

4-1-2013

## When Caring Is Work: Home, Health, and the Invisible Workforce: Introduction

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### Recommended Citation

Dianne Avery & Martha T. McCluskey, *When Caring Is Work: Home, Health, and the Invisible Workforce: Introduction*, 61 Buff. L. Rev. 253 (2013).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol61/iss2/2>

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# BUFFALO LAW REVIEW

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VOLUME 61

APRIL 2013

NUMBER 2

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## 2012 James McCormick Mitchell Lecture

### When Caring Is Work: Home, Health, and the Invisible Workforce

#### Introduction

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Most adults will at some point depend on extensive personal caretaking assistance for the needs of daily living. Much of this care takes place in the home—the site of family privacy and individual autonomy—and it involves the most intimate activities, from assisting with bathing, toileting, and dressing to alleviating the emotional and social effects of old age and disabling injuries and illnesses. Despite its deeply personal nature, this care work is thoroughly intertwined with law and public policy. Furthermore, although care work tends to be associated with home and family, it also holds a central place in the contemporary economy: it is one of the fastest growing occupations in the United States, with more than 1.7 million workers employed by third-party agencies as home health aides or personal care aides by 2008.<sup>1</sup> More than

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1. EILEEN BORIS & JENNIFER KLEIN, CARING FOR AMERICA: HOME HEALTH WORKERS IN THE SHADOW OF THE WELFARE STATE 6 (2012) (citing Bureau of Labor Statistics data for 2008); *see also* Application of the Fair Labor Standards Act to Domestic Service, 76 Fed. Reg. 81,190, 81,207 (proposed, Dec. 27, 2011) (to be codified at 29 C.F.R. § 552) (“Between 2008 and 2018 the number of home health aides is projected to increase by 50 percent and the number of personal care aides by 46 percent.”).

200,000 additional individuals are estimated to be self-employed or hired directly by families, many working informally in a “grey market” of “consumer-directed” care.<sup>2</sup> Like domestic workers generally, home care workers today are primarily poor, immigrant, women of color.<sup>3</sup> Laboring in the private domain of the family household, they have been invisible workers—hard to identify, difficult to organize, and largely denied labor protections afforded to most workers in the United States. In the last few decades, these once invisible workers have started to organize with unions and community groups, to challenge the legal and bureaucratic rules and structures that limit their social and economic rights. Yet in-home adult care work has only recently begun to receive scholarly attention commensurate with its importance in everyday life, in the economy, and in the law.

The 2012 James McCormick Mitchell Lecture, presented at SUNY Buffalo Law School on October 19, 2012, featured three distinguished scholars whose current work addresses the history, social structure, politics, and law of home care work in the United States: Hendrik Hartog, Class of 1921 Bicentennial Professor in the History of American Law and Liberty and Director of American Studies at Princeton University; Jennifer Klein, Professor of History at Yale University; and Peggie R. Smith, Charles F. Nagel Professor of Employment and Labor Law at Washington University Law School in St. Louis.<sup>4</sup> In the Mitchell Lecture and in the following Essays, Professors Hartog, Klein, and Smith provide an account that traces the social and legal history of home care for the elderly and disabled from the late nineteenth century to the present.

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2. Application of the Fair Labor Standards Act to Domestic Service, 76 Fed. Reg. at 81,208.

3. Nationwide, in-home caregivers are estimated to represent 18% of all domestic workers, whereas housecleaners are 57% and nannies 25%. See LINDA BURNHAM & NIK THEODORE, NAT'L DOMESTIC WORKERS ALLIANCE, HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK 41 tbl.a-1 (2012) (citing American Community Survey, 2005–2009 five-year sample).

4. SUNY Buffalo Law School, *SUNY Buffalo Law School 2012 Mitchell Lecture* (Oct. 19, 2012), <http://www.youtube.com/watch?v=4wZNzvqlKyk> (2012 Mitchell Lecture).

