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## Two Stories about Two Currencies of Care

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## Two Stories About Two Currencies of Care\*

HENDRIK HARTOG†

My work on the history of care has been shaped by a desire, a yearning, to discover what the experience of caregiving was like, both for the producers and the consumers of that care. Of course what I found was never that, exactly. Rather, at most, research uncovered testimony about how the experience of care was described and explored within the confines of litigation, or how the experience of care was shaped or constituted by the legal culture. Still, my semi-conscious goal was always to get as close as I could to something that looked or smelled like experience.

That desire, my yearning, is, of course, a very unfashionable one and also one that much critical writing (by, among others, Joan Scott) has all but eviscerated.<sup>1</sup> Today that desire has become—or is recognized—as archaic and outdated. The search for representative experience is so last century. None of my graduate students would be stupid enough to admit to such. And they are right, and I am wrong.

Still, I am the product of a social historical moment. My education as a historian was shaped—determined—by a 1970s historian’s fantasy that with sufficient work and energy, I could find access to the “real” experiences of ordinary people in everyday parts of their lives. I have carried some version of that fantasy with me through most of my working life as a historian. There have been precious few instances when legal sources—particularly cases—could

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\* Unless otherwise indicated, portions of the following discussion have been drawn from and expand upon scholarship reported in HENDRIK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE (2012).

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1. See Joan W. Scott, *The Evidence of Experience*, 17 CRITICAL INQUIRY 773, 797 (1991).

possibly have satisfied that desire. But the desire, the aspiration, for traces of experience, for something more than discourse, for access to the everyday lives of real people, for a way to reconstruct how they lived lives—how they worked and fought and played and loved—in the present tense (their present tense), that remains.<sup>2</sup>

Back around the turn of the new century, in 2000 and 2001 and 2002 and 2003, I began to work with a body of nineteenth and early twentieth century New Jersey cases that offered surprising and illuminating portraits of carework within families. The cases involved disputes over promised but undelivered legacies or inheritances. I had begun reading them less out of a social historian's fantasy or yearnings and more because I had enjoyed teaching such cases as legal doctrine in the days long past when I had been a property law teacher. I was curious both about the evolution of that legal doctrine and about the stories that produced the legal doctrine.

But soon I was entranced—I still am—by the descriptions of work scattered throughout the testimony in the trial records, language that seemed to offer the access into an intimate and lost world that I had long yearned for. For historians of my generation and inclinations—at least for this historian—such access was talismanic magic. Reading the transcripts, I felt as if I could see, could smell, could hear, the real. There's nothing quite like a description of how it feels to get hands dirty while giving a stepfather by marriage an enema or what it means to wrestle a demented aunt to the ground as she destroys the family furniture.<sup>3</sup> But how to make such images and stories parts of a history, parts of an analysis of change over time? That question stumped me, and it took me a very long time to find answers, or ways to answer that question. And in the end, you will have to accept that the book is my answer, inadequate though it is.

Here, though, let me offer two stories, both as a way to illustrate how the case files I dealt with “speak” or “spoke”

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2. See Hendrik Hartog, *Horwitz and the End of Socio-Legal History: 1975*, in 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY—LAW, IDEOLOGY, AND METHODS: ESSAYS IN HONOR OF MORTON J. HORWITZ 43-44 (Alfred Brophy & Daniel Hamilton eds., 2010).

3. HENDRIK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE 161, 255 (2012).

about issues of care and the experience of caretaking and as a way to connect the work I did to the more immediate and twenty-first century concerns that shape the writings of my brilliant copanelists. In particular, these stories suggest how Americans once struggled over the contested boundary between family member and worker. What did it mean to "care"? What did it mean to do "carework"? What were the expectations—the reliance interests—that arose within a capitalist economy when men and women, usually women but not only women, worked to take care of older relatives, older family? What did they owe to those who had once brought them up? What did it mean that those who did the work also found a home within the households of those they worked for?

These may not be questions that one wants raised in a conference on careworkers, understood not as family members but rather as part of a relatively un- or underorganized labor pool, today made up largely of persons of color, often participants in global labor movements.<sup>4</sup> Although Klein and Boris describe recent efforts in some states to compensate family members for staying home to care (kin care), those family members are not the centerpiece of their work.<sup>5</sup> And if there is a carework movement in the offing, it begins, I suspect, with efforts to see careworkers, first of all, as workers like other workers, as employees, entitled to the benefits that we wish were part of the rewards that belonged to all workers within this immensely wealthy and profligate society.

But *Someday All This Will Be Yours*, like much of my work over the past two decades, was, in the first place, a work of family history. Much of it is devoted to the legal, moral, and emotional situations of adult children, some of whom returned to a parental home after a period of time working and living elsewhere, some of whom never left. How to think about such beings: as adults, that is, as persons competent to contract with parents and grandparents to provide care? Or, as children, doing what is expected of them within a household, perhaps hoping that

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4. See EILEEN BORIS & JENNIFER KLEIN, CARING FOR AMERICA: HOME HEALTH WORKERS IN THE SHADOW OF THE WELFARE STATE 4-5 (2012); Eileen Boris & Jennifer Klein, "We Have to Take it To the Top!": Workers, State Policy, and the Making of Home Care, 61 BUFF. L. REV. 293 (2013).

5. See BORIS & KLEIN, *supra* note 4, at 34, 49-53.

eventually they would be remembered in a will? Can one imagine such “children” as contractual actors, contracting with parents for compensation? How did it feel to be stuck at home, still dependent (or newly dependent) on a parent? What were the rewards to which one became entitled?

