
BOOK REVIEWS

ALL UNHAPPY FAMILIES: TALES OF OLD AGE, RATIONAL ACTORS, AND THE DISORDERED LIFE

SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE. By Hendrik Hartog. Cambridge, Mass.: Harvard University Press. 2012. Pp. 353. \$29.95.

*Reviewed by Ariela R. Dubler**

Professor Hendrik Hartog revels in mess. Domestic messes of every variety fill the pages of *Someday All This Will Be Yours: A History of Inheritance and Old Age*. Hartog serves as a brilliant navigator of this complex and potentially befuddling cacophony of family scenes and conflicts. He guides us through families' domestic and legal battles, bringing family members' daily lives and experiences into the center of inheritance law and the legal history of the family.

Families living in New Jersey from roughly the mid-nineteenth century through the early decades of the twentieth century produced the historical mess into which Hartog has waded neck-deep. Fearlessly, Hartog assembles and picks through this stunning array of emotional, legal, and financial debris. Patiently, he reconstructs the origins of the wreckage: the travails of families struggling to negotiate the needs, desires, and anxieties surrounding the care of aging relatives in a time before state programs and paid caregivers eased some of the predictable burdens of old age. The original creators of this wreckage were unable to exert control over many aspects of their situations. Medical emergencies and limited resources often determined their destinies. Hartog, however, narrates their lives with great intentionality, thereby reconceptualizing the role of these families in the law and, indeed, the very meaning of law itself.

Someday All This Will Be Yours is about the ways that older people, terrified of being left alone in their final years of life, used promises of future wealth transfers to ensure that younger members of their households would care for them in their old age. It is about how those promises shaped family arrangements, domestic duties, and, particularly, the provision of end-of-life care. And it is about what happened when, unsurprisingly, some promises of future riches went unfulfilled and some disappointed promisees turned to the courts for

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redress. Ultimately, *Someday All This Will Be Yours* is about the blurry and mutually constitutive spheres of family life and family law, viewed through the prism of New Jersey families stumbling through the pitfalls of old age and complex familial relationships.

Hartog is a master storyteller, and the core of *Someday All This Will Be Yours* is stories: stories of deals made between hopeful (or, sometimes, desperate) relatives, stories of grueling illness and nursing care, and stories of despair at promises and expectations unfulfilled. These tales of anticipation and disappointment are relentlessly messy — unruly collections of people living together as households, physical spaces falling into disrepair, and elderly bodies confronting the impending end of life with all the accompanying bodily decay.

Without flinching, Hartog arrays these overlapping layers of dishevelment before us. Indeed, his explicit goal is to counter the false neatness of past accounts of such familial scenarios. He writes:

There is a certain bloodlessness to the history of care as it has often been written about. Care itself is a neutral word that can hide the rages of the demented and of their caretakers, and the struggle to keep a house clean when one has to live with an incontinent old man or woman, the chaos of everyday life. (p. 12)

True to this commitment, the pages of *Someday All This Will Be Yours* brim with metaphorical and literal blood: not only hard-to-characterize configurations of people and conflicting legal doctrines, but also emotionally devastating encounters with mental breakdowns, the tortured administration of enemas, caretakers “smeared up” with fecal matter (p. 255), old people with “suppurating wounds” (p. 157), and one man with swollen testicles “as big as a small muskmelon” and “as black as ink” (p. 262).

It is all a big mess. And Hartog almost rejoices in its unkemptness. The blood allows us all to peer into the lives and legal struggles of families negotiating the perils of sickness and death. Moreover, the blood allows Hartog to dismantle the traditional boundaries between legal doctrine and lived experiences.

Of course, a historian like Hartog, with his eyes trained on the intimate puzzles of the past, might understandably savor such a complex landscape of domesticity gone awry. The law, however, at least as it has been conventionally constructed, is no friend of such unmitigated disorder. The law, understood as the doctrinal work product of judges and legislators, is famously intolerant of chaos, both inside and outside of families. As Alexis de Tocqueville observed, “What lawyers love above all things is an ordered life.”¹ In the face of mess, lawyers often

¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 266 (J.P. Mayer ed., George Lawrence trans., HarperPerennial 1988) (1835).

act as the most efficient of clean-up crews, with the law serving as the capacious rug under which junk of all kinds is conveniently swept. The disordered life is soon rearranged and tidied up. Complicated conflicts are shoved out of view. The appearance of order is restored, good as new.

Amidst these countervailing forces of familial disorder and legal tidiness lies the central drama of *Someday All This Will Be Yours*: how family members and legal actors made sense of the disconcerting conflicts and oozing bodily fluids that accompanied familial decisions around what we would now call eldercare. Drawing on a treasure trove of carefully mined sources, Hartog again and again pulls all the familial junk back out from under the law's rug. He unapologetically brings families' struggles back into plain view where he can ponder the significance of the disordered life, as well as the law's valiant, but ultimately futile, attempts to impose a patina of order upon familial states of disorder.

In the end, though, *Someday All This Will Be Yours* forces us to reckon with the fact that order and disorder are themselves hard to separate. The rug cannot be separated from all that it is trying to hide. Despite the rigorous efforts of judges, the law too is a messy business.

It has long been Hartog's scholarly project to get historians and lawyers alike to reject any neat definition of law in favor of one that recognizes law as complicated, multiple, and contingent — the result of people's actions and understandings, not any particular text or judicial pronouncement. True to this vision, *Someday All This Will Be Yours* highlights the deep ways that family and law are actually more similar than dissimilar: indeterminate, conflicted social institutions whose strength and very meaning emerge from their complex roles in people's unruly lived experiences.

Which is not to say that the people in Hartog's stories — family members or legal professionals — ever threw up their hands and conceded that they could control neither home nor law. Quite the contrary. Through private bargaining and public litigating, lay people and professionals alike stubbornly sought to exert control over family and doctrine. Hartog's stories are about the seemingly rational deals that family members struck with one another to benefit their respective needs for care or money. These are stories of attempts to impose order on familial disorder. And these are stories about the clear accounts that judges gave of what family members had done and the allegedly predictable consequences of their well-reasoned actions. Judicial narratives sought again to rearrange messy familial conflicts into ordered resolutions.