Hendrik Hartog begins his historical narrative of home care work in the United States with stories drawn from New Jersey court cases from the mid-nineteenth to early twentieth century, before worker pensions, nursing homes, and government programs such as Social Security, Medicare, and Medicaid mitigated the hardships of old age, poverty, and disability. The elderly and infirm who had sufficient wealth to avoid the poorhouse might be cared for in the home by household servants or by family members, usually women, who offered their services out of duty or love, sometimes in exchange for a promise of an inheritance. When those promises were broken—when wills were changed to benefit other relatives or never written at all or when deeds were never signed and delivered—disappointed caregivers sued the decedent’s estate to compel delivery of the house or land or money promised or, at least, for the value of services rendered. The resulting court cases left an extensive written record of trial transcripts, affidavits, and deposition testimony from which Hartog has woven a vivid and intricate legal and social history in his book *Someday All This Will Be Yours*.<sup>5</sup> His lecture featured two of the many stories from the cases that he examined in the book. In *Cooper v. Colson*, a loyal housekeeper cared for her aged and infirm employer from 1876 to 1901 in reliance on his oral promises to leave her a farm when he died.<sup>6</sup> When he died without a will, she sued the estate in equity to compel delivery of a deed to one of his farms.<sup>7</sup> In *Frean v. Hudson*, a woman who had served for nearly twenty years as a companion to an elderly woman, giving her the love and care of a daughter, failed to receive the legacy she expected under the testator’s will.<sup>8</sup> She sought compensation from the Hudson estate in quantum meruit on the theory that her labors as a housekeeper, companion, and nurse, though

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

6. 58 A. 337, 337 (N.J. 1904); see HARTOG, *supra* note 5, at 102-06, 185-88, 190-92, 265.

7. 58 A. at 337, 339; see HARTOG, *supra* note 5, at 102-06, 185-88, 190-92, 265; Hendrik Hartog, *Two Stories About Two Currencies of Care*, 61 BUFF. L. REV. 269, 273 (2013).

8. 93 A. 582, 583 (N.J. 1915); see HARTOG, *supra* note 5, at 239-45, 248, 251; Hartog, *supra* note 7, at 277-78.

lovingly performed, were based on an implied promise to compensate her for the value of her services.<sup>9</sup>

These two cases, like most of the cases in Hartog's book, have complicated legal and factual developments as they wend their way from the chancellor or trial court to final appellate decisions. The stories are revealing for what they tell us about law, the courts, and lawyering in the early twentieth century, but they also provide a window into the most intimate family arrangements for care work for the elderly and infirm. Wealth and testators' freedom played an important role, as did notions of family loyalty and duty, when aging individuals sought to secure the care that they needed without giving away the family farm. In telling the stories of the aggrieved caregivers—often in their own words from trial transcripts—Hartog captures both the bleak reality and difficulty of their work which, though hidden from public view in the privacy of the household, was deserving of compensation like any work in the market.

In her lecture, Professor Jennifer Klein picked up the historical narrative of home care work in the 1930s with the Great Depression and the creation of the modern welfare state. Drawing on her research with Professor Eileen Boris<sup>10</sup> for their coauthored book, *Caring for America*,<sup>11</sup> Klein explained how law and social movements have played a central role in developing the conditions and structures of home caretaking as paid market work distinct from family relationships. The New Deal and Great Society expansions of the welfare state emphasized the role of government in supporting the economic and social wellbeing of individuals and families. Government programs and funding designed to provide paid home caretaking assistance were part of this growth in public support for a range of conditions of vulnerability, from illness and aging to unemployment and family disruption.

Klein's lecture focused on the more recent history of the unionization of publicly-funded home health workers in California, New York, and Illinois—from the civil rights-inspired activism of the 1970s and 1980s to the community-

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9. *Frean*, 93 A. at 583; see HARTOG, *supra* note 5, at 239-45.

10. Professor Boris is Hull Professor and Chair, Department of Feminist Studies, at the University of California, Santa Barbara.

