

CAN SEPARATE BE EQUAL?
INTIMATE ECONOMIC EXCHANGE AND THE COST OF
BEING SPECIAL

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Replying to Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491 (2005).

How does the law respond to economic exchanges in the intimate sphere? Professor Hasday answers this important question by illustrating that the legal system is “eager to differentiate intimate relations” and does so by locating these relations in “a sphere of life removed from the market.”¹ Although the general argument for separation of spheres is far from being new, it is voiced in this Article in a nuanced and careful tone. Professor Hasday convincingly demonstrates that the law differentiates intimate exchanges from regular market exchanges not only by *refusing* to enforce the transactions made between spouses or in the familial context (passive approach), but also by *applying special rules* upon recognizing such exchanges (active approach). In an attempt to explain the law’s use of these opposed techniques, Professor Hasday suggests that they actually aim at the same goal. They seek to mark “the dignity and specialness of intimate relations”² by “claiming that they are separate from the market.”³

As a realist description, this analysis sharpens our understanding of how the law defines the intimate sphere as special. It is more problematic, however, to accept this notion *normatively*. Here Professor Hasday seems to remain ambivalent: she expresses an ongoing belief in a legal approach that dignifies the intimate sphere through its distinction — even as she acknowledges the downside of such an approach. This ambivalence may be associated with four axiomatic assumptions that are worthy of further consideration. First, the separation of the intimate sphere is presented as a given, as if the intimate realm has

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¹ Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 499 (2005).

² *Id.* at 493.

³ *Id.*

always been removed from the market.⁴ Second, it is assumed that the legal efforts to segregate are based only on the “urge to signify the dignity and distinctiveness”⁵ of intimate relationships, and no other ground is considered. Third, and as a result of the previous point, it is presumed that the law’s successes in separating the spheres, as in of itself, is desirable, “valuable,”⁶ helpful,⁷ serves “an enormous societal interest,”⁸ and “seeks to protect something of tremendous importance.”⁹ Fourth, the alternative suggested in the Article is based on preserving the basic mechanism of drawing lines between intimate economic exchanges and other economic exchanges. Under this alternative, intimate exchanges will be allowed in the market but nevertheless they will not be seen as “normal” market exchanges. In the four Parts ahead I explore these assumptions and express some serious misgivings with regard to each of them.

I. THE HISTORY OF THE SEPARATION

The home, the family, and the intimate sphere of coupling and parenting were not always removed from the market. Following Foucault’s *Genealogy*,¹⁰ I argue that nothing that we know today, including firm legal categories, should be perceived as simply existing. Therefore, in order better to understand the meaning and necessity of the twenty-first century’s legal severance of the intimate sphere from the market realm it is essential to trace its roots. A journey back in time would reveal that the concept of binding promises (contracts), which call for legal protection (enforcement), emerged precisely where the norm of unenforceability controls today: in the domain of marriage.¹¹ More generally, as many other scholars have emphasized, the separation of the modern market from the home is not a given but

⁴ This point is supported by Professor Hasday’s estimation that “the legal tradition of limiting economic exchange between intimates is deeply entrenched and unlikely to be forsaken.” *Id.* at 528.

⁵ *Id.* at 522.

⁶ *Id.* at 517.

⁷ *Id.* at 496, 498.

⁸ *Id.* at 517.

⁹ *Id.*

¹⁰ Michel Foucault, *Genealogy and Social Criticism*, in *THE POSTMODERN TURN: NEW PERSPECTIVES ON SOCIAL THEORY* 39 (Steven Seidman ed., 1994). Generally, genealogy explores what was not evident because of the institutionalization of knowledge by those in power. See Hila Keren, *Textual Harassment: A New Historicist Reappraisal of the Parol Evidence Rule with Gender in Mind*, 13 *AM. U. J. GENDER SOC. POL’Y & L.* 251 (2005) (illustrating the application of genealogy in the legal context by presenting an elaborated journey to the roots of another leading commercial idea, the parol evidence rule).