Ultimately, however, Hartog's stories reveal just how hard it is to restore order convincingly to either the family or the law. While judges, desperate to dispose of the claims of feuding relatives, often

presumed a rationality to the decisions made by parents and children, scraps of evidence almost inevitably hint at the possibility of other motivations. Time and again, Hartog's stories subtly suggest that, although family members might bargain for what they need, it is hard to transform all familial relationships into purely rational transactions based on costs and benefits.

Yet, the impulse toward order must be a deep one. And even as Hartog reveals law and family life as inextricably intertwined social spheres, forms of thematic order emerge in his own narrative. Moreover, even as Hartog forces us to recognize the disorderly heart of the law, he seems drawn to his own sense of order based on family members' roles as rational actors engaged in calculated deals. Hartog's own narrative, then, often seems to understand family arrangements as the reasoned outcomes of bargained-for goods, albeit with calculations made in suboptimal circumstances.

But this order too almost begs to be unmasked. In particular, these tales might force us to reckon with the role of far less rational emotions — particularly, love — in guiding the familial structures crafted by aging parents and their grown children. Indeed, *Someday All This Will Be Yours* subtly expresses a profound ambivalence about the role of love and altruism in familial negotiations. Hartog seems unable to banish love fully from the familial realm and, simultaneously, unable to grant it significant explanatory power.

So too the law. Just as Hartog occasionally concedes that a parent or child might have acted not out of rational self-interest but rather out of emotional connection, the law cannot entirely figure out what to do with love's messy impact on the otherwise rational actors that make up the legal family. In *Someday All This Will Be Yours*, then, narrator and subjects alike seem deeply ambivalent about whether family members act out of their own self-interest or out of commitments that might be deeply out of sync with their own well-being.

These tensions are not simply an artifact of history. The ambivalence that weaves through *Someday All This Will Be Yours* lurks deep within contemporary family law, as well. In fact, through the lens of nineteenth- and early-twentieth-century New Jersey inheritance law, Hartog offers us a rich view, more generally, of the multifaceted, fraught relationship between the messy, mutually constitutive arenas of the family and the law. In this respect, *Someday All This Will Be Yours* offers not only a history of a narrow set of familial practices in one period of New Jersey legal history, but also the critical antecedents of the central themes and struggles of family law today as judges continue to confront the order and disorder, and the rationality and irrationality, that burn alongside each other at the core of the legal family.

I. HARTOG ON OLD AGE AND THE LAW

Family after family traipses through the pages of *Someday All This Will Be Yours*. The heart of every chapter of Hartog's book consists of detailed, poignant narratives of specific families' experiences and struggles, their agreements and disappointments. Hartog has crafted spectacularly rich tales of families' actions and relationships from a range of court documents and trial transcripts. His sources overflow with the elements of family life that are precious and rare in historical documents and, particularly, in published legal sources.

Hartog tells the parts of people's stories that are often hardest to learn and almost always missing in judges' dispositive accounts of familial conflict: detail-rich descriptions of family negotiations, compromises, and tensions around the most intimate forms of the emotional and physical care that many old people require. In story after story, we learn of people's deepest fears, their conflicted notions of responsibility, their physical frailties, their desire for freedom, and their potential for both extreme kindness and heartbreaking cruelty. Hartog brings the reader into the web of interactions and conflicts that, ultimately, led some member of each family to turn to the law to resolve his or her problems.

A. *The Family Drama*

Every embattled family in *Someday All This Will Be Yours* is different. And Hartog marvels that "[o]ne true wonder of these records — as social history — is in their inability to be reduced to a representative norm" (p. 13). Nonetheless, the book assembles these stories because they are linked in critical ways.

A basic cast of characters, for instance, binds the distinct family conflicts and travails that unfold in the chapters of *Someday All This Will Be Yours*. The common *dramatis personae* consist of an aging member of a family and some number of younger members of the household — usually, but not always, biological relatives of the aging person. Across tales, a basic narrative thread similarly links these characters. The fundamental recurring plot is as follows:

Act One: An aging family member realizes that old age will likely mean the need for a caregiver. Deep fear and "anxieties of solitude" set in (p. 120). What if there is no one to provide the necessary care when the time comes? What if old age means being left all alone and helpless? For many, reports Hartog, "[t]here was no imagined escape from abandonment" (p. 120).

Act Two: A possible solution presents itself: guarantee that someone will care for you by making some younger, able-bodied member of the household an offer that she or he cannot resist. And so the aging person makes the book's eponymous promise: "Take care of me, and

someday all this will be yours.” In each story, some younger person, enticed by the vision of future wealth and prosperity, makes the deal.

Act Three: Things fall apart. Not surprisingly, especially since this is a history based on court documents, happy endings often prove elusive. Some time after the deal is made and the younger family member has endured a period of grueling physical care given at the expense of pursuing more fulfilling life options, the old person dies and leaves the promised property to someone else.

Act Four: Enter the judges. The aggrieved younger family member goes to court to get his or her due. He or she must find a legally remediable account of a deep familial injustice. A judge is then asked to decide whether some legal action might offer some remedy — in the form of property or compensation — for the angry younger caregiver.

By unfolding this drama again and again, Hartog paints a vivid portrait of family relations. It is, of course, a portrait from a very particular angle. One of Hartog’s spectacular, disquieting moves in *Someday All This Will Be Yours* is to shift the focus of our lens when we examine the family. As Hartog points out, most studies of the family have focused on either husbands and wives or parents and young children. By contrast, through Hartog’s sources, “our attention is drawn to two characters, shadowy figures within family law as it has ordinarily been conceived: the adult child and the elderly person” (p. 21).