11. See BORIS & KLEIN, *supra* note 1.

based organizing and politically-oriented campaigns undertaken by locals of the Service Employees International Union (SEIU) at the end of the twentieth century. In their Essay, Klein and Boris describe in detail the struggles and successes of one Chicago union—Local 880.<sup>12</sup> Because many home care workers are not covered under the National Labor Relations Act and the Fair Labor Standards Act, the SEIU and other labor and community groups utilized innovative organizing strategies, focusing primarily on low-wage immigrant workers.<sup>13</sup> By 2010, over 400,000 home care workers—most of them poor and minority women—were in unions.<sup>14</sup> In their historical account of this significant social movement, Klein and Boris demonstrate how home care workers in their fight for respect and dignity as workers were able to make care work in the home visible and, as Klein stressed in her lecture, “to challenge the definition of work as production.” But, as Klein and Boris have noted in their book, these union successes were threatened by the Great Recession of 2008 and the conservative attacks on “big government” and public sector unionism.<sup>15</sup>

Professor Peggie Smith’s lecture and her Essay on the current state of the home care industry and of the legal regulation of home care work picks up Klein’s historical narrative at the point where the Boris and Klein book ended: the 2007 Supreme Court case of *Long Island Care at Home, Ltd. v. Coke*.<sup>16</sup> In *Coke*, the SEIU represented Evelyn Coke, a Jamaican immigrant, in her challenge to a 1975 Department of Labor (DOL) regulation<sup>17</sup> interpreting the companionship exemption to the Fair Labor Standards Act (FLSA)<sup>18</sup> to exclude employees of third-party in-home care

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12. Jennifer Klein & Eileen Boris, “We Have to Take It to the Top!”: Workers, State Policy, and the Making of Home Care, 61 BUFF. L. REV. 293, 293 (2013).

13. See BORIS & KLEIN, *supra* note 1, at 15-16.

14. *Id.* at 5; see also Klein & Boris, *supra* note 12, at 296.

15. See BORIS & KLEIN, *supra* note 1, at 220-21.

16. 551 U.S. 158 (2007); see BORIS & KLEIN, *supra* note 1, at 213-14; Peggie R. Smith, *Who Will Care for the Elderly?: The Future of Home Care*, 61 BUFF. L. REV. 323, 324 (2013).

17. 29 C.F.R. § 552.109(a) (2006) (providing that the statutory exemption includes those “companionship” workers “who are employed by an employer or agency other than the family or household using their services”).

18. 29 U.S.C. § 213(a)(15) (2006) (exempting from the FLSA minimum wage and overtime provisions “any employee employed in domestic service

agencies from coverage under the federal wage and hour laws.<sup>19</sup> Although “domestic service” workers were finally included under the FLSA in 1974, the companionship exemption, as interpreted by the DOL, treats the labor of all in-home elder companions as casual labor, like the work of an occasional babysitter.<sup>20</sup>

Smith argued in her lecture that this interpretation of the law undermines the viability of home care work as a decent job at a time when the number of informal caregivers is dwindling and the need for access to care for the elderly is growing. In a time of shrinking public funding for home care and the rise of for-profit agencies in the market for delivery of care services, the *Coke* rule pits home care consumers against home care workers, imposing on care workers the cost of expanding access to care. The irony is that both consumers and workers are primarily low-income, and, as Smith explained, the refusal to recognize elder companions as real workers threatens the quality of elder care, and renders these workers invisible to the market and to the public debates over society’s collective responsibility for elder care. The political significance of the issue is captured in the fact that President Obama’s attempt in 2011 to reverse *Coke* through a new DOL regulation<sup>21</sup> has stalled, and in June of 2012, Senate Republicans introduced a bill to preserve the *Coke* rule in the event that the DOL overturns it.<sup>22</sup>

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employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor])).

19. *Coke*, 551 U.S. at 162-64; see BORIS & KLEIN, *supra* note 1, at 213-14.

