Elder Care, Gender, and Work: The Work–Family Issue of the 21st Century

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INTRODUCTION .......................................................................................... 352

I. BACKGROUND ....................................................................................... 355
   A. Demographic Transformations: The Aging of the Baby Boomers .......... 355
   B. The Need for Elder Care ................................................................. 356
   C. The Gendered Dimensions of Elder Care ...................................... 360

II. ELDER CARE AS A WORK–FAMILY ISSUE FOR EMPLOYEES ............ 364
   A. Elder Care versus Child Care ....................................................... 365
      1. Care Reversals .......................................................................... 365
      2. Proximity Concerns: Too Close for Comfort and Long–Distance Caregiving ............................................................. 366
      3. Timing and Planning .................................................................. 368
   B. The Consequences of Elder Care .................................................. 370

III. ELDER CARE AS A WORKPLACE ISSUE FOR EMPLOYERS ............... 374
   A. Traditional Employer Support for Aging ....................................... 375
   B. The Case for Employer Support of Elder Care .............................. 379

IV. ELDER CARE AND THE FMLA: SUBSTANTIVE PROMISES AND PITFALLS .............................................................................................................. 382
   A. Intermittent Leave ......................................................................... 383
   B. Serious Health Condition .............................................................. 384
   C. The Meaning of Care .................................................................... 386
      1. Pang v. Beverly Hospital ............................................................ 387
      2. Gradilla v. Ruskin Manufacturing ............................................... 390

V. THE FMLA’S VISION OF FAMILY: IMPLICATIONS FOR ELDER

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351
INTRODUCTION

Over the past several decades, scholars have vigorously discussed how best to help workers address the often competing demands of work obligations and family responsibilities. The impetus for the discussions can be traced to the growing presence of mothers in the workplace. Between 1960 and 1999, the labor force participation rate for women with children under the age of six years grew from 20 percent to 64 percent. Considering this demographic shift, it comes as no surprise that work-family policies focus primarily on workers who have child care obligations. Yet, a demographic shift of a different kind is steadily emerging.

Presently, individuals 65 and older represent 12 percent of the total United States population, up from 4 percent in 1900. By 2030, the figure is expected to increase to 20 percent. The aging of the population has prompted predictions that caregiving for the elderly will equal, if not surpass, child care as the work-family concern of the twenty-first century. Estimates indicate that 22.5 million people in the United States currently

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4 Id.

5 Id.

6 See, e.g., Martha Lynn Craver, Growing Demand For Elder Care Benefits, Kiplinger Business Forecasts, May 29, 2002; Julia Lawlor, Coping with Elder Care, USA Today, July 19, 1994, at 1B; Diane E. Lewis, Caring for a Parent Often Exacts a Toll on Job, Boston Globe, May 2, 1999, at C1.
care for an elderly person and 64 percent of them work for wages outside the home.  

By 2020, forty percent of the workforce expects to care for an elderly relative. In view of these transformations, it is critical that work–family discussions expand so as to allow for the multitude of ways in which employees care. This Article bites off a piece of the expansion enterprise by situating aging within the legal literature on work–family issues. Specifically, it examines how elder care—informal care of the elderly by family and friends—impacts employed caregivers, and evaluates the significance of such care for work–family policies.

Because elder care parallels child care in important ways, child–focused, work–family policies offer a useful starting point for exploring how to assist employees who care for aging family members and friends. Most notably, elder care, similar to child care, is heavily gendered, with women disproportionately represented among elder care providers. As the graying of America continues, women can expect to spend 18 years caring for elderly relatives. However, despite similarities, significant differences

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8 See Martha Lynn Craver, supra note 6. See also Joanne Wojcik, Need for Elder Care Programs Grows, BUS. INS., June 25, 2001, at 10.


10 Adult children are an important source of caregiving on behalf of their aging parents. See infra notes 53 and 57 and accompanying text. This Article does not address, however, the extent to which children should be responsible to care for aging parents, especially when care conflicts with other obligations such as work or child care. For a consideration of filial responsibility, see Seymour Moskowitz, Filial Responsibility Statutes: Legal and Policy Considerations, 9 J. L. & POL'y 709 (2001). See also Joann Blair, "Honor Thy Father and Thy Mother"—But for How Long?—Adult Children's Duty to Care for and Protect Elderly Parents, 35 U. OF LOUISVILLE J. FAM. L. 765, 779–780 (1996/1997) (discussing arguments against imposed filial responsibility); Joel C. Dobris, 52 OHIO ST. L.J. 625, 637 (1991) (reviewing JOHN EEKELAAR & DAVID PEARL eds., AN AGING WORLD, DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY (1989)) (same).

11 See infra Section I.C.

12 139 CONG. REC. H366 (daily ed. Feb. 3, 1993) (statement of Rep. Lynn Schenk) (commenting that "[w]omen can expect to spend 17 years of their lives caring for their children and 18 years caring for an
exist between elder care and child care which highlight the importance of conceptualizing work–family policies in a comprehensive fashion that extends beyond child care. Research indicates, for example, that relative to child care, elder care involves more unanticipated caregiving situations, is more complicated to manage, and causes greater levels of stress for the care provider. These and other differences call into question the extent to which work–family initiatives, premised on child care, are appropriate for thinking about how to help workers cope with elder–care related concerns.

The remainder of this Article is divided into Five Sections. Section I provides an overview of demographic trends with respect to America’s elderly population and discusses the growing demand among the elderly for long-term care. This Section also discusses the gendered dimensions of elder care. Section II explores the impact of elder caregiving on employed care providers. The section begins by drawing on recent research to map out some of the relevant attributes of elder care that distinguishes it from child care. While Section II approaches elder care from the perspective of employees, Section III examines the significance of elder care for employers. Specifically, the Section considers why employers should care about elder care. A review of employers’ traditional responses to aging sets the stage for the discussion. Although employers have a long history of supporting workers to prepare for the challenges of aging, this Section argues that employers must adopt a new approach to aging when it comes to elder care. Instead of focusing on aging from the perspective of previously employed workers, employers must concentrate on currently employed workers who have the responsibility of caring for elderly relatives and friends. Together Sections IV and V explore the relevance of the Family and Medical Leave Act (FMLA) to elder care. Elder care, similar to child care, exposes various deficiencies in the FMLA. Yet elder care also illuminates aspects of the Act that have gone largely unnoticed in the legal literature. In particular, care for the elderly shines a spotlight on the Act’s concept of care. Exactly what does it mean to say that an employee is caring for someone with a serious health condition? Section IV examines this question along with other substantive provisions of the FMLA and considers their import for elder care. Although legal commentators have frequently examined the provision of a “serious health condition,” the elderly relative”). See also Margaret Hellie Huyck, Returning a Mother’s Kindness, CHI. TRIB., May 13, 2001, at Cl; Karen Seccombe, Employment, the Family, and Employer–Based Policies, in GENDER, FAMILIES, AND ELDERCARE 165, 167 (Jeffrey W. Dwyer & Raymond T. Coward eds. 1992) [hereinafter Seccombe, Employment, the Family, and Employer–Based Policies].

13 This statement assumes a child care situation that involves caregiving for a child without a disability. See infra Section II.A.3 (noting that elder care is similar in some respects to the care of a disabled child). See also infra Section II.A (discussing the unique dimensions of elder care relative to child care).


caring provision has prompted only minimal inquiry. Section V evaluates how the FMLA's unduly narrow concept of family adversely impacts both the elderly and the employees who care for them. Importantly, while many elderly rely upon their spouses and adult children for care, a growing number of elderly individuals must depend on caregiving relationships that fall outside the scope of the FMLA.

I. BACKGROUND

A. Demographic Transformations: The Aging of the Baby Boomers

Historically, elder care was not a pressing issue for most families since relatively few individuals lived to an advanced age. In 1900, when the proportion of the population aged 65 or over was only 4 percent, the average life expectancy at birth was forty years. Today Americans have an average life expectancy of 77 years, and the percentage of elderly...
individuals in the population has risen to 12 percent.\textsuperscript{21} This demographic shift partially reflects the aging of America’s baby boom generation.\textsuperscript{22} The generation started in the aftermath of the Second World War and includes those individuals born between 1946 and 1964.\textsuperscript{23} At 76 million strong, the baby boom generation is the largest population mass in United States history.\textsuperscript{24} In 2011, the first wave of boomers will turn 65.\textsuperscript{25} The growth of America’s elderly population also includes an increase in the percentage of individuals 85 years and older, a group that includes the parents of the baby boomers. This so-called “old-old” age group is the fastest-growing population segment, having increased 274 percent between 1960 and 1994.\textsuperscript{26} Today, the 85 and older group numbers 4 million strong and will more than triple to 14 million by 2040.\textsuperscript{27}

\textbf{B. The Need for Elder Care}

The aging of the population presents significant consequences for caregiving. Although Americans are living longer and generally healthier lives,\textsuperscript{28} longevity has increased the number of elderly who have chronic

\textsuperscript{21} See supra note 3 (citing source documenting current percentage of elderly individuals in the population).

\textsuperscript{22} DOUG OWRAM, BORN AT THE RIGHT TIME: A HISTORY OF THE BABY-BOOM GENERATION (1997); see also JESSICA WEISS, TO HAVE AND TO HOLD: MARRIAGE, THE BABY BOOM, AND SOCIAL CHANGE (2001).


\textsuperscript{28} See COLE, supra note 17, at 236 (noting the reduction in poverty among older Americans and their ability to secure greater health benefits).
illnesses, multiple medical problems, functional limitations, and disabilities. These health concerns, in turn, have generated a growing demand among the elderly for care to help with a range of activities. In 1999, approximately 7 million elderly individuals suffered from a disability, and consequently required long-term care.

Long-term care helps maintain or improve "the ability of elderly people with disabilities to function as independently as possible for as long as possible." It consists of primarily low-tech services and encompasses the social and environmental needs of the elderly as well as their medical needs. Importantly, the provision of long-term care depends heavily upon the involvement of family members and friends to assist elderly persons who require care.

The specific type of care varies according to factors such as age, illness, physical mobility, and mental acuity. Many elderly require help with one or more "activities of daily life" ("ADLs") including meal preparation and eating, bathing, dressing, toileting, and mobility. Americans 85 and older need the most care, with approximately 50

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29 See Demographic Perspectives on Gender and Family Caregiving, in GENDER, FAMILIES, AND ELDERCARE 20 (Jeffrey W. Dwyer & Raymond T. Coward eds., 1992) [hereinafter Dwyer & Raymond, Demographic Perspectives] (noting that longevity has resulted in more Americans with chronic illnesses, functional impairments, and health-related disabilities); GAO, LONG-TERM CARE, supra note 27, at 10 (stating that in "coming decades, the sheer number of aging baby boomers will swell the number of elderly with disabilities and the need for services").

30 GAO, LONG-TERM CARE, supra note 27, at 10–11 (noting that the aging of the population has increased the demand for long-term care).

31 See also ROBYN STONE, LONG-TERM CARE FOR THE ELDERLY WITH DISABILITIES: CURRENT POLICY, EMERGING TRENDS, AND IMPLICATIONS FOR THE TWENTY-FIRST CENTURY, MILBANK MEMORIAL FUND 35 (2000) [hereinafter STONE, LONG-TERM CARE] (reporting that estimates indicate that in 2040, the number of individuals "aged 85 years or older—those mostly likely to need long-term care—[will] range from 8.3 million to 20.9 million"), available at http://www.milbank.org/reports/0008stone/LongTermCareMech5.pdf.

32 STONE, LONG-TERM CARE, supra note 31. Although this Article discusses long-term care as it affects the elderly, the need for such care "can be an issue for any young or middle-aged person who has been seriously injured in an accident or who has suffered a debilitating illness." Robert R. Pohls, Long Term Care Insurance, 32 BRIEF 28, 28 (2002).

33 STONE, LONG-TERM CARE, supra note 31.

34 Id.

35 See Joan Buchanan et al., An Assessment Tool Translation Study, 24 CARE FINANCING REV. 45 (2003) (distinguishing between “basic tasks such as eating, dressing, grooming, transferring, walking and bathing” and instrumental tasks "such as shopping, telephone use, laundry, medication use, managing finances, meal preparation and housework"); James Laditka & Sarah Laditka, Adult Children Helping Older Parents: Variations in Likelihood and Hours by Gender, Race, and Family Role, 23 RES. ON AGING 429, 430 (2001) (drawing a distinction between activities of daily living—bathing, eating, dressing, etc.—and instrumental activities of daily living—shopping and transportation); Elaine Tilka Miller & Judith Spilker, Readiness to Change and Brief Educational Interventions: Successful Strategies to Stroke Risk, 35 J. NEUROSCIENCE NURSING 215 (2003) (distinguishing between ADLs such as dressing, grooming, and bathing from IADLs such as ability to use phone, take medication, and handle finances).

36 GAO, LONG-TERM CARE, supra note 27, at 3 (adding that “[a]lthough a chronic physical or mental
percent of individuals in this age group requiring assistance with ADLs.\textsuperscript{37} The elderly may also need help with "instrumental activities of daily living" ("IADLs") which include occasional tasks such as making telephone calls, shopping, transportation, managing finances, and yard work.\textsuperscript{38} In instances where elderly individuals have a mental impairment, care often takes the form of supervision to insure that they do not wander off or otherwise risk harming themselves.\textsuperscript{39}

The government funds part of the costs associated with long–term care of the elderly, mainly through Medicaid\textsuperscript{40} and to a lesser extent, through Medicare.\textsuperscript{41} Medicaid accounts for 45 percent of government funds for long–term care, while Medicare accounts for 14 percent of public long–term care expenditures.\textsuperscript{42} Together the programs contribute $81 billion dollars towards the cost of long–term care.\textsuperscript{43} Unfortunately, however, the programs do not benefit many of the elderly who need care. Medicare, for example, primarily covers costs associated with long–term care when an elderly person is hospitalized for acute care.\textsuperscript{44} Medicare does fund some skilled nursing care in a nursing facility or in the home but only when the care qualifies as post–acute care.\textsuperscript{45} Although Medicaid is the main source

\textsuperscript{37} See FRANK HOBBS & BONNIE DAMON, 65+ IN THE UNITED STATES, at 6–4 (1996), available at http://www.census.gov/prod/1/p23-190/p23-190.pdf. See also Rachel Brand, The Health Care Crunch: Aging Population, Rising Costs Will Strain Medical Programs, ROCKY MOUNTAIN NEWS (Denver, CO), Dec. 16, 2002, at 7S (citing a report by the American Health Care Association which indicates that "[t]here is a 50 percent chance that every person 85 and older will require some type of long–term care"); James Knickman & Emily Snell, The 2030 Problem: Caring for Aging Baby Boomers, 37 HEALTH SERVICES RES. 849, 849 (2002) (noting that the "percentage of elderly older than 85 years who are ADL impaired or institutionalized is more than six times the rate of 65 to 74 year–olds").

\textsuperscript{38} See supra note 35 (distinguishing between ADLs and IADLs).