These characters focus us on very particular and peculiar characteristics of the family. Most strikingly, when an adult child and an elderly parent sit at its core, the family becomes a setting devoid of formal obligations to tie family members to one another. Jarringly, parents had no legal obligation to provide for their children in their wills, and children had no obligation to care for their aging parents. Unlike the arena of husband-wife relations or parent-(young) child relations, then, the law made no demands on the core familial relationship structuring the dramas in Hartog’s book. Parents and their adult children had to work out their mutual responsibilities for themselves. Similarly, adult siblings — often the rivals in these dramas over family wealth — owed each other no legal duties.

Thus, Hartog’s “focus is on families within which competent parties negotiated and fought with each other over promises, inducements, commitments, and obligations and over differing understandings of needs and duties” (p. 28). Far from the image of the family as a “haven in a heartless world,”² a respite from market forces and hostilities, Hartog’s families are bonded by the need to barter over their varied goods and services. In *Someday All This Will Be Yours*, “families are

² See generally CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD (1977).

studied as locales or arenas filled with men and women who held interdependent but conflicting life plans and identities” (p. 28).

The families that emerge in this terrain of negotiated exchange are extremely varied and porous. It is not a neat landscape of fixed identities. The line between family member and employee, for instance, often blurred. Many people inhabited a “peculiar middle space” in which they were “neither family nor employees — or both family and employees” (p. 249). And to complicate matters further, identities often shifted over time. As years passed, blood relations and non-blood relations came in and out of seemingly familial configurations. “By the time the younger people discovered that they were not getting what they believed they had already been given . . . [a]lignments within families had shifted, and new families had formed. People had died, remarried, and quarreled. Debts had been incurred, and inopportune comments expressed” (p. 141). Faced with these disorderly scenes, courts “struggled to fix identities that were multiple and contradictory” (pp. 249–50).

By contrast, Hartog works to unfix those identities in order to dwell on the ways that familial relationships were contingent and ambiguous. Likewise, while judges sought to categorize familial conflicts into predictable patterns, Hartog stresses that each family’s tale is different. To be sure, he concedes, “part of the allure of such cases is their apparently universal, folktale-like qualities” (p. 49). But while Hartog seeks to bring these cases together to understand something about people’s lived experiences across cases, no case in Hartog’s book is meant to be representative. All of the tales in the book “about daughters, sons, housekeepers, or adopted children became, through the matrix of petitions and complaints and the testimony of supportive witnesses, particularized and distinctive” (p. 13).

Moreover, Hartog recognizes that each family’s story could itself be told in many different ways. Marriage could sit at the center. Or parenthood. Or a sibling relationship. In many cases, “the underlying conflict was both between parent and child and between contending and competing siblings” (p. 52). Any overarching narrative, Hartog cautions, might “bleach out many of the characters that shaped the conflict in the case” (p. 52). And, above all, “it is important not to deny a messy reality” (p. 53). Everyone — family members, lawyers, judges, and Hartog himself — is constantly making narrative choices that produce particular accounts of family deals and injustices.

By reconstructing many detailed and varied accounts of the “some-day all this will be yours” tale, each unfolding in its own way with its own eccentricities, Hartog explores how families made decisions about important life choices, how the law understood the doctrinal significance of those choices, how those legal understandings shaped familial choices, and how families shaped the law.

These stories are filled with the elusive details of domestic labor, the types of work too often thought to be so private or uninteresting or embarrassing that they are omitted from many of the written documents — particularly, those of a legal variety — that are available to historians. By focusing on cases surrounding broken promises of inheritance, Hartog has brought to light trial documents that tell us how families did the laborious work that comes along with domesticity, from tending to farms, to cleaning the house, to preparing meals, to nursing a sick relative. His sources are jam-packed with the “revealing detritus” of family life (p. 142). He has even found transcripts that give the poignant details of the physical labor involved in giving the most intimate care to incontinent, incoherent, and demented old people.

As Hartog notes explicitly, these are stories of family members performing the forms of labor that today we often outsource to paid workers (pp. 270–73). The government also provides services for the elderly (p. 270). But Hartog’s transcripts reflect a time when such caregiving was almost always performed by relatives or at least by people who understood themselves to be family members.

B. Enter the Lawyers

Hartog is particularly attentive to the legal profession and the role that lawyers played in the lives of aggrieved family members as they struggled to frame their legal options and assess their entitlements. As more and more “someday all this will be yours” cases arose, lawyers proved only too happy to try to provide advice and counsel to family members seeking to claim what had been promised to them. Indeed, the second part of Hartog’s book shifts its attention to the imagined attorney’s office and the advice that lawyers were likely to give their clients when, with increased frequency beginning in the mid-nineteenth century, cases arose in which a young relative sought money or property for care provided to someone already dead. Over time, more and more people realized that “[t]he death of a parent was a good time to talk with a lawyer” (p. 172). And thus, Hartog’s stories reveal “the everyday, normal, known ways of recourse to law in the face of family conflict and uncertainty” (p. 13).

Through the book’s stories, then, Hartog explores not only the lives of families with an aging relative in their midst, but also the doctrinal questions that challenged lawyers and courts when disputes about broken promises and lost inheritances entered the realm of litigation.

While families have always experienced conflict, not every type of conflict has always been able to morph into a legal dispute. Cases about broken promises of future inheritance in exchange for present caretaking, Hartog observes, began appearing in court records for the first time only around 1850 (p. 49). Suddenly, courts were forced to

decide whether, in fact, a contract had existed between a deceased person and the surviving younger relative who had served as the deceased's caregiver. In other words, judges were forced to decide whether the young relative had acted out of legal obligation because an agreement had been reached or whether that relative had cared for his aging family member for some other reason — be it convenience, familial pressures, or cultural expectations.

Moreover, in many instances, judges were forced to decide whether the younger caretaker was a relative at all, whether that mattered and, if it mattered, what it meant for the outcome of the case. Frequently in Hartog's stories, upon an older person's death, a member of the deceased person's family claimed that the caregiver, who claimed to be a relative entitled to inheritance, was in fact an employee. Judges, then, had to decide both what constituted a familial relationship and also what types of contracts for care could exist between elderly people and a range of family and nonfamily relations.