20. See Fair Labor Standards Act, ch. 8, sec. 7, §§ 7(b)(1), (2), 88 Stat. 62 (1974) (codified as amended at 29 U.S.C. § 206(f) (providing a minimum wage for “domestic service” employees); *id.* § 207(d) (extending overtime laws to “domestic service” employees)).

21. Application of the Fair Labor Standards Act to Domestic Service, 76 Fed. Reg. 81,190-01 (proposed Dec. 27, 2011) (Notice of Proposed Rule Making).

22. Companionship Exemption Protection Act, S. 3280, 112th Cong. (2d Sess. 2012); see Smith, *supra* note 16, at 337-42, 337 n.78. For a critique of economic and social benefits of the DOL’s proposed rule, see Jeffrey A. Eisenach & Kevin W. Caves, *Economic and Legal Aspects of FLSA Exemptions: A Case Study of Companion Care*, 63 LAB. L.J. 174, 174-75 (2012).

Smith, whose recent scholarship has explored many aspects of domestic service,<sup>23</sup> sees some positive trends at the state level: for example in 2010, in response to active lobbying by the Domestic Workers Union, New York enacted the Domestic Workers Bill of Rights, the first state law extending significant labor rights to domestic workers.<sup>24</sup> On the other hand, Smith raised concerns about the shift from agency-based home care to consumer-directed care (CDC).<sup>25</sup> Under a CDC model, the legal status of the worker as an employee is ambiguous, as is the search for the responsible employer.<sup>26</sup> Is the worker an independent contractor or an exempt domestic employee of the consumer?<sup>27</sup> Indeed, if the state funds the care and the consumer directs the care, who has the duty as an employer to ensure labor protections for the caregiver, such as a right to minimum wage and overtime, to workplace safety standards, or to workers compensation?<sup>28</sup>

Turning her focus to the global labor market of more than 100 million individuals—mostly poor women—engaged in domestic service worldwide, Smith concluded her lecture by citing the recent landmark achievement of the International Labour Organization: The Convention on

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23. See, e.g., Peggie R. Smith, *Work Like Any Other, Work Like No Other: Establishing Decent Work for Domestic Workers*, 14 EMP. RTS. & EMP. POL'Y J. 159 (2011) [hereinafter Smith, *Work Like Any Other Work*]; Peggie R. Smith, *Home Sweet Home? Workplace Casualties of Consumer-Directed Home Care for the Elderly*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 537 (2007) [hereinafter Smith, *Home Sweet Home?*]; Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851 (1999).

24. Domestic Workers' Bill of Rights, 2010 N.Y. Sess. Laws 1315 (McKinney) (codified at N.Y. EXEC. LAW §§ 292, 296-b; N.Y. LAB. LAW §§ 2(16), 160, 161, 170, 651; N.Y. WORKERS' COMP. § 201). The law took effect November 29, 2010. *Id.* In 2012, a bill for a similar law in California was vetoed by Governor Brown who, in his veto message, urged further study of the potentially harmful impact of the statute on access to care by elderly and disabled individuals. Letter from Edmund G. Brown, Jr., Cal. Governor, to Cal. State Assembly (Sept. 30, 2012) (on file with authors).

25. See Smith, *Home Sweet Home?*, *supra* note 23, at 537-38.

26. See *id.*

27. See *id.* at 538.

28. *Id.* at 543.



Decent Work for Domestic Workers.<sup>29</sup> Although, as she noted, the United States will likely not ratify this convention, it “will stand as the clear measuring stick” for lawmakers here and elsewhere.<sup>30</sup> Significantly, the ILO Convention on Domestic Workers shifts the legal framework of paid work in the home from labor rights to human rights.

In their Mitchell Lecture presentations and in the Essays that follow, Professors Hartog, Klein, and Smith offer us a richly detailed picture of home caretakers’ struggles to gain visibility and support for their work. Using a variety of legal and political strategies, home care workers voice a common theme, with the stories of early twentieth century caretakers amplified by California labor organizers in the 1990s and echoed in the 2011 Convention of the International Labor Organization. Across the globe, and throughout a century of dramatic changes in medicine, government, family and economy, those who provide home care services have confronted and resisted the idea that the intimate nature of their work inevitably brings subordinate status, with fewer public protections and less compensation than other forms of labor.