Who was an adult child? Or, rather, who could be or could become an adult child? Did the identity of an adult child depend on birth, on being a blood relation? Nineteenth and twentieth century literature—both legal literature and imaginative literature—was littered with stories about young women, and occasional men, who became adopted children by doing the work of care. From *Heidi* to *Little Lord Fountleroy* to *Anne of Green Gables* to Pip in *Great Expectations*. All of them performed being daughters or sons, and their performances made them into someone who should be rewarded as a son or as a daughter because of the work they did in caring for those who were their fictive kin.

Behind the romance of those stories lay an emotional or existential fact: many older people were left alone, abandoned by their children and grandchildren—their real children and grandchildren, who had moved away and who lived lives too far away to care.<sup>6</sup> The mobility of nineteenth century America, indeed, of the whole world, combined with the instability of capitalist land markets, undid inherited understandings that made staying home a reliable expectation for adult children.<sup>7</sup> And in a world—a social order—in which old age care still depended on family, a social order marked by the absence of the public structures or the insurance schemes or the corporate marketing to the old that mark our days, a social order that was then almost entirely dependent on private law, older people had to make someone else into their child if they had any hope of a happy, that is, a cared-for old age.<sup>8</sup> And adoptions—at first only informally, later through formal legislative means—became one way to solve the problem.<sup>9</sup>

But what of servants, employees, those who came into a household not as “family,” or as potential “family,” but as workers? (I should note that I experience so much wrong

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6. See HARTOG, *supra* note 3, at 67.

7. *See id.*

8. *See id.* at 23-24.

9. *Id.* at 94.

with that question the moment I type it into my computer, so much unexamined. Everyone in a household was a worker. That is, throughout the period I study, a family was a place where work occurred. So the distinction between worker and family member makes no sense. And as we will see, the boundary between worker and family member, even when made, was always hard to sustain. And because of the deep commitment throughout the legal culture to the Anglo-American idea of testator's freedom, no "child," even a direct biological descendant, had anything more than a hope of being remembered as an heir. No one was an heir until the death of the testator. And any person in the household could, in theory, be rewarded with an inheritance.)<sup>10</sup>

But what, to ask the question again, of servants and employees? That question, however wrongheaded, does lead us to the two stories I want to tell. So, let me begin:

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Consider *Cooper v. Colson* (1904),<sup>11</sup> a case that became an important doctrinal precedent in New Jersey and elsewhere.<sup>12</sup> This was the case of a housekeeper, Margaret Sayre, who had been promised one of her employer's three farms if only she would stay and care for him. She stayed for more than two decades, never earning more than two or three dollars a week, until his death from the consequences of what we today would call dementia, perhaps Alzheimer's. She had relied on his promise to give her one of his three farms, a promise repeated endlessly. But in the end, that promise would not be fulfilled.

What services had she "performed" or "rendered" for the old man? "I did all the work around the place, around the house, I cooked for him, and I cooked for his men,—not all the time, but at times I used to milk and I went out into the fields to work, I dropped corn, and husked corn, and I carried the sheaves of wheat and tied them together and carried hay to the mow, and I pitched sheaves of wheat and

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10. *See id.* at 68.

11. 58 A. 337 (N.J. 1904).

12. The material in the paragraphs that follow is drawn from the transcript of the record of *Cooper v. Colson*. See Transcript of Record at 6-7, 24-27, 31-37, 42, 46, 52, 54-55, 66-67, 72, 121, 124-25, *Cooper v. Colson*, 58 A. 337 (N.J. 1904) (the record is available at the New Jersey State Library in vol. 320, issue 6 [hereinafter *Cooper Record*]; HARTOG, *supra* note 3, at 102-06, 185-92, 239-43.

I did all that one day, and I used to separate the corn. . . ." What did she do for him personally? "I used to cut his hair, I had to give him his bath and attend to his clothes, and waited on him every way I could." For how long? "Ever since I lived with him, until about a year before he died, I would cut his hair every time it wanted it. . . . But the last summer we were there I had to give him his bath just like a trained nurse would have to do; he could not do it himself." She never received any extra compensation. Not even toward the end, when she rented a small house in town where she cared for him. "How long had he been queer and troublesome on account of the softening of the brain . . . ?" "When he got to be real funny, I suppose about six months." "[B]efore that time . . . was [he] any more trouble . . . than an ordinary person would be?" "[O]nly at times. There would be other times before that that he got so he didn't know how to get his clothes on and I would have to help him."

Many witnesses confirmed her testimony, both about the work she did and the promises he had made. One witness reported that the old man had frequently said "that all he was giving her was the privilege of raising the poultry for her services." But, he continued, "if she remained with him, [presumably until he died] . . . she shall be well repaid for her services." He expected "to deed her the little farm." Another witness testified: "[H]e wanted her to have a farm . . . [f]or being good to him, and working for him, and he didn't think anyone could do like Maggie did for him. . . . [N]o ordinary hired girl would ever do for Mr. Colson what Maggie Sayre did for Mr. Colson, as there ain't one-half of them cares, and she did care." Over games of checkers and while husking corn, he was always telling listeners that a farm or "the" farm was going to be hers. Another witness described how he had once asked the old man if he could take some apples lying on the ground, "and he says: 'I have plenty of apples there on Maggie's farm; if you want any, go over there and get them.' . . . and when I was there he came up and said to me that that is Maggie's farm."<sup>13</sup>