\textsuperscript{39} See supra note 35 (distinguishing between ADLs and IADLs).

\textsuperscript{40} See supra note 35 (distinguishing between ADLs and IADLs).

\textsuperscript{41} See supra note 35 (distinguishing between ADLs and IADLs).

\textsuperscript{42} See supra note 35 (distinguishing between ADLs and IADLs).

\textsuperscript{43} See supra note 35 (distinguishing between ADLs and IADLs).

\textsuperscript{44} See supra note 35 (distinguishing between ADLs and IADLs).

\textsuperscript{45} See supra note 35 (distinguishing between ADLs and IADLs).
of public funding for long-term care, it too holds limited value for the elderly. The overwhelming bulk of all Medicaid funding goes to institutional care; however, most elderly individuals who need long-term care live in the community and are not institutionalized.

Given the restrictions imposed by Medicare and Medicaid, the majority of elderly individuals who need assistance rely upon informal, unpaid care. See Andrew I. Batavia, *A Right to Personal Assistance Services: "Most Integrated Setting Appropriate" Requirements and the Independent Living Model of Long-Term Care*, 27 AM. J. L. & MED. 17, 23 (2001) (stating that Medicaid “is the single largest payor of long-term care in this country”); GAO, *LONG-TERM CARE*, supra note 27, at 4 (observing that Medicaid is “the largest funding source for long-term care”).

In 1995, 85 percent of all Medicaid expenses for long-term care of the elderly were for institutional care. See Knickman & Snell, supra note 37, at 849 (adding that the Medicaid’s funding preference for institutional care stems from an attempt “to focus on the most frail, who tend to be in nursing homes”). See also Hooyman, supra note 41, at 188–91 (discussing the limitations of Medicaid funding for the long-term care needs of the elderly); GAO, *LONG-TERM CARE*, supra note 27, at 4 (reporting that Medicaid contributes the bulk of funding to provide long-term care for the elderly and gives priority to those individuals who are the most frail, the poorest, and who are cared for in nursing homes).

Medicaid does provide minimal funding for in-home care services; however, the level of care varies considerably from state to state. See generally United States General Accounting Office, *Long-Term Care: Elderly Individuals Could Find Significant Variation in the Availability of Medicaid Home and Community Services* (2002), (discussing state trends in the availability of Medicaid to help fund long-term care for the elderly), available at http://www.gao.gov/new.items/d02113lt.pdf. In addition, most states require that an elderly person first deplete her own assets before she can qualify for Medicaid assistance. See, e.g., John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 CORNELL J. L. & PUB. POL’Y 81, 86 (2003) (noting that “Medicaid’s resource limit in most states is about $2,000”).


See Marshall B. Kapp, *Options for Long-Term Care Financing: A Look to the Future*, 42 HASTINGS L.J. 719, 729 (1991) (observing that “[m]ost home care services in the United States are provided today
care from family members and friends. Among family members, an available spouse is most likely to provide care. Absent spousal care, adult children assume the bulk of caregiving for aging parents. To a lesser extent, care is provided by extended family members and non-kin individuals.

C. The Gendered Dimensions of Elder Care

Because elder care, unlike child care, is not inextricably linked with the biological event of pregnancy, one might anticipate a relatively equal distribution of elder caregiving as between men and women. In fact, however, women provide approximately 70 percent of all elder care. Gender pervades elder care patterns across the board, shaping most

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51 See STONE, LONG-TERM CARE, supra note 31, at 9 (observing that the "major long-term care provider is the family and, to a lesser extent, other unpaid 'informal' caregivers" and that the "overwhelming majority of noninstitutionalized elders with disabilities—about 95 percent—receive at least some assistance from relatives, friends, and neighbors"); Doty, supra note 48, at 35 (reporting that "[n]early three-quarters of the elderly disabled who live in the community rely solely on family and friends for the assistance they require").

52 Jeffrey Dwyer & Karen Seccombe, Elder Care as Family Labor: The Influence of Gender and Family Position, 12 J. FAM. ISSUES 229, 230 (1991) [hereinafter Dwyer & Seccombe, Elder Care as Family Labor].


54 See infra Section V (discussing the significance of elder care relationships that are not covered by the FMLA).

55 See, e.g., EMILY K. ABEL, WHO CARES FOR THE ELDERLY? 4 (1991) (commenting that women represent 72 percent of all caregivers for the elderly); Huyck, supra note 12, at C1 (reporting that close to "75 percent of unpaid caregivers of the elderly are women"); Rebecca Korzec, A Feminist View of American Elder Law, 28 U. TOL. L. REV. 547, 555-556 (1997) (remarking that "[r]esearch conducted over the past twenty-five years studying the relationships of elderly parents and their adult children indicate that the traditional assignment of gender roles occurs in carrying out filial responsibility"); Craig S. Meuser, Long-Term Care for the Elderly: Why Government and Business Should Take a Closer Look at Adult Day Care, 1 QUINNIPIAC HEALTH L.J. 219, 250 (1996/1997) (stating that nearly 75% of caregivers for the elderly are women); ASSOCIATION FOR PEOPLE IN THE MIDDLE: A REPORT ON MULTICULTURAL BOOMERS COPING WITH FAMILY AND AGING ISSUES 14 (2001) [hereinafter IN THE MIDDLE] (stating that "studies have consistently shown that most elder care is performed by women"). While elder care remains a task that primarily falls to women, the prevalence of male elder caregiving appears to be increasing. THE METLIFE STUDY OF SONS AT WORK: BALANCING EMPLOYMENT AND ELDERCARE 3 (2003) [hereinafter, STUDY OF SONS] (reporting on a study that found "that the percentage of men reporting they are the primary caregivers [for elderly parents] . . . increased 50% between 1984 and 1994").
caregiving relationships. Among elderly couples, wives are more likely to provide care for elderly husbands, in part because women typically live longer than men and because wives are on average younger than their husbands.\(^5^6\) When a spouse is unavailable to provide elder care, the responsibility falls most commonly on an adult daughter.\(^5^7\) Research on mixed-sibling families, that include both adult sons and adult daughters, reveals that the latter is twice as likely to have primary caregiving responsibility for an elderly parent.\(^5^8\) The gendered dimensions of elder care also surface in studies which show that wives often supply the bulk of hands-on care for their in-laws, the parents of their husbands.\(^5^9\) In short, the principle caregivers for the elderly are women, who provide care in their roles as wives, daughters, and daughters-in-laws.\(^6^0\)

Gender also structures the type of elder care activities performed by women and men. As previously noted, care activities can be grouped into

\(^{56}\) See Gary Lee et al., *Gender Differences in Parent Care: Demographic Factors and Same-Gender Preferences*, 48 J. GERONTOLOGY 9 (1993). As Lee explains, the fact that elderly wives are more likely to be caregivers relative to elderly husbands "does not pose a major explanatory problem . . . . Women tend to marry older men, and women also have longer life expectancies. Husbands therefore, are likely to need care earlier in the marital life cycle and to have wives available to provide it; by the time wives are sufficiently infirm to require regular assistance, they are more likely to be widowed." Id. at 9. See also Eleanor Stoller et al., *Systems of Parent Care within Sibling Networks*, 14 RES. ON AGING, 28, 29 (1992); *Report Says Women Provide More Home Care, Get Less*, CHICAGO TRIB., Dec. 22, 2000, at 7 (reporting a study which found that "[o]nly 11 percent of disabled women reported any informal care from a spouse, compared with 44 percent of the disabled men").

\(^{57}\) See, e.g., Emily Abel, *Adult Daughters and Care for the Elderly, in The Other Within Us* 135 (M. Pearsall ed., 1997); Doty, *supra* note 48, at 40 ("most of the family care of impaired elders not provided by spouses has traditionally been provided by middle-aged adult daughters and daughters-in-laws"); Dwyer & Coward, *Gender, Family, and Long-Term Care, supra* note 17, at 5, 12; Stoller, *supra* note 56, at 29.

\(^{58}\) See, e.g., Ellen Ernst Kossek, *Assessing Employees' Emerging Elder Care Needs and Reactions to Dependent Care Benefits*, 22 PUB. PERSONNEL MGMT. 617, 619 (1993) [hereinafter Kossek, *Assessing Employees*] ("Research . . . indicates that daughters are twice as likely as sons to assume the primary responsibility for caregiving."); Fairlee Winfield, *Workplace Solutions for Women Under Eldercare Pressure*, 64 PERSONNEL 31, 31 (1987) (noting that "[o]verwhelming evidence indicates that this responsibility continues to fall to middle-aged daughters"); Douglas Wolf et al., *The Division of Family Labor: Care for Elderly Parents*, 52 B J. GERONTOLOGY 102, 102 (1997) (studies "that have focused on the sharing of caregiving among siblings have shown the greater tendency of daughters than of sons to provide elder care"). The gender difference between sons and daughters remains strong even in families with male-only children or female-only children. While male-only children participate in elder care at rates higher than men from mixed-sibling families, their participation rates still pale in comparison to the rates of care provided by female-only children. See Raymond Coward & Jeffrey Dwyer, *The Association of Gender, Sibling Network Composition, 12 RES. ON AGING 158, 173 (1990).*

\(^{59}\) See Winfield, *supra* note 58, at 32 (observing that the majority of caregivers are women "even when the person needing care is the husband's parents"). See also *infra* notes 294–297 and accompanying text (discussing implications of elder caregiving by daughters-in-law for the FMLA).

\(^{60}\) Although women provide the majority of care for the elderly, men do serve as elder care providers as well. See Jane Aronson, *Care of the Frail Elderly: Whose Crisis? Whose Responsibility?*, CANADIAN SOC. WORK REV. 45, 48 (1986) (discussing the care provided by elderly husbands who tend to look after infirm wives); Dwyer & Seccombe, *Elder Care as Family Labor, supra* note 52, at 231 (discussing when sons typically assume the role of primary caregiver for an elderly parent).
ADLs that include personal and household tasks needed on a daily basis (e.g., cleaning and bathing), and IADLs, tasks that occur with less frequency (e.g., transportation, yard work, and financial management). Among nonspouse caregivers, women help with both ADLs and IADLs, while men tend to help only with IADLs and rarely assist with intimate ADLs such as bathing.

The gendering of elder care represents a complex set of social norms. "Women's predominance in [elder] caregiving results in part from the social construction of gender, traditional family roles, and societal constructs including economic arrangements."

Similar to child care, elder care bears the mark of a social order that continues to privilege the ideology of separate spheres. A strong assumption endures that women are better equipped than men to attend to the private realm of family life and

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61 See supra note 35 and accompanying text (discussing the distinction between ADLs and IADLs).
62 Dwyer & Seccombe, Elder Care as Family Labor, supra note 52, at 232 (stating that “daughters were 3.22 times more likely than sons to provide ADL assistance and 2.56 times more likely to provide IADL assistance”; id. at 231 (reporting on research that found that sons, relative to daughters, “provided less overall assistance to their parents, and they limited their performance of ‘hands-on’ tasks such as bathing and dressing”); Kossek, Assessing Employees, supra note 58, at 619 (observing that “[w]omen tend to help more with personal and household tasks which are generally needed on a daily basis, while men help more with transportation, home repairs and financial management”); Stoller, supra note 56, at 29 (reporting that the assistance of men to elder care is “concentrated on tasks such as house repairs, yard work, and financial management”); Robyn Stone, Caregivers of the Frail Elderly: A National Profile, 27 GERONTOLOGIST 616, 617 (1987) [hereinafter Stone, Caregivers of the Frail Elderly] (stating that women “are much more likely than males to attend to the personal hygiene needs of the care recipient and to engage in household tasks and meal preparation” and noting that “male caregivers typically provide transportation and help the older person with home repairs and financial management”); Judith Barker & Linda Mitteness, Invisible Caregivers in the Spotlight: Non-Kin Caregivers of Frail Older Adults, in THE HOME CARE EXPERIENCE: ETHNOGRAPHY AND POLICY 116 (observing that “men, even closely related men such as husbands and sons, tend not to undertake personal care tasks for dependents, but instead provide aid in transportation, financial, and other more instrumental arenas” and that “male caregivers tended to shy away from personal care tasks, especially those involving intimacy, taking on care recipients mainly instrumental assistance instead.”).

This distinction may reflect differing socialization norms as between men and women. See Stoller, supra note 56, at 31 (stating that the gender division of labor reflects the fact that elder care is family labor and as such the difference between sons and daughters “parallel[s] gender differences in housekeeping and child care”). It may also reflect the greater percentage of women who are among the pool of care recipients and their preference for female caregivers. See infra notes 71–73 and accompanying text.

63 See generally Dwyer & Seccombe, Elder Care as Family Labor, supra note 52. (attempting to account for the greater tendency of women to perform elder care).
64 See Laditka & Laditka, supra note 35, at 432.
associated caregiving responsibilities, irrespective of women's status as waged workers. Caregiving, be it in the form of elder care or child care, is deemed the special province of women.

Gender's imprint on elder care also points to the impact of gender-based socialization. From a young age, boys and girls receive messages from their families, cohorts, and society instructing them in appropriate gender-based behavior. For young girls, the messages place a high premium on caregiving and nurturing traits. In a world where it remains acceptable for young girls to play with dolls—a primary symbol of care—but unacceptable for boys to do the same, it is no surprise that women shoulder the burden of caregiving responsibilities. In addition, because many women who care for the elderly also care for children as primary caregivers, they become more accustomed than do men to caregiving.

Gender imbalances in elder care may be exacerbated further by the preferences of care recipients. A few researchers have reported a gender link between care recipients and caregivers. Specifically, research suggests that, among child-parent caregiving relationships, care recipients may have a preference to receive care from a caregiver of the same gender. The preference appears most noticeable as regards female care recipients who prefer to receive personal care from daughters. In view of the fact that women constitute the majority of the elderly population that requires long-

66 See Carol Gilligan, Woman's Place in Man's Life Cycle, in FEMINISM AND METHODOLOGY 57, 66 (Sandra Harding ed., 1987).
68 See C. Estelle Campenni, Gender Stereotyping of Children's Toys: A Comparison of Parents and Nonparents, 40 SEX ROLES 121 (1999); see also Claire Etaugh & Marsha B. Liss, Home, School, and Playroom: Training Grounds for Adult Gender Roles, 26 SEX ROLES 129 (1992).
69 See infra note 77 and accompanying text (noting that many female caregivers are members of the sandwich generation with responsibility for both child care and elder care).
70 See Peter Rabins, Men and Women: Do They Give Care Differently?, GENERATIONS 23, 26 (Fall 1985) (observing that since women have been the primary caregiver for a dependent child, they have this as their model).
72 Lee et al., supra note 56, at 15. See also id. at 10 (noting that "[f]emales may prefer to receive [intimate] personal care from other females rather than from males"); id. at 15 ("the forms of intimate, personal contact often required by caregiving may be regarded as culturally inappropriate in the mother-son relationship. Mothers may prefer to receive such care from daughters rather than from sons."). It appears as if the research on this issue has focused largely on female care recipients, although researchers speculate that "the probability that a son provides care is greater if the parent is a father than if the parent is a mother . . ." Id. at 10. Whether this probability reflects a preference among male care recipients to receive care from a caregiver of the same gender is unclear in the literature.
term care, because they live longer than men, such a gender-based preference may exacerbate the burden on female caregivers.