The three Mitchell lecturers show how the hardships and sacrifices typically accompanying this work result from choices of law and policy, not simply from the natural difficulties of aging and infirmity. Government authorities have (often inventively) shaped law and policy to make home care workers distinctly vulnerable, treating care services as an expression of love rather than contract (as Hartog describes), or as social rehabilitation for marginal citizens rather than as skilled health care provision (as Klein explains), or as informal “companionship” exempt from labor standards (as Smith criticizes).

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29. ILO Convention 189: Decent Work for Domestic Workers, 100th Sess., Geneva 2011. As of November 2012, the Convention had been ratified by three nations—Uruguay, Philippines, and Mauritius. See THOMSON REUTERS FOUND. FOR THE TRUST WOMEN CONFERENCE, *A LANDSCAPE ANALYSIS OF DOMESTIC WORKERS’ RIGHTS AND ILO CONVENTION 189*, at 2 (2012) (reporting on case studies of existing domestic workers’ protections in England, France, Italy, Turkey, Singapore, Indonesia, South Africa, and Chile).

30. Smith, *Work Like Any Other Work*, *supra* note 23, at 177; see also Einat Albin & Virginia Mantouvalou, *The ILO Convention on Domestic Workers: From the Shadows to the Light*, 41 *INDUS. L.J.* 67, 67 (2012) (comparing rights under the ILO Convention to existing labor rights for domestic workers in Great Britain).

By analyzing this pattern of policies discounting home care work, the Mitchell lecturers open a window into more fundamental questions about law. The United States system of law and government is grounded in an ideal of the “liberal subject”—the self-governing, self-reliant individual.<sup>31</sup> In this vision, law’s primary role is to minimize interference with individual autonomy, protecting the spheres of family and market as zones of private control and self-sufficiency.<sup>32</sup> Government can legitimately exercise power to facilitate and secure that autonomy, through public law providing national security, criminal justice, and mechanisms for collective self-governance, along with so-called private law systems governing subjects such as contract, property, tort, family, labor, business organizations, international trade, finance, and other commercial relationships.

In this framework, a primary purpose of government is to enable individuals to take responsibility for satisfying their personal needs through the seemingly private market and family.<sup>33</sup> Although government may sometimes intervene to protect against incapacity and vulnerability, providing a “safety net” to soften the harmful results of private action, this intervention appears to be the exception rather than the rule.<sup>34</sup> For that reason, government protection for vulnerability can lead to controversial questions about when (and for whom) the failure to achieve

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31. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 10 (2008).

32. *Id.*

33. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 20-22 (2004) (explaining and criticizing the idea that self-governing liberal citizenship requires economic self-sufficiency in the seemingly private sphere); see also *id.* at 36-37 (explaining how the autonomy myth relegates responsibility for dependency to the private family).

34. See Martha T. McCluskey, *Changing, Not Balancing, the Market: “Economic” Politics and “Social” Programs*, in PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS: RETHINKING IDEOLOGY AND STRATEGY 131-33 (Clare Dalton ed., 2007) (explaining that the narrowly targeted “safety nets” offered as the solution to the harms of neoliberal policies tend to be undermined by those same policies); Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 870-71 (2003) (criticizing the view that social welfare programs should aim to fill market gaps, rather than to help change overall economic policy) [hereinafter McCluskey, *Efficiency and Social Citizenship*].

self-reliance represents true dependency deserving protection and when (and for whom) any such failure should be treated instead as opportunistic avoidance of the responsibilities and opportunities of independence.<sup>35</sup>

But even for those who count as truly deserving dependents, public protection comes at a price in a legal system centered on an ideal of autonomy. If the status of dependency is understood to be a deviation from the norm of responsible citizenship, dependents will tend to be treated as less than full citizens, less deserving of the rights and resources identified with private power.<sup>36</sup> Further, any public support for dependency will appear likely to risk undercutting the government's role in promoting autonomy for others who must shoulder the burdens of public dependency in addition to taking responsibility for their own expenses.<sup>37</sup> As a result, government protection against dependency may appear to be inherently risky and divisive, leading more individuals to become dependent themselves in a vicious cycle that imposes escalating burdens on those who uphold the ideal of independence and self-reliance.<sup>38</sup>

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35. McCluskey, *Efficiency and Social Citizenship*, *supra* note 34, at 799-801 (discussing changing ideas about "true dependency" of single parents in the former federal Aid for Families with Dependent Children (AFDC) program).

36. *See id.* at 835 (criticizing both liberal and communitarian theories for constructing protection for dependency in opposition to citizenship norms); Martha T. McCluskey, *Razing the Citizen: Economic Inequality, Gender, and Marriage Tax Reform*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP* 267, 268-70 (Linda C. McClain & Joanna L. Grossman eds., 2009) (explaining that gender and other status-based assumptions undercut the ideal of social citizenship, making government economic support a sign of incapacity for full citizenship).

37. *See* Martha T. McCluskey, *The Politics of Economics in Welfare Reform*, in *FEMINISM CONFRONTS HOME ECONOMICUS: GENDER, LAW AND SOCIETY* 193, 203 (Martha Albertson Fineman & Terence Dougherty eds., 2005) (explaining and criticizing arguments about the costly "externalities" of AFDC) [hereinafter McCluskey, *Politics of Economics in Welfare Reform*]; *see also* McCluskey, *Efficiency and Social Citizenship*, *supra* note 34, at 803-05 (explaining and criticizing the argument that social welfare programs drain resources from others, leaving less money for government social spending, in a costly downward spiral).

38. *See* McCluskey, *Politics of Economics in Welfare Reform*, *supra* note 37, at 213-15 (criticizing this "moral hazard" or "cycle of dependency" argument in welfare policy).

By bringing adult dependency out of the margins as a common condition of life and emphasizing care work as a valuable economic activity, this year's Mitchell lecturers unsettle this foundational legal focus on autonomy. The experiences of predominantly low-wage, women home care workers suggest possibilities for repositioning collective support for human dependency as central to the goal of a free and prosperous society, rather than as an exception or deviation from normal citizenship.

Proposing an alternative vision, legal scholar Martha Fineman focuses on the "vulnerable subject" instead of on what she describes as the mythical ideal of individual autonomy.<sup>39</sup> Fineman argues that law should be grounded "in the fact that we all are born, live, and die within a fragile materiality that renders all of us constantly susceptible to destructive external forces and internal disintegration."<sup>40</sup> The normal human lifespan typically includes extensive periods of physical and mental dependency on others for daily life.<sup>41</sup> The dominant legal focus on personal autonomy typically excludes from view that universal reality of the embodied human condition, falsely imagining that society consists mainly of individuals who are fully formed but not yet aging adults, generally free from infirmity and disability.<sup>42</sup> Countering that vision, Fineman explains that even those adults who appear most strong and independent do not achieve their successes simply through individual self-reliance, but instead inevitably rely on support from others, both in the private and public sphere.<sup>43</sup>

Finally, Fineman explains that this myth of autonomy obscures not only the pervasive needs of human dependency but also the caretaking labor that society uses to address those needs.<sup>44</sup> Those individuals whose work enhances and

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39. Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 255 (2010); see also FINEMAN, *supra* note 33, at 31-32 (critiquing the ideal of autonomy as a foundational myth).

40. Martha Albertson Fineman, "Elderly" as *Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 ELDER L.J. 71, 89 (2012).

41. *Id.* at 88.