After all the testimony had been taken, Vice Chancellor Reed summarized how Margaret Sayre's life had been shaped by her relationship with Joseph Colson: She first

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13. Cooper Record, *supra* note 12, at 36-37; see Cooper, 58 A. at 337; see also Stone v. Todd, 8 A. 300, 305 (Sup. Ct. N.J. 1887).

went to work for him in 1872, when he lived on a rented farm in Salem County. At the time she was paid three dollars a week wages. In early 1875, he quit farming, and she left and got a job elsewhere, in "service." In 1876, Colson went into the "marl" business. Marl was a loose and crumbling earthy deposit consisting mainly of calcite or dolomite, used as a fertilizer for soils deficient in lime.<sup>14</sup> Demand for marl boomed as demand for fertilizer rose in the farming areas of New Jersey.<sup>15</sup> Margaret returned to work as his housekeeper at two dollars a week, with the understanding that after two years she would receive whatever she could make from the poultry she kept, in place of wages. But then Colson went back to farming. He bought one farm in 1881 and asked her to raise chickens there for one-half the profit. She refused the offer. Then he said that if she would do as he wanted and stay with him, he would leave her a farm. She accepted that offer. But a year and a half later Margaret changed her mind and decided to move to Montana. But again he convinced her to stay. Once again he did so by promising that "if she stayed with him and took care of him as long as he lived he would give her a farm." Over the next years, they continued to discuss which farm she would take of the three he eventually owned. They lived on one or another of those farms until the mid-1890s. Throughout all those years, she did all kinds of work that went well beyond what a housekeeper ordinarily did. And when Joseph Colson became demented and unable to care for himself at all, she moved into a house in town, in Woodstown, where she nursed and cared for him, until just before the end of his life, when he had to be moved into an insane asylum. There he died, without a will.<sup>16</sup>

What did that history mean? To Vice Chancellor Reed, it meant that all of the elements of a contract had been proved.<sup>17</sup> He ordered that the administrators of Colson's

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14. See *New Jersey Marl*, N.Y. TIMES, July 2, 1869, at 2.

15. See *id.* (describing the boom in the marl business).

16. See *Cooper Record*, *supra* note 12, at 120-22 (Vice Chancellor's summary). In the 1900 census, when they were living in Woodstown, she is listed as the "head" of the household. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, TWELFTH CENSUS OF THE UNITED STATES (1900) (E.D. 187, Woodstown Borough, Salem, New Jersey, sheet 1B).

17. *Cooper Record*, *supra* note 12, at 122.

estate convey to her a deed to the "Peterson" farm, one of the farms Colson owned at his death.

But the lawyers for the Colson estate appealed to the New Jersey Court for the Correction of Errors and Appeals, which reversed, by a vote of nine to two. Margaret Sayre would not get her farm. The opinion by Justice Fort began with an understanding, drawn from his reading of the treatises, that there were two "acts" of part performance that would take a "parol agreement" (that is, an oral agreement) "out" of the Statute of Frauds and allow a court of equity to decree specific performance. One such act was "actual open possession" of the land or other property; the other was "permanent and valuable improvement" made to the land. Each of these he regarded as easy cases. He then drew from the early New Jersey cases the conclusion that there might in addition be "special acts of personal service and the like" that, "when performed upon condition that land would be conveyed," might "entitle the party so performing" to a decree for specific performance. The cases revealed that when the result of "performance of the labor and service under the agreement" had been "to change the whole course of the life or life work" then the case was one "within" the rule as to part performance, even without possession of or improvements to the land.

But here there was no such transformation of a life. Margaret Sayre was a housekeeper when she started; she was a housekeeper at the time of Joseph Colson's death. All the work she did, including her intimate bodily care of her long-time employer, was coherent with gendered expectations of what such women did as routine aspects of their lives, whether as paid employees or as kin. There was no doubt, Fort conceded, that Margaret had served Colson "in part, though not wholly, in reliance upon compensation by way of the conveyance of a farm." But nothing she had done was either "exceptional nor extraordinary. . . . She in no way changed her mode of living or course of life or life work." And so she would not get the farm she had been promised.<sup>18</sup>

Fort's much cited opinion was read by lawyers and judges to restate a test that required "exceptional" tasks as the proof of a life transformed. Certainly for anyone who

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18. *Cooper*, 58 A. at 339.

was not a blood relative. Performing tasks that were coherent or predictable within roles or jobs assumed within a family failed that test. Proof of the work done was by itself never enough. One had to demonstrate that the work done could only be explained by the prior presence of a promise to convey property. Everything Margaret Sayre had done was just work, perhaps work for which pay was expected, but not work that earned one a legacy of a farm.

By the middle of the nineteenth century, men who gave up jobs or careers to care for older property owners at “home” often were understood as having passed that test. Returning home had become, in the culture and in the law, an exceptional undertaking, at least for young men who ordinarily left home and entered labor markets. By contrast, women who gave up or put off marriages to stay and to care for older relatives or employers were not often recognized as having made such an undertaking. There were too many possible routine and unexceptional reasons why a marriage had not occurred. Specific performance required an unusual story and an unusual relationship, an undertaking that could only be understood through the lens of an unquestioned promise to convey valuable property.

