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The Aging Workforce and Paid Time Off

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The workforce is getting older. This is not simply a matter of the workforce aging as the population ages. The *relative* workforce participation of older Americans has risen steadily over the past decade.[2] The Bureau of Labor Statistics projects that the workforce participation rate of workers in the over-55 age group will continue to increase, pushing back the retirement age.[3]

Several factors help explain this phenomenon. Health and education levels have improved among older Americans, enabling them to work longer, with the potential of exploiting higher human capital investments.[4] Also, changes in the nature and degree of health and retirement security have increased the necessity of working longer: a shift from defined benefit to defined contribution plans has transferred risks associated with retirement income from employers to workers, and the costs of health care and health insurance are rising relative to income.[5] The current economic downturn is likely to only further these trends as older Americans confront dramatic reductions in their anticipated retirement savings.

In addition, the age at which individuals are eligible to collect old-age pension benefits under Social Security has increased.[6] Concern about the long-term solvency of Social Security has prompted recommendations to encourage workers to delay retirement further still.[7] Additional work years would increase Social Security revenues, enable older Americans to prolong coverage under employee health plans thus reduce the

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[2] U.S. BUREAU OF LABOR STATISTICS, SPOTLIGHT ON STATISTICS, OLDER WORKERS 2 (July 2008), http://www.bls.gov/spotlight/2008/older_workers/pdf/older_workers_bls_spotlight.pdf [hereinafter, BLS, SPOTLIGHT ON OLDER WORKERS].

[3] Mitra Toossi, *Labor Force Projection to 2016: More Workers in Their Golden Years*, MONTHLY LABOR REV., Nov. 2007, at 34, http://www.bls.gov/opub/mlr/2007/11/art3full.pdf (in 1986, workers over 55 made up just 12 percent of the workforce, by 2006 it had increased to 16.8 percent, and by 2016, it is expected to reach 22.7 percent).

[4] *Id*., at 40.

[5] *Id*.

[6] The Social Security Amendments of 1983, PL 98-21, 1983 HR 1900, §201, increased the age at which full Social Security benefits are payable and increased the delayed retirement credit for those who work beyond full retirement age. The age for collecting full Social Security retirement benefits will gradually increase from 65 to 67 over a 22-year period which began in 2000 for those retiring at 62.

[7] See generally, MELISSA M. FAVREAULT AND C. EUGENE STEUERLE, THE IMPLICATIONS OF CAREER LENGTHS FOR SOCIAL SECURITY (Urban Institute, Retirement Policy Program Discussion Paper No. 08-03, 2008); GOPI GODA, SLAVOV SHAH, N. SITA & JOHN B. SHOVEN, REMOVING THE DISINCENTIVES IN SOCIAL SECURITY FOR LONG CAREERS (NBER Working Paper No. W13110, May 2007), *available at* SSRN: http://ssrn.com/abstract=986960.

demands on Medicare, and reduce dependency on Old Age and Survivors' Insurance benefits.[8]

An increase in the proportion of workers aged 65 and older raises distinctive issues with respect to workplace policies. For example, the desire of many older workers to retire gradually by "phasing" to part-time work before full retirement introduces questions about continuity of health insurance and pension eligibility.[9] Workplace design interventions might enable older workers to work more comfortably, safely, and productively given visual, hearing, and other physical changes with aging that can affect performance.[10] For similar reasons, training and retraining may be necessary to take full advantage of the human resources of older workers who change vocations.[11]

Another concern, and the subject of this article, is the need among older workers for occasional, temporary, work interruptions. As I will elaborate below, older workers have a higher risk of health complications, and as a corollary to this, may need to miss work. If such leaves require a suspension of pay, they can impose economic strain on the workers who take leave and their families. In this chapter, I argue that policies to accommodate the need for income security during temporary work interruptions may be desirable for a number of reasons: first, they might alleviate economic strain on older workers who need time off, as well as similar strains on younger workers who must interrupt work to care for elderly parents. In addition, by responding to a heightened need for flexibility, they have the potential to encourage extended workforce participation by older citizens, which for reasons mentioned earlier, might be desirable as a matter of social policy. Absent such participation, there may be increased pressure on other aspects of the social welfare system, such as old age pensions and long-term disability insurance.[12]

In addition, I examine the political task of generating public support for paid leave. Most who have advocated some kind of wage replacement for workers who need to take leaves to absence due to personal illness or the need to care for ill family members have focused on the needs of working parents with dependent children.[13] Some have

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[8] GODA *et al., id*. at 4.

[9] Chai R. Feldblum, Testimony in Hearing on Phased Retirement, Working Group on Phased Retirement, 2008 ERISA Advisory Council, Sept. 9, 2008.

[10] Committee on the Health and Safety Needs of Older Workers, HEALTH AND SAFETY NEEDS OF OLDER WORKERS 177-86 (David H. Wegman & James P. McGee, eds., 2004).

[11] *Id*., at 186-98

[12] *See. e.g*., Ziaoyan Li & Nicole Maestas, *Does the Rise in the Full Retirement Age Encourage Disability Benefits Applications? Evidence from the Health and Retirement Study* 2-3 (2008), Michigan Retirement Research Center Working Paper No. 2008-198 (finding increase in federal Social Security Disability Insurance application rate as the Social Security full retirement age has increased and speculating that as old age benefits have become less generous relative to disability benefits there has been substitution between the two). The possibility of substitution between workplace accommodations for temporary health-related absences and disability insurance assumes imperfection in verifying permanent disability.