¹¹ See Peter Goodrich, *Gender and Contracts*, in *FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW* 17 (Anne Bottomley ed., 1996).

rather a “man-made” product of a very special “moment” in history — the industrial era.¹² As Adrienne Rich gracefully describes it:

From earliest settled life until the growth of factories as centers of production, the home was not a refuge, a place for leisure and retreat from the cruelty of the outside world; it was part of the world, a center of work, a subsistence unit. In it women, men and children as early as they were able, carried on an endless, seasonal activity . . .¹³

Moreover, the entire process of defining separate spheres for the home and the market was connected to if not dependent on reforms in the law of marriage, and the law had both reflective and proactive roles in this process. After explaining that the industrial era “understood the ‘essence’ of marriage in the discourse of spheres,” Professor Siegel goes on to contend: “Because legislatures and courts reformed the common law of marital service with attention to the emergent distinction between market and household labor, they revised the marital status doctrines of the common law in such a way as to reflect and reinforce the gender mores of the industrial era.”¹⁴

This historical background has subversive potential. A closer look at the birth of the separation suggests that its very existence should not be understood as innate and natural. Therefore the justification of the detachment cannot be taken at face value and should be questioned. The following Part takes that path.

II. THE REASON(S) FOR SEPARATION

The legal task of drawing and then preserving the lines between the market and the intimate sphere is consistently explained by Professor Hasday as an effort to protect the specialness of the intimate sphere. Such a motive is also openly and repeatedly expressed by the courts. However, given the history sketched earlier, one might wonder whether the reasons were and still are indeed exclusively those offered explicitly. Is it really solely the benefit of the intimate end of the dichotomy that leads legal systems to avoid or treat differently exchanges made in the intimate setting?¹⁵ An alternative (or at least additional) impulse might be exposed by looking in the opposite direction

¹² See, e.g., Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2139 (1994); Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305, 311-15 (1999). Interestingly, a similar argument was made from the masculine perspective. See, e.g., TERRENCE REAL, I DON'T WANT TO TALK ABOUT IT: OVERCOMING THE SECRET LEGACY OF MALE DEPRESSION (1997).

¹³ ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 46 (1986).

¹⁴ Siegel, *supra* note 12, at 2210.

¹⁵ By using the term “legal systems” I suggest that the American legal system is not alone in its tendencies — a comparative point I do not have the space to elaborate in this Reply.

— at the market’s end of the dichotomy. Drawing sharp lines between the home and the market served as a tool for advancing and protecting the market throughout its early stages of existence, although the rhetoric employed by lawmakers and judges sought to camouflage this effect.

The transition to an industrial society controlled by a market economy has been an onerous process. It has brought about, to name only a few obvious detriments, harsh competition, instability, long hours of travel and work, growing social alienation, and weakening of familial and communal supportive systems.¹⁶ The legal response to this reality was part of a larger ideological effort to reduce people’s mounting anxieties mainly by persuading them that the change in general was desirable while the specific difficulties were either inconsiderable or temporary. Under a wide liberal pro-capitalist campaign, aimed at improving the market’s image, it was claimed, in many direct and indirect forms, that alienation should be accepted as valuable individualism and that competition in a free market would eventually lead to social and economic success. As part of this nineteenth century effort, contract law became selective regarding promises, increasingly focusing on commercial transactions and thus signaling a strong belief in the centrality of the market. “Domesticity,” on the other hand, developed as a kind of consolation to those daunted by emerging industrialism, cultivating the image of home as a shelter from the harmful external world.¹⁷ Attaching separate fields of law to the different spheres — commercial law to market obligations and (some) family law to home-made promises — simultaneously reflected and reinforced the new division and the role of domesticity in protecting the market. What might explain the survival of the dichotomy is that later in history — when the market prospered to be the powerful foundation of modern Western societies — it became extremely advantageous for the body of law that had been concentrating on the market for so long to preserve its traditional focus. As of today, the law of the market may be seen as preferring to retain its lucrative image by rebuffing non-market promises, especially those made deep in the intimate sphere.¹⁸ Law and economics scholars have identified a similar practice of preserving superiority through rejecting unwanted transactions in the

¹⁶ See, e.g., Jay M. Feinman & Peter Gabel, *Contract Law as Ideology*, in *THE POLITICS OF THE LAW* 373 (David Kairys ed., 1990).