The court in *Cooper* did acknowledge that Margaret should probably succeed if she went back to court and sued quantum meruit for unpaid wages, though the amount she could get (certainly, much less than a farm!) would be limited by statutes of limitation and would possibly only incorporate her work in the last years as Colson’s nurse.<sup>19</sup> A housekeeper would not, however, ordinarily become an heiress, that is, someone entitled to land or other property.<sup>20</sup>

Consider then, as my second story, a slightly later case, *Frean v. Hudson*, which did involve a suit quantum meruit, after a woman was disappointed by an employer’s will.<sup>21</sup> Julia Frean went to court after she discovered that Cornelia

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19. *Id.*

20. *Id.*

21. The material in the paragraphs that follow is drawn from *Frean v. Hudson*, 93 A. 582, 582-83 (N.J. 1915). See Transcript of Record at 1, 4-9, 12-13, 15-16, 19-20, 26, 30, 35, 40, 48-54, 57-58, 65-67, 70-96, 99, 103-05, *Frean v. Hudson*, 93 A. 582 (N.J. 1915) (the record is available at the New Jersey State Library the record is available at the New Jersey State Library in vol. 636, issue 5) [hereinafter *Frean Record*; see also HARTOG, *supra* note 3, at 239-51].

Hudson had left her only a pittance. Julia had been Cornelia's companion. She had lived in Cornelia's household in Bayonne for more than twenty years, ever since she had failed her teacher's examinations in Staten Island, where she had grown up. She was no relation of Cornelia Hudson; her parents had been Cornelia's friends.

After Cornelia Hudson's death in 1913 at the age of eighty-four, a codicil to her will was found to include a gift of \$100 to Julia, "as an act of friendship . . . which she is to forfeit if she sues my estate or my heirs, as she has no claim whatever against me or against my estate." Julia, who had expected much more from the will and who believed that Cornelia's son, Edward Hudson, had fraudulently inserted the codicil into the will, protested. Edward, who was executor of Cornelia's estate, offered Julia \$500, "to pacify her." At first she accepted the offer. But then she repudiated it. And then she sued, asking compensation based on six years of work as Cornelia's "housekeeper and companion" at twenty-five dollars a month (the temporal limit of what she could ask for, given the statute of limitations on such actions), plus three and one half years of work as a nurse at an additional fifteen dollars a week. A Hudson County jury awarded her \$4159.18.<sup>22</sup>

On appeal to the New Jersey Court of Errors, Elmer Demarest, the lawyer for the estate and for Edward Hudson, asked the court to reverse, on the theory that the trial judge should never have let the case go to the jury. His brief began by insisting that Julia had been "practically a member" of Cornelia's family, and had always been "treated as such" by all the members of the household. (Indeed, in a later passage in the brief, she was described as treated better than other members of the family (which meant son Edward, who was the only other recognized member of the household.)) "No closer relationship can be imagined between persons without consanguinity, than that which the respondent [that is, Julia Frean] admits existed between her and Mrs. Hudson." Julia, the brief continued, was no nurse. She was "59 years of age, lame, and had no experience as a nurse." She knew perfectly well that "the services she was performing were given as though she were a member of the family." She was no servant; she ate at the

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22. See *Frean Record*, *supra* note 21, at 70-71, 88-89. Statutes of limitations precluded her from asking for more than six years of work. *Id.* at 3.

table with other family members. She and Cornelia acted as “mother and daughter.” Julia understood herself as possessing “an equal right in the household with the other members of the family.” What she did within the household she did “because of her affection and friendship for” Cornelia. She might have hoped for a legacy, but she knew, or ought to have known, that the “tenderness” with which Cornelia “cared for her” should have been enough. And she should have realized that testator’s freedom meant that Cornelia was free to choose to give all of her estate to her son, while excluding Julia.<sup>23</sup> The main ground of appeal then was that Julia’s “admission that the position of the parties were in *loco parentis*” barred her right to anything more than the love and appreciation she had received from Cornelia Hudson. Thus there should have been a nonsuit.<sup>24</sup> At trial, one year earlier, the work that Julia Frean had done for Cornelia Hudson had been described by a maid who had long done housework for elderly Cornelia. What had Julia done for Cornelia? Helped her do the cleaning, helped do the housekeeping and running of the house, everything except washing and ironing. And then, after that, Julia sat with Cornelia; she did sewing and crocheting, and all the mending, “besides waiting on Mrs. Hudson.” She also went out on errands for Cornelia, who never left the house. The maid had overheard many conversations between Cornelia and Julia, with regard to payment for services. Cornelia apparently often said “she would give it to her [that is, to Julia] if she had it[,] but she did not have it on account of her son, Ed Hudson, taking it from her.” When he cross-examined her, Demarest had led the maid to describe how Mrs. Hudson and Miss Frean, and sometimes Edward Hudson, all sat down together at meal times. He was pointedly distinguishing the maid as a paid employee from Julia, whom he characterized as family. Two next door neighbors had added detailed portraits of the work Julia Frean did, including material on her serving at the table, clearing, dusting, getting rooms cleaned, cleaning the

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23. *Id.* at 5-6.