These contract questions, of course, were embedded in an underlying set of legal rules. Testamentary freedom, for instance, was a basic principle of Anglo-American law (p. 67). The law would not compel parents to leave an inheritance to their children. Thus, a child, like a stranger, had no automatic legal recourse if a parent died and left all of his or her money to someone else (p. 67). But what if a promise had been made? Then judges had to decide whether the promise constituted a contract that restricted the general principle of testamentary freedom. And, if such a contract existed, whether that entitled the promisee to either the property he or she had been promised or alternatively some form of financial compensation for the caregiving services already performed.

With the guidance of their attorneys, aggrieved promisees crafted two different types of claims in their quests for the wealth that had been promised to them. In some cases, they sought the actual land they had been promised; in others, they sought financial compensation for their domestic services. Over time, these claims both responded to and shaped a set of evolving legal doctrines.

The former claim for the return of land led judges to ask whether a promise of future wealth had prompted "a life transformed" (p. 181). Faced with claims of hard labors performed and enticing promises broken, "[c]hancellors and vice chancellors wanted rich descriptions of lives spent doing things that could be explained only as resulting from such agreements" (p. 181). This was, of course, a tricky business. As Hartog observes, courts were wary of understanding all decisions made by children or young relatives within this paradigm. To do so would have undermined a basic normative premise of familial behavior. After all, "[c]hildren who did what their parents wanted . . . revealed nothing about the necessary existence of a prior agreement. Obedience was what children did at home without the

need for or the presence of a contract” (p. 181). Thus, to win a claim, someone had to demonstrate some type of extraordinary circumstance.

The latter argument for compensation, by contrast, presented courts with claims of quantum meruit. Such claims began from the premise that “[a]t least for free American adults who worked outside the home, work presumed a right to compensation” (p. 207). The question for judges, then, was whether that was true when work was performed within a family context or whether “[f]amily work meant noncompensable work that was done for reasons other than expectations of pay” (p. 208). Successful claims of compensation, therefore, generally demanded that a member of a household convince a court that she or he had provided the care in a role that, while familial in some ways, was not the role of a child.

C. *The Messy Character of the Law*

In Hartog’s hands, the law itself becomes a central, if complicated, character in his tales of familial care and betrayal. Hartog never paints a simple portrait of the law. And he never has. Hartog’s scholarly agenda has long been committed to revealing “legal meaning as multiple and contestable.”³ “The meaning of law,” Hartog has always insisted,

is not given by a particular group of law makers, not presumptively imposed on those affected by those who officially interpret. It is not, indeed, an “it,” but instead a multitude of possibilities, arguments, strategies, positions, located in various institutions and in the imaginations of a complex and diverse citizenry.⁴

Even the Constitution must be treated as “contested interpretive terrain, as an arena of struggle between contending and changing normative orders.”⁵ Thus, Hartog has altered the field of legal history by teaching lawyers and historians alike that the law cannot be found in any one document or pronouncement, no matter how august or definitive. “If a legal historian has to define or assume a nature of law,” he has advised, “he or she might as well start with a definition of law as an arena of conflict within which alternative social visions contended, bargained, and survived.”⁶

In *Someday All This Will Be Yours*, Hartog once again reveals that the law, like the families turning to it for relief, was neither uniform nor determinate. “There were always several right answers,” he ar-

³ William E. Forbath, Hendrik Hartog & Martha Minow, *Introduction: Legal Histories from Below*, 1985 WIS. L. REV. 759, 759.

⁴ *Id.* at 764.

⁵ Hendrik Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All,”* 74 J. AM. HIST. 1013, 1032 (1987).

⁶ Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 934–35.

gues, “as judges and chancellors confronted rich and indeterminate evidentiary records of family quarrels and enmeshed relationships, which they necessarily shaped by picking and choosing their way through thick fields of inconsistent legal doctrines” (p. 5). Thus, seemingly similar cases could come out differently. And complex doctrinal intersections — such as the relationship between the statute of frauds and the doctrine of part performance (p. 178–79) — could generate mixed results.

But, crucially, Hartog argues that this is not a story of doctrinal incoherence. This is legal pluralism. In Hartog’s account, legal pluralism is a critical part of understanding the role that the law played in people’s everyday lives — and, equally importantly, the role that people’s lives played in the law. Drawing on the terms of legal anthropology, Hartog understands the cases that underlie his stories as “cases of trouble” (p. 11). As such, each of his stories

reveals norms of the legal culture (i.e., what ought to have happened) even as it is by nature a case about claimed violations of norms and tests of the power of norms, as well as a case about individuals who did not easily or comfortably embody or conform to the identities the norms prescribed. (p. 11)

To be sure, while families and legal doctrine alike were often a mess, “[m]any voices in the law and in the popular culture struggled to resist or to deny that chaos” (p. 149). And, true to Tocqueville’s basic insight, judges sometimes struggled mightily to restore a vision of order. Thus, the allure of the rug to hide all kinds of sins: “[T]he chaos of having to manage the needs of the old, once enmeshed in a situation where rational planning was at an end, was everywhere in the case records, although often hidden in judicial opinions” (p. 150).

But imposing order was difficult. And despite its pluralistic nature, or perhaps because of the many possibilities inherent in it, the law exerted a powerful pull over individuals. “Parents, children, neighbors, and other relatives all thought and spoke about what would happen in the law” (p. 14). Across Hartog’s sources, people’s “conversations and their negotiations revealed internalized and sometimes sophisticated understandings of legal norms” (p. 14). As such, legal history and social history necessarily collide and inform one another in Hartog’s book as he weaves a web of people’s most intimate familial experiences, their arms-length discussions with lawyers, and the complex state of their legal consciousness.

II. ORDER AMIDST CHAOS

So Hartog wants us to see that it is all a mess: families, law, and families in the law. Hence the complexity of the landscape Hartog constructs in *Someday All This Will Be Yours*. Each family is unique. Each legal opinion is contingent. Each familial struggle and each trip

to the lawyer's office are occasions not only for doctrinal prediction, but also for the law's very redefinition. It is a rich portrait of the disordered life.