[13] Many have argued for public provision of paid leave for family care needs. Examples include Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace*, 9 U. PENN. J. LABOR & EMP. L. 293 (2007); Erin Gielow, Note, *Equality in the Workplace: Why Family Leave Does Not Work*, 75 S. CAL. L. REV. 1529 (2002); Emily A. Hayes,

addressed elder care, however, these analyses tend to focus on problems faced by adult children, particularly women, who must balance paid employment and caring for their aging parents.[14] Very few have addressed workers who themselves are older, and the economic insecurity associated with work interruption due to their own (or their spouse's) health needs.[15] I argue that refocusing public discourse in a way that takes a broader range of interests into account may be an important tool for generating public support for paid leave in the short run, and political resiliency in the longer run.

I begin by examining the argument in favor of paid leave given the growing needs of an aging workforce, both in terms of the demographic shift currently taking place, and in terms of the existing public and private infrastructure for supporting workers who need to take temporary leaves of absence from work. I then turn to questions of political feasibility.

I. Work Interruption for Health-Related Personal and Family Care

a. The Aging Workforce and Worker Health

The percentage of workers over 55 years of age is projected to rise from 16.8 % in 2006 to 22.7 % in 2016.[16] This is 5 times higher than the projected growth rate of the workforce as a whole.[17] The age groups expected to grow the fastest over the next several years are those workers between 65 and 74 and those 75 and older; both groups are expected to grow by more than 80 percent between 2006 and 2016.[18]

Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993, 42 WM. & MARY L. REV. 1507, 1532–38 (2001); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2214–21 (1994); Lisa M. Keels, *Family Law: Family and Medical Leave Act* 7 GEO. J. GENDER & L. 1043, 1052 (2006); Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39, 53–54 (1994); Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. GENDER 1 (2005); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 770-73 (2000); Angie K. Young, *Assessing the Family and Medical Leave Act In Terms of Gender Equality, Work/Family Balance, and the Needs of* Children, 5 MICH. J. GENDER & L. 112 (1998).

[14] See, e.g., Holly Shaver Bryant, *Funding Kinship Care: A Policy-Based Argument for Keeping the Elderly in the Family*, 8 WM. & MARY J. WOMEN & L. 459, 482-83 (2001-2002); 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 &LAW 69 (2004); Jennifer L. Morris, *Explaining the Elderly Feminization of Poverty: An Analysis of Retirement Benefits, Health Care Benefits, and Elder Care-Giving*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 571, 597-98 (2007); Peggie R. Smith, *Elder Care, Gender and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMPL. & LAB. L. 351 (2004).

[15] An exception is Chai Feldblum, Testimony Before the United States Senate Special Committee on Aging, Hearing on Leading By Example: Making Government a Model for Hiring and Retention of Older Workers, April 30, 2008.

[16] Toossi , *supra* note ___ at 34.

[17] *Id.* at 33.

[18] BLS, SPOTLIGHT ON OLDER WORKERS, *supra* note 2 at 9.

In addition, older workers are working longer hours. In the early 1990s, part-time work increased among older workers with a corresponding decline in full-time work. But since 1995, this trend has reversed itself, with a sharp rise in full-time work among workers 65 and over.[19] The majority of older workers now works full-time.[20]

Although the health of older Americans has been improving, episodic and chronic health problems nevertheless accompany aging. In 2006, nearly 19% of people aged 55-64, and 22% of people aged 65-74, reported that their health was only fair to poor, compared with 9% of people in all age groups.[21] The fact of poor health does not mean that an individual is incapable of work. Many older workers with chronic health conditions remain in the workforce, even though their participation is lower than that of people without chronic conditions.[22]

If the proportion of older workers in the workforce continues to increase, we may see a corresponding decline in average worker health. Predicting the relationship between delayed retirement and worker health is complicated by the phenomenon of selection: it is possible that those workers who elect to remain in the workforce will be healthier, on average than those who exit. Studies that have tried to capture this phenomenon have found some evidence of this type of "survivor bias."[23] However, when the size of the workforce expands, we might see a dampening of this selection effect: to the degree that those who historically would have selected themselves out of the workforce due to poor health find it more difficult to do so because of pressure to maintain wage income, we might predict declining health among older workers.[24] Another factor that might lead to declining worker health as older adults delay retirement is that the segment of the population most likely to need to work longer to maintain economic security is low-income individuals, a group that tends to have poorer than average health.[25]

b. Health- and Care-Related Work Interruptions

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[19] *Id*., at 3 (between 1995 and 2007, the number of older workers on full-time work schedules nearly doubled, while the number working part-time increased by only 19 percent).
[20] *Id*.
[21] NATIONAL CENTER FOR HEALTH STATISTICS, 2007, tbl.60, *available at* http://www.cdc.gov/nchs/data/hus/hus07.pdf#listfigures.
[22] Sara E. Rix, *Health and Safety Issues in an Aging Workforce*, AARP Public Policy Institute, May 2001 at 3-4.
[23] *Id*., at 4; Guy D. Nuyts, Monique M. Elseviers & Marc E. DeBroe, *Healthy Worker Effect in a Cross-Sectional Study of Lead Workers*, 35 J. OCCUPATIONAL MEDICINE 387, 390 (1993) (discussing self-selection effects such as drop-out of unhealthy workers , that may explain finding that workers in jobs involving lead exposure are healthier than the general population).
[24] Rix, *id.*
[25] *Id*., at 3; Alicia H. Munnell, Mauricio Soto & Alex Golub-Sass, *Will People be Healthy Enough to Work Longer?* Center for Retirement Research at Boston College Working Paper #2008-11 (© August 2008) (finding disparities in healthy life expectancy between those in the top and bottom income quartiles of the population).