42. *See id.*

43. FINEMAN, *supra* note 33, at 50-53.

44. *Id.* at 35-36.

maintains others' personal autonomy often experience what Fineman terms "derivative dependency" because their service is denied public protection and compensation as productive work.<sup>45</sup> She argues that public policy reforms can alleviate many of the inequities and hardships associated with dependency and dependent caretaking, but that these reforms need to be grounded in a vision of justice that affirms support for vulnerability as a basic role of the government in general, rather than as a private privilege enjoyed by a few at the expense of others.<sup>46</sup>

The inheritance cases that Hartog discusses provide examples of how law exacerbates the vulnerability and inequality of dependent caretakers by avoiding full recognition of their valuable contributions to others' success and survival. When courts discounted the promises of property represented by Hartog's book title, *Someday All This Will Be Yours*, they drew on traditional assumptions about family, gender, and class status to leave care providers' expected economic legacies subject to the changing discretion of wealth holders. This legal context allowed elderly and infirm individuals, whose families depended on caretaking services, to take advantage of the economic vulnerability and personal devotion of caregivers, and, in the end, to avoid legal responsibility for meaningful compensation for the labor provided.

On the surface, such court decisions protected the independence of propertied individuals, who might decide at their final hour to leave their house or land to a distant relative rather than to the woman who had enabled the owner's survival by bathing, dressing, and feeding him or her for years at the expense of their own economic and social opportunities. At the same time, this legal emphasis on private autonomy denied the wealth-owner's physical vulnerability and dependence on the household caretaker's labor—and the law's role in reinforcing the economic dependency of caretakers for the benefit of seemingly independent actors.

Although the twentieth century welfare state grew to overshadow private inheritance as the main target of caretakers' struggles for security and compensation, Klein

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45. *Id.*; Fineman, *supra* note 40, at 87.

46. Fineman, *supra* note 39, at 264-65, 272.

shows how those public systems of support for adult dependent care similarly took shape through a misleading emphasis on individual independence. In their book, *Caring for America*, Klein and Boris describe how government support for home care following World War II was focused on “rehabilitation” of both those receiving care and also those providing care services.<sup>47</sup> Women on welfare, often women of color, were targeted for training and support in home care service as part of a goal of moving them from economic dependency to self-sufficiency.<sup>48</sup> As an alternative to institutionalization, home care also emphasized the goal of restoring or retaining privacy and control for adults with chronic illness and disability.<sup>49</sup> Yet this status as a social service for dependents at the margins of economy and society seems likely to have undermined political and social support for these programs, which lacked sufficient funding to achieve these professed goals.<sup>50</sup>

In contrast, as Klein noted in her lecture, the postwar welfare state included extensive funding for the developing health care industry, including major federal spending on hospital construction with the Hill-Burton Act, followed by Medicare’s funding for medical care.<sup>51</sup> By describing how home caretaking was pushed to the underfunded margins of this public support for health care, denying home caretaking status as part of the skilled health professions and as productive investment in economic development, Klein and Boris underscore how public policy makers refused to recognize the economic and social significance of everyday, long-term needs of dependency.<sup>52</sup> Tracing the continuing struggle for recognition through the current era of fiscal austerity and general economic insecurity, Klein and Boris show how constructing this dependency as a discretionary social service separate from mainstream economic activity means that the interests of both home care providers and care recipients repeatedly get discredited and disadvantaged in the face of competing demands.

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47. BORIS & KLEIN, *supra* note 1, at 49-53.

48. *See id.* at 46-49.

49. *See id.* at 41.

50. *See id.* at 53.

51. *Id.* at 56, 66, 85-87.

52. *See id.* at 9-11.

Klein and Boris further challenge the ideal of private autonomy in welfare state policy by examining home care workers' efforts to resist the marginalization of their services through union organizing and political action. This labor history reveals how dependency and vulnerability are not simply problems of personal incapacity or of exclusion from private responsibilities in market and home, requiring individual "rehabilitation" or charity. Instead, the power to participate fully in economy and society requires meaningful access to ongoing collective support. By structuring home care work so that it lacks much of the collective support benefiting other occupations and industries, Klein and Boris show how welfare state policy has entrenched rather than alleviated the problems of dependency. From this perspective, an alternative legal ideal centered on collective support for human vulnerability need not come at the expense of private freedom, but instead could better advance that goal through a more nuanced understanding of the resources and conditions that foster individual capacity.