24. *Id.* at 5-6, 8-9. She was listed as a part of Cornelia’s household in both the 1900 and 1910 censuses. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, TWELFTH CENSUS OF THE UNITED STATES (1900) (E.D. 8, Dist. 1, Bayonne City, Ward 3, Hudson, New Jersey, sheet 1A); BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, THIRTEENTH CENSUS OF THE UNITED STATES (1910) (Bayonne City, Ward 3, Hudson, New Jersey, sheet 5A).

silverware, and taking care of the son's clothes and his dogs. On cross-examination, though, Demarest had asked the first neighbor if she had ever seen Julia do any work that a member of that family would not do as one family member for another. The second was challenged to justify Julia's claims that she did the work of a professional nurse.<sup>25</sup>

Cornelia Hudson's long time physician had testified that he considered Julia Frean to have been Cornelia Hudson's "nurse and attendant." What nursing work had been necessary? He answered: Cornelia Hudson could not "go upstairs or outside without someone with her." She was troubled with dropsy. That is, her limbs were swollen below the knees, making it almost impossible for her to get from chair to bed. "I would not have considered her a safe woman in the last five or six years." Toward the end, she was not able to attend to her person. Most of the time she had control of her bowels, but not always. Then Julia attended and cleaned up. Julia, he concluded, had been a good nurse. But he thought there had been much conflict in the house about the question of payment to her. In cross-examination, Demarest asked the doctor whether the services Julia had provided were not ones that any "woman member of the household could ordinarily perform?" No, he answered, "[n]ot in the last two or three years." What made her good at what she did? Well, in part that she had done it for a long time. She knew Cornelia's "habits, her nervous makeup and her physical condition better than any one else would." No one else could have done it. Was Julia like a daughter? Demarest tried again. He never thought of her that way, the doctor answered; he "considered her as a [paid] companion and as a nurse in the household."<sup>26</sup> Julia Frean had then testified. She too detailed all the work she done, including directing the servant in the household work. She did all the mending, and she would go out to do the marketing. She had expected to be paid for her time, but she wasn't, although she did receive two dollars a week for taking care of Edward Hudson's dogs. After 1910, in her rendition of the facts, she had taken full charge of Mrs. Hudson's bodily care: bathed her every morning, clothed her, and fed her, and she had had to change her bedding. Cornelia sometimes

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25. *Frean Record*, *supra* note 21, at 40.

26. *Id.* at 48-50.

soiled the bed. She did all the work usually done "in an invalid's room."

Demarest had reserved the right to object to her testimony, since it was an open question whether a plaintiff could testify in her own case. But then he cross-examined her about her treatment within the family. He had her walk across the courtroom to demonstrate how lame she was. Too much so, he implied, to have been a real, that is, a paid nurse. She insisted she had been lame only for the past few years. They then went back through Julia and Cornelia's life together. She had been remembered at holidays with gifts, and she had given gifts to other members of the family, and she sat with them in the evenings. She was certainly no servant consigned to the back rooms. When Cornelia Hudson still travelled, Julia Frean accompanied her, and they stayed in hotel rooms together. For years she had not been paid, but she did "fancy work" that she sold, and she paid for her own clothing. Julia described in detail all Cornelia's excuses not to pay her. Why then, Demarest asked, had she stayed? "Because she never wanted me to leave her, and at last she was so sick I could not leave her." Cornelia Hudson was very fond of her, treated her as a member of the family. And she considered herself a member of the family.

At that moment, one of Julia's two lawyers had Demarest repeat the question, presumably to give her a chance to realize what she was saying, since all knew that a family member, as such, had no expectation of pay. This time she answered that she was only treated as a family member by Cornelia Hudson, not by others in the household. The services were "performed" for Cornelia alone. Demarest asked again, "you considered that the services that you were performing for her . . . were as though you were a member of her family, as of her household, did you not?" She had answered, "Yes." He repeated the question, then moved on. Had Cornelia Hudson become like a mother to her? "Yes, she was like a mother to me." "You had no mother, had you?" She had answered: "No." The occasional spending money you received from her, "you looked upon as spending money, the same as she would give . . . to any member of her family?" Julia answered, "Yes, between ourselves." He pressed again: "You considered yourself, so far as she was concerned, a member of her household, did you not? . . . Practically a member of the family, with the possible distinction that you

were not a blood relative?" She answered, "No." She did not believe herself a blood relative. But had she felt on an equal level with other members of the family because of what Cornelia Hudson was doing for her and what she was doing for Cornelia? "Yes." (One might imagine that Julia thought she was showing Edward that she was a better child to Cornelia than Edward had been.) At that moment, one of her lawyers tried to intervene, on the theory that Julia evidently did not understand the questions posed (or the implications that could be drawn from her answers). The questioning went on: There was much conflict about money in Cornelia's last years. Julia tried to raise the possibility that Edward Hudson had forged the codicil to the will. She insisted that Cornelia Hudson had promised to take care of her in her will.

Demarest then returned to the question what had motivated her to remain and to care: "And up to that time you were rendering to Mrs. Hudson these services because of your love and your affection and friendship for her, the same as you had done for a number of years previous, depending upon her to give you at the time she died some legacy?" Her answer: "Yes, she always said she would." She had known she could not depend for support on the other members of the family. It was only when she found out how little she got that she had become dissatisfied. Until then she had never expressed dissatisfaction? "No, because she [Cornelia] always said she would take care of me." Demarest: "You felt while you were living with Mrs. Hudson that she was doing as much for you as you were for her?" Answer: "She died in my arms." Question: "But you felt that the tenderness with which Mrs. Hudson cared for you and the fact that she was giving you a home from the time you had been unfortunate [presumably, here he was referring back to when she had been fired from a teaching position], was equal to anything that you could do for Mrs. Hudson in return, did you?" Her lawyer intervened again, because the witness was "a little upset." (And one can presume he feared she was about to destroy her case for compensation.) She took a moment to compose herself. Then she answered: "Yes." (One can only imagine the slumped shoulders of the lawyer at that moment.)

On redirect, that is, when her lawyers regained the opportunity to question her, they had worked to reclaim ground. Under their questioning Julia described how, in Cornelia's last years, her nursing services took up every

hour of the day. She would be up several times at night, and there was no one brought in to relieve her. When had she become lame? "Oh, when I was taken sick, and then when I fell working for her and doing—I was worn out working for her and then I fell, and I have been lame ever since." It happened in 1911. How much had her fancy work earned for her? Answer: Only forty dollars, earned one winter knitting sweaters.

On recross, under questioning again from Demarest for the other side, she had admitted that if Cornelia Hudson were still living she would not have sued. She had brought suit only because of the way she had been treated by Cornelia's child. This, once again, could be read as a concession that she had no contract with Cornelia. But then there had been one more set of questions from her lawyers (on re-redirect): Why wouldn't she be suing if Cornelia Hudson were still alive? "Because I expect I should be living with her yet, kept right on taking care of her." She did tell Cornelia once, though, that she would wait until she was gone, and "then I would sue her. I said I would not worry you now, she was worried enough."<sup>27</sup> In spite of Demarest's efforts during the trial, in spite of her own concessions that love had shaped her conduct and her identity as a member of Cornelia Hudson's family, Julia Frean won. As is always the case, the written transcript cannot fully convey what the judges and the jury saw and what they knew to be "true." And effective lawyering can only go so far. We can surmise that Julia's expressions of love for Cornelia did not, in the end, counter perceptions of the fundamental unfairness of the will Cornelia Hudson had signed (whether or not it was an expression of her intentions). Justice Bergen, who wrote the opinion for a unanimous Court of Errors and Appeals, rejected Demarest's argument that there should have been a nonsuit, that the judge in the Hudson County court should never have allowed a jury to consider the question of whether Julia Frean was entitled to compensation. Demarest's interpretation of the law "that no contract to pay can be inferred from services when the plaintiff was a member of the decedent's family," was answered by the fact that Julia "was not a relative in any degree" of Cornelia Hudson. The evidence was not conclusive that the services she had provided were intended

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27. *Frean Record, supra* note 21, at 105-06.

as "gratuitous." There was a "fair inference" to be drawn from the testimony that there had been "an express promise to pay what the services were reasonably worth." And in any case these were questions that could properly be submitted to the jury.

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These two cases help make a conventional historian's point—actually, two points that historians make conventionally. The first is that the past is a foreign country, filled with practices from which we today are estranged. I will at the end of this Essay return to this point, to challenge it or at least to complicate it. The second is that people living in the past had complex moral lives, as complex and sophisticated as our own. A primary mistake many make about the past is to assume the simplicity of those living there, in contrast to our own sophistication. Thus, some, usually on the left, assume that those in the past took care of others solely because of oppression, in the absence of the protections of the state, while others, usually on the right, assume that once upon a time there was a working private family where caretaking happened more or less naturally.

In the period in the history of caretaking that I explored in my book, relative/nonrelative described both a crucial and absolute boundary and highly contested and complex space. On one side, on the side of nonrelatives, lay a familiar world of contract and (theoretically, at least) of arms length bargaining, a world shaped by a familiar and marketized economic order.<sup>28</sup> Workers were paid. Maids were paid. By the early twentieth century, those who provided nursing care were paid. Farmworkers were paid. And all were paid wages.<sup>29</sup> They were not paid enough; they did not achieve respect. But they were paid.

On the other side, on the familial side, lay a world that is partially familiar but largely lost to us. We would recognize some aspects of their lives. They, like us, found negotiations for compensation within families discomforting and easily challenged.<sup>30</sup> Spouses and other intimate members of families in particular should not, most believed,

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28. HARTOG, *supra* note 3, at 7, 14.

29. *See id.* at 232-33, 264.

30. *Id.* at 28-29.

make care contingent on hard bargaining.<sup>31</sup> There was then and now a strong doctrinal presumption that the ordinary things that one family member did for one another, including ordinary caretaking, were done without expectations of compensation.<sup>32</sup> What was or was not “ordinary” care was—then and now—a matter of ongoing litigation and uncertainty.<sup>33</sup> There was always an array of arguments and understandings available to challenge an expectation that family members should pay salaries to one another for providing care. Love, we might say, should rule, at least sometimes.<sup>34</sup>

And yet, to shift to the lost or the relatively unfamiliar features of that world: nineteenth and early twentieth century family life was never conceptually separated from economic—working—life.<sup>35</sup> That may be our understanding or fantasy, but it was not theirs. A nineteenth century or early twentieth century household was filled with workers, some of whom were blood relations.<sup>36</sup> What distinguished family members from non-family members was not a distinction on the order of nonwork/work or love/work—because everybody worked.<sup>37</sup> Rather, the intimate family was organized using the currency of legacies, and that currency had its own rules and practices.<sup>38</sup> (Note my dependence on the work of my colleague Viviana Zelizer.)<sup>39</sup> Or, to be more precise, there would be some workers who would be paid in cash, like the maid in *Frean v. Hudson* or

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31. *Id.*

32. See AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 182-87 (1998); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2191-96 (1994). This literature has been framed by the problem of pay-for wives; much less has been done on children's labor in and out of the home. See STEVEN MINTZ, HUCK'S RAFT: A HISTORY OF AMERICAN CHILDHOOD 152-53 (2004).