The absence rate for older workers is higher than for workers in other age groups.[26] The difference is sharper if the comparison is limited to absences by reason of illness, injury, or medical problems (this category excludes maternity).[27] The Bureau of Labor Statistics also collects data on the duration of absence of workers who become ill or injured, although this data is limited to *occupational* injuries. Older workers who miss work due to occupational illness or injury are also much more likely than others to require a lengthy absence (31 days or more), and their median number of days away from work is double or even quadruple the median number of days for workers in age categories below 44.[28]

The most marked increase in workforce participation among older Americans has been among women.[29] The increased prevalence of dual-earner families across all age groups means workforce entry by a non-working partner within a household is less likely to be available as "insurance" against loss of the working partner's income. If both partners are already working in order to meet a household's non-discretionary expenses, no "backup" earner is available.[30] Moreover, if one partner becomes ill and the other must give care, a dual-income household may suffer a significant shock to financial security if both partners are required to interrupt work.[31]

In addition, and no less important, illness among older Americans (whether working or not), is likely to impose increased demands on the next generation to provide care. The adult children of disabled elders often provide care, and may need to interrupt work in order to do so. If older citizens are more likely to be working now than in the past, and if they have adequate leave and health care policies, those policies will assist

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[26] U.S. Dept. of Labor, Bureau of Labor Statistics, Current Population Survey, tbl. 46, *Absences from Work of Employed Full-Time Wage and Salary Workers By Age And Sex* (2007). The rate for workers 16-19 is 2.8, for 20-24 is 2.9, for 25-54 is 3.1, and for 65 and over is 3.5. Reasons include own illness, injury, or medical problems; child-care problems; other family or personal obligations; civic or military duty; and maternity or paternity leave. Excluded are situations in which work was missed due to vacation or personal days, holiday, labor dispute, slack work or business conditions, and the wait for a new job to begin.

[27] *Id*. The rate for workers 16-19 is 1.9, for 20-24 is 1.9, for 25-54 is 2.1 and for over 65 is 2.8. Note that "illness, injury, or medical problem" excludes absence to care for others, maternity, and paternity leave.

[28] U.S. Dept. of Labor, Bureau of Labor Statistics, Nonfatal Occupational Injuries and Illnesses Requiring Days Away from Work, 2007, tbl. 8 (37.7% of workers 65 and over, and 33.3 % of workers 55-64 were absent more than 31 days in 2007, compared with 20.8% of workers 25-34 and 27.1% of workers 35-44; the median days away from work for workers in age group below 44 ranged from 3 to 8 days, whereas for workers 65 and over it was 16 days).

[29] The number of employed women over 65 years old increased by 147 percent between 1977 and 2007 (compared with 75 percent for men in that age group). BLS, SPOTLIGHT ON OLDER WORKERS, *supra*, note 2 at 1. Moreover, the proportion of employed women 65 and older is also increasing: in 1977 only about one-third of employed women over 65 were married, but by 2007 it was nearly one-half. *Id*., at 4.

[30] *See* ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE CLASS PARENTS ARE GOING BROKE 62 (2003) (describing this phenomenon as the "two-income trap").

[31] The costs are not limited to foregone wages. A recent study estimates that caregivers of ailing loved ones spend on average 10 percent of their household income on the out-of-pocket costs of such necessities as groceries, medications, and transportation. NATIONAL ALLIANCE FOR CAREGIVING, EVERCARE STUDY OF FAMILY CAREGIVERS: WHAT THEY SPEND, WHAT THEY SACRIFICE (November 2007), *available at* http://www.caregiving.org/data/Evercare_NAC_CaregiverCostStudyFINAL20111907.pdf.

not only older citizens themselves, but also by their adult working children who will otherwise be left with difficult burdens given their own dual-career circumstances.

c. Normative Arguments Favoring Intervention

When work interruption leads to a loss of income, households might compensate by drawing down savings or by borrowing. However, given the potentially unexpected nature of illness, the possibility that the need to care for others may occur early in one's career, and the lack of discretionary income available in many households, savings may be inadequate to cover the shortfall.[32] Obtaining a loan against the promise of future earnings is often difficult or impossible. If supporting and enabling delayed retirement is a desirable policy goal, it is useful to consider mechanisms for provision of income security during work interruption.