And yet, the impulse to create order has a strong pull, and as one reads *Someday All This Will Be Yours*, some forms of order begin to emerge. Embedded within Hartog's detailed narratives are not just a common set of character types and plot moves, but also a set of overarching analytic themes. Like a clever painter, Hartog obliquely inserts patches of ruminations on particular themes amidst the sometimes camouflaging details of his intricate tales. Often one story leads into another with little by way of explicit analytic transition. The themes sit somewhat precariously at the interstices of the stories.

I will admit that I sometimes longed for Hartog to paint his themes with a slightly heavier hand. At points, I found myself wishing that he had been more willing to stray from the details of his sources to offer greater explicit argument and analysis with respect to the thematic links between his stories. He rarely is. Though I would have loved to hear more of his thoughts, it is hard not to admire his methodological commitment to letting his sources speak for themselves in all their particularity and complexity.

Indeed, the themes are surely there. In particular, three themes link many of the stories in *Someday All This Will Be Yours*: the tension between formal and functional approaches to defining the family, the role of gender in legal understandings of familial rights and duties, and the legal significance of differentiating between home and work. These intellectual categories, to be sure, did not provide clear answers to any particular case. They did, however, provide some predictability and order by shaping the questions that family members, lawyers, and courts asked and the ways they reasoned about families in the law.

Notably, these are also themes that shape contemporary family law. Bringing them to the fore of *Someday All This Will Be Yours* makes clear that, like the messy modern family itself, the central themes of twenty-first-century family law have deep antecedents in legal history. Hartog's stories give one such history to the contemporary analytic categories that judges and lawmakers commonly draw on to think through the questions concerning the allocation of familial rights and obligations.

A. *Formal and Functional Parent-Child Relationships*

The easiest way to guarantee your legal status as a member of someone's family is through the formal links clearly recognized by the law as routes to familial status: blood, marriage, and adoption. These three "on-off" switches mark legally protected transformative moments. Flip the switch — by giving birth to your biological child, by marrying your intimate partner, or by adopting a child — and you are

a legal family with all the attendant rights and obligations. Neat and tidy, just as the law likes it.

But often relationships do not fit into the law's prescriptive neat boxes. Not all parties to intimate or caregiving relationships can or do avail themselves of these transformative moments. Even absent formal bonds, however, lots of people develop relationships that, over time, make them seem like they are a family. They act like families. They look, in many ways, like families. Others recognize them as families. And then, in many different circumstances, they turn to the law for clarification or protection. For one reason or another, they ask a court to decide whether their relationships entitle them to the legal rights and responsibilities that accompany the designation of family. Judges and lawmakers, thus, are often faced with the task of deciding whether to recognize functional families (based on ways of acting over time) alongside formal families (based on blood, marriage, or adoption).

The stories in *Someday All This Will Be Yours* introduce a stunning array of functional families. Masterfully parsing his sources, Hartog dissects the myriad households that assembled themselves in nineteenth- and twentieth-century New Jersey and the complicated mixtures of formal and functional relationships that challenged lawyers and courts when disputes arose over inheritance entitlements. Many of these households formed not around marriage or birth, but rather around informal ties that developed over time.

One married woman, for example, for reasons that are unclear in Hartog's sources, raised her neighbor's baby. As that girl, Martha, grew up, Ruth Buzby sometimes referred to her as a daughter and other times referred to her as a servant (p. 58). Ruth also raised her own granddaughter as though she were her daughter. She also gave birth to children of her own. Her home brought all of these children together in one domestic unit (p. 58). When Ruth died, though, she left a significant portion of her estate to her granddaughter, Mary, "specifically excluded [her] grandson Nathan W. Buzby," and yet included Martha (p. 61). Her biological children were, not surprisingly, outraged and charged that their mother's will was invalid as it had been created under the "undue influence" of her quasi-adopted young relatives (pp. 62–63). After much litigation, the New Jersey appellate court declared the will valid. Ruth was competent to leave her money to whomever she chose, and the law protected her right to do so (p. 65).

Hartog's tales are replete with complicated extended families like Ruth Buzby's, linked by a web of biology and performance, and chock-full of conflict over individuals' ambiguous duties to one another. As one reads *Someday All This Will Be Yours*, it becomes increasingly clear that such complexity and ambiguity was not as unusual as we might have imagined. Indeed, it would appear that in matters of

family structure “the routine became the exceptional” (p. 126). Adults raised children as their own who were not, biologically, their children (pp. 58, 94, 95). Or they had children in their households whose familial status was unclear — children they sometimes cared for like family members, and sometimes treated like employees (pp. 239–41). And, eventually, as old age took its toll, many children started to act more like parents (p. 165). Gradually, old people assumed the functional role of children.

As Hartog brilliantly demonstrates, it was rarely easy for courts to sort out the relationship between formal familial ties and functional familial patterns of behavior. So they developed a range of legal approaches in an attempt to neaten the landscape of the law. But the approaches were inconsistent and varied. Thus, in some doctrinal areas, biology became increasingly irrelevant. A court might simply ask, “Did you belong to the family, or did you not belong?” (p. 232). In other areas, by contrast, courts increasingly clung to biology as a more “seemingly objective” approach to questions of familial status (p. 226). Formal and functional, in other words, competed with one another again and again as courts looked to how people behaved — “to what had been said and done” (p. 82) — and also to their blood relationships in order to understand what it meant to be a parent and a child within a family.

B. Gender and Familial Expectations

Sometimes lawyers and judges talk about parents and children. Other times, they talk about mothers and fathers, or daughters and sons. Sometimes it seems to matter that some parents and some children are female and that others are male. Often, though, it is difficult for courts to explain clearly why and how gender matters. It just seems relevant.

Inchoate intuitions about gender can do powerful work in the law. As Hartog’s stories make clear, because functional standards have always competed with formal categories, judges struggled to understand the social meaning and legal import of behavior that took place within people’s households. Old people made promises and young people provided care. Old people said certain things and made certain demands, and young people tended to homes, washed decrepit bodies, and prepared countless meals.

