

Laws of Care

The Supreme Court and Aides to Elderly People

Eileen Boris and Jennifer Klein

THERE'S NO PLACE like home"—unless you're one of the 1.4 million home aides who assist elderly and disabled people but whom the Supreme Court last June abandoned to the feudal manors of the past. In *Long Island Care at Home v. Evelyn Coke*, the justices unanimously determined that the Department of Labor had the authority to place providers of home care outside the labor law. For seventy years, the Fair Labor Standards Act (FLSA) has guaranteed minimum wage and overtime compensation to the nation's workers, but somehow one of the fastest growing occupations of the twenty-first century doesn't deserve the status and protection of formal employment.

Even Ruth Bader Ginsburg, the court's champion of women's rights, let anxieties over the availability, affordability, and quality of long-term care trump justice for this disproportionately minority, female labor force. She joined the opinion of Stephen Breyer, who during oral testimony had worried whether "millions of people" could afford to keep their loved ones out of institutions if they had to abide by the wage-and-hour law. In foregrounding the concerns of consumers, Breyer obscured the realities of those who actually perform care work as employees of home health agencies. Typical of these women is seventy-three-year-old Jamaican immigrant Evelyn Coke, now infirm herself, who in twenty years of bathing, cleaning, and feeding her charges rarely received overtime for twelve- and sometimes twenty-four-hour shifts.

Long-standing assumptions have cast home care as outside the law. Consisting of activities necessary to sustain daily living, but not technically medical, with the worker substitut-

ing for an incapacitated or absent wife or mother, home care easily became confused with routine family maintenance, mother love, or wifely obligation—labors of love that we think exist beyond the marketplace. Even if work in the home was real work, common sense insists that you can't enter a man's castle to regulate what happens there. And since anyone can do this work, it must be unskilled and not worth much. Such notions rationalized low pay and irregular working hours.

Care might take place in the home, but government policies since the 1930s significantly shaped its contours. The New Deal created visiting housekeeping projects as work relief for unemployed domestics. Following the Second World War, both public welfare departments and private family agencies established homemaker services to maintain aged and disabled people in the community rather than in more expensive hospitals and nursing facilities. The private agencies depended on child welfare and public assistance monies—Old Age Assistance, Aid to Dependent Children, Aid to the Blind, and Aid to the Totally Disabled—to run their programs. The Older Americans Act promised new services, while Medicare and Medicaid promoted a particularly medicalized version of home care. By the 1960s, antipoverty initiatives, including "manpower training" and workfare for mothers on welfare, provided the labor force. Poor women were to meet the care and rehabilitation needs of others and, in the process, be "rehabilitated" into self-supporting citizens.

That home care belonged to the policy realms of welfare, poverty, health, and aging, not labor standards, helps to explain what came next. Intent on rectifying legacies of racism and sexism, Congress in 1974 finally covered private household workers under the FLSA, but omitted casual babysitters and elder companions. New Jersey Democratic Senator Harrison

Williams, a champion of worker rights and co-sponsor of the 1974 amendments, was well aware of the need for home aides. In 1971, he unsuccessfully sought to extend Medicare payments for nonmedical household assistance in the home. But in stressing the plight of “frail individuals” and monetary savings from shorter hospital stays, he ignored the aide, who entered the bill as a means for the betterment of others rather than as a subject deserving better wages. During debate over the FLSA, he made no mention of the emerging home care industry, but he certainly understood the home aide as a type of domestic worker, whose persistent treatment as “slaves” his amendment was to end. Williams would not have been thinking of the home aide when analogizing that “a babysitter is there . . . to watch the youngsters” and that “‘companion,’ as we mean it, is in the same role—to be there and to watch an older person.” Without offering any rationale, the Wage and Hour Division in early 1975 extended the analogy. It classified employees of “third-party” agencies as elder companions, essentially removing from the law those who a mere decade before had come under the act by working for a large enough “enterprise.”

The timing of this ruling could not have been more propitious. With nursing home scandals, the demand for elder care shifted to home- and community-based alternatives. Just as the need for personal attendants soared, employers could avoid paying the minimum wage, displacing the cost of the service onto the laborer herself. To stymie unionization as well as cut costs, New York City had begun contracting out housekeeper and attendant jobs to vendor agencies in 1969, accelerating the process during the next decade. Under the Reagan presidency, the state used Medicare and Medicaid rules, government subsidies, federal social service grants, job training funds, and vendor contracts to boost a for-profit industry in home care services.