Insurance could increase social welfare by pooling the risk of income interruptions, thus helping to smooth consumption over the life cycle. Competitive insurance markets, however, depend on the availability of accurate information in order to quantify risk and set an efficient price, and certain determinants of personal financial risk—such as risk of unemployment, longevity, long-term health, or future costs of health care—can be very difficult to quantify.[33]

Private insurers also need accurate information about the risk characteristics of potential claimants. If there are significant information asymmetries between insurers and consumers, private insurance may be impossible.[34] Suppose, for example, prospective insurance buyers have systematically better information about their own health risks, unobservable to insurers (i.e., there is *adverse selection).* Without means to distinguish between "high risk" and "low risk" consumers, a private insurance provider might charge a premium that is actuarially competitive *on average*, effectively presuming the presence of both high and low risk consumers. But such pricing will drive away low-risk consumers, with the result that the private market will supply insurance only to the high risk individuals, with all others inefficiently failing to purchase insurance.[35] Secondly, when an insurer is unable to monitor behavior perfectly, it is unable to adjust prices to account for the possibility that an individual who is fully insured will reduce efforts to

[32] WARREN & TYAGI, *supra*, note 26 at 51 (reporting a drop since the 1970s in the discretionary income available to the average middle-class American family after covering fixed household expenses such as mortgage, child care payments, etc.).

[33] *See, e.g.*, Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 364 (2001) (discussing this problem in the context of unemployment risk).

[34] See generally Mark V. Pauly, *Overinsurance and Public Provision of Insurance: The Roles of Moral Hazard and Adverse Selection*, 88 Q.J. ECON. 44 (1974).

[35] George A. Akerlof, *The Market for "Lemons": Quality, Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970) (classic demonstration that where the quality of used cars cannot be ascertained, sellers with higher quality cars, because they cannot be fully rewarded, will exit the market leaving behind a "market for lemons").

avoid injury. Consequently, it will charge rates that reflect an expectation that consumers will (inefficiently) reduce efforts at avoiding claims.[36]

Where private insurance is unavailable, government intervention can help in a number of ways. One possibility is that the government could mandate or create incentives for individual savings. Such policies, however, cannot solve the problem of early-career interruptions that occur before sufficient savings have accumulated. If the program were mandatory, the government could enable those who have failed to accumulate sufficient savings to borrow to some extent against the future for certain kinds of need.[37] But even assuming this were possible, for people with low incomes, setting aside a portion of earnings may lead to perilously low residual cash flow.

Another possible intervention is to mandate participation in a system of public insurance that provides partial wage replacement to workers who must temporarily leave work due to personal health or the need to care for others. A mandate can help to resolve adverse selection problems because it obviates the necessity of sorting individuals based on unobservable or only partially observable characteristics. Compulsory participation also improves the ability of the insurer to adapt *ex post* the cost of insurance if there are unexpected changes in risk of hazard or cost of losses.[38] Taking these factors into account, public provision might occur at lower cost than private provision, leading to efficiency gains.[39]

II. Existing Protection Against Health- and Care-Related Work Interruption

Existing provision for workers who need to take temporary leaves of absence from work due to either personal illness or the need to care for others is limited. Benefits that provide some kind of financial assistance are available to only a limited subset of workers, and when available, include either no, or only very brief, benefits.

a. Unpaid Benefits – The Family and Medical Leave Act

[36] Steven Shavell, *On Moral Hazard and Insurance*, 93 Q. J. ECON. 541 (1979) (modeling the optimal insurance policy, where the cost of insurance factors in the ability of the insurer to observe level of care by the insured).
[37] *See* Stephen D. Sugarman, *Short-Term Paid Leave: A New Approach to Social Insurance and Employee Benefits*, 75 CAL. L. REV. 465, 488-89 (1987) (discussing strengths and limitations of this approach).
[38] The costs imposed by moral hazard issues are more organic to the provision of insurance generally. Government provision has no clear comparative advantage in addressing this problem. As a result, social insurance contains devices designed to reduce moral hazard parallel to those used in private insurance, such as copayments, deductibles, and so forth.
[39] Similar arguments can be made for the efficiency of compulsory intergenerational transfers (e.g., public pensions) financed either through accumulation of reserves, or pay-as-you-go financing, whereby current workers finance the pensions of current retirees. Here, the intervention enables efficient life-cycle income smoothing, rather than efficient insurance for various life risks. See, e.g., Zvi Bodie, *Pensions as Retirement Income Insurance*, 28 J. ECON. LIT. 28 (1990).

The Family and Medical Leave Act of 1993 (FMLA)[40] is the U.S. federal law that grants up to 12 weeks of job-protected leave during any 12-month period to eligible workers who need to take time off due to a serious health condition that makes them unable to perform the functions of the job[41] or to care for a spouse, son, daughter, or parent who has a serious health condition.[42] While on leave, employees must continue to receive any group health plan benefits that the employee would have received had the employee not gone on leave.[43] Fairly restrictive eligibility rules mean that only about half of the American workforce is covered by the FMLA.[44]

A significant feature of the FMLA is that it does not include wage replacement. A government survey completed in 2000 found that the most common reason given by workers who took leave during the previous 18 months—whether covered by the FMLA or not—was due to their own health condition.[45] The survey found two-thirds of workers who took a family or medical leave between 1999 and 2000 received wage replacement from their employer, primarily through private sick leave plans.[46] This figure, however, does not account for workers who did *not* take leave or who cut short their leave because of inadequate wage replacement. Although 16.5% of all employees in the United States took leaves of absence from work to handle family or personal medical needs in 2000, another 2.4% of employees reported that they did not take leave despite feeling that they needed it (i.e., roughly 13% of employees who reported needing to take a leave did not take it).[47]

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[40] The Family and Medical Leave Act, Pub L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 29 U.S.C. and 5 U.S.C.).

