.

#### CONCLUSION

*[N]orms promoting trust within intimacy can help foster individual fulfillment, productive cooperation, committed caregiving, and satisfying community life . . . .*

— Jill Elaine Hasday (p. 51)

Hasday has supplied a rigorous, engaging treatment of intimate lies and the law. She has shed light on the gender dimensions of our practices of lying and truth telling, and the system that supports those practices. And this important book has also offered provocative questions and promising proposals to support a combination of trust and distrust.

I have presented a framework combining affective trust and epistemic curiosity to evaluate Hasday's proposals and recent legal developments as well as to spur innovations. Ultimately, if cognitive distrust takes the form of curiosity, not insatiable but willing to be satisfied eventually, then that curiosity may well support a deeper form of affective trust. Asking the questions in the back of their minds may better enable partners to inhabit the trust that comes after the answers.

*Intimate Lies and the Law* has illuminated this overlooked area of law and offered some promising ideas for legal reform. Perhaps this compelling book will also make it easier for individuals to ask hard questions, to find out the answers, and to settle in to a feeling of security in their intimate relationships, comforted by the legal and social safety net that can catch them when they fall.

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Barton Swaim, "Trust, but Verify": An Untrustworthy Political Phrase, WASH. POST (Mar. 11, 2016), <http://wapo.st/1TTQyw5> [<https://perma.cc/K4BK-KW9K>]. Note that Barton Swaim appears to define trust like Carol Rose's "real trust," Rose, *supra* note 70, at 534, rather than disaggregating the affective and cognitive components, as my framework does — and therefore does not believe it's possible both to trust and to verify. Swaim, *supra*. ("Of course, taken on its own, the phrase is either ambiguous or meaningless: If you trust, you won't insist on verifying, whereas if you insist on verifying, clearly you don't trust.")