33. HARTOG, *supra* note 3, at 206-07.

34. *Id.* at 10, 33, 279.

35. *Id.* at 278-79.

36. *Id.* at 279.

37. *Id.*

38. *Id.* at 279-80.

39. VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 14-15 (2005); VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY 2, 25 (1994).

the farmworkers in *Cooper v. Colson*. In the seventeenth and eighteenth centuries some of these would have been known as casual laborers.<sup>40</sup> But there might also be workers, members of the family, who would be paid by way of legacies, through inheritance.<sup>41</sup> Margaret and Julia belonged, at least in their own minds and in the arguments of their lawyers, to that second class. The boundary between those classes within the household was fraught and contested. But it was also real.<sup>42</sup>

Let's posit that in some sense Julia Frean and Margaret Sayre were both servants. We don't know the intimacies of Julia's relationship with Cornelia, or, rather, we only know some of them; nor that of Margaret with Joseph Colson. We know two things about them and about how they lived: there were others in or connected to the household who were just or merely servants—men and women who worked for cash; and we know that Julia and Margaret had become something else, something more; just as many who do carework today become something else, something more, because of the intimacy and the continuities and the love that shapes their work lives. Julia and Margaret marked that something else—their membership in that other class—in many ways. Margaret called Colson "uncle."<sup>43</sup> Julia worked hard to make manifest her equality with and similarity to Cornelia's son.<sup>44</sup>

And yet the most important way they had of marking their difference from mere servants rested in the lawsuits they created and pursued: their assumption that the relevant economic currency for their work lay in inheritance, the very fact that they waited until their "employer's" death, before seeking compensation.<sup>45</sup>

In my research, I found case after case where older people (like Joseph Colson and Cornelia Hudson) avoided paying cash for the care they needed. During life, cash was not how one paid for care—certainly not for intimate care

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40. See ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR 19-21 (1991).

41. HARTOG, *supra* note 3, at 104-05.

42. *Id.* at 101-06.

43. *Cooper* Record, *supra* note 12, at 59-60.

44. *Frean* Record, *supra* note 21, at 75-79.

45. HARTOG, *supra* note 3, at 28.

within a household.<sup>46</sup> But it would be wrong to assume that they and those who cared for them were not participating in economic transactions. The promises older people made were understood, and were meant to be understood, as commitments—contingent commitments, a property lawyer would say—but still commitments.<sup>47</sup> They drew younger careworkers into work that was needed; and the promises kept them from leaving.<sup>48</sup> And the cases I read were almost universally the detritus left from those transactions.

Both workers and “employers” would have understood the rules of the game of legacies. At least in the Anglo-American legal world, certainly so in nineteenth and early twentieth century New Jersey, the trump of testator’s freedom often played a determinative role in determining ultimate entitlements to family wealth.<sup>49</sup> But testator’s freedom (real, though bounded by a variety of rules and limitations), the fact that many workers would not get what they thought they were working for, was no more a denial of the reality of the economic relationship than the employment at will doctrine or the entireties doctrine was a denial of contractual freedom in the non-familial world of labor relations.<sup>50</sup> It was, rather, a shaping part of the rules of the game in which older people and careworkers—workers like Julia and Margaret—participated.

Of course, part of what made it complicated to play the game of working for a legacy was the cultural overlay—composed out of romanticism and evangelical Protestantism and notions of separate spheres and so much else—that made the family appear as a space where work occurred as a response to need, without calculations of pay at all.<sup>51</sup> Moreover, workers like Julia and Margaret always had to confront a set of legal and equitable presumptions that made near blood relatives presumptive legatees.<sup>52</sup> Lawyer Demarest tried to turn those cultural and legal overlays

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46. *Id.* at 103-04.

47. *Id.* at 7, 10.

48. *Id.* at 5-6.

49. *Id.* at 250-51.

50. *Id.* at 67-68.

51. *Id.* at 121-22.

52. *Id.* at 70-71.

into a trap for Julia Frean, and often (as one saw with Julia) litigants had themselves apparently internalized those understandings into their own contradictory and ambivalent understandings of their positions as working family members.<sup>53</sup>

And yet, women like Julia Frean and Margaret Sayre were also perfectly capable of holding both their love of their employers and their sense of entitlement to compensation for work done together. It seems to me that they lived at the same time in at least two moral universes. And many of them managed the burden of negotiating around and between those two moral universes with remarkable skill.

In one universe, that of the family/household, they earned rewards—moral and spiritual rewards, as well as material rewards—by sharing in a common family enterprise. The material rewards of having invested in the family might be frustrated. Older people—those in control of family property—usually did not have to act in accord with promises made or with apparent commitments and investments. Testator's freedom remained something close to a trump card. The property owner, the older person, retained the right to change his or her mind, to deny promised rewards. There was no legal duty to share in the end. And the fights after death might have ruined the moral and spiritual rewards of family life, at least retrospectively. But within the moral economy of the family, women like Margaret and Julia earned rewards, if rewards were earned, by joining in, by being a loving member of an ongoing family unit. Remember Margaret Sayre's description of the varieties of work that she did. They justified themselves within that normative universe by showing exclusive loyalty, by submerging their independence as competent adults, by emphasizing their continuing place in the family. (It is, therefore, not surprising that so many adult daughters and other women who served as caretakers—including Margaret Sayre—also put off marriage until parental or older employer's death.)<sup>54</sup>

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53. See Frean Record, *supra* note 21, at 78.