[41] *Id.* § 2612(a)(1)(D).

[42] *Id.* § 2612(a)(1)(C). Domestic partners do not qualify as spouses, and in-laws are not considered parents. 29C.F.R. § 825.113. A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves inpatient care in a medical facility or continuing treatment by a health care provider. *Id*. § 2611(11).

[43] *Id.* § 2614(c)(1); *see also* 29 C.F.R. § 825.209. If an employee fails to return from leave, the employer may seek to recover the costs of continuing health benefits to the employee during the leave period. 29 U.S.C. § 2614(c)(2).

[44] In 2005, the FMLA covered only 54% of employees in the United States were covered. U.S. DEP'T OF LABOR, FAMILY AND MEDICAL LEAVE ACT REGULATIONS: A REPORT ON THE DEPARTMENT OF LABOR'S REQUEST FOR INFORMATION 128 (2007), *available at* http://www.dol.gov/esa/whd/FMLA2007Report/2007FinalReport.pdf. Only workers who are "employees" (as defined in the Fair labor Standards Act of 1938, 29 U.S.C. § 207(e)) are eligible, and then only if they have worked for at least 1,250 hours during the previous twelve-month period at a worksite where the employer employs at least fifty employees within a seventy-five-mile radius. 29 U.S.C. § 2611(2). Covered employers are those that employ at least fifty employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year are covered. § 611(4)(A)(i). Finally, the employer need not accommodate salaried employees in the top ten percent of the payroll if denying their reinstatement is necessary to prevent substantial and grievous economic injury to the employer. §2614(b).

[45] Personal health problems were the reason given by 52.4 percent of leave-takers, followed in a distant second place by leave to care for a newborn or newly-adopted child (18.5 percent). U.S. DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS 2-5 (2000) [hereinafter U.S. DEP'T OF LABOR, BALANCING].

[46] *Id*., at 4-5 tbl.4.4.

[47] *Id*. at 2-2 tbl.2.1, 2-14 tbl.2.14. In a 2003 survey of employed workers in California, 18.4% reported that at some point in the previous five years, they did not take a leave despite having wanted to do so. Ruth Milkman & Eileen Applebaum, *Paid Family Leave in California: New Research Findings*, *in* THE STATE

Among those who were unable to take a needed leave, the most common reason cited was not being able to afford it.[48] Workers who took leaves were more educated, had higher incomes, and were more likely to earn a salary (as opposed to hourly wage) than those who did not.[49] The average duration of leave was fairly short: ten days.[50] Among those who did take leave, more than half reported that their biggest source of anxiety about the leave was financial.[51] Thirty-seven percent of leave-takers in 2000 reported cutting short their leave time because of lost wages.[52] Among workers in the 2000 survey who reported being unable to take a needed leave, 48 percent would have taken the leave for their own health condition and 23 percent would have used the leave to care for an ill parent.[53]

b. Paid Benefits: Private

Sick leave is a fixed or accrued amount of paid, job-protected, leave time that an employee can accumulate upon working a certain number of hours. Approximately 57% of private industry workers are eligible for sick leave through their employer.[54] Private sick leave is typically available for only a short duration – from about 10 to 20 days[55]— which limits its usefulness in enabling workers to take advantage of their job-protected leave entitlements under the FMLA. In addition, sick leave is usually intended only for the worker's own illness, although some plans allow workers to use their sick leave to care for others.[56] It ordinarily provides full wage replacement, and can usually be used for minor non-work related illnesses, such as the flu, that are very common but do not meet the rigorous definition of a "serious" illness (under a physician's care) required by the FMLA.

OF CALIFORNIA LABOR 2004, at 57-58 (2004), *available at* http://www.irle.ucla.edu/research/scl/pdf04/scl2004ch2.pdf.

[48] U.S. DEP'T OF LABOR, BALANCING, *id.* at 2-16 tbl.2.17 (77.6% of workers who reported needing leave cited this reason for not taking it). *See also* Milkman & Applebaum, *id.*, at 58 (reporting similar findings from the 2003 California survey; 83% of women and 52.2% of men in the group that reported having foregone a leave despite wanting to take one cited not being able to afford it as the main reason).

[49] U.S. DEP'T OF LABOR, BALANCING*, id.,* at § 2.1.3.

[50] Although the average duration was short, about 10% of leave-takers took between 41 and 60 days and another 10% took more than 60 days. *Id.*, at 2-3.

[51] *Id*. at 4-2 tbl.4.1 (53.8% of leave-takers cited this worry, with smaller percentages citing worries about job loss, job advancement, or loss of seniority).

[52] *Id*. at 4-9 tbl.4.8.

[53] *Id*. at 2-15.

[54] *Id*. at 28 tbl.19.

[55] PRESS RELEASE, U.S. DEP'T OF LABOR, AVERAGE PAID HOLIDAYS AND DAYS OF PAID VACATION AND SICK LEAVE: 1997, *available at* http://www.bls.gov/news.release/ebs3.t04.htm (showing average number of sick days ranging from 11.2 days for an employee who has been worked for a particular employer for 1 year, to 21.1 days for an employee of 25 years).