II.
ELDER CARE AS A WORK–FAMILY ISSUE FOR EMPLOYEES

An expanding body of literature in the fields of sociology, gerontology, and human resources has started to explore how elder care affects caregivers. The research to date suggests that employed elder care providers endure many of the negative consequences experienced by employed child care providers because of tensions between caregiving obligations and work responsibilities. As is true of child care, elder care can adversely impact employees both personally and professionally, as well as emotionally and financially. However, while similarities exist between child care and elder care, the caregiving literature reveals that the latter differs from the former in important ways. Part A of this Section describes aspects of elder care that set it apart from child care. Part B examines the nature of work–family conflicts that revolve around elder care and in the process, considers how specific dimensions of elder care influence the work experiences of employed caregivers.

Given the gendered dynamics that characterize caregiving, the ensuing discussion pays close attention to how elder care compromises the employment opportunities of women. That said, it is instructive as an initial matter to emphasize the extent to which elder care intimately implicates the interests of working women. Studies have consistently shown that women shoulder a disproportionate responsibility for elder care irrespective of their employment status, with nearly two-thirds of them holding full-time employment. As between women and men, research on the caregiving patterns of adult daughters and sons reveals that virtually all of the former, regardless of employment, care for elderly relatives when needed compared to only 54 percent of unemployed sons and 35 percent of

73. See Mary Anne Bobinski & Phyllis Griffin Epps, Women, Poverty, Access to Health Care, and the Perils of Symbolic Reform, 5 J. GENDER, RACE & JUST. 233, 247 (2002) (observing that “[w]omen . . . tend to have more chronic illnesses and are over-represented in nursing home populations”); Kapp, supra note 50, at 754 n.2 (commenting that “[s]ince advanced age is the single biggest risk factor for use of long-term care services, and since women on the whole outlive men, the majority of long-term care consumers are female”).

74. See Phyllis Moen et al., Women’s Work and Caregiving Roles: A Life Course Approach, 49 J. GERONTOLOGY 176, 184 (1994) (noting that employment does not appear to preclude women’s subsequent caregiving responsibilities; “it does not appear that as women become more involved in the paid labor force the prevalence of their caregiving declines. Women seem to be adding to their role repertoire rather than experiencing shifts in roles”).

Moreover, a sizeable portion of women elder care providers belong to the so-called “sandwich generation,” meaning that they are sandwiched between older and younger generations, responsible for both child care and elder care. Hence, one needs to adopt a multifaceted perspective when evaluating the connections among gender, work, and elder care.

A. Elder Care versus Child Care

Elder care and child care are closely aligned in many ways. They both exist as a form of family labor that is performed primarily by women. They both involve domestic reproductive tasks such as meal preparation, feeding, hygiene, and cleaning. In addition, elder care, like child care, carries little economic currency in a world that devalues home-based labor, particularly unpaid domestic labor. These similarities notwithstanding, elder care diverges from child care in key respects.

1. Care Reversals

Elder care has a life cycle that conflicts with the cycle involved in most child care situations. “Elder care is not about having babies and raising children—the positive aspects of life. Elder care is about the end of life, aging and dying.” For most children, aging usually leads to greater independence and less assistance with daily activities, and eventually day-to-day parental care ends with maturity. In sharp contrast, most elder care responsibilities increase with time as elders become more physically

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76 Dwyer & Seccombe, Elder Care as Family Labor, supra note 52, at 231.
78 Elder care is often referred to simply as a form of family labor. Yet, as various scholars have observed, this characterization glosses over the highly gendered division of that labor. See Brewer, supra note 67, at 218; Dwyer & Seccombe, Elder Care as Family Labor, supra note 52, at 231; Seccombe, Employment, the Family, and Employer–Based Policies, supra note 12, at 169.
80 See Ellen Ernst Kossek et al., Caregiving Decisions, Well–being, and Performance: The Effects of Place and Provider as a Function of Dependent Type and Work–Family Climates, 44 ACAD. OF MGMT. J. 29, 30 (2001) [hereinafter Kossek, Caregiving Decisions].
81 Molly Shonsey, Eldercare Support Hits its Stride in 90s, 49 EMPLOYEE BENEFIT PLAN REV. 48, 48 (1994). See also ABEL, supra note 55, at 90 (reporting on a study of elder caregivers and noting that all the caregivers “emphasized the vast differences between caring for children and aging parents”;
82 Kossek, Caregiving Decisions, supra note 80, at 30.
dependent with age, requiring greater assistance with eating, dressing, toileting, and bathing.\footnote{Id.} In many cases, the health of elders who need assistance constantly declines. Consequently, the time involved with such care ends not with maturity but most commonly with death.

In parental elder care arrangements, this reversal is accompanied by a second reversal; namely the role reversal in the relationship between parent and child where the latter becomes the care provider and the former becomes the care recipient. Adult children engaged in parental elder care often confront an emotional crisis as they begin to reckon both with the impending death of a parent as well as with the recognition that a parent has become a dependent, who may no longer possess the capacity for independent judgment and self support.\footnote{See Abel, supra note 55, at 89–91 (describing the role reversal dynamic that occurs in elder care relationships). See also Charlene Marmer Solomon, Elder—Care Issues Shake the Workplace, 78 Workforce 58 (1999) (commenting that “[i]t's hard to see your parents with any form of illness. It's difficult to accept that they're getting older”). Elder care can also be emotionally unsettling as it often forces adult children to confront their own aging. See Abel, supra note 55, at 101.} As one commentator explains, “caring for adult children represents continuity with the past, [while] caring for an elderly parent involves a ‘filial crisis’ as adults come to realize that their parents are no longer ‘pillars of strength’.”\footnote{Naomi Gerstel & Sally Gallagher, Kinkeeping and Distress: Gender, Recipients of Care, and Work—Family Conflict, 1. Marriage & Family 598, 599 (1993) (adding that “[t]his process produces a discomfiting, yet always incomplete, role reversal and foreshadows the caregiver's own old age, even death, while reawakening childhood feelings incompatible with the changed relationship”).}

2. Proximity Concerns: Too Close for Comfort and Long–Distance Caregiving

While most elderly individuals prefer to live on their own,\footnote{See Doty, supra note 48, at 43. See also National Alliance for Caregiving, Caring Today, Planning for Tomorrow 14 (1999) (noting a recent study which found that “85 percent of older respondents prefer to remain in their own homes if they need care”), available at http://www.caregiving.org/nacguide.pdf.} and not with their adult children, circumstances sometimes necessitate shared living arrangements particularly when the elderly become functionally impaired and require assistance with ADLs.\footnote{See Doty, supra note 48, at 44.} Studies indicate that elder caregivers, who reside with elder care recipients, are more likely to suffer negative consequences as compared with elder caregivers who do not live with care recipients and as compared with the most common pattern of parental care, where parents reside with their children.\footnote{See Kossek, Assessing Employees, supra note 58, at 620; see also Kossek, Caregiving Decisions, supra note 80, at 31.} A study conducted by the National Alliance of Caregiving found that 20 percent of all care recipients
reside in the same home with their caregiver.\footnote{NATIONAL ALLIANCE FOR CAREGIVING AND AMERICAN ASSOCIATION OF RETIRED PERSONS, FAMILY CAREGIVING IN THE U.S.: FINDINGS FROM A NATIONAL SURVEY 15 (1997), available at http://www.caregiving.org/finalreport.pdf.} As a result of the close proximity to the aging process, elder caregivers involved in home-based, co–residence care are “less able to separate from the dependent’s deterioration and emotional or health problems.”\footnote{Kossek, Caregiving Decisions, supra note 80, at 31.} Close proximity to death and dying can amplify “depressing psychological effects, leading to especially high levels of conflict and especially low levels of well–being and performance in work and family roles.”\footnote{Id.} By contrast, most home–based child care does not involve heightened exposure to death or deterioration.\footnote{Id. As Kossek explains, unlike home–based care of the elderly which correlates with “especially high levels of conflict and especially low levels of well–being and performance” for the care provider, home–based child care typically “does not involve increased exposure to death or reverse life cycle dynamics. In fact, many workers experience it positively.” Id.}

While living apart from elderly persons in need of care has advantages to caregivers, it can also pose its own unique disadvantages relative to child care. The further apart elder caregivers live from care recipients the more likely it is that they will experience complications involved in long–distance caregiving. Whereas parents typically have their children with them, in the same household, elder caregivers must frequently manage the care of elders who live in a separate environment—a different community, a different state, or a care facility. The National Council on Aging estimates that about 30 percent of elder caregivers are long–distance caregivers, who live an hour or more away from the person for whom they provide care.\footnote{National Council on Aging, Nearly 7 Million Long–Distance Caregivers Make Work and Personal Sacrifices, Mar. 12, 1997, available at http://www.ncoa.org/content.cfm?sectionID=105&detail=49. See also Susan Williams, As Population Ages, Helpers Need Help, Too, THE SUNDAY GAZETTE–MAIL (Charleston, WV), Aug. 26, 2001, at 1B.} Research suggests that this number likely will continue to climb as increasing numbers of elderly individuals express a preference to live apart from their children.\footnote{See Katherine Boo, The Return of the Extended Family, UTNE READER, July/Aug. 1992, at 90–91 (reporting that between 1960 and 1990, the number of elderly living apart from their children increased from one in three to one in five); DONNA WAGNER, COMPARATIVE ANALYSIS OF CAREGIVING DATA FOR CAREGIVERS TO THE ELDERLY 1987 AND 1997 3 (1997) [hereinafter WAGNER, COMPARATIVE ANALYSIS] (noting the decline in co–residency among elder caregivers and recipients), available at http://www.caregiving.org/nacanalysis.pdf. See also Alison Grant, When Older Relatives Need Help, PLAIN DEALER (Cleveland, Ohio), Oct. 27, 2003, at E1 (observing that “the scattering of families will require more long–distance caregiving”); Susan Levine, In Caring for Aging Relatives, a Long–Distance Toll, WASH. POST, Mar. 23, 1997, at B01; Karen Goldberg Goff, Geriatric Managers Help with Household Issues, Transition to Long–term Care, WASH. TIMES, Oct. 26, 2003, at D01 (citing study that estimates that “the number of long–distance caregivers will double in the next 15 years”); Eileen Beal, Caregiving Can Happen from Many Miles Away, CRAIN’S CLEVELAND BUS., May 5, 2003, at 20 (observing that “[b]ecause of today’s mobile work force, more employees are becoming long–distance caregivers”).} A 2004 MetLife study found that on average long–
distance elder caregivers lived 450 miles from the care recipient,\footnote{Id. at 10.} and spent an average of more than 7 hours traveling to care for the recipient.\footnote{Id. at 8.}

Negotiating elder care involves unique challenges when families are geographically dispersed. Caring from a distance usually requires caregivers to miss work or otherwise arrange their work schedules for travel purposes. Of the respondents in the MetLife study, more than half had to rearrange their work so as to accommodate their caregiving responsibilities.\footnote{Id. at 7.} Distance also adversely impacts the amount of care that caregivers can provide. While a third of long distance caregivers are able to visit their elderly family member at least once a week,\footnote{Id. at 9.} the frequency of care diminishes the longer it takes for the caregiver to travel to visit the care recipient.\footnote{Id. at 10.} Caregiving is further complicated by distance because caregivers must spend time managing the care of loved ones. Long distance caregivers report spending over 7 hours a week arranging services on behalf of care recipients and monitoring the quality of care being delivered.\footnote{Id. at 6.} Caring from afar also takes an emotional drain on caregivers. As one caregiver observed, “It is very hard to have a loved one at a distance who needs care. You worry because they may not eat, or have anyone to look out for them in an emergency.”\footnote{See also Ethel Sharp, Caregiving When Miles Intervene, ST. PETERSBURG TIMES (Fla.), Apr. 29, 2003, at 22G (“Long-distance caregiving is usually difficult for everyone involved. The issue becomes more complicated when parents decide to live far away from their children. This kind of lone decision-making can cause stress on all family members.”).}

\section{3. Timing and Planning}

A final aspect of elder care that distances it somewhat from child care relates to timing and planning. Contrary to the birth or adoption of a child, which parents frequently await with eager anticipation, caregiving for elderly family members or friends is not a role that most individuals typically aspire to or even anticipate.\footnote{See Kossek, Caregiving Decisions, supra note 80, at 31 (noting that “caregiving for elders is not a role that many employees have anticipated, and a lack of perceived competence in managing elder care is a common problem that many consider stressful”).} Whereas parents usually have at least nine months to prepare for the arrival of a child, the need for elder care frequently results from an unexpected crisis event, such as a stroke, that can

\footnote{\textsc{Nat’l Alliance For Caregiving, Miles Away: The MetLife Study of Long-Distance Caregiving} 6 (2004) [hereinafter MILES AWAY], available at http://www.caregiving.org/milesaway.pdf.}

\footnote{Id. at 6. See also Ethel Sharp, Caregiving When Miles Intervene, ST. PETERSBURG TIMES (Fla.), Apr. 29, 2003, at 22G (“Long-distance caregiving is usually difficult for everyone involved. The issue becomes more complicated when parents decide to live far away from their children. This kind of lone decision-making can cause stress on all family members.”).}
“throw the caregiver’s otherwise orderly life into disarray” and wreak havoc in a workplace.\textsuperscript{103} Of course, parenting also can be fraught with difficulties and unexpected demands, and the ability of parental caregivers to cope depends on a range of factors, including the availability of economic resources. Yet, early research suggests that elder caregivers confront a unique set of issues that partially reflect the fact that the need for care often occurs without warning, and the complexity involved with coordinating social and medical services such as home health care, assisted living, respite care, Social Security, and adult day care.\textsuperscript{104} In addition, elder care, when compared with child care, is seldom discussed in the workplace as an open topic of conversation among caregivers.\textsuperscript{105} Consequently, elder caregivers often feel lost when attempting to manage the many complex tasks associated with elder care.