Confronted with these scenarios, Hartog identifies the many ways that courts understood the significance of all parties’ actions through a gendered lens. That is, as they understood the significance of what family members (or alleged family members) did, they refracted people’s actions through a set of conventional understandings about men’s and women’s distinct roles at home, as well as their imagined potential lives away from home. Men and women were expected to

act in different ways within families. And, for judges, those assumptions about gender made parents' and children's actions look more or less intelligible, logical, and predictable.

Certain family gender roles were, of course, not mere social conventions. They were written into the law for much of the long nineteenth century that is the timeframe of Hartog's book. Coverture, in the varied forms it assumed over this period, explicitly defined the rights and obligations of husbands and wives as distinct.⁷ This doctrinal scrim quietly shades the backdrop of many of the stories in *Someday All This Will Be Yours*. For instance, as Hartog observes with respect to James Davidson, who worked and cared for his father for some years after his mother died and his youngest sisters got married, "[i]t may well be that marrying, in effect finding a woman who could replace sister Ida and his mother as a caregiver, was a central aspect of what it meant for James to 'keep' his father" (p. 38).

As a matter of social norms and as a matter of law, wives and husbands played different roles. As a matter of practice, though not of law, so too did sons and daughters. Thus, judges often attached very different meaning to a daughter's decision to remain in her parents' home and care for them than they attached to a son's decision to do so. Housework, after all, was something women did. Caregiving was women's work, the role of a wife and/or daughter. For a daughter to perform such tasks was unremarkable — certainly not evidence of a life transformed by a contract. For a son to do so, by contrast, often seemed like a quite extraordinary decision explicable only by an unusual contractual arrangement. As Hartog observes, "[y]oung men would not, so the courts often presumed, have stayed or returned to work for parents or others without an agreement Young men were presumptively restive and mobile" (p. 97). Not so young women: "The work they typically did within families — intimate, personal, household care, cleaning, and cooking — often became, in judicial scrutiny, just what daughters did" (p. 98). Thus, Hartog points out, in many decisions

inside work was contrasted with outside work, care work contrasted with economically productive work, the ordinary work of a household contrasted with "exceptional" tasks that were explicable and undertaken only because of a contractual understanding, the prospect of marriage contrasted with the prospect of a career, and voluntary gifts contrasted with enforceable contracts. (p. 99)

As legal doctrines developed to adjudicate the growing number of "someday all this will be yours" cases, these gendered ways of thinking had concrete legal consequences. For example, "men who gave up jobs

⁷ See, e.g., HENDRIK HARTOG, MAN AND WIFE IN AMERICA 115–22 (2000).

or careers to care for older property owners at home were often understood as having passed th[e] test” of demonstrating a life transformed by reliance on a contract (p. 188). Some women were able to pass that test too (pp. 188–90). After all, the law was never fully determinate. But, for the most part, as Margaret Sayre, a housekeeper who agreed to stay and care for her elderly boss after he promised her a significant inheritance, learned when her boss died without providing for her: “All the work she did, including the intimate bodily care of her longtime employer, was coherent with gendered expectations of what women did as routine aspects of their lives” (pp. 187–88).

Similarly, as grown children began to bring lawsuits to reclaim wages for care they had provided to their deceased parents, sons found it much easier to recover. To make out a legal case for wages earned, a child had to prove that he or she was an emancipated adult working within his or her parent’s home (pp. 218–22). A child, after all, would not be paid for household tasks. Only an adult forgoing other employment could possibly be paid for in-home caregiving. Van Dyke Ten Broeck, for instance, succeeded in convincing a court that he would never have worked in his father’s home had he not believed he was doing so for wages (pp. 223–24). As Hartog explains, the court concluded that “Van Dyke had not remained because that is what a son naturally did He remained because he and his father had made a deal” (p. 224). By contrast, a court was unwilling to award wages to Sarah A. Schooley, a woman who had left home to learn a trade but returned when her mother fell ill (pp. 224–25). Such actions, according to the court, could not be construed to imply a “promise to pay for services rendered by a daughter to her father” (p. 225).⁸

C. *Work/Home*

Judges have always had a hard time imagining certain forms of caregiving as paid labor, not only because these tasks were usually done by women who were expected to do them as mothers or daughters, but also because of where women usually did them — that is, in their family homes. The home was long imagined as the antithesis of the public sphere of the market and the workplace.⁹ Thus, when acting in their familial roles, people were presumptively acting not within an economic sphere, but rather within a sphere of reciprocal, unremunerated caregiving.

⁸ The author quotes *Gardner’s Administrator v. Schooley*, 25 N.J. Eq. 150, 154 (N.J. Ch. 1874). An internal quotation mark has been omitted.

⁹ See, e.g., NANCY F. COTT, *THE BONDS OF WOMANHOOD* 64–74 (1977); LASCH, *supra* note 2, at 4–8.

Hartog's stories repeatedly circle around this set of assumptions about a home-market divide. Again and again in his stories, this ideological construct fuels the assumptions of family members and judges alike about whether caring for an elderly relative constitutes work for which anyone could have reasonably expected to be compensated. If a family member "did the things that a daughter would do," she surely could not have expected to be paid (p. 95).¹⁰

As Hartog explains, most people did not want to believe that their homes were sites of paid labor: "They did not want to see themselves as employers. They particularly did not want to 'employ' their daughters and sons (including adopted daughters and sons) in tasks that intertwined with a household economy" (p. 101). Hence the difficulties faced by plaintiffs seeking, for example, wages for caregiving work performed for a deceased family member. For the most part, "[f]amily work meant noncompensable work that was done for reasons other than expectations of pay" (p. 208).

To pay family members for care done at home was to require people to acknowledge that the line between home and work was a blurry one. And that was a threatening admission, to say the least. Willfully, people "wanted to act as if those tasks — that work — belonged to an unmonetized or relatively unmonetized economy" (p. 101). And vast dangers lay in repudiating this view: "To look to contract law and to expect a court to adjudicate what one family member owed another for the work done in maintaining that family must have seemed, by its very nature, an odd and perilous task, one that risked destroying the very bonds that united a family" (p. 209).