[56] VICKI LOVELL, INSTITUTE FOR WOMEN'S POLICY RESEARCH, NO TIME TO BE SICK: WHY EVERYONE SUFFERS WHEN WORKERS DON'T HAVE PAID SICK LEAVE 9 tbl. 4 (2004) (between 1996 and 1998, 30% of workers were in plans that permitted sick leave to be used for care of sick family members), *available at* http://www.iwpr.org/pdf/B242.pdf.

Short-term disability benefits are an insurance benefit funded by contributions by the employer or employee (or both). Like sick leave, these benefits are intended for personal illness. About 38% of workers in private industry have paid short-term disability insurance: 13% receive coverage through their employer, while the remainder either self-insure or are covered by state-mandated social insurance (discussed below).[57]

About one-third of private establishments polled in a 2000 government survey reported offering fully or partially paid leave benefits specifically designated for family care needs: 31.8% reported offering benefits for workers to care for a seriously ill family member.[58] However, the fact that an establishment provides paid benefits for family leave does not mean that all workers will be eligible to receive them. A recent government survey reported that in 2007, only 8% of private industry workers were actually eligible for paid family leave benefits through their employer.[59]

c. Paid Benefits: Public

A number of programs that have existed for many years and might commonly be thought to provide some measure of insurance against wage loss due to family care or non-occupational illness are in fact aimed at other types of income interruption. For example, worker' compensation programs in every state provide cash benefits to workers who become ill or injured, but coverage is limited to workplace-related injuries and illnesses. Social Security Disability Insurance (SSDI) is an important benefit for workers who experience long-term disability, but is not appropriate for workers who experience temporary absences: benefits are available only to workers who have impairments that are expected to last at least a year, and are available only after a 5-month waiting period.[60] A few states interpret their unemployment insurance laws to allow workers forced to quit by reason of family caregiving obligations to collect UI benefits, but for the most part, such work interruptions are considered voluntarily quits and foreclose benefits.[61]

Recently there has been an increase in publicly-provided wage replacement for temporary work interruptions resulting from non-work related illnesses or injuries or the need to care for family members. Still, such benefits are very limited.

i. Sick Leave.

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[57] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, MARCH 2007, at 27 tbl. 18, *available at* http://www.bls.gov/ncs/ebs/sp/ebsm0006.pdf [hereinafter COMPENSATION SURVEY].

[58] U.S. DEP'T OF LABOR, BALANCING, *supra* note 41, at 5-14 tbl.5.6 (2000). Some establishments stated that pay would depend on circumstances.

[59] COMPENSATION SURVEY, *supra* note 53, at 28 tbl.19.

[60] To be considered medically disabled under Social Security rules, an individual must be unable to engage in any "Substantial Gainful Activity" (SGA) due to any medically determinable physical or mental impairment(s) which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

[61] BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, COMPARISON OF STATE UNEMPLOYMENT LAWS 5-3 to 5-4 (2008), *available at* http://workforcesecurity.doleta.gov/unemploy/uilawcompar/2008/nonmonetary.pdf.

Wider adoption of sick leave benefits is a major thrust of current advocacy efforts. San Francisco and the District of Columbia recently passed laws mandating employers to provide sick leave.[62] In both instances, employees may use their sick leave to care for family members as well as themselves.[63] Several other states and cities are currently considering similar mandates of between five and nine sick days per year.[64] Most current proposals would exempt small businesses, requiring only business over a certain size—typically fifty employees or more—to provide the benefit. All provide that the sick days may be used not only for personal illness, but also to care for a sick family member. In addition, a bill recently introduced in the House of Representatives, The Healthy Families Act, would require employers with more than 15 employees to allow their workers to earn at up to 7 days of sick leave in a year, which they could use to care for themselves or family members.[65]

A key aspect of many current reform proposals is to make existing private sick leave benefits transferable to use for care of family members. Several states have also recently passed laws that require employers with sick leave plans to permit employees to use the benefits to cover work absences to care for family members, although in some cases these are limited to caring for sick children.[66]

ii. Short-Term Temporary Disability Insurance (TDI).

Five states (California, Hawaii, New Jersey, New York, and Rhode Island) and Puerto Rico mandate short-term disability insurance through a state social insurance program.[67] Together, these state insurance programs account for coverage of 6% of the U.S. workforce. As with private short-term disability insurance, these benefits were historically intended for personal illness only, although in some places this has changed.

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[62] See S.F., CAL., ADMINISTRATIVE CODE § 12W.3 (mandating all employers to provide maximum of between five and nine days of accrued sick leave, depending on size of employer); Accrued Sick and Safe Leave Act of 2008, § 3(a)(1)-(3), 55 D.C. Reg. 3452, 3453 (employers, depending on size, must provide maximum of between three and seven days sick leave per calendar year).

[63] S.F., CAL., ADMINISTRATIVE CODE § 12W.4(a); D.C. Accrued Sick and Safe Leave Act of 2008§ 3(b)(1)-(3).

[64] See generally, NAT'L P'SHIP FOR WOMEN & FAMILIES, STATE AND LOCAL ACTION ON PAID SICK DAYS: 2009 (2009), *available at* http://www.nationalpartnership.org/site/DocServer/2009_PSDTracking_090309.pdf?docID=1922.

[65] Healthy Families Act, HR 2416, introduced May 18, 2009.