In some respects, the unique dynamics involved in elder care are comparable to the challenges that confront parents who care for children with disabilities relative to parents who care for children without disabilities.\textsuperscript{106} As with elder care, caring for a disabled child can occur without warning as in the case of an unexpected medical event or an undiagnosed disability that existed prior to the birth of a child. Moreover, even when parents have prior knowledge of a child’s disability, they are usually unprepared for the reality of caring for a disabled child.\textsuperscript{107} Similar

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\bibitem{Moen} Moen, supra note 74, at 176. \textit{See also} Shonsey, supra note 81, at 48 (observing that “[m]ost often, the onset of an elderly person’s dependence on an adult child arises from a sudden crisis, such as a stroke, heart attack, or unforeseen death in the family”); Michael Prince, \textit{Elder Care Benefits Valued: Demand for Benefit Expected to Grow}, BUS. INS., July 29, 1996, at 3 (observing that in elder care, there is very little preparation time as events generally occur unexpectedly). Indeed, even absent a crisis event, most elder care providers did not plan ahead for their caregiving roles. Kossek, \textit{Caregiving Decisions}, supra note 80, at 31; Solomon, supra note 84, at 58. The failure to do so suggests the extent to which caregivers, most notably adult children, experience discomfort with their parent’s aging, and deny the consequences of aging. \textit{See} ABEL, supra note 55 at 101, 102–103; Gerstel & Gallagher, supra note 85 at 599.
\bibitem{Kossek} Kossek, \textit{Caregiving Decisions}, supra note 80, at 31 (observing that “[m]anaging elder care is also more complex than managing child care because it involves the coordination of many social services”).
\bibitem{Solomon} See Solomon, supra note 84, at 58 (“One of the problems is that [elder care] isn’t the kind of issue employees talk about much in the workplace. As a society, we don’t plan for aging. And as long as our parents are healthy, we deny that we’re ever going to face the problem, so they take on crisis proportion.”). Evidence suggests that the hidden nature of elder care in the workplace may be particularly problematic for male elder caregivers as they are less likely than women to discuss their caregiving obligations with co–workers or supervisors. \textit{See} STUDY OF SONS, supra note 55 at 8; \textit{id. at} 7 (observing that the “reticence of some men to talk about caregiving at work may be more related to attitudes and beliefs about their responsibilities as men than a belief that elder care carries a stigma”).
\bibitem{Green} \textit{See} Sara E. Green, \textit{Mothering Amanda: Musings on the Experience of Raising a Child with Cerebral
to elder care, caregiving for a disabled child involves navigating through a complex set of social and medical services that creates a level of stress not typically experienced by parents of children without disabilities. In addition caring for children with disabilities does not follow the usual trajectory of child care whereby the level of care and parental supervision subside as the child matures into adulthood. As in elder care, the care involved in caring for a child with a disability often becomes enhanced over time. To be sure, caregiving for the elderly and for children with disabilities is highly diverse, and subject to a range of variables including, for example, the age of the care recipient, the specific type of care demanded, the nature of the impairment, the availability of financial resources, the attitude of the caregiver, and the level of familial support. Yet, notwithstanding this diversity, both elder care and the care of children with disabilities present challenges that are distinct from the caregiving involved in raising children without disabilities.

B. The Consequences of Elder Care

The professional toil that elder care exerts on employees includes increased absenteeism, tardiness, a reduction in work hours, unavailability for overtime work, a shift from full-time to part-time work, and in some instances, early retirement or prolonged departures from the work force.

Consider the following evidence on the impact of elder care on employed caregivers: sixteen percent quit their jobs; 38 percent take time off from

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Palsy, 7 J. LOSS & TRAUMA 21, 22 (2002) (observing that "[m]ost parents of children with disabilities lack previous experience with or even knowledge about disability").

Michelle Rogers & Dennis Hogan, Family Life with Children with Disabilities: the Key Role of Rehabilitation, 65 J. MARRIAGE & FAMILY 818, 821-822 (2003) (discussing the various types of "rehabilitative services" that families with disabled children may need to navigate and some of the problems associated with using the services); Schilling et al., supra note 106, at 48 (observing that "rearing a handicapped child is often burdensome, stressful, alienating, and frustrating"). For discussions of the impact of raising a disabled child on the employment of parents, see Naomi Breslau et al., Women's Labor Force Activity and Responsibilities for Disabled Dependents: A Study of Families with Disabled Children, 23 J. HEALTH & SOCIAL BEHAVIOR 169 (1982); Shirley Porterfield, Work Choices of Mothers in Families With Children With Disabilities, 64 J. MARRIAGE & FAMILY 972 (2002).


See Robyn Stone & Pamela F. Short, The Competing Demands of Employment and Informal Caregiving to Disabled Elders, 28 MED. CARE 513 (1990); Donna Wagner & Gail Hunt, The Use of Workplace Eldercare Programs by Employed Caregivers, 16 RES. ON AGING 69 (1994).

NAT'L ALLIANCE FOR CAREGIVING & NAT'L CTR. ON WOMEN & AGING, THE METLIFE JUGGLING ACT STUDY: BALANCING CAREGIVING WITH WORK AND THE COSTS INVOLVED 8 (1999) [hereinafter JUGGLING ACT], available at http://www.caregiving.org/JugglingStudy.pdf. See Melina Fitting and Peter Rubins, Men and Women: Do They Give Care Differently?, GENERATIONS 23, 25 (Fall 1985) (reporting on a study in which 28% of women quit their jobs because of elder care responsibilities); Benjamin Gottlieb et al., Aspects of Eldercare That Place Employees at Risk, 34 GERONTOLOGIST 815, 815 (1994) (reporting that "findings from the National Hospice Study reveal that, of 1,445 primary caregivers, fully one-third terminated employment to assume care responsibilities").
work to attend to elder care responsibilities; in addition to compromising the status of presently employed workers, elder care responsibilities have prevented some caregivers from entering the workforce. Caregiving from a distance has been shown to exacerbate these difficulties, with long-distance caregivers missing more days of work and requiring more supervisory time compared to elder care providers who live in close proximity to care recipients.

Although male elder care providers also experience work disruptions, the above evidence poses particularly harmful implications for women because they are significantly more likely to provide elder care and to provide more hours of care relative to men. Women are also more likely than men to care for aging family members and friends irrespective of their employment status. For example, a regional study on elder care reported that while employment had no significant impact on the amount of time that adult daughters spent caring for aging parents, employment resulted in adult sons reducing their level of care by more than 20 hours a month. The evidence suggests that most employed women who provide care remain employed but they experience disruptions to work and they compensate by reducing their leisure time.

The work disruptions caused by elder care responsibilities lead to

112 Haupt, supra note 53.
113 Gottlieb, supra note 111, at 815 (reporting on a national sample of caregivers of frail elderly persons which found that “21% worked fewer hours, 18.6% took time off without pay, and almost 30% rearranged their work schedule”). See also Moen, supra note 74, at 177 (reporting on a study based on data from the National Long Term Care Survey which found that of elder care providers, “8.9 percent had quit their jobs to enter this role, and of employed caregivers, 21 percent worked fewer hours, 29.4 percent rearranged their schedules, and 18.6 percent took time off without pay”); Susan Franklin et al., Acquiring the Family Eldercare Role, 16 RES. ON AGING 27, 33–34 (1994) (reporting the results of a 1998 study on the influence of caring for a physically disabled relative on women’s employment experiences: “while 68 percent of care givers were employed full time prior to assuming the care giving role, that percentage declined to 43.2 after the caregiving role was assumed”).
114 Moen, supra note 74, at 177 (reporting on a study conducted based on data from the National Long Term Care Survey).
115 Beal, supra note 94.
117 See supra Section I.C. (discussing the greater tendency of women, relative to men, to care for the elderly).
118 See Jeane Anastas et al., Working Families and Eldercare: A National Perspective in an Aging America, 35 SOC. WORK 405, 405 (1990) (noting that in “workplace studies of men and women, the women reported giving more hours of help per week than did the men . . . due to elder care”); Lawlor, supra note 6, at 1B (stating that women spend 20 hours a week on elder care and men spend 12 hours a week).
119 Seccombe, Employment, the Family, and Employer–Based Policies, supra note 12, at 171.
120 Hooyman, supra note 41, at 111; Seccombe, Employment, the Family, and Employer–Based Policies, supra note 12, at 172.
substantial adverse economic consequences for caregivers.\textsuperscript{121} A 1999 MetLife survey found that, on average, an elder care provider suffers a total wealth loss of $659,139 over his or her lifetime.\textsuperscript{122} That number represents the combined financial loss attributed to lost wages, lost security benefits, and lost pension benefits.\textsuperscript{123} Added to this loss, elder care providers report that they expend out-of-pocket funds caring for the elderly by providing financial assistance with expenses such as mortgages, home care professionals, food, transportation, and medication.\textsuperscript{124} These out-of-pocket expenses usually occur over a period of two to six years and total almost $20,000.\textsuperscript{125}

The cost of elder care manifests not only in economic and financial terms but also in terms of caregivers' overall health. Caregivers report feelings of depression, isolation, loneliness and stress stemming from their caregiving obligations.\textsuperscript{126} In the aforementioned 1999 MetLife study, 75 percent of the caregivers surveyed indicated that their caregiving duties had negatively impacted their health, and of that figure, nearly half stated that they sought help from a health care professional as a result.\textsuperscript{127} Levels of stress experienced by elder care providers vary according to gender and income levels. Women caregivers generally report higher levels of stress than men who provide elder care.\textsuperscript{128} Specifically, studies of adult children

\textsuperscript{121} To address this problem, commentators have proposed that family caregivers should be compensated. See Nathan Linsk et al., Wages for Caring: Compensating Family Care of the Elderly (1992); Suzanne England et al., Paying Kin for Care: Agency Barriers to Formalizing Informal Care, 2 J. Aging & Social Policy 63 (1990); L.B. Gerald, Paid Family Caregiving: A Review of Progress and Policies, 5 J. Aging & Social Policy 73 (1993); Robyn Stone & Sharon Keigher, Toward an Equitable, Universal Caregiver Policy: The Potential of Financial Supports for Family Caregivers, 6 J. Aging & Social Policy 57 (1994). For a recent note that advances this argument specifically in the context of elder care and the FMLA, see Nicole Harms, Caring for Mom and Dad: The Importance of Family-Provided Eldercare and the Positive Implications of California's Paid Family Leave Law, 10 WM. & MARY J. WOMEN & L. 69 (2003). See also Holly Shaver Bryant, Note, Funding Kinship Care: A Policy-based Argument for Keeping the Elderly in the Family, 8 WM. & MARY J. WOMEN & L. 459 (2002) (advancing an argument in favor of using Medicare and Medicaid to compensate informal elder care providers).

\textsuperscript{122} Juggling Act, supra note 111 at 4. Other studies have reported higher quit rates.


\textsuperscript{124} Juggling Act, supra note 111, at 6.

\textsuperscript{125} Id. at 8.

\textsuperscript{126} Kossek, Caregiving Decisions, supra note 80, at 31 (noting studies that show that elder care providers are "more likely to experience increased depression, anxiety, and poor health; family interference with work; stress; and personal and job costs"). See also Seccombe, Employment, the Family, and Employer-Based Policies, supra note 12, at 173; Marjorie E. Starrels et al, The Stress of Caring for a Parent: Effects of the Elder's Impairment on an Employed, Adult Child, 59 J. Marriage & Family 860 (1997).

\textsuperscript{127} Juggling Act, supra note 111, at 9.

\textsuperscript{128} Margaret Neal et al., Balancing Work and Caregiving for Children, Adults and Elders 116 (1993) (noting that "[f]emale caregivers . . . experience considerably higher stress than do male caregivers"); Alexis Walker et al, Informal Caregiving to Aging Family Members, 44 Fam. Rel. 402, 404 (1995) (stating the "caregiving literature has established that caregiving is more stressful for
who care for aging parents, indicate that women “experienced more hostility, and less happiness and autonomy than their male counterparts.”

These results may reflect that among elder care providers, women put in more hours than men, are more likely to provide help with ADLs, and are frequently combining elder care with child care. Low-income care providers also feel more stressed as a result of elder care compared to caregivers who have greater financial resources. According to findings by the American Association for Retired People, low-income care providers “report being more overwhelmed by their family responsibilities.” Given the close alliance between class and race, caregivers of color report feeling especially burdened.

The literature on elder care supports the proposition that caregivers who experience stress and poor health are more likely to report lower levels of work performance than non-caregivers. The correlation between caregiving-induced stress and job performance is especially strong when one compares elder care to child care. A 2001 study that evaluated the effects of elder care and child care on worker’s well being found that relative to child caregivers, caregivers for the elderly face greater levels of stress, and as a consequence, report lower work performance. Research suggests that the higher incidence of stress and poor work performance among elder care providers is partially linked to some of the various differences that exist between elder care and child care discussed previously, including elder care’s association with death and dying and the complex nature of caring for the aged. The differences suggest that family–friendly workplace policies premised on child care may not always be effective in the context of elder care.

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130 See supra note 118 and accompanying text.
131 See supra notes 61–62 and accompanying text.
132 See supra note 77 and accompanying text. See also NEAL ET AL., supra note 128, at 116 (offering reasons to explain the difference including the observation that male caregivers often receive more help with their care obligations than do female caregivers).
133 IN THE MIDDLE, supra note 55, at 6–8.
134 Id.
135 Gerstel & Gallagher, supra note 85, at 598–599.
136 Kossek, Caregiving Decisions, supra note 80, at 39.
137 Id. at 31.
138 Id. (commenting that future studies that investigate how caregiving influences employment need to recognize that “managing elder care interacts with variables to influence employee outcomes more negatively than does managing child care, especially when caregiving is at home or by a family member”).
III.

ELDER CARE AS A WORKPLACE ISSUE FOR EMPLOYERS

Commentators have noted that, despite frequent discussions of the family–friendly workplace, work–family policies in the United States fall far short of securing for employees the assistance they need to forge an optimal balance between work and family. As between support for children and support for the elderly, a strong perception exists that employers in particular and society in general have been much more responsive to the needs of the latter. The perception is clearly accurate when one considers that while America lacks a comprehensive child care policy, support for the elderly is a central component of this country’s welfare system, even as imperfections riddle the system. Yet, as Part A of this Section demonstrates, support for the elderly does not equate with support for employed elder care providers. Part A advances this point by discussing the traditional forms of employer support for aging. Part B

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140 Paula England & Nancy Folbre, The Silent Crisis in U.S. Child Care: Who Should Pay for the Kids?, 563 ANNALS AM. ACAD. POL. & SOC. SCI. 194, 200 (1999) (observing that “[o]ver the last 30 years, the elderly in this country have received far greater transfers per capita than the young have”); Wendy A. Fitzgerald, Maturity, Difference, and Mystery: Children’s Perspectives and the Law, 36 ARIZ. L. REV. 11, 14–15 (1994) (observing that “[o]ur political choices reveal societal hostility to children . . . We have succeeded in lifting the elderly from poverty . . . while condemning ever greater numbers of children to malnutrition”); Harry D. Krause, Child Support Reassessed: Limits of Private Responsibility and the Public Interest, 1989 U. ILL. L. REV. 367, 390 (posing the question: “Has society gone too far in the direction of accepting responsibility for the elderly and fallen too short in what it does for children?”).