Of course, ultimately, a key argument that Hartog develops throughout *Someday All This Will Be Yours* is the deep incoherence of the traditional work-home divide. As Hartog powerfully demonstrates through the book's stories, the ideology of separate spheres actually performed an inversion of reality: "[W]ork was what happened at home in nineteenth- and early twentieth-century households" (p. 181). Moreover, "[n]early everyone relied on the power of contract law to organize private relations, including familial relationships. Everyone knew that it was only through law that property would be transferred and held" (p. 16).

Indeed, the stories at the heart of the book "reveal a regimen of work and attention almost unimaginable today, one that was carried out in chaotic but distinctively private households" (p. 158). A central message of *Someday All This Will Be Yours* is that the family has never actually constituted "a special domain in which the individual was

¹⁰ The author quotes "Dusenberry v. Ibach," Records and Briefs, 1008 (2), Court of Errors and Appeals (New Jersey State Library, 1926), 2–3. An internal quotation mark has been omitted.

restrained and family members — that is, wives and husbands, as well as parents and small children — engaged with each other out of ‘love,’ that is, without an expectation of pay or of immediate compensation” (p. 26).

Notably, “love” requires quotation marks in this analysis.

III. LOVE AND THE RATIONAL ACTOR

Love is, indeed, something of a puzzle in the law.

Some years ago, I observed the first day of a colleague’s Family Law class. My colleague began by asking the class of over one hundred law students the following basic question: why do people get married?

Hands shot up. Students offered a range of answers: to get health insurance, to please your parents, to fit into your community, because your church encourages it, for financial stability, to gain entry to the United States, to ensure hospital visitation privileges, because you want to have children, and — my own New York City real estate-centric favorite — to increase your chances of passing a co-op board interview.

My colleague, who I surmised had witnessed this exercise play out similarly before, wrote everyone’s suggestions in a long list on the blackboard. She then noted with a wry smile that one motive for marriage was notably absent from the list: Love. No one in the entire class had speculated that some people get married even without the pressure of an impending co-op board interview just because they are in love. Where, she asked the class, was love on this list of reasons to marry? And what were we all to make of its absence? Could it really be that no one in the class believed that people got married because they were in love? Or did that answer simply seem implausible in the context of a law school classroom?

It took me a number of years of teaching Family Law to realize that these law students, perhaps inadvertently, had stumbled onto a profound insight: the law does not know what to do with love. Love is perfect fodder for literature and politics. It is the rare novelist who is not drawn to the complexity and incomprehensibility of love, its ineffable grandeur and incomparable pain. And, on the flip side, it is the rare politician who does not speak as though the meaning of love (certainly the love between that politician and his or her spouse) is quite obvious and simple.

But the law cannot find a comfortable place for love. In particular, the law cannot quite figure out what to do with the role that love should play in people’s familial choices and commitments. Love is something the law can neither compel nor measure. Deep cultural convictions tell us that family members should and do love one another, but legal metrics and incentives to that effect are elusive. The law

can force one person to pay for the expenses of a former intimate partner. It can force property transfers of all kinds. It can force a parent to pay for a child's physical needs. And it can force an adult to take a child to school. But, regardless of social pressures or biological ties, no judge can force one person to love another person. Love, like the family and the law, is messy.

In fact, although cultural ruminations on love and marriage abound, even constitutional law's most canonical description of marriage is missing any mention of love. In *Griswold v. Connecticut*,¹¹ the Supreme Court famously waxes rhapsodic, proclaiming: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."¹² Powerful stuff. But nothing about love. My colleague's Family Law students were, perhaps, on to something.

Love hovers over *Someday All This Will Be Yours* much as it hovered over the student-generated list of reasons to marry in my colleague's class. Its minimal role in the book's stories seems somehow to cry out for comment. For a reader steeped in the social conventions surrounding how we talk about families, it is jarring how minimally expectations of love figure in Hartog's stories — in his accounts of family members' actions, as well as courts' interpretations of those actions. Parents and children in Hartog's stories act out of rational self-interest, out of calculated need, not out of love.

To be sure, Hartog's sources undoubtedly guided and limited the role of affective connections in the book's tales. Families overflowing with feelings of love for one another rarely, if ever, encounter the law. Often, law enters precisely when love exits. The families in *Someday All This Will Be Yours* created a paper trail of acrimony, conflict, and bargaining, not one of love and altruism. And Hartog doggedly follows that trail, analyzing family members as they presented themselves within legal processes arising out of deals gone sour. Legal conflicts are not likely to produce much data on love.

Moreover, even beyond the general bias of legal sources, in Hartog's particular collection of cases, legal incentives sometimes actually disincentivized any mention of love. In certain types of "someday all this will be yours" cases, if one dared articulate the pull of affection it could backfire in a court of law. Once in litigation, "for the young who worked for the old, love was a great legal danger" (p. 147). After all,

¹¹ 381 U.S. 479 (1965).

¹² *Id.* at 486.

[i]f a court was going to give them what they had earned, they had to appear as independent, individual, and canny bargainers. . . . They had to resist being revealed to be what they often really were — family members who had done what they had for deeply emotional, as well as material, reasons. They and their lawyers worked to mask the fact that they were children who were returning care and love to their parents, who had once cared for and loved them. (p. 147)

In this project, then, Hartog might be even less likely than the average scholar of legal sources to encounter family members waxing rhapsodic about their love for one another.

Yet, even up against all of these barriers, sometimes love creeps into *Someday All This Will Be Yours*. Once in a while, Hartog recognizes love as a strategic façade, the thing that family members would like people to think is motivating their actions, notwithstanding all evidence to the contrary. Sometimes

[l]ove was context, and love was a tool. Love may sometimes have been the goal of the negotiations. The older persons sought to reassure themselves that a child or someone else cared about them. They wanted to know that care was being given for reasons other than an anticipated exchange of property. (p. 147)

In still other moments, the possibility of caregiving motivated by a far less rational sense of obligation seems to creep into the narrative. At one point, for example, Hartog concedes with respect to analyzing the motives of caregivers: “One can, if one wishes, understand their acts as instances of family altruism that are perhaps explicable through a metahistorical evolutionary biology” (p. 142).