[66] Jurisdictions that permit extension of these rights to private employees include California, CAL. LAB. CODE § 233; Connecticut, CONN. GEN. STAT. § 31-51ll; the District of Columbia, D.C. CODE § 32-502; Hawaii, HAW. REV. STAT. §398-4; Minnesota, MINN. STAT. § 181.9413 (applicable only for ill children); Oregon, OR. REV. STAT. § 659A.174; Vermont, VT. CODE ANN. tit. 21, § 472; Washington, WASH. REV. CODE § 49.12.270; and Wisconsin, WIS. STAT. § 103.10.

[67] EMPLOYMENT & TRAINING ADMIN., U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS: TEMPORARY DISABILITY INSURANCE 8-1 [hereinafter TEMPORARY DISABILITY], *available at* http://www.workforcesecurity.doleta.gov/unemploy/uilawcompar/2008/disability.pdf. Of workers in private industry covered by short-term disability benefits in 2007, 17% (about 6% of all workers) were given the benefits because of state mandates or public provision. COMPENSATION SURVEY, *supra* note 53, at 27 tbl.18.

Recently, three states have enacted universal paid family leave programs based on a social insurance model,[68] and five other states have recently considered or are currently considering such proposals.[69] In 2004, California expanded its temporary disability insurance program to cover workers who must take time off to care for seriously ill family members to bond with a new child.[70] Financed by a payroll tax on workers, it covers substantially more employees than the FMLA—almost all private-sector workers—but does not include job restoration rights. The state of Washington followed in 2007, creating a parental leave program that will give new parents up to $250 per week for a maximum of five weeks following the birth or adoption of a child, and include job protection rights for many of those who do not have it under FMLA.[71] In 2008, New Jersey also expanded its existing temporary disability insurance program to include a family leave benefit.[72]

These recent developments indicate public support for paid leave insurance for the care of ill family members, at least in some states. However, in two instances (California and New Jersey), the new programs built on a pre-existing short-term disability insurance scheme, whereas most states have no established program of cash benefits for short-term illness and disability. The feasibility of establishing short-term disability insurance programs in the first instance, let alone extending them to include a caregiving component, is perhaps the greater challenge for imagining a more comprehensive regime of cash benefits for health- and caregiving related work interruption.

In sum, workers have limited access to wage replacement programs, public or private, when they experience work absences that are beyond just a few days (i.e., as covered by sick leave programs), but not expected to result in long-term disablement (as might be covered by Social Security Disability Benefits). While expanding the availability of sick leave is an important step towards income security for workers who must interrupt work due to personal or family care needs, the availability of temporary paid time off of intermediate duration fills a distinct niche. It is likely to be especially valuable for older workers, who, recall, are more likely than younger workers to require

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[68] CAL. UNEMP. INS. CODE §§ 3300-3306; WASH. REV. CODE § 49.86 (2008); Act of May 2, 2008, 2008 N.J. Sess. Law Serv. ch. 17.

[69] Arizona, Massachusetts, New Hampshire, New York, and Oregon. *See* H.B. 2598, 49th Leg., 1st Reg. Sess. (Ariz. 2009); S. 71, 186th Gen. Ct. (Mass. 2009); H.B. 661-FN, 161st Sess. (N.H. 2009); A. 7130, 2009 Leg. (N.Y. 2009); SB 966, 75th Sess. Reg. Ass. (Or. 2009). *See also* NAT'L P'SHIP FOR WOMEN & FAMILIES, STATE AND LOCAL ACTION ON PAID FAMILY AND MEDICAL LEAVE: 2009 OUTLOOK 1 (2009), *available at* http://www.nationalpartnership.org/site/DocServer/Paid_Leave_Tracking.pdf?docID=1921.

[70] CAL. UNEMP. INS. CODE §§ 2625-3306. The new provisions on Family Temporary Disability Insurance are located at CAL. UNEMP. INS. CODE §§ 3300-3306 .

[71] WASH. REV. CODE § 49.86 (2008). Employment protection rights are extended to those leave-takers working for employers with (1) twenty-five employees or more and (2) who have worked for the employer for at least twelve months and for at least 1,250 during the previous period. WASH. REV. CODE § 49.86.090 (2008). At the time of writing, the funding mechanism has yet to be determined and thus the program has not been implemented.

[72] Act of May 2, 2008, 2008 N.J. Sess. Law Serv. ch. 17 (West) (providing up to six weeks of partial wage replacement benefits for family temporary disability leave).

an extended absence following illness or injury.[73] Moreover, for workers in their middle years who may confront multiple needs at once, e.g., care for children, parents, and possibly personal health needs linked with the birth of children, short-term sick leave may be inadequate.

III. Social Preferences and Accommodation of Older Workers

It is possible that the absence of more extensive private or public provision of protection against family or health-related income interruption reflects a lack of public demand. However, the previous section of this chapter offers at least circumstantial evidence of an unmet need that more extensive provision would serve. Lobbying by business interests has undoubtedly played an important role in limiting public intervention. While I do not wish to suggest that the influence of this factor is unimportant –on the contrary, it is probably quite profound[74] – it is also important to consider the preferences of citizens who vote and influence elected officials with respect to policy change. In this Part of the chapter, I consider the dimensions across which a proposal for public provision of paid leave might garner public support.

In the abstract, if state intervention helps to surmount a market failure, thus enabling the provision of a benefit that the public desires, the majority of the voting public might support the intervention. However, social insurance often goes beyond simply correcting an information- or coordination-based market failure.