141 June Axinn & Mark Stern, Age and Dependency: Children and the Aged in American Social Policy, 63 HEALTH & SOC./THE MILBANK MEMORIAL FUND Q. 648, 659–662 (1985) (concluding that direct public support for the elderly has significantly outpaced support for children since the enactment of the Social Security Act); Martha Minow, Whatever Happened to Children’s Rights, 80 MINN. L. REV. 267, 289 (1995) (explaining the disparate impact that welfare measures had on children relative to the elderly during the 1930s); Samuel Preston, Children and the Elderly: Divergent Paths for America’s Dependents, 21 DEMOGRAPHY 435, 436–37 (1984) (noting research documenting that public expenditure on the elderly has exceed that expended on children); Sara Rosenbaum, Rationing Without Justice: Children and the American Health System, 140 U. PA. L. REV. 1859, 1859 (1992) (“The United States offers children no floor of health care decency as it does for the elderly through the Medicare program. There is no body of case law, no constitutional guarantee, that assures all children access to comprehensive, basic health care regardless of ability to pay.”). See also John Iceland et. al., U.S. CENSUS BUREAU, ARE CHILDREN WORSE OFF? 1 (remarking that the poverty rates for children continue to exceed the rates for the elderly), available at http://www.census.gov/hhes/poverty/povmeas/papers/iceland/john.html.
ELDER CARE, GENDER, AND WORK

consider whether employers should expand their approach to aging so as to better accommodate workers with elder care responsibilities. It discusses how elder care affects worker productivity and also surveys current employer initiatives with respect to elder care.

A. Traditional Employer Support for Aging

Corporate America has played an instrumental role in helping workers to meet the challenges of aging, primarily through the legal mandate of the Social Security system and voluntary contributions by way of private pensions. Title II of the Social Security Act of 1935 established the Old-Age, Survivors, and Disability Insurance program, a national plan created to provide economic support for qualifying wage workers upon their retirement.142 The Act’s old-age insurance program, which is frequently referred to as social security, delivers retirement benefits to workers age 65 or older who have “earned” the benefits through employment in jobs covered by the program.143 A product of the Great Depression, the social security system was enacted in response to the devastating economic hardship that befell so many workers following the stock market crash of 1929.144 The widespread economic turmoil and poverty that accompanied the Great Depression prompted numerous calls for the federal government to create a national program of old-age assistance.145

Financing for the social security program comes from mandatory payroll taxes paid by employees and employers.146 According to Edwin Witte, one of the primary architects of the social security system, the justification for employer contributions to old age insurance mirrors “the revenues which [employers] regularly set aside for depreciation on capital equipment.”147 The social security system represents a humane approach that enables employers to replace older workers with younger ones.148 In other words, providing for old age is a cost of doing business.

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143 See Karen C. Burke & Grayson McCouch, Women, Fairness, and Social Security, 82 IOWA L. REV. 1209, 1213 (1997) (discussing the view of social security benefits as an earned right).
145 Id.
146 See 26 U.S.C. §§ 3101(a), 311(a) (payroll taxes imposed at 12.4 percent rate, split equally between employers and employees).
148 Edwin E. Witte, Old Age Security in the Social Security Act, 45 J. POL. ECON. 1, 27 (1937) (stating that “[a] charge for the depreciation of the labor element in production is just as proper as is a charge for depreciation of capital”).
Along with contributing to social security, some segments of the business community have responded traditionally to old-age by voluntarily providing workers with retirement benefits in the form of pensions.149 The early provision of private pensions during the industrial revolution had a number of complementary explanations. Pensions functioned as a tool to stifle strikes, encourage worker loyalty,150 and decrease labor turnover, all of which promoted workplace productivity.151 Pensions also enabled companies to foster an ethic of care for their employees after years of faithful service.152

Importantly, the rationales for employer support of old age, as regards both social security and pensions, focus on the needs of a previously employed workforce. Neither vehicle was designed to alleviate work–family conflicts that confront presently employed workers who have elder care responsibilities. More importantly, neither vehicle seems capable of alleviating the work–family tensions posed by elder care. To be sure, income from both social security and pensions may enable senior citizens with health care needs to fund some of the costs associated with acquiring long-term care. For example, the elderly may be able to use part of their pensions or social security benefits to help secure formal caregivers whose presence would lessen the burden on informal caregivers. However, this indirect approach to elder care leaves much to be desired.

Elder care providers commonly care for individuals who either do not receive social security or pension benefits, or whose benefits are insufficient to purchase formal care.153 Although the value of the social security program to the elderly cannot be overstated,154 the program by itself neither provides adequate income for retirees nor addresses the long–

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150 HABER, supra note 17, at 115.

151 MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 203–04 (1996); HABER, supra note 17, at 110 (“through their adoption, they brought order and stability to the workforce”).

152 MURRAY W. LATIMER, INDUSTRIAL PENSION SYSTEMS IN THE UNITED STATES 17, 18 (1932); Murray W. Latimer, Old Age Pensions in America, 19 AM. LAB. LEGIS. REV. 55, 59–60 (1929) (noting that pensions served as a reward for service and aided in stabilizing workplace personnel); HABER, supra note 17, at 110 (commenting that pensions were “based on the employers’ ‘moral obligation’ to the elderly worker . . . ”; employers were “rewarding the worker who had served their interests long and faithfully”).

153 See infra notes 156–57 and accompanying text (noting that those individuals who most need care are the least able to pay for it).

154 According to a 1999 study by the Center on Budget and Policy Priorities, nearly half of all Americans age 65 or older would live below the poverty line were it not for Social Security. See Gene Koretz, Social Security Is Aptly Named, BUS. WEEK, May 10, 1999, at 26.
term care needs of the elderly. Consider that over half of all disabled elderly persons live in poor or near-poor families. Consider also that those elderly, at the highest risk of needing long-term care, are more likely to be poor or near-poor relative to more affluent members of the elderly population.

Related concerns exist with respect to the availability of pensions. Only 56 percent of all private-sector workers participate in a pension plan. In addition, those who do are increasingly likely to participate in a defined-contribution plan, which unlike a defined benefit plan, does not guarantee them a pension. These observations are particularly relevant given that women, who account for a disproportionate percentage of elder care recipients, are more likely than men to be at a disadvantage with respect to both social security benefits and private pensions. Both funding sources depend primarily on an attachment to the labor market. Yet, women’s labor force attachments are more tenuous compared to

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157 Id. (stating that “[t]he financial circumstances of the elderly are highly diverse, although elderly persons at the highest risk of needing long-term care are more likely to be poor or near-poor”).


159 Fernando M. Torres-Gil, The New Aging: Individual and Societal Responses, 10 ELDER L.J. 91, 110–111 (2002) (discussing the decline in the number of workers who have a defined pension plan); Mary E. O’Connell, The Economic Insecurity of Contingent Workers, 52 WASH. & LEE L. REV. 889, 892 (1995) (same); US Scheme Underfunding Widespread, Says Wyatts, PENSIONS WEEK, Oct. 6, 2003 (observing that the “number of defined benefit pension plans has declined by about 20% in the last three years”).

160 See Peter Cappelli, The New Deal at Work, 76 CHI.–KENT. L. REV. 1169, 1185–86 (2000) (commenting on the “shift in the nature of pensions from defined benefit plans, where workers earn the right to predetermined benefit levels according to their years of service, toward defined contribution plans, where employers make fixed contributions to a retirement fund for each employee . . . . With this shift, the employer no longer bears the risk of guaranteeing a stream of benefits. That problem now falls to the employee”).

161 See supra note 73 and accompanying text.


men's. In addition, women are more likely than men to work in jobs that lack a pension, and when they do receive pensions, the value of those pensions is worth less than those received by men. Finally, as regards social security, while women live longer than men and thus receive benefits for more years, they receive lower average benefits relative to men. In short, women—who will need more care than men—have less retirement money than men to spend on care.

Moreover, even for those elderly who do receive pensions or social security benefits, many still rely on family and friends for care and support. Elder care contributes to work–family tension not only because many caregiving employees, and their loved ones, lack sufficient funds to purchase formal care but also because it involves numerous caregiving activities that do not lend themselves to outsourcing. Assuming the availability of formal care, there remains a need for employees to provide care by, for example, responding to emergency caregiving situations; providing psychological comfort to an aging parent; or helping with decisions about housing, finances or the like. Finally, research strongly indicates that employed elder care providers and care recipients generally prefer informal care over existing formal care options.

In the final analysis, if employers are to respond effectively to the problem of elder care—a problem that has been dubbed "the silent productivity killer"—

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164 See generally DAPHNE SPAIN & SUZANNE M. BIANCHI, BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN (1996) (discussing the improvements that women have made within the workforce but noting that their labor force attachment still trails that of men due in part to interruptions caused by childbearing and childrearing activities, discrimination, and differing human capital investments).

165 See Dana M. Muir, From Yuppies to Guppies: Unfunded Mandates and Benefit Plan Regulation, 34 GA. L. REV. 195, 220 (1999) (noting that disparity in pension coverage between men and women owing to factors such as women's greater concentration in part–time work and those job sectors that have lower rates of pension sponsorship); Schmall, supra note 162 (noting the relative lack of pension coverage for women).

166 See Muir, supra note 165, at 220–22; Women and Retirement Income, supra note 162, at 4 (reporting that "[a]mong new private sector pension annuity recipients in 1993–94, the median annual benefit for women was $4,800, or only half of the median benefit of $9,600 received by men. And among women approaching retirement, pension wealth is much smaller: for example, single women had average pension wealth that was 34 percent of the single men's average.")

167 Women and Retirement Income, supra note 162 at 9.

168 Id.

169 Id. at 5 (reporting that "[i]n 1997, median income for elderly unmarried women (widowed, divorced, separated, or never married) was $11,161, compared with $14,769 for elderly unmarried men and $29,278 for elderly married couples").

170 Walker et al., supra note 128, at 408 (noting that formal care of the elderly in an institution does not end family caregiving responsibilities).

171 Id. (observing that "individuals increasingly see home care as desirable and inpatient facilities as impersonal and even dangerous"). In a 2001 study conducted by AARP, 76 percent of respondents indicated that "even if their parents could afford to hire help, they would prefer to continue providing assistance." In THE MIDDLE, supra note 55, at 50.

172 Carol Kleiman, Elder Care Quietly Saps Worker Output, CHICAGO TRIB., Oct. 28, 2003, at 2; Joan
they will need to reorient their focus from assisting previously employed workers, through social security contributions and pensions, to providing support for the swelling ranks of presently employed workers who care for aging adults.

B. The Case for Employer Support of Elder Care

Attempts to justify employer support for elder care reveal a central limitation on thinking about work–family policies largely from the perspective of child care. A frequent argument advanced in support of greater employer accommodation of work–family conflicts centers on expected future benefits that employers will reap once children become adults. As one commentator writes, “there is no business in the next generation unless businesses make it their responsibility to invest in that next generation.” By providing child care, “employers will ensure that the workers of tomorrow are better prepared than their present day counterparts.” To quote another commentator, employers should assist in helping workers with child care because they “profit from access to skilled, disciplined, and cooperative workers.” The limits of such future–oriented arguments become readily apparent when applied to elder care.

A more convincing approach arguably rests in persuading employers that support for elder care, similar to support for child care, is good for their bottom line. Initial research on the impact of elder care indicates that

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Fleischer Tamen, The Sandwich Generation, Many Baby Boomers Find Their Careers under Stress as They Try to Care for Elderly Parents as Well as Raise Their Children, SOUTH FLORIDA SUN–SENTINEL, Feb. 29, 2004, at 1E.


176 See SANDRA L. BURUD ET AL., EMPLOYER–SUPPORTED CHILD CARE: INVESTING IN HUMAN RESOURCES 5, 19–65 (1984) (providing an overview of the benefits that employers reap as a result of employer sponsored child care); Lucinda Finley, Transcending Equality Theory: A Way Out Of The Maternity and Workplace Debate, 86 COLUM. L. REV. 1118, 1175 (1986) (observing that companies that have child plans have seen an increase in worker morale and productivity); Arielle Horman Grill, Comment, The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?, 17 COMP. LAB. L. 373, 382 (1996) (commenting that “[p]roductivity increases when workers are able to remain at home after their children are born”). See also Marion Crain, "Where Have all the Cowboys Gone?: Marriage and Breadwinning in Postindustrial Society, 60 OHIO ST. L. J. 1877, 1954 (2000) (commenting that “workers who feel personally supported by their employers are more likely to think innovatively on the job, make important contributions at work, and feel more attached and loyal to the organization”); Donna Lenhoff & Claudia Withers, Implementation of the Family and Medical Leave Act: Toward The Family–friendly Workplace, 3 AM. U. J. GENDER & LAW 39, 51 (1994) (referencing studies on the FMLA and observing that the Act saves employers money); Joan Williams, Do Wives Own Half? Winning for Wives After Wendt, 32 CONN. L. REV. 249,
such caregiving takes a tremendous toll on worker productivity. As noted in Section II.B., as a result of elder care responsibilities, employees confront numerous work–care conflicts such as workday interruptions, missed days of work, job turnover, and early job termination.\textsuperscript{177} Employer surveys of elder care also reveal a growing concern with the costs imposed by “presenteeism”; namely, even when workers are not absent, elder care-related distractions lead to time spent on the phone, stress, and ultimately less productivity.\textsuperscript{178} These various costs negatively affect both employees and employers. A 1997 study estimated that the annual cost of elder–care related workplace disruptions to employers is between $11 billion and $29 billion annually.\textsuperscript{179} Of this amount, the largest cost involves expenses (estimated at $5 billion a year) associated with replacing employees such as recruiting, training, and relocation.\textsuperscript{180}

Elder care’s hefty economic price tag has sparked some corporate interest in measures to help workers with elder care responsibilities. Most voluntary employer benefits can loosely be grouped into three categories: information benefits, financial benefits, and flexibility benefits. Information benefits commonly take the form of resource/referral services that provide employees with elder care–related information.\textsuperscript{181} Because referral/resource programs cost employers relatively little, they rank as the most common voluntary, employer–based elder care program.\textsuperscript{182}

\textsuperscript{177} See supra Section II.B. See also Joann Blair, "Honor Thy Father and Thy Mother"–But for How Long?–Adult Children’s Duty to Care for and Protect Elderly Parents, 35 U. LOUISVILLE J. FAM. L. 765, 780 (1996/1997) (reporting the results of a study in which surveyed employees who cared for elderly relatives or friends reported a decline in productivity and an increase in absenteeism and tardiness).

\textsuperscript{178} See Judy Greenwald, Elder Care Costs Are Increasing, BUS. INS., Jan. 27, 2003, at 4 (noting that “elder care problems are a ‘huge distraction,’ even if an employee is not absent”); Hara Estroff Maron, Night Life, 36 PSYCHOL. TODAY 43, 50 (2003) (describing presenteeism as an “inability to focus on the job while there”); Jodie Snyder, Employers Step Up Wellness Programs, ARIZ. REPUBLIC, Dec. 26, 2003, at 1D (describing presenteeism as a “phenomenon in which people show up at work preoccupied with personal matters such as health care”); MetLife Mature Marketing Group and National Alliance for Caregiving, MetLife Study of Employer Costs for Working Caregivers 5 (1997) [hereinafter MetLife Employer Costs], available at http://www.caregiving.org/metlife.pdf (finding that elder caregivers report decreased performance because of interruptions during the day stemming from “time spent making phone calls to the care recipient or to service providers, receiving phone calls or being distracted from work in other ways”).