The contracting out of labor and services by states maximized the uncertainties of the work, the employment status of homecare workers, and hence, the service itself. Rather than increasing efficiency and quality, privatization of home care tangled lines of authority. At the end of the century, the labor was

even more casualized than in the 1960s. States continued to take advantage of the federal Wages and Hours code, in some cases mirroring the language of the exemption. As a growing number of states moved toward deinstitutionalization in the 1990s, legislatures justified home care purely in fiscal terms—as a “cheaper” option. Such rationales further devalued the labor of care.

THIRTY YEARS after the fact, the Bush administration claimed that paying below minimum wage serves the public good by making home care more affordable. It offered the dubious rationale that the Labor Department had the authority to undermine the FLSA itself by exempting agencies like Long Island Care at Home. This assertion is in keeping with an administration that has reclassified entire groups of workers as supervisors to keep them from receiving overtime. Yet you get what you pay for. Low wages have generated turnover, discouraged training, and increased the possibility that the worker would be unreliable or not up to the job. By contrast, in places like San Francisco, where workers receive living wages, turnover rates have dropped.

Two decades ago, under the slogan, “We Care for the Most Important People in Your Life,” New York consumers, unions, and employer associations together won increased state payment for home care. They understood what disability rights groups, senior advocates, and organized labor in California during the 1990s and in Oregon, Washington, and elsewhere since 2000 have learned: better wages and better care go hand in hand. Thus, the American Association of Retired Persons and the American Association of People with Disabilities filed an *amicus* brief in support of Evelyn Coke. Transformation of home care belongs to the larger reorganization of health care, but meanwhile, government can enhance funding so that adequate hours for consumers no longer depend on exploitative wages.

Now Evelyn Coke might just benefit from this early presidential race. Poverty advocate and presidential hopeful John Edwards immediately responded to the ruling by declaring, “The Bush Administration may not know the difference between professional home care

workers and babysitters, but older Americans and people with disabilities who rely on them for quality care certainly do.” He vowed that if Congress failed to “do what’s right and fix the law,” he “as president” would. Senators Ted Kennedy (D-MA) and Tom Harkin (D-IA) each stated that they would pursue such a fix. The Service Employees International Union (SEIU) has promised to push for corrective legislation in the states as well as in Congress. Legislation probably will add the word “casual” before “elder companion” for a more precise definition of exempted workers. But other options include eliminating the elder companion exemption as a historic anachronism or treating elder companions just like domestics, which would place those working for third parties under the law but still keep from overtime those hired directly by an individual senior or disabled person. An expansion of the gray market outside the law could result.

Craig Becker, SEIU associate counsel, who represented Coke before the Supreme

Court, disagrees with the verdict but finds some hope in the Court’s decision. In concluding that “it’s not clear what Congress intended so we think courts need to defer to the Department of Labor,” the Court opened the door to a political solution. Becker thus argues that “a new administration could construe the law differently.” Indeed, an administrative overturning of the 1975 rule was in the making during the waning days of the Clinton presidency, only to be squashed by Bush’s Labor Department. Given the likelihood that Bush would veto any legislation, women like Evelyn Coke need a change in Washington for rights at work. ●

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Media, Democracy, and the Left

Seeing the Bigger Picture

Jeffrey Scheuer

IF YOU HAD attended the most recent National Conference for Media Reform, held in Memphis, Tennessee, this past January and sponsored by Free Press (www.freepress.net), you might think that the media reform movement is on a roll. There was a palpable sense of momentum in Memphis, as more than 3,000 attendees—a substantial increase over previous conferences in Madison, Wisconsin, and St. Louis, Missouri—filled the convention center to hear speakers such as Jesse Jackson, Bill Moyers, David Brancaccio, FCC Commissioner Jonathan Adelstein, Senator Bernie Sanders (I-VT), Van Jones, Geena Davis, and

Jane Fonda preach eloquently to the choir.

There is, indeed, reason for optimism. Thanks to people like the Memphis conferees, a lot of independent media are emerging, especially on the Internet. They run the gamut from independent news services, such as OneWorld and the video-based The Real News, to community broadcasting and a plethora of local, small-scale, and left-leaning media outlets.

But after decades of media concentration and broadcast deregulation, this important and overdue movement, mainly for independent alternatives to commercial media, is still in its infancy. It remains to be seen whether it can eventually transform the media mainstream, rather than merely supplement it.

One lesson of these gatherings is that the left should pay more attention to the media