At particular moments, even the people in Hartog’s stories seem to realize that love could play a role in their family lives. Indeed, at certain narrative moments, love seems to haunt Hartog’s characters’ own experiences, however painful and anguished their family lives have become. Hartog notes, for instance, that one of the reasons that aging parents did not like to pay either their family members or household employees for care was so they “could live out the partial fantasy that everything that was going on was being done out of love” (p. 104). And, true to the fantasy, here and there throughout *Someday All This Will Be Yours*, love occasionally enters the picture. As Hartog notes, “[m]oral obligations and love joined with legal rights, duties, and expectations . . . to produce ways of managing generational transitions and the needs of old people and other dependents” (pp. 17–18).

But, for the most part, Hartog presents the book’s characters as rational actors, motivated by calculated self-interest, not feelings of love or affection. Even if this is the dominant refrain in the book’s sources, Hartog is surely deeply aware of the strategic biases shaping the self-presentations of his stories’ central characters. Yet, Hartog steadfastly reads his sources so as to credit the notion that family members imagined one another to be rational actors rather than emotionally inter-

twined partners guided by feelings of affection. Parents wanted their children close by, but were never sure how to make that happen. “Love and service,” Hartog says, “provided often inadequate answers” (p. 125). Thus Hartog makes explicit his assumption that “[i]f we imagine the older people as rational economic calculators, we might presume that who got the property in the end was a secondary concern. . . . [W]hat was most important was the care, and they would make whatever promises they needed to secure care and attention” (pp. 100–01).

It all seems to make sense. But families do not always make such sense, and love’s muted role in *Someday All This Will Be Yours* might prompt us to ponder the basic challenge of bringing family life within the boundaries of legal discourse. After all, the core questions of Hartog’s book are about familial decisionmaking around matters of eldercare and the incentives created by the law to behave in certain ways: Why do people care for their elderly relatives? Why do young men and women with ambitions and responsibilities of their own take on the often-unpleasant tasks involved in caring for an ailing old person? What prompts people to act in these ways that we all recognize as at once familial and, in many ways, deeply unappealing? And what role does the law play in all of these processes?

Of course, one available answer to many of these questions begins not with negotiations and incentives, but with emotional bonds. We could begin not with a rational actor model, but with a model built on compassion and affection. Maybe people care for their parents because they love them. Maybe that is what it means to be a member of a family. And maybe people do things for their loved ones that they would not do for other people — not because they have been promised anything in exchange and not because it makes good sense, but because they want to act in certain exceptional ways with certain exceptional people.

Even the law can, occasionally, imagine such an account of the family and caregiving. When it comes to answering the question of why parents care for their young children, for instance, the law seems relatively comfortable approaching the realm of love or, at least, emotional connection. The Supreme Court has thus famously opined “that natural bonds of affection lead parents to act in the best interests of their children.”¹³ Parents, in other words, naturally love their young children and thus do the right things for them. Or so the law is willing to presume. And this presumption of love carries with it vast legal significance. This presumption of affective connection has led the

¹³ Parham v. J.R., 442 U.S. 584, 602 (1979).

Court to guard jealously the right of parents to make decisions about their minor children's care.

But Hartog's stories are not about these natural bonds of affection. Hartog's materials are all about what happens when the parent and child switch roles. In his stories, the children have become the caregivers and the parents are the ones in need of care. And in this context, the natural bonds of affection apparently cease to capture people's own perceptions of reality, or the legal imagination, or Hartog's own speculations.

As Hartog observes:

Parents had to love their children, and that meant they had to care for them. Children did not have to reciprocate. They were free of obligations. They were free to turn their parents out, to put them away, to refuse them, to ignore them, to move away, and it was because of that freedom that older people ended up in the poorhouse. (p. 19)

By Hartog's account, then, aging people concerned about their future care never truly believed that the younger members of their households would care for them out of love — hence the need to incentivize that care through promises of future wealth. And even those promises needed to be carefully crafted so as to avoid what Hartog labels the “King Lear problem,” that is, “the problem of not giving up control and power and property too early” (p. 33). So aging parents had to measure and titrate their offers carefully — a little promise of future riches here, a little control of present circumstances there — to achieve the right formula. Likewise, young adults needed to evaluate carefully that precise mixture of short-term constraint and long-term freedom to decide whether caring for aging parents made good sense in their lives.

And the law followed suit in Hartog's account, embracing this same rational actor view of family relations. Faced with disputes over property upon the death of an elderly relative, judges viewed the facts with an assumption that family members tended to act not out of impulsive emotionality, but rather out of calculated self-interest. Judges assumed that young people organized their lives in response to the rational incentives created by their aging relatives and that they protected their financial stakes when they could demonstrate that they had transformed their lives in response to a relative's promises.

Throughout *Someday All This Will Be Yours*, Hartog's tone suggests a deep and poignant ambivalence about the relationship between love and rationality in people's caregiving plans, an ambivalence mirrored in the law. Like many of the judges he describes, Hartog himself seems committed to imagining old people “as rational calculators when plans for old age were put into place” (p. 144–45). Ultimately, this perspective reflects, perhaps, the book's own commitment to order in the face of the disordered life.

Hartog closes his book with a modern mystery. “Perhaps the real mystery,” he writes, reflecting on our own times when so much of the caregiving in his historical materials is outsourced to paid professionals, “is why some younger people still stay home to provide care, why families continue to work and to share, why adult children and old people still remain entangled, remain ‘family’” (p. 284).

Across the long nineteenth and twentieth centuries and into our own day, the law has struggled to make sense of parents’ and children’s actions. Perhaps the answer is that the decisions made by mothers, fathers, daughters, and sons do not always make sense. Perhaps, here too, order cannot really be imposed. Or perhaps it is naïve to think that love plays any part in explaining those decisions. Perhaps, in the end, that is the puzzle at the heart of the messy legal family.