\textsuperscript{179} Id. at 4. See also Margaret Boles, Elder Care Is Everyone’s Responsibility, 76 WORKFORCE 23 (1997) (describing the costs to employers of various elder care responsibilities).

\textsuperscript{180} MetLife Employer Costs, supra note 178, at 4.


\textsuperscript{182} See Greenwald, supra note 178, at 4–5 (reporting that resource and referral services are “[t]he most common–and least costly–of these services,” costing about $1 to $2 per employee per month); Rudy Yandrick, Elder Care Grows Up: It’s about Productivity and Worker Retention—and Helping
The program offered by J.P. Morgan illustrates the type of referral and resource services that employers provide.\textsuperscript{183} The company sponsors seminars, geared to employees, that address a range of elder care–related topics including aging, Alzheimer’s disease, dementia, in–home care providers, medical supplies, and household equipment necessary for safe caregiving.\textsuperscript{184} Other aspects of the program include help locating and assessing nursing homes and rehabilitation facilities;\textsuperscript{185} access to elder care consultants who work with employees to develop a tailored care plan; and online support services that allow employees to participate in moderated Web chats and bulletin board discussions.\textsuperscript{186}

Dependent care spending accounts rank as the most popular form of financial support that employers offer to assist with elder care. The accounts allow employees to put away before–tax dollars to use on dependent care expenses.\textsuperscript{187} A less common elder care financial benefit is long–term health insurance.\textsuperscript{188} The third set of voluntary benefits that employers commonly offer to aid workers with elder care obligations encompasses policies that allow for greater workplace flexibility.\textsuperscript{189} These

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\textit{Employees Take Care of a Growing Need, 46 HR MAG. 72, 74 (2001) (commenting that “[m]ost programs use R&R as the base and add other services as employees’ caregiving needs become clearer”). See also Donna L. Wagner, The Development and Future of Workplace Eldercare, in DIMENSIONS OF FAMILY CARRYING: A LOOK INTO THE FUTURE 27, 29 (Elizabeth Joyce ed., 2000).}
\textsuperscript{183} Kelley Blassingame, Eldercare Benefits Expand as Number of Caregivers Rises, EMPLOYEE BENEFIT NEWS, Sept. 15, 2002.
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} See Wojcik, supra note 8 (reporting on Fannie Mae’s Eldercare Program which includes an on–site care manager who helps employees identify the extent of care needed, alternative caretakers when the employees cannot be present, and transportation needs; the program also offers financial planning, legal consultations, counseling, and concierge services to help employees with errands). See also Pamela Yip, Caring Concerns: Struggles to Help Elderly Can Put Kin in Financial Need, DALLAS MORNING NEWS, Aug. 26, 2002, at 1D. (describing the elder care program at Texas Instruments, Inc. which provides employees with workplace seminars, referral and resource support, and access to elder care experts).\textsuperscript{187} In its 2003 Eldercare Survey, the Society of Human Resource Management found that of surveyed employers, 76 percent offered dependent care flexible spending accounts that employees could use for dependent care expenses, including elder care. Survey Underscores Need for Eldercare Benefits, MANAGING BENEFIT PLANS, March 2004, at 7. As a practical matter, however, many employees are unable to utilize the accounts for elder care purposes because in order to do so, they must be able to claim the person as a dependent with the Internal Revenue Service. \textit{NEAL et al., supra note 128, at 210; Jean Chatzky, Credits for Caring, TIME MAG., Mar. 22, 2004, at 74. The same limitation holds true with respect to the dependent–care tax credit. See LAURIE YOUNG, WOMEN AND AGING: BEARING THE BURDEN OF LONG–TERM CARE, SENATE SPECIAL COMMITTEE ON AGING AND THE SENATE HEALTH, EDUCATION, LABOR AND PENSIONS SUBCOMMITTEE ON AGING 6 (Feb. 6, 2002) (observing that the definition of dependence in the dependent care tax credit is “too restrictive to be an effective relief mechanism for most [elder] caregivers”).}
\textsuperscript{188} Wojcik, supra note 8, 10 (noting study conducted by Hewitt Associates which found of its surveyed employers, that only 20 percent offered their employees access to long–term care insurance for themselves or their parents).\textsuperscript{189} Gloria Gonzalez, Elder Care Resources Offer Comfort to Workers, BUS. INS., Mar. 29, 2004, at T11 (reporting on a Hewitt Associate survey which found that 74 percent of surveyed employers offered
policies include flextime, compressed workweeks, job sharing, and telecommuting. Other employer benefits that can help ease the strain of caring for an elderly person include company–supported elder care day centers or subsidies to help defray the costs of elder care.

The trend toward elder care benefits represents a welcome addition in the panoply of workplace policies to help accommodate employees with work–family conflicts. Yet, while employers are becoming more alert to the reality of elder care as a workplace issue, those that offer voluntary elder care benefits remain the exception rather than the rule. In its 2003 survey, the Society for Human Resource Management found that only 25 percent of all respondents provided elder care benefits. Absent specific employer initiatives, employees caring for aging family members and friends depend upon the FMLA. Because flexibility is the benefit that employed elder caregivers say they need most, the FMLA stands as an important vehicle to reduce work–family incompatibilities that center on elder care.

IV. ELDER CARE AND THE FMLA: SUBSTANTIVE PROMISES AND PITFALLS

Enacted in 1993, the FMLA provides qualified employees with up to twelve weeks of unpaid leave to give birth to or adopt a child, to care for a spouse, child, or parent who has a serious health condition, or to care for the employee’s own serious health condition. Apart from using the FMLA to care for themselves, employees primarily utilize the FMLA for child-care related purposes. In 2000, approximately 38 percent of all FMLA leave involved child care while 10 percent was to care for a parent.

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190 See Neal et al., supra note 128, at 194–203 (providing an overview of workplace flexibility policies that can help accommodate work and family).

191 Marsha King, When Employees Are Weighed Down by Family Matters, Seattle Times, Feb. 29, 2000, at 1A. See also Patel, supra note 26, at 168 (referring to comment of human resource consultant that elder care does not appear on “most employers’ radar screens”).

192 Id.

193 Carter & Carter, supra note 75. Women Want Elder Care as Benefits Choice, 6 Fed. Human Resources Week (Sept. 27, 1999) (reporting on a survey of National Association for Female Executives where 64 percent of respondents indicated a desire for more flextime to help with elder care).


196 Balancing The Needs, supra note 195, at 3–16 (reporting that employees taking leave to care for a
However, the changing demographics referenced earlier suggest that more workers may look to the Act as a means to help with elder care responsibilities.

Unfortunately, as this Section reveals, the FMLA is a mixed bag in terms of its ability to accommodate employees who have elder care obligations. As an initial observation, many of the critiques levied at the FMLA with respect to child care are equally applicable to elder care and suggested FMLA reforms—such as expanding coverage to include smaller workplaces and providing paid leave—should inure to the benefit of workers with elder care responsibilities as well as those with child care obligations. That said, elder care casts a new light on the FMLA’s ability to help workers chart an acceptable course between work and family. This Section focuses on substantive provisions of the Act as they relate to elder care; namely, the availability of intermittent leave, the requirement of a serious health condition, and the concept of care.

A. Intermittent Leave

An important feature of the FMLA that allows employees greater flexibility to manage the dual responsibilities of elder care and work is intermittent leave. Intermittent leave enables an employee to take time off on a periodic basis "rather than for one continuous period of time." The leave can be taken in increments of time ranging from an hour or more to several weeks. An employee might take leave "on an occasional basis for medical appointments” or take leave “several days at a time spread over a period of six months, such as for chemotherapy.

Intermittent leave may prove especially beneficial to employees who care for elderly individuals who have a chronic serious health condition, 

newborn, newly adopted or placed foster child accounted for 24.4 percent of all leave, and employees taking leave to care for an ill child accounted for 13.5 percent of all leave).

197 See supra notes 17–27 and accompanying text.


200 29 C.F.R. § 825.800 (defining “intermittent leave”).

201 29 C.F.R. § 825.203(a).

202 29 C.F.R. § 825.203(b).
such as Alzheimer’s disease,\textsuperscript{203} that requires periodic visits to see a health care professional. Employees can use intermittent leave not only in situations where a health condition is intermittent but also when the employee is only needed on an intermittent basis “such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.”\textsuperscript{204} For example, an employee with an elderly family member who has Parkinson’s disease may use intermittent leave to provide an occasional respite—for a few hours or a few days—to a primary care provider.\textsuperscript{205}

### B. Serious Health Condition

In the context of elder care, FMLA leave only applies when an employee needs time off to care for a covered elderly person who has a serious health condition. The FMLA defines a serious health condition as “an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider.”\textsuperscript{206} The Senate Report on the legislative history of the Act lists several examples of conditions that qualify as a serious health illness including “heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, [and] strokes . . . .”\textsuperscript{207}

The Department of Labor Regulations also list a number of short-term conditions which, absent complications, do not fall within the meaning of a serious health condition including “the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, [and] periodontal disease.”\textsuperscript{208} The Act’s

\textsuperscript{203} Liesi E. Herbert et al., Alzheimer Disease in the US Population, 60 ARCHIVES OF NEUROLOGY 1119, 1119–1121 (2003) (reporting on a study that projects that by 2050, the number of persons who suffer from Alzheimer’s will triple to 13.2 million persons; the number of persons with Alzheimer’s between the ages of 75 to 84 will double; the number of persons with Alzheimer’s over 85 will quadruple). \textit{See also} Jodi Reynosa, Assessing the Cost of Alzheimer’s, STAR-GAZETTE (Elmira, NY), Sept. 9, 2003, at 8C (reporting on the projected increase of individuals with Alzheimer’s disease); Anna L. Griffin, Alzheimer’s Disease Becoming More Prevalent, MONTACHUSETT TELEGRAM & GAZETTE (Mass.), Nov. 19, 2003, at 10 (commenting that as the baby boom generation ages, the prevalence of Alzheimer’s will increase).

\textsuperscript{204} 29 C.F.R. § 825.116(c).

\textsuperscript{205} To qualify for intermittent leave, “there must be a medical need for leave (as distinguished from voluntary treatments and procedures) and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule.” 29 C.F.R. § 825.117

\textsuperscript{206} 29 U.S.C. § 2611(11). \textit{See also} 29 C.F.R. § 825.114(a) (Department of Labor regulations defining serious health condition).

\textsuperscript{207} 29 U.S.C. § 2611(11).

\textsuperscript{208} 29 C.F.R. § 825.114(c) (“Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.”).
legislative history indicates that Congress excluded these conditions, for which treatment and recovery are very brief, because it is expected that they "will fall within even the most modest sick leave policies . . ." However, this expectation falls flat given that many employers do not have a sick leave policy and those that do commonly limit the availability of the policy to cover a worker's own illness.

This concern notwithstanding, various of the illnesses that often accompany aging—such as Alzheimer's disease, strokes, diabetes, arthritis and heart disease—readily fit within the meaning of a serious health condition. Other age-related health problems that seem good candidates for the label of a serious health condition include Parkinson's disease and dementia. In addition, the elderly may experience a serious health condition that involves a physical fracture resulting from a fall. Falls are the primary cause of accidental death among the elderly age

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209 S. REP. NO. 103–3, at 28 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 30. See also Mora v. Chemtronics, 16 F. Supp. 2d 1192, 1200 (1998) (observing that the "FMLA does not supplant employer-established sick leave and personal leave policies, rather it provides leave for uncommon and often stressful events such as caring for a child with a serious health condition").

210 See David J. Walsh, The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?, 20 BERKELEY J. EMP. & LAB. L. 74, 93 (1999) (reporting that among full-time, blue-collar production and service employees, only 39 percent had paid sick leave). See also HEYMANN, THE WIDENING GAP, supra note 2, at 114–15 (reporting that seventy-six percent of those in the lowest income quartile lack sick leave).

211 See Walsh, supra note 210, at 96 (reporting on the availability of employee sick leave among full-time, blue-collar production and service employees; while the reported statistics did not specifically address the availability of leave for elder care purposes, it is useful to note that 36 percent of the survey employers did not allow any alternative uses for sick leave other than for the employee's own use).

Congress may also have assumed that employers would not terminate employees who take time off to care for elderly individuals who have medical conditions that do not qualify as a serious health condition. This assumption is questionable in light of anecdotal evidence documenting instances of employers who terminated employees because of the latter's elder care responsibilities. See, e.g., infra notes 280 and 295.

212 29 C.F.R. § 825.114(a)(2)(iv) (listing Alzheimer's among the examples of conditions that would qualify as a serious health illness).

213 29 U.S.C. § 2611(11) (listing strokes among the examples of conditions that would qualify as a serious health illness).

214 29 C.F.R. § 825.114(a)(2)(iii)(C) ("A chronic serious health condition is one which . . . may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.").

215 29 U.S.C. § 2611(11) (listing "severe arthritis" among the examples of conditions that would qualify as a serious health illness).

216 29 U.S.C. § 2611(11) (listing various heart-related illnesses among the examples of conditions that would qualify as a serious health illness).

217 David Perlman, 20 Million Infusion for Parkinson's Study, S.F. CHRON., Aug. 27, 2002, at A2 (noting that Parkinson's affects about 1.5 million Americans, most of whom are elderly).

218 Susan Kelley, Prevalent Mental Health Disorders in the Aging Population: Issues of Comorbidity and Functional Disability; Mental Health Disorders in Aging, 69 J. REHABILITATION 19, 19 (2003) (noting that the frequency of dementia increases with age and citing evidence that "up to 11% of persons over age 65 and 36% of persons over age 85 have some form of dementia" and that as many as 14 million elderly individuals will have dementia by 2040).
65 and over, and the sixth leading cause of death for the age group. While most falls do not result in death, they can cause serious injuries that compromise the ability of an elderly person to live independently, and thus prompt the need for a caregiver. 

Although key illnesses and disabilities that confront the elderly qualify as a serious health condition, employed elder care providers may find some of the FMLA’s limitations particularly frustrating. As noted, the FMLA only provides 12 weeks of unpaid leave. Yet, illnesses such as Alzheimer’s and Parkinson’s are long-term degenerative illnesses. Rarely is there a light at the end of the tunnel. Care, which is often prolonged and protracted, most often ceases when the care recipient dies. On the one hand, this reality illuminates the need for a leave policy that increases the limited 12–week provision that currently exists in the FMLA. On the other hand, it raises a real concern about the ability of the business community to accommodate the growing demand among workers to take care of aging relatives and family members.

C. The Meaning of Care

A related, though different concern that elder care presents to the FMLA framework hinges on the Act’s incorporation of a medical–model of caregiving. Other than providing employees with time off for the birth or adoption of a child, the Act allows leave only for caregiving in connection with a serious health condition. The issue here is not a continuation of the topic discussed above—namely, which health conditions qualify as serious health conditions. Instead, the ensuing discussion examines the following question: What does it mean to say that an employee is required to help care for a person with such a condition?

FMLA regulations and case law make clear that the concept of care encompasses both physical and psychological care. The regulations illustrate physical care by reference to a situation in which a family member

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221 Tofani, supra note 220.

222 See supra note 194 and accompanying text.


224 29 C.F.R. § 825.116(a).
is unable to care for his or her “basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor.” With respect to psychological care, the regulations refer to a situation where an employee provides “psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.” Care can also include “situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.” Although these illustrations give “care” a relatively expansive definition, two recent court interpretations of the concept have restricted it in a fashion that holds troubling implications for employees with elder care responsibilities.

1. Pang v. Beverly Hospital

The situation in Pang v. Beverly Hospital likely resonates with many adult children caring for aging parents. Ms. Pang had a long-distance relationship with her elderly mother who was in poor health. Because the mother lived in a large home that had become difficult to navigate in light of her health, she wanted to transition to smaller living quarters. She requested her daughter’s assistance to help make the transition.

Ms. Pang resided in California and worked for Beverly Hospital. Her mother, who lived in New York, suffered from an array of illnesses including “narcolepsy, cataplexy, high blood pressure, arthritis, circulatory problems, and a heart condition.” She also experienced neck pain and immobility in one arm, and had balance problems that had resulted from a stroke several years earlier. Because of these ailments, the mother was incapacitated periodically for more than three days at a time and was under the continuing supervision of a health care provider. In late May 1996, Ms. Pang informed her employer that she soon would have to travel to New York to assist her mother in relocating from one home to another. At the beginning of June, Pang notified her employer, the Hospital, that she had to leave for New York. The Hospital responded by terminating Pang, claiming that she had abandoned her job. Pang’s suit against the Hospital

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225 Id.
226 Id.
227 29 C.F.R. § 825.116(b).
229 Id. at 990.
230 Id.
231 Id.
232 Id.
233 Id.
alleged that she had been terminated for taking time off to care for her mother in violation of the California Family Rights Act (CalFRA), California’s counterpart to the FMLA.

In support of her claim, Pang stated that her mother’s age and medical conditions made it increasingly difficult for her mother to continue living in a two-story home. As a result, the mother had rented an apartment, put her house on the market for sale, and hired a moving company to facilitate the move of her belongings from the house to the apartment. Pang stated that she handled many of her mother’s business affairs and that her mother had requested that she help with the packing and relocating of those items which the mother was “physically unable to do herself due to her medical conditions.”

Although Pang’s mother was largely self-sufficient at the time—driving a car, living by herself, as well as bathing and feeding herself—the evidence indicated that her medical conditions often compromised her ability to function and that, as a result, she was physically unable to provide much assistance in the move. In summarizing Pang’s theory of the case, the California Court of Appeals wrote: “In order for Pang’s mother to remain independent and minimize her need for at-home assistance, the mother wanted to move to a one-level apartment. Because Pang’s mother was unable to take part in the move, Pang was needed to help out. Pang’s assistance with her mother’s move therefore constituted ‘care’ under CalFRA.”

In affirming the lower court’s dismissal of Pang’s claim, the Court stated that the concept of care “involves some level of participation in ongoing treatment of [a serious health] condition.” Although the mother suffered from serious health conditions, reasoned the court, Pang was not engaged in caregiving under the Act because her involvement in assisting with the move did not “directly or even indirectly provide or participate in medical care for her mother.” As the Court saw it, Pang was there “to help pack her mother’s belongings and tell the movers where to place her

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235 79 Cal. App. 4th at 993; Gradilla v. Ruskin Mfg., 320 F.3d 951, 956 (9th Cir. 2003) (observing that the “CFRA was modeled on the federal Family and Medical Leave Act”). Plaintiff also claimed that termination was a violation of public policy and a violation of the Fair Employment and Housing Act.
79 Cal. App. 4th at 989.
236 79 Cal. App. 4th at 990.
237 Id. at 991. (Pang’s sister confirmed their mother’s medical problems, and indicated that she personally was unable to help with the move because of other obligations.)
238 Id.
239 Id. at 992.
240 Id. at 994.
241 Id. at 996.
242 Id.
mother's furniture."\textsuperscript{243} The Court conceded that Pang was "caring for her mother in a practical sense," and acknowledged that the move into an apartment was to accommodate the mother's health conditions, but concluded that the CalFRA did not contemplate such "practical care."\textsuperscript{244}

The Court's decision restricts care to "hands on" medical activities such as "administering various treatments and medications, preparing... meals, tending to... personal hygiene needs, taking [care recipients] to their health care providers, and supplying the emotional comfort and support often needed to see a loved one through... trying circumstances."\textsuperscript{245} Elsewhere, I demonstrated how the FMLA's emphasis on this medical-model of caregiving adversely impacts child care obligations and I argued for the development of a legal framework capable of accommodating routine child care obligations.\textsuperscript{246} A comparable proposal applies to elder care responsibilities. As intimated earlier, managing elder care is frequently more complex than managing child care because it involves the coordination of many services including transportation, medical appointments, retirement decisions, arrangement of meals to be delivered, household duties, finances and the like.\textsuperscript{247} Employees may need time off, for example, to accompany an elderly parent to the doctor for a routine medical examination, to help an elderly family member select a care facility or to provide assistance in relocating the family member to a more appropriate housing environment, such as a retirement home, a nursing home or an assisted–living facility. Yet, as it presently stands, the Act excludes all of these caregiving situations absent proof that the care is required because of a serious health condition.

To ensure that employees are protected when faced with routine elder care obligations that conflict with work responsibilities, consideration should be given to expanding the FMLA in a manner similar to that which has occurred with a few state family leave statutes. The family and medical leave statutes in both Massachusetts\textsuperscript{248} and Vermont\textsuperscript{249} protect employees based on a broader range of elder care responsibilities than does the FMLA. Under both statutes eligible employees can take up to 24 hours leave per 12 month–period, in addition to FMLA leave, to accompany an elderly relative to routine medical or dental appointments or appointments for other professional services related to the elder’s care, such as interviewing at

\begin{itemize}
\item \textsuperscript{243} Id.
\item \textsuperscript{244} Id. at 997 n.11.
\item \textsuperscript{245} Id. at 999.
\item \textsuperscript{246} Smith, Accommodating, supra note 1.
\item \textsuperscript{248} Smith, Caregiving Decisions, supra note 80, at 31 (citing research for the proposition that "[m]anaging elder care is also more complex than managing child care because it involves the coordination of many social services").
\item \textsuperscript{247} MASS. ANN. LAWS ch. 149, § 52D(b)(3) (2004).
\item \textsuperscript{249} VT. STAT. ANN. tit. 21, § 472a(a) (2003).
\end{itemize}
nursing or group homes.\(^{250}\)

Although these state level trends are encouraging, there remains cause for concern. While Massachusetts’ and Vermont’s family leave statutes cover routine elder care activities, most states that recognize the importance of routine caregiving obligations have done so only in the context of child care and have yet to appreciate the value of such caregiving as it impacts elder care. The family and medical leave law in Louisiana illustrates the point well.\(^{251}\) The law allows an eligible employee leave “to attend, observe, or participate in conferences or classroom activities” that are conducted at his or her child’s school or day care center, if activities cannot reasonably be scheduled during non–work hours.\(^{252}\) However, no provisions are made with respect to routine obligations for elder care.

2. Gradilla v. Ruskin Manufacturing

Employees may not be protected under the FMLA even when they provide the type of hands–on, medical care emphasized by the Pang Court. In Gradilla v. Ruskin Manufacturing,\(^{253}\) the Ninth Circuit denied protection to an employee who took a short leave of absence from his job to care for his ill wife while they traveled to attend her father’s funeral. The plaintiff, Arnulfo Gradilla, worked as a manual laborer for the defendant. Mr. Gradilla’s wife suffered from a serious heart condition and her doctors had expressed the view that she might require a heart transplant.\(^{254}\) When faced with a stressful event, the wife’s heart condition resulted in spells during which her blood pressure increased, her heart beat fast, she became dizzy and faint, and she became incapacitated. Her husband had to care for her

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\(^{252}\) Id. See also Cal. Lab. Code §230.8(a)(1) (West 2001) (mandating that an employee can take off “up to 40 hours each year, not exceeding eight hours in any calendar month of the year, to participate in activities of the school or licensed child day care facility of any of his or her children”); Nev. Rev. Stat. Ann. § 392.920(1)(a) (Michie 2004) (requiring employers to accommodate parents who must take leave to attend a requested school conference or a reported school emergency regarding his or her child); Ill. Comp. Stat. 147/15 (2004)(allowing parents leave to “attend school conferences or classroom activities related to the employee's child if the conference or classroom activities cannot be scheduled during nonwork hours”); R.I. Gen. Laws § 28–48–12 (2003) (providing employees leave to attend school conferences or other school–related activities for a child).

\(^{253}\) 320 F.3d 951 (9th Cir. 2003). The opinion was later withdrawn by Gradilla v. Ruskin Mfg., 328 F.3d 1107 (9th Cir. 2003) pursuant to a stipulation filed by the parties. Although the opinion was withdrawn, it does create uncertainty about the scope of the FMLA and it still provides a useful illustration of how a federal court might approach the care provision in the FMLA or that contained in a state family leave act. The court’s analysis offers some interesting points that other courts might draw upon to help decide a similar issue in the future, especially considering the paucity of case law addressing the concept of care generally and the likelihood that situations like that in Gradilla will become more common as more workers take on elder care responsibilities.

\(^{254}\) 320 F.3d at 953.
during these periods because only he "knew how to take care of her when she had a traumatic episode."255

In October 1999, Gradilla received a telephone call from his wife, stating that her father had just died in an automobile accident. She requested that Gradilla accompany her to the funeral in Mexico as she would need him to care for her given that the stress surrounding her father’s death had aggravated her heart condition.256 While in Mexico, Mrs. Gradilla did experience problems because of her heart condition, and Mr. Gradilla had to care for her.257 Gradilla missed three days of work as a result of the trip to Mexico,258 and although his supervisor had granted him leave to accompany his wife, he was terminated upon his return to work259

Gradilla filed suit raising a number of claims including a violation of the California Family and Medical Leave Act.260 The defendant’s motion for summary judgement was granted by the district court.261 In a split decision upholding the dismissal, the Ninth Circuit concluded that although Gradilla’s wife had a serious health condition, Gradilla had not produced sufficient evidence that the requested leave was necessary “to care” for his wife within the meaning of the law.262 The Court reasoned that the Act did not require an accommodation of an employee whose care for a family member is triggered by the family member’s decision to travel for a purpose unrelated to her medical condition or treatment.263 In support of this conclusion, the court invoked the FMLA regulations.264 Specifically, the court referred to those sections of the regulations that indicate a need for care in a situation (1) where the care recipient is unable to transport himself or herself to the doctor because of a serious health condition;265 (2) where the care recipient is receiving inpatient or home care because of a serious

255 Id. at 954.
256 Id.
257 Id.
258 Id.
259 Id. While Gradilla was away, the employer scheduled a mandatory overtime workday. Because of the mandatory overtime, Gradilla missed three days of work. In terminating Gradilla, the employer claimed that Gradilla had violated its three day “no-call/no show policy” because Gradilla had failed to give notice that he was seeking to use CalFRA leave. Id. at 953. Gradilla claimed that the employer was well aware of his wife’s medical condition, and that he mentioned it when he told his supervisor that he needed to accompany her to Mexico. On this issue, the court held that sufficient evidence existed from which a reasonable jury could conclude that Gradilla had provided adequate notice under the CalFRA. Id. at 956.
260 Id. at 955. See also id. at 956 (observing that the “CFRA was modeled on the federal Family and Medical Leave Act”).
261 Id. at 955.
262 Id. at 957.
263 Id.
264 Id. at 958; see also id. at 956 (stating that federal FMLA law will be applied to Gradilla’s CFRA claim).
265 Id. at 958.
health condition, or (3) where because of a serious health condition, the care recipient needs to be transferred to a nursing home. These sections, declared the Court, "suggest that 'caring for' a family member with a serious health condition involves some level of participation in ongoing medical or psychological treatment of that condition, either inpatient or at home."

In effect, the Court held that in order for care, that occurs in connection with a serious health condition, to merit protection, it must occur in the home, a care facility, or be administered while the care recipient is en route to or from the office of a medical provider. Yet, such a spatial limitation occurs no where in the language of the California Family and Medical Leave Act or the FMLA. As the dissent observes, both statutes provide coverage "as long as the employee actually provides care, and the relative actually has a serious medical condition." The protections afforded by the statute do not depend on whether that care takes place in the home or in a motel room, in California or in Mexico. Seriously ill persons who need a caregiver to accompany them when they leave their homes do not lose their status as seriously ill spouses or parents whenever they venture outdoors or travel to some location or office other than their doctor's. That is why the regulations do not place a geographic restriction on coverage for such care, or contain any restriction to the effect that basic care must be provided only in the home.

The majority justifies its decision in terms of the reason that prompted the need for care. The Court expresses concern that an employer could be required to provide leave whenever covered family members with serious health conditions request an employee to travel with them so as to provide needed care, irrespective of the reason for the travel. "The travel could be for unlimited personal reasons, to any destination, for lawful or unlawful purposes, for business or vacation. Courts would then have to decide, in each case, the worthiness of the family member's travel motives." Apparently worried by the specter of employees requesting leave to accompany and provide care to relatives who want to head to Las Vegas or the like, the majority imposes a spatial restriction so as to ensure that most travel–related care merits coverage only when the travel itself is medically

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266 Id.
267 Id.
268 Id.
269 Id. at 962.
270 Id. at 963. The dissent, authored by Judge Stephen Reinhardt, added that the majority's ruling was an example of "passionless conservatism" and commented: "That a poor, hardworking, Hispanic man, struggling to support his family by performing manual labor, could be fired by his employer under the circumstances of this case is almost unimaginable." Id. at 960.
271 Id. at 958.
necessary.

While one can sympathize with the majority's thinking, it goes too far. Not only does it lack support in the Act, but the consequences of such thinking as applied to elderly individuals are particularly harmful. It perpetuates the stereotype of the elderly as dependent, passive and unproductive.\textsuperscript{272} It suggests that an elderly person who has a serious health condition hinges on the brink of death's door, hidden away in the home or a care facility, with the occasional trip out only to visit a doctor. The senior citizen who wishes to remain active and involved, notwithstanding a serious health condition, but who needs the assistance of an employed family member, plays no part in the vision of aging fostered by the \textit{Gradilla} Court.