54. Transcript of Record at 28-29, Hattersley v. Bissett, 29 A. 187 (N.J. 1894); Cooper Record, *supra* note 12, at 83; see Ridgway v. English, 22 N.J.L. 409, 416-17 (N.J. Sup. Ct. 1850); Transcript of Record at 52, 58, 63, Petty v. Young, 9 A. 377 (N.J. 1887).

In the other universe, on the other hand, in the normative universe that a suit for compensation quantum meruit to a common law court or a petition for specific performance to a court of equity articulated, rights and identities as independent and contractually competent actors took priority. Subordination within the household was inconsistent with an adulthood that produced a successful cause of action. As was too much love. As Alexis De Tocqueville had famously put it, in describing the effect of inheritance on the lives of young American men, “[a]s the family is felt to be a vague, indeterminate, uncertain conception, each man concentrates on his immediate convenience.”<sup>55</sup>

A good plaintiff's lawyer ordinarily worked to cabin a client within the second moral universe and to suppress the often multitudinous traces of the first. But as we have also seen, the complexities of real lives kept leaking out into the testimony. And that made the lawyer's work difficult. Revelations of sharing, caring, and love could become destructive to the case the lawyer wanted to make. Remember the anxious interventions of Julia Frean's attorney as she described her love for Cornelia Hudson. But in the hands of a clever lawyer, it was even possible to turn testimony about how subordinated, how submerged, an adult child had been, into support for a successful right to individual compensation. Just as no competent individual or adult would have accepted the discipline of the factory floor without the expectation of pay, so it was with the adult child within the household. Margaret stayed; she did not go to Montana. She hardly received any compensation. She relied on Joseph Colson's promise that she would have a farm. One ironic consequence of subordination and loyalty within the family was that it could occasionally become implicit proof of a labor agreement between older person and younger family member. Someone like Julia Frean would not have stayed and done all that work, accepted a role as a “dependent,” if she hadn't expected to be paid.

For those on the other side, for lawyers and their clients—executors and administrators of estates, as well as

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55. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 51-55 (George Lawrence ed., J.P. Mayer trans., 1969). On justification within moral universes, see LUC BOLTANSKI & LAURENT THÉVENOT, *ON JUSTIFICATION: ECONOMIES OF WORTH* 164-78 (Catherine Porter trans., 2006).

siblings and others who opposed careworkers' claims to property or compensation—there were many ways to mark such employees who had become wannabee legatees as something else—as greedy or ungrateful, as morally obtuse or dishonest, as forgetful of the primary moral universe in which they had actually spent their lives. Because of bad legal advice or because of their own moral deficiencies, these "family members" had insisted on rights to property or to payment. Instead, they should have understood themselves as privileged to have been part of loving homes. Or, they ought to have recognized themselves as gift givers, not as crass contractors. They were people who had done good deeds as individuals, in caring for older people. It sullied and darkened their moral status that they were now insisting on compensation for what they once had given voluntarily and freely, out of the goodness of their hearts, out of love. And always there lurked the question whether what they claimed now had been solemnly sworn and promised commitments—contracts—had really been something else earlier, before death and litigation. Was it only after the fact—sometimes many years after the fact, after the relevant speakers were dead—that mere talk had been reconstructed into contracts?

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Does any of this resonate with the experience of careworkers today? Are these dilemmas and negotiations ones that simply belong to a past that is gone? The weird practices of a now lost or forgotten foreign country?

Certainly, the world of care now looks so very different than the world I reconstructed out of the New Jersey cases. Institutionally and politically, old age is today shaped by a pervasive commercialized and corporate health care system, by the identification of the old as the targets of corporate greed and commercial growth, by a pervasive state bureaucracy, and by the increasing presence of a global migratory army of careworkers. All of that makes carework look very different, and makes plausible the public policies that Peggy Smith argues for, which would attach careworkers to the political institutions identified with other forms of work, ones away from "the home."<sup>56</sup>

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56. See Peggie R. Smith, *Who Will Care for the Elderly?: The Future of Home Care*, 61 BUFF. L. REV. 323 (2013).

And in general, for almost everyone, the economy of inheritance, the game of working for a legacy, has disappeared as a plausible life strategy. It certainly would make no sense, or little sense, as framing the work expectations, the reliance interests, to those who do home care today. There may once have been a language and a currency used to mark carework, framed by the presence of inheritance as a life strategy. That currency no longer exists.

So, it all seems so very different, although I would expect (and ethnographic and other research confirms) that the contradictions that Julia Frean experienced are not that different from those that many careworkers experience today. When carework occurs “within” families (whatever “within” might mean) and when one is—when one understands oneself—as having become a family member, the boundaries between what one does out of love or routine or habit or custom or gendered expectations or whatever and what one does because one will be paid for it, will be experienced as confusing and uncertain, complicated. Still, the answer to the question, who is a family member, is not available today. Few today assume that a family member is one whose expectation of pay was through inheritance.

And I think that absence helps describe a huge divide between then and now. At least that divide shaped how I framed the book I wrote.

And yet, from the time I began working on this material and giving talks about carework and old age to various audiences, I have had people in the audience tell me that I am wrong, that the stories I tell speak to them, not as exotic travel reports from a distant “foreign country,” but as articulations of familiar facts in their own moral and emotional lives.

What lessons should we draw from those “experiences”? How lost is the past that I explored? And to return to where I began, what should be the enterprise of reconstructing the experience of carework, past and present?