¹⁷ See Williams, *supra* note 12, at 311.

¹⁸ Professor Hedley makes a similar argument regarding the common law’s leading decision *Balfour v. Balfour*, [1919] 2 K.B. 571 (C.A.) (U.K.), which declined to apply contract law to Mr. Balfour’s promises to pay his wife. See Stephen Hedley, *Keeping Contract in Its Place — Balfour v. Balfour and the Enforceability of Informal Agreements*, 5 *OXFORD J. LEGAL STUD.* 391 (1985) (arguing that the decision, especially as later used, helps to conceal the fact that it is law’s choice and not the parties’ intentions that explains the refusal to enforce intimate exchanges).

business world's technique of creating special transaction costs that keep the unwelcome away from the market.¹⁹

If we are willing to question its declared rationale, the modern policy of enforcing economic exchanges mainly in the market and rarely (and differently) at home may be seen less as *protecting* the home from the market and more as *using* the domestic sphere to advance the market and then *abandoning* it. The resulting sense of neglect will stand at the core of the next Part.

III. THE HARM CAUSED UNDER THE SEPARATION

The Article's analysis becomes more critical when it points to the main problem: the current legal effort to isolate the intimate domain — ostensibly in order to maintain and promote its singularity — entails a price to be paid mainly by women and poorer people.²⁰ All the same, Professor Hasday does not expose the deeper roots of this distributive difficulty or examine its causal connection to the very classification of the intimate sphere as “non-market.” Instead the Article goes on to an attempt to resolve the described difficulty by canvassing a possible reform. This bypassing of the question of separation seems to fit the more general ambivalence of the Article regarding the debate between the two main camps on this issue, those who support the dichotomy and those who resist it.²¹

In response to the Article's ambivalence on this point I argue that it is hard to see how the harmful impacts of the home/market dichotomy, mainly on women's lives, can be avoided without giving up the dichotomy itself. Instead, the separation effort should be seen as accountable for its gendered outcomes for two reasons.

First, the gender bias starts with the very impulse of separating and worsens when that impulse generates a rigid division of spheres of life. The separation endeavor is based upon a belief that the ability to separate one thing from another is a human achievement and a sign of development. A further underlying belief is that through acts of disconnection we will find ways to better control our lives. Those two beliefs, which are echoed in the Article, fit the stereotyped masculine way of progressing through life and clash with common assumptions regarding the feminine trajectory.²² As a result, feminists from differ-

¹⁹ David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers and Anti-competitive Effects*, 104 MICH. L. REV. (forthcoming Mar. 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=798308.

²⁰ Hasday, *supra* note 1, at 517–22.

²¹ *Id.* at 492–93.

²² From cultural feminism we have learned that women do not perceive themselves, or their experiences, as isolated units. Motherhood, for example, pushes women to do just the opposite —

ent schools seem united — *albeit for different reasons*²³ — in their resistance to the glorification of separation. The gendered implications of separation are especially salient in relation to the separation of the domestic domain, which reinforces the polarization of stereotypical masculine and feminine traits (rational, self-interested, impersonal, publicly located male vs. emotional, altruistic, personal, privately centered female).

Second, whenever a dichotomous separation is defined, the human instinct responds by establishing a hierarchy.²⁴ Accordingly, as confirmed by the Article's updated study, a promise for economic exchange made in the intimate sphere has less value than its commercial counterpart and players in the former sphere are more likely to forfeit their rights when they seek to invoke "normal" market conventions. Rejecting or altering market rules in the context of "home" creates an area of "lawlessness" where the law, frequently through its absence, exposes people to greater legal risks and abandons them to deal with the consequences.²⁵ In a world dominated by the liberal ethos this hierarchy is definite and substantial. A lawless conception of the intimate sphere negates the liberal values of individualism and choice and preaches for selfless altruism. From the liberal perspective, therefore, the market is the superior "normal" and the intimate sphere is the inferior exception.²⁶

This hierarchical point can sharpen our understanding of the inevitable connection between the initial separation and its harmful effect. As long as women are more invested in the intimate sphere than their male counterparts (who remain dominant in the market²⁷), the above

to combine their spheres of involvement: career, parenthood, and so forth. *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

²³ Generally those who resist the glorification of separation per se are more likely to be cultural feminists. Poststructural or queer feminists might be disturbed by the naturalization or normalization of the intimate sphere as a gendered space that rejects transgressive forms of self-presentation. Dominance feminists might be bothered by the separation not simply because it veils the constructedness of gender relations, but because it veils the power relations that underlie and produce it. I thank Kathryn Abrams for this concise and helpful description.

²⁴ This was, for example, the ground for the political and legal rejection of "separate but equal" throughout the era of *Brown v. Board of Education*, 347 U.S. 483 (1954). For the post-modernist analysis of the phenomenon see, for example, GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 117–18 (1995).

²⁵ Marjorie Maguire Schultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55 (1991); *see also* Michelle Oberman, *Sex, Lies, and the Duty To Disclose*, 47 ARIZ. L. REV. (forthcoming Dec. 2005) (on file with the Harvard Law School Library) (illustrating that under current contract doctrine the required level of disclosure in market transactions is significantly higher than in the intimate sphere and arguing that this segregation is extremely harmful to those involved in exchanges in the intimate setting).

²⁶ Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1567–68 (1991).

²⁷ *See, e.g.*, Hasday, *supra* note 1, at 519 n.64 (collecting sources).

hierarchy will continue to be highly gendered. If this is true then the harm can only be mitigated by *blurring the lines* between intimate and market economic exchanges, a proposition that is further discussed in the next Part.

IV. THE ALTERNATIVE TO SEPARATION

Is it possible to imagine another world without sabotaging valuable social institutions such as the family and the market? Consider a legal system that dares removing the entry barriers to the market and treats intimate exchanges with the same a priori enforceability enjoyed by other exchanges; reflect on a law that, for example, not only allows paying a surrogate mother, but also supports promises to give monetary value to domestic services.²⁸ Think of history and then imagine re-merging the separated spheres of intimacy and the market. Imagine a sequel to the *Merchant of Venice* in which Venice of business and cold self-interested considerations is combined with Belmont of intimacy, warmth, and altruistic support. In such “Belnice,”²⁹ for example, couples dividing responsibilities and sharing revenues will be analogous to business partners and “seen as free and independent subjects protecting their autonomy and at the same time needing each other.”³⁰ In “Belnice” the law will impose market-standard duties of disclosure in the context of bargains between intimates, moving beyond “the status quo, wherein *caveat emptor* lives on in this most vulnerable of settings.”³¹ “Belnice,” in short, will treat human exchanges equally regardless of their classification and will symbolize the end of the disparate treatment of the intimate terrain.³²

²⁸ This option is not considered in the context of the reform suggested in the Article.

²⁹ The idea of imagining “Belnice” (Belmont combined with Venice) belongs to Professor Pohjonen. See Soile Pohjonen, *Partnership in Love and Business*, 8 FEMINIST LEGAL STUD. 47, 60–62 (2000). But see Kenji Yoshino, *The Lawyer of Belmont*, 9 YALE J.L. & HUMAN. 183 (1997) (objecting to the idea of merging Venice and Belmont).

³⁰ Pohjonen, *supra* note 29, at 51.

³¹ Oberman, *supra* note 25 (manuscript at 83) (calling for the application of the market standard of disclosure in exchanges made between intimates). Scholars have also argued for other concrete applications of the “Belnice” idea. See, e.g., Twila L. Perry, *The “Essentials of Marriage”:* *Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 22 (2003) (arguing that “[i]t is time to remove the duty of support and services as a barrier to interspousal contracts that do not threaten the public interest”); Marysol Rosado, Note, *Sign on the Dotted Line: Enforceability of Signed Agreements, upon Divorce of the Married Couple, Concerning the Disposition of Their Frozen Preembryos*, 36 NEW ENG. L. REV. 1041, 1075 (2002) (arguing that “[c]ontract law is the best method by which to enforce express disposition [of frozen preembryos] agreements”).

³² This is not to say, of course, that in “Belnice” the market rules will remain unchanged. The special nature of “Belnice” as containing a wider spectrum of human exchanges will surely have an impact on the character of the norms that would be applied to this broader range.

The alternative canvassed here is far more expansive than the one introduced by the Article, which compares intimate economic exchanges to exchanges between lawyers and their clients and doctors and their patients.³³ Surely, some intimate exchanges fit these suggested models and for them ideas such as applying a fiduciary duty³⁴ or requiring an informed consent³⁵ might be promising. However, in many other contexts these comparisons are very problematic, mostly because they are founded on hierarchy (of a professional, educational, and financial nature) and excessive dependence. Employing such analogies would mark the specialness of the intimate sphere along the lines it has been marked so far, adopting and then reinforcing the gendered, dependent, and even victimized image of the people who engage in exchanges outside of the market. It seems that here again the Article shows ambivalence regarding the need to preserve the separation and therefore seeks to find “alternative means of differentiating relationships that advance the same expressive ends with less distributional cost.”³⁶ Conversely, rejecting the separation itself, as suggested by other recent works that attempt to cope with the distributive difficulty,³⁷ allows room for imagining a new world that can offer the intimate sphere an ample range of business models from which to choose, including non-hierarchical paradigms.³⁸

While the alternative of integrating the spheres might appear to be a dramatic shift, it is truly a humbler move. Modern law no longer regulates the market only by adhering to the classical model of contract law, but has also adopted a relational contract theory that pluralistically accommodates numerous variations of human economic exchange.³⁹ Such an established theory is highly suitable to encompass the long-term, complex, dynamic, and frequently informal relation-

³³ Hasday, *supra* note 1, at 522–26.

³⁴ *Id.* at 522–23.

³⁵ *Id.* at 524–25.

³⁶ *Id.* at 522. At the very end of her piece Professor Hasday calls for a *flexible* preservation of the separation. It is interesting to compare this proposal with Professor Siegel’s opposite perspective on the value of flexibility. See Siegel, *supra* note 12, at 2210–11 (arguing that “the long history of the doctrine of marital service suggests that caste regimes do not survive by their rigidity, but instead through their malleability and adaptability”).

³⁷ See sources cited *supra* note 31.

³⁸ See, e.g., Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001) (suggesting the application of business models to intimate affiliations as a way to achieve more equality in the intimate sphere).

³⁹ Professor Ian Macneil is the founding father of the Relational Contract Theory. Among his celebrated works see, for example, Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974); and Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983).

ships that are so typical of the intimate domain.⁴⁰ Furthermore, I strongly believe that the entry of market rules into the intimate sphere will in turn generate a relational shift in the nature of the standard market norms themselves, thus enhancing the process of substantive integration.

CONCLUSION

In reply to Professor Hasday I have argued that after more than a century of segregating the intimate sphere we have to be meticulous and explicit about detailing the harm that has resulted under the pretext of protecting the dignity of the intimate sphere. When looking at “intimate economic exchange” we have to decide whether to keep emphasizing the intimacy or to highlight the economic exchange in the phrase, not because there is no intimacy in economy and not because there is no economy in intimacy, but exactly because they are entwined. The benefit to the intimate sphere is obvious: in seeing intimates as legitimate economic actors, as equals to traditional market players, we are pointing to the way out of the land of economic lawlessness.⁴¹ In addition we may be helping those at home by supplying them with traditional and useful market tools.⁴² What is less obvious — but equally promising — is the potential of such a move to enrich the legal tools offered to the “hard core” market with the fresh and creative legal solutions that emerge from having to deal with intimate exchanges. However, this point will have to wait for another day.

⁴⁰ See, e.g., Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998) (reasoning why and how relational contract theory might add to our understanding of obligations arising from intimate relationships); John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 FEMINIST LEGAL STUD. 93, 102 (2000) (same). For an opposite view see, for example, Ira Mark Ellman, “Contract Thinking” Was Marvin’s *Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1369–70 (2001).

⁴¹ See, e.g., Oberman, *supra* note 25.

⁴² See Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1537 (1998).