Smith's lecture further suggests how a superficial emphasis on autonomy impedes government efforts to respond to vulnerability. Smith cautions against policies of "consumer-directed" care—aimed at increasing individual control and dignity for those in need of care—that structure the relationship between care provider and recipient as a competitive market transaction. Instead, Smith argues that more effective empowerment for consumers of care requires positioning the state as the employer accountable to both caregivers and consumers for improving standards and securing resources essential to consumers' dignity and effective participation in care. This approach points toward an understanding of the care relationship as a situation of mutual vulnerability that has the potential to foster mutually productive power when the interests of both care recipients and care providers are recognized as deserving of state and market support.

Despite the central role of home care for dependents in the national economy and in the everyday lives of many families, the normal human need for dependent care continues to be treated as a personal burden that naturally should be borne quietly, privately, and unequally with minimal government support or protection in the interests of social freedom and prosperity. The 2010 policy paper by Republican Representative (and 2012 Vice Presidential

nominee) Paul Ryan, *A Roadmap for America's Future*, warns that a “culture of dependency” fostered by expansive government social programs threatens to “smother the economy,” undermining the personal initiative and responsibility central to success for both individuals and society.<sup>53</sup> In 2012, Democratic Governor Jerry Brown of California vetoed legislation that would have established a bill of rights for domestic workers, including adult home care providers.<sup>54</sup> That legislation would have extended basic labor rights such as overtime pay and access to meal and rest breaks to service workers long excluded from standard labor law protections as “companions.”<sup>55</sup> While Governor Brown praised home care work as a “noble endeavor,” he refused to sign the law due to concerns about increased costs of care and government intrusion into the privacy of the home.<sup>56</sup>

Both of these political leaders reinforce the longstanding failure of the government and individual care recipients to acknowledge and fairly compensate the hard work, initiative, and skill of home care workers. These workers, typically women and often women of color,<sup>57</sup> have long been expected to sacrifice their income, personal privacy, family life, control over working hours and conditions, and long-term economic security to meet the needs of elderly and infirm adults. The three Mitchell lecturers describe how government policy and legal rules

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53. PAUL RYAN, *A ROADMAP FOR AMERICA'S FUTURE: A PLAN TO SOLVE AMERICA'S LONG-TERM ECONOMIC AND FISCAL CRISIS* 1-3 (Jan. 2010), <http://roadmap.republicans.budget.house.gov/uploadedfiles/roadmap2final2.pdf>.

54. Brown, Jr., *supra* note 24; Sara Bufkin, *Domestic Workers Bill Killed in California by Jerry Brown Veto*, HUFFINGTON POST (Oct. 1, 2012, 7:16 PM), [http://www.huffingtonpost.com/2012/10/01/domestic-workers-california\\_n\\_1930268.html](http://www.huffingtonpost.com/2012/10/01/domestic-workers-california_n_1930268.html); see also *Domestic Work Employees*, A.B. 889, 2011–2012 Reg. Sess. (Cal. 2012).

55. See Bufkin, *supra* note 54.

56. Brown, Jr., *supra* note 24.

57. A study of California's domestic workers over the period 2006–2008 (including nannies and housekeepers as well as adult caretakers) found that only 20% are white, 67% are Latina, and 93% are women. Lauren D. Applebaum, *Why a Domestic Workers Bill of Rights?*, UCLA INST. FOR RES. ON LAB. & EMP'T, Research & Policy Brief No. 6 (Dec. 2010) (citing American Community Survey 2006–2008).



often have enabled individuals, families, and society to benefit from this vital care without taking responsibility for its value. The result has helped bring much more economic and social hardship, vulnerability, and incapacity for dependent care recipients and dependent caregivers, as well as their families and communities. Because virtually all of us will belong to one or more of those groups over our lives, we share a collective interest in moving home care work out of the shadows and into the foreground of law's protections for productive social and economic activity.