The majority may be correct in its intimation that Congress did not intend the FMLA to cover an employee who leaves work, for example, to accompany a family member on a leisure trip to Vegas because the relative needs care due to a serious health condition. Yet, it seems equally unlikely that Congress intended to deny protection to employees whenever the requested leave does not involve care administered in the home, a care facility, or during the course of a visit to a doctor's office. There is no basis offered by the \textit{Gradilla} Court to conclude that Congress thought that care administered to someone with a serious health condition during the course of a trip to attend her father's funeral is any less deserving of protection than care administered in the home.

V.

THE FMLA'S VISION OF FAMILY: IMPLICATIONS FOR ELDER CARE

For some workers with elder care responsibilities, the FMLA offers no protection because of the Act's severely limited understanding of family. The Act's vision of family turns on a nuclear family, defined by marriage and parenthood. Consequently, leave for purposes of caregiving is only available for a worker to care for herself, a child, a spouse, and a parent. As for the many people who form caregiving bonds that fail to fit this rigid view of family, they are “disadvantaged, punished, disregarded, and ignored” by the Act.\textsuperscript{273} With respect to elder care, the Act's caregiving framework assumes marriage and the presence of a spouse capable and willing to provide care, or alternatively, parenthood and the presence of a child capable and willing to provide care. The Act also seems to assume that the elderly either reside with their adult children or live in close proximity. All three assumptions hold troubling ramifications.\textsuperscript{274}

\textsuperscript{272} See COLE, supra note 17, at 89 (discussing stereotypes of elderly Americans).


\textsuperscript{274} While this discussion centers on elder care, the limitations raised have general applicability to all
The Act's assumption of marriage overlooks those individuals who were married but have since become divorced, separated or widowed as well as those individuals who are presently married but whose spouses are also coping with age-related difficulties or are otherwise unable to shoulder the burden of caregiving. On this point, observe that the Act's privileging of marriage stands to adversely impact elderly women more so than men; 59 percent of elderly women are "unmarried" (widowed, divorced, separated, or never married) compared with only 27 percent of elderly men. The Act's marriage presumption also ignores elderly individuals who never married as well as those in same-sex relationships. Finally, the assumption of spousal caregiving has important racial implications. African Americans, relative to whites, have lower rates of marriage and remarriage, and experience a higher incidence of marital dissolution. Moreover, elderly Blacks are more likely to be widowed than their white counterparts.

Absent spousal caregiving, the FMLA assumes that adult children will care for their aging parents. Hence, the Act defines "parent" as "the biological parent of an employee or an individual who has stood in loco parentis to an employee when the employee was a son or daughter." Case law makes clear that "parent" cannot be readily expanded to include grandparents absent a showing of an in loco parentis relationship as between the employee and the grandparent when the employee was a child. While adult children do provide considerable elder care, the caregiving relationships that do not adhere to the vision of caregiving reflected in the FMLA.

275 See Women and Retirement Income, supra note 162, at 5.
278 Hobbs & Damon, supra note 37, at 6-4 (noting that "Black men 75 to 84 are more likely to be widowed than White or Hispanic men that age. Similarly, Black women 75 to 84 are more likely to be widowed than White and Hispanic women in the same age group."). See also Margaret Summers, Caring for Our Elders, Essence, Dec. 1996, at 22 (reporting that Census Bureau date reveals that "Black seniors between the ages of 75 and 84 are more likely than Whites to be widowed and relying on relatives for help").
279 29 U.S.C. § 2611(7). 29 C.F.R. § 825.113(C)(3) ("persons who are 'in loco parentis' include those . . . who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.").
Act's presumption of parenthood proves too much. First, not all elderly individuals have children who can care for them. Some have never had children, others have outlived their children, and still others may be unable to rely upon their children for care. Although the number of elderly individuals who fall into these categories is unknown, statistics show that increasing numbers of the elderly will be unable to depend upon care from adult children. Census Bureau data indicate that the number of childless couples is expected to grow nearly 50 percent by 2010, a projection tied to a pronounced increase in childlessness among women. The upward trend in the number of childless individuals holds serious limitations for family-friendly measures like the FMLA that presuppose a nuclear family model in which elderly individuals are supposed to turn to filial support for caregiving.

Absent filial or spousal support, many elderly rely upon an expanded care network of extended family members as well as non-kin individuals. Such caregivers include grandchildren, siblings, in-laws, nieces and •

281 See supra note 53 and accompanying text.
282 See Colleen Leahy Johnson & Donald Catalano, Childless Elderly and their Family Supports, 21 GERONTOLOGIST 610, 610 (1981) (commenting that the nuclear family approach to caregiving of the elderly, which uses "filial support as the measuring stick of family relations," overlooks "age-peer relationships with extended kin and friends who conceivably also function as part of an informal support system" and that the approach also overlooks "the disproportionate number of childless and unmarried persons who are institutionalized").
283 See supra note 58, at 102 (observing that "we can expect that older people will have fewer surviving children on average, and that there will be a greater percentage of elderly persons with no surviving children").
285 See Amara Bachu, Labor Force Participation of Women in Childbearing Years and Fertility, U.S. CENSUS BUREAU (March 2000) (reporting that "[c]hildlessness among all women 40 to 44 years old increased from 10 percent in 1980 to 19 percent in 1998; [a]mong ever-married women, childlessness doubled from 7 percent in 1980 to 14 percent in 1998"). See also Future Workplaces Must Welcome Myriad Lifestyles, SHRM Says, PR NEWSWIRE, Sept. 4, 1996 (reporting on findings of the Society for Human Resource Management that "childless and single people will represent one of the fastest growing workforce groups in the next millennium").
286 Judith Barker & Linda Mitteness, supra note 62, at 105 (noting that a "non-kin caregiver is a person who accepts primary responsibility for their dependent's well being either at the older person's urging or on their own initiative, and who had no officially recognized family connections to the care recipient at the start of the caregiving arrangement"). An examination of the legislative history of the FMLA reveals that Congress had little awareness of the extent to which elderly individuals would need to rely upon nonkin caregivers in the coming years. With one exception, there also did not appear to be an appreciation of the ethnic differences in caregiving. The exception was Senator Daniel Akaka of Hawaii who observed that in Hawaii, "familial and economic realities have resulted in situations where a large number of multigenerational or extended families share a residence." 137 CONG. REC. S14154 (daily ed. Sept. 19, 1991) (statement of Sen. Akaka).
nephews, other relatives as well as friends.\textsuperscript{287} Extended caregivers serve a critical function in the lives of those elderly individuals who require assistance from individuals who do not qualify as caregivers under the FMLA.\textsuperscript{288} Over one-half of unmarried, childless elderly individuals identify an extended family member as their greatest source of help, most commonly a sibling.\textsuperscript{289} In a study of care providers for the frail elderly, researchers found that 27 percent had an "other" relationship to the care recipient that included sons- and daughters-in-law, siblings and grandchildren.\textsuperscript{290} As Stone observes, the importance of a caregiving network that extends beyond immediate family members "is underscored by the fact that 50 percent of elderly people with long-term care needs who lack a family network live in nursing homes, compared to only 7 percent of those who do have family caregivers."\textsuperscript{291}

The number of elderly who rely on extended caregivers will likely increase in the coming years due to changing demographics. Estimates indicate that by 2020, 1.2 million elderly people will live alone, without living children or siblings, almost twice the number without family support in 1990.\textsuperscript{292} Yet, while extended caregivers can expect to play an expanding role in caring for the elderly, if they are employed, they remain vulnerable to adverse employment actions. Those individuals who likely will be most affected are people of color because they tend to rely more heavily on extended kin networks for physical, emotional, and economic support relative to whites.\textsuperscript{293}

\textsuperscript{287} Stone, Caregivers of the Frail Elderly, supra note 62, at 621 (noting that the group of "other" elder care providers includes "sons- or daughters-in-law, siblings, grandchildren, other relatives, and nonrelatives"); Barker & Mitteness, supra note 62, at 103 (observing that "[i]nvestigators of informal caregivers and the elderly have long recognized the existence of a category of caregivers and unrelated persons" and reporting that estimates of the "prevalence of non-kin caregiving among the elderly range widely, from 5% or less to as high as 24%").

\textsuperscript{288} Barker & Mitteness, supra note 62, at 110 (noting that the "pool of potential kin caregivers is restricted for the elderly who do not have children, who have children living out of the area, or who are alienated from their children").

\textsuperscript{289} Johnson & Catalano, supra note 282, at 612 (in a study on the sources of support for the childless unmarried, finding that "[s]iblings were the most important source of support"); Ethel Shanas, The Family as a Social Support System in Old Age, 19 GERONTOLOGIST 169, 173 (1979) (observing that for the elderly who have no children, "there is some evidence that brothers, sisters and other relatives tend to substitute for a child"). See generally Victor Cicirelli, Siblings as Caregivers in Middle and Old Age, in GENDER, FAMILIES, AND ELDERCARE 85 (Jeffrey W. Dwyer & Raymond T. Coward eds., 1992).

\textsuperscript{290} See Wolf et al., supra note 58, at 102.

\textsuperscript{291} STONE, LONG-TERM CARE, supra note 31.

\textsuperscript{292} GAO, LONG-TERM CARE, supra note 27, at 12. See also Wolf et al., supra note 58, at 102 (noting that during the coming decades," we can expect that older people will have fewer surviving children on average, and that there will be a greater percentage of elderly persons with no surviving children").

\textsuperscript{293} See Colleen Johnson & Barbara Barer, Families and Networks Among Older Inner-City Blacks, 30 GERONTOLOGIST 726, 726 (1990) (noting that the "creation of 'para-kin' or fictive kin is common in black populations and further suggests the important role of nonkin as a source of support"); IN THE MIDDLE, supra note 55, at 7 (finding that higher proportions of African Americans include their siblings
Even in instances when elderly individuals have adult children with whom they have a close relationship, they may rely upon care from outside of the nuclear family embraced by the FMLA. As an illustration, recall that married women often provide the bulk of hands-on-care for their in-laws. However, the FMLA regulations and case law unequivocally state that the FMLA does not protect employees who provide such care. The exclusion of parent-in-laws from the Act stands potentially to adversely impact racial ethnic groups. Among Korean families, for example, a strong cultural norm mandates that the parents of married sons should be cared for by their daughters-in-law. Indeed, within the Korean tradition, the wives of sons are regarded as primary caretakers of the son’s elderly parents, even when the parents have adult daughters.

Extended caregiving also becomes important when the elderly live apart from their children and consequently, rely upon friends for assistance. Imagine a situation in which an elderly person, who lives several states away from her adult children, suffers a heart attack. A next door neighbor rushes to her aid and provides care until the children can arrive. Under the FMLA, such a caregiver would receive no protection if, because of her care, she misses work and is penalized by her employer.

To address this deficiency, the FMLA should be revised so as to allow for a broader range of caregiving bonds. Presently, several states have expanded the definition of family in their state family leave acts, most noticeably to include parents-in-law. This expansion marks a useful step in their definition of family).

294 See supra notes 59–60 and accompanying text.


298 Stoller, supra note 56, at 30 (commenting that “[e]lderly people without children nearby appear to compensate by developing close relationships with other kin and with friends. . . . [F]riends occasionally perform some of the roles usually handled by family members among elderly people with proximate kin”); Jacqueline Queener, Note, Finding the Gold to Finance the “Golden Years”: Options for Financing Long-term Care in Arizona, 45 Ariz. L. Rev. 857, 872 (2003) (noting that fewer elders may be able to rely upon informal care from family members given a decrease in family size and geographic mobility of family members); GAO, Long-Term Care, supra note 27, at 12 (observing that “geographic dispersion of families may further reduce the number of unpaid caregivers available to elderly baby boomers”).

299 ALASKA STAT. § 39.20.500 (2002) (“‘parent’ means a biological or adoptive parent, a parent-in-law, or a stepparent”); HAW. REV. STAT. § 398–1 (2003) (“‘parent’ means a biological, foster, or adoptive
but it is only a first step toward recognizing that individuals provide and receive care in the context of relationships that extend beyond the Act's limited definition of family.300

CONCLUSION

America's aging population presents enormous social and economic challenges, many of which center on health care.301 The majority of elderly folks who need assistance because of health-care related concerns turn, first and foremost, to family members and friends who serve as informal elder care providers. A group comprised disproportionately of working women, elder care providers seem to be losing the struggle to manage successfully work–family conflicts. From costly work interruptions to emotional fatigue, elder care exacts a heavy toll on caregivers. The magnitude and complexity of the conflicts presented, the emotional and financial costs involved, and the numbers of elderly who currently need care, and will need care in the future, strongly indicate that no one approach can effectively address the emerging elder care crisis. Already policy makers, scholars, and elder care advocates have proposed strategies to ameliorate the crisis as it relates to a broad range of issues that impact the health care industry, including social security, medicare and medicaid, pensions, the available pool of health care professionals, and the quality of institutional care.


300 While expanding the FMLA to include parents–in–law will undoubtedly help many workers who care for their in–laws, such a strategy does pose a risk. The majority of employees who will benefit from such an expansion will be women. Absent a restructuring of gender relationships, resulting in more men serving as caregivers, expanding the FMLA to include parents–in–laws may contribute to the workload of women workers and perpetuate their status as caregivers. Brewer notes a similar concern in the context of policies that emphasize home care for elders in lieu of institutional placement. As she observes, such policies, ‘‘[i]f they are not combined with incentives to attract male as well as female caregivers,’’ may ‘‘serve only to perpetuate patriarchy and to reinforce women’s subordinate positions.’’ Brewer, supra note 67, at 232.

301 For an international overview of some of the many challenges presented by the increase numbers of elderly individuals, see AN AGING WORLD, DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY (John Eekelaar & David Pearl eds., 1989).
However, the implications of elder care for employed workers, and for work–family policies generally, have been slow to garner comprehensive attention, particularly from within the legal literature. As a work–family issue, elder care remains largely in the shadow of child care. Yet the distinct set of workplace difficulties that confront employed elder care providers suggests the importance of addressing elder care on its own terms, not simply as an extension of child care concerns.

Against that backdrop, this Article evaluates the role of employer support in ameliorating some of the obstacles that hinder the ability of workers to combine successfully employment with elder caregiving. Employers cannot, nor should they be expected, to bear sole responsibility for the adverse implications of elder care on employed care providers. That said, the business community can usefully assist workers by helping to facilitate the coordination of work with elder care obligations. Toward this end, the Article demonstrates that, as applied to elder care, employers must expand their traditional view of aging so as to allow for the interests not only of previously employed workers but also of presently employed workers. While the FMLA stands as an important tool in dismantling work–elder care conflicts, this Article reveals its shortcomings, including an unduly narrow approach to care and caregiving, and a failure to recognize the value of extended family and non–kin caregiving relationships. This Article represents a step along what promises to be a long road: rethinking work–family policies in a manner that allows for the breadth of employees’ caregiving responsibilities, including elder care.

302 For an overview of additional policies that can assist employed elder care providers, see YOUNG, WOMEN AND AGING, supra note 175, at 6 (strategies include modifying the medicare program to support informal caregiving, strengthening social security by recognizing the work of informal caregivers, and improving pension coverage for employed caregivers).