By mandating participation by individuals who would exit from a private insurance market, public insurance *redistributes* relative to the market. For example, even when exposure to certain forms of risk are observable, such as where there are predictable changes in risk exposure at various points in the life cycle, or between genders, social insurance typically pools risk beyond what would be actuarially efficient. Public pensions, for example, tend to redistribute resources from young to older generations (assuming pay-as-you-go financing), and from people with short to long life spans. Social insurance also might not (indeed typically does not) distinguish between households of different sizes. For risks that multiply with the number of persons in a family (such as health risks), larger families become net transfer beneficiaries. Third, some types of social risks, including illness, disproportionately affect low-income populations, such that mandatory social insurance might also lead to cross-class redistribution.[75]

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[73] *See supra,* text accompanying note 28.

[74] *See, e.g.*, Robert Pear, *Business Lobby Presses Agenda Before '08 Vote*, N.Y. TIMES, Dec. 2, 2007, §1, at 11; Tom Hester, Jr., *Many N.J. Businesses Fight Plan to Give Workers Paid Family Leave*, N.J. RECORD, Nov. 20, 2007, at B6; Steven Greenhouse, *Spitzer Pushes a Plan for Paid Leave to Care for Relatives*, N.Y. TIMES, June 2, 2007, at B1 (reporting that businesses object to N.Y. paid family leave proposal as it would "increase absenteeism, [which thereby would] increase costs and create burdens for employers").

[75] Whether an employment-based mandated benefit does in fact lead to redistribution depends on a number of factors. If the benefit is taken up disproportionately by easily identifiable individuals or groups, its cost might be passed on to those beneficiaries in the form of reduced wages or employment. Employment levels will also fall if workers value the benefit less than the cost of the wage reduction. *See generally*, Lawrence Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177, 180-81 (1989)

Assuming a new policy to expand availability of paid leave benefits were financed through a payroll tax (as is the case in the existing states that have short term disability insurance and paid family leave programs), redistribution would principally occur between groups of workers. If the frequency and duration of absences for personal injury and illness are higher for older workers than others, a paid leave benefit would tend to redistribute from younger workers to older workers.

As the proportion of older workers increases, we might expect political support for policies that benefit older workers also to increase, either because of self-interest on the part of voters who will immediately benefit from such policies, or because an increasing number of voters come to believe "that could be me" (given longer life expectancy) or "that could be me soon" (given fewer average years to the decision over whether to retire or continue working).[76] Senior citizens are a powerful constituency in American politics and only growing stronger as the population ages. Certain social programs, such as Social Security and Medicare, owe their resilience in significant part to the powerful lobby of senior citizens.[77]

Thus, it is possible that we are entering into a period in which there will be increasing public support, driven by voters' perceptions of their own interests, for policies to accommodate the needs of older workers who delay retirement.

However, it is possible that the mobilization of older workers around their own interests would be inadequate to the task of policy change. This raises the further question of under what conditions citizens might support a redistributive social program

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(modeling the cost-shifting of mandated benefits using partial equilibrium analysis based on price theory). If this is the case, the redistributional character of the mandate may be muted. Populations more likely to suffer frail health (e.g., older workers, low-income workers) or have caregiving obligations (especially women in their childbearing years), might pay for a paid leave benefit in wages or employment levels.

Cost-shifting to intended beneficiaries might occur even when a mandate imposes no direct costs on employers. If a social insurance scheme were created and funded entirely by a tax on workers, employers might perceive certain groups of workers as more expensive to hire than others because once funded, they would be more likely to take leaves of absence thus imposing "disruption" costs on the employer. The employer might reduce the hiring or wages of these workers to offset the costs of having to hire and train replacement workers. See Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 290 (2000); Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation and Universal Mandates--Aren't They All the Same?* 24 BERKELEY J. LAB. & EMP. L. 111, 152 (2003).

However, both the existence and degree of cost-shifting are uncertain. Statutory prohibitions on discrimination in wages and hiring, to the degree they are enforced, would ameliorate the shifting of costs to beneficiaries, at least those from protected groups, in heterogeneous workforces. Further, to the degree that a benefit increases the workforce attachment of its beneficiaries, employers will bear lower costs of turnover. The employer might place higher value on certain groups of workers that it previously avoided hiring, paid lower wages, or made fewer investments in based on predictions that they would quit before the employer could recoup its investment. Lester, *Paid Family Leave, supra* note __ at 61.

[76] Peter H. Lindert, *What Limits Social Spending?* 33 EXPLORATIONS IN ECON. HIST. 1, 10-15 (1996) (studying effects of aging of the population on mass support for social spending).

[77] ANDREA LOUISE CAMPBELL, HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE 32-37 (2003) (describing the effect of senior citizen political participation on the growth and strengthening of Social Security and Medicare).

even believing that they will *not* be its principal beneficiaries. There is a significant body of research showing that although self-interest remains an important—perhaps the predominant—human motivator, altruism is also a distinct motivation that influences human sociality.[78] In other words, rationality appears to encompass a fairly complex utility function that incorporates both self- and other-regarding motivations. Although the literatures in economics and psychology addressing this topic are large, I focus here very briefly on studies of empathy-altruism and its connection to in-group favoritism.

Social cognition is made possible through the learned human capