## Book Review

# FAMILY LAW REIMAGINED*

by Jill Elaine Hasday

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> No matter how many communes anybody invents, the family always creeps back.[1]

1 There are two basic truths about family law. The first is that happy families are not just all alike, they have less need for law than unhappy ones. The second follows the Tolstoyan axiom that every unhappy family is unhappy in its own way. Prof Hasday's exploration of the current canon in family law examines the bias and pitfalls that get in the way of legislative and judicial thinking. She also searches the important areas that are insufficiently noticed or regarded but are nonetheless significant and crucial if family law is to be properly understood and developed. In the first part of her book, she describes how by diverting family law's connection to other fields of law family law exceptionalism detracts from our understanding of family law itself. In the second part, she contends that the "common sense" approach to family law is inconsistent and contradictory and that, in turn, misrepresents the reality of family law by concentrating on marriage and parenthood. In the third part, she examines the areas that have been overlooked and missing from the current narrative. By "canon" she means "the dominant narratives, stories, examples, and ideas that judges, lawmakers, and (to a less crucial extent) commentators repeatedly invoke to describe and explain family law and its governing principles".[2]

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* Harvard University Press, 2014. This book is a study of the family law canon in the United States of America but have ideas that may be found useful elsewhere.

1 Attributed to Margaret Mead.

2 Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) at p 2.

2 Prof Hasday begins by explaining the courts' inclination to localism as opposed to federalism. She points to the Supreme Court's decision in *United States v Lopez*[3] in which the court struck down the Gun-Free School Zones Act of 1990[4] (which made it a crime to possess firearms near a school). A high school boy was charged for delivering an unloaded firearm and five cartridges in a school compound; a job he said he did for payment of US$40. Holding that Congress exceeded its commerce power in making this a federal crime, and that if Congress' interpretation was correct, it would have meant that Congress had the power to legislate on "family law" and "child-rearing". Importantly, as Prof Hasday points out, "*Lopez* did not explain why congressional regulation of family law would be inappropriate".[5]

3 Prof Hasday refers to two legislative enactments that demonstrate the prevailing exceptionalism attitude of the Supreme Court – the Violence against Women Act 1994,[6] and the Defense of Marriage Act 1996[7] – as examples of misguided anti-federalism in family law. In the former Act, the court acknowledged that there was undeniably a need to protect women from violence but the remedy proposed by the Act "could involve the courts in a whole host of domestic relations disputes".[8] Such disputes, it ruled, has "traditionally been reserved to state courts".[9] In the latter Act, the Supreme Court held that the Act had defined a spouse as a "person of the opposite sex", this was therefore clearly a matter of family law that is within the province of the States and not Congress. Prof Hasday cited Senator Feinstein in saying that "[w]hether one accepts the idea of same-sex marriage or not is not the central issue here".[10] Prof Hasday explains that the issue was whether "we want to inject the Federal government into an area that has, for 200 years, been the exclusive purview of the States".[11]

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3 514 US 549 (1995).
4 Codified at 18 USC §922(q).
5 Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) at p 21.
6 Codified at 42 USC §13925 *ff*.
7 Codified at 1 USC § 7 (2012) and 28 USC § 1738C (2012).
8 Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) at p 28.
9 Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) at p 28.
10 Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) at p 33.
11 Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) at p 33.

4 Prof Hasday contends that the Supreme Court was wrong to have categorised the two Acts as trespassers in state territory. She says that "federal family law is already far-reaching and well-established. In addition, federal family law is sometimes unavoidable given the demands of the federal Constitution and the existence of exclusive federal jurisdiction".[12] Further, "[j]ust as state family law decides for purposes of state law who counts as a legal family member, how legalized family relationships are begun and ended, and what turns on legal recognition as a family member, federal family law decides these issues for the purposes of federal law".[13] The decision in *Michael H v Gerald D*[14] is an example. In that case the Supreme Court had ruled that a man has no constitutional rights to his child born to another man's wife. Prof Hasday then scrutinises the areas in which federal legislators had created "considerable family law" in areas which federal law has exclusive sovereignty. She considers in turn, military law, immigration law, citizenship law, international relations law, Native American law, bankruptcy law, intellectual property law, benefits for federal employees law, veterans' benefits law, tax law, social security law, labour law, housing law, and criminal law, and shows how in each and every one of these areas family law has already been shaped by federal legislation and judicial ruling.

5 There is yet another area in which the court and Congress try to keep family law at a distance, and that is economic exchange, perhaps because it is generally accepted that marital support and family bliss cannot command a price. Prof Hasday claims that the canonical narrative about family law's separation from market principles obscures more than it illuminates. "The faulty premise that family law does not countenance economic exchange to any notable extent misdirects debate and discussion in family law."[15] She examines two areas which exemplify the market separation narrative. The first is the prohibition on interspousal contracts for domestic services, and the second is the refusal to recognise human capital as divisible matrimonial property at divorce. The first assumes that all matrimonial labour is free, and no matter how explicit a couple might have been in their agreement to pay for the domestic services of one of them, the courts will not enforce that agreement. In the second, a divorced spouse (in the absence of agreement, whether pre- or post-nuptial) is entitled to keep his or her assets acquired before marriage. Matrimonial property, that is, property

12 Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) at p 8.
13 Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) at p 39.
14 491 US 110 (1989).
15 Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) at p 67.

acquired during marriage is divisible. But here, in determining the entitlement of the spouses, the courts will look at the human capital expanded during the marriage. There is thus an ambiguity in the approach so far as the divisibility of human capital is concerned. The reluctance to fully and properly regard human capital as matrimonial property has been explained in cases such as *Pyeatte v Pyeatte*.[16] The wife there postponed her own education to work as a teacher so that her husband could go to law school. He divorced her soon after graduation. In that short marriage, the husband's law degree was the only real asset of the marriage but the court dismissed the idea that it counted as matrimonial property. Yet when it came to pre-nuptial or post-nuptial agreements, the courts, Prof Hasday says, "argued that such contracts did not promote divorce, but instead encouraged marriage among people who were reluctant or unwilling to subject their assets to family law's default rules".[17]

6 Prof Hasday points out that courts had often intervened to order economic exchanges between family members when they had not made any of their own – such as continuing maintenance payments. Prof Hasday also examines economic agreements between family members (such as contracts between siblings). The separation of the market from family law diverts attention away from the actual choices that family law confronts. The pressing issue, she says, "is *how* to regulate economic exchange within the family, in what forms, for what purposes, and to what ends" [emphasis in original].[18] She recognises that rejection of economic exchange "can inflict on women and poorer people, maintaining and worsening distributive inequality".[19] She hopes that this book will spark debate, not on the moot question whether the law should permit economic exchanges within the family, but on how best to regulate such exchange.

7 Prof Hasday points to two progressive narratives that create confusion and inconsistent thinking even though they purported to signify a break from the discriminations of the past. The first is the repudiation of the common law doctrine of coverture – that women are under the protection of their husbands, a guise under which men claimed wives to be their property. The second narrative claims that family law, once controlled by status rules, has now embraced contract rules. But understanding the scope and meaning of these two narratives

16 661 P 2d 196 (1982).

17 Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) at p 76.

18 Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) at p 86.

19 Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) at p 91.

has proven to be difficult, and in many areas, the force of these narratives either lingers on or has failed to fully burst forward. The persistent imprint of coverture is denying spouses the right to sue for damages for assault by the other spouse. Marital rape is another incident of coverture's old hand at work. The status to contract narrative exists in tension with the separation of family law from the market. This tension has not been addressed and thus, Prof Hasday says, "both narratives persist simultaneously".[20] The aim here is to stimulate debate for as Prof Hasday acknowledges, there may be disadvantages to contract rules. One example is that the transition from fault-based to no-fault divorce may be economically disadvantageous to many women and their children. As she says:[21]

> The pressing questions to consider are about whether, when, and why family law should keep the persistent manifestations of coverture's legacy in place. Decisionmakers cannot assume that family law has evolved beyond status rules and that contract rules are necessarily better than status rules. The pressing question to consider is what are the costs and benefits of implementing any specific family law policy in status or contract form.

8 In the last three chapters, Prof Hasday examines the impact of the progress narrative for children and the poor. The movement from parental prerogatives to the child's best interests is a major change. The wit of Edward VIII – 'What impresses me most about America is the way parents obey their children' – conceals the pain inflicted on children in family law. The progressive narrative of the best interests of the children, like the narrative of the demise of the doctrine of coverture, has not generated a clearer understanding of the problems in reality. These include the separation of siblings in custody matters, the separation of siblings in adoption, and the rights of third parties (such as grandparents). One of the more pointed problems lies in the fact that in proclaiming the best interests of the children, the courts do so by determining what they think are the best interests of the children, declarations are thus often made with scant evidence and a forgetfulness of how every unhappy family differs from each other.

20 Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) at p 121.

21 Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) at p 132.

9 As Prof Hasday says:[22]

> In the real world, family law overlaps with many other areas of the law. Law schools should not treat family law as an intellectual silo disconnected from the rest of the curriculum.
>
> Recasting the family law canon is a long and demanding project.

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22 Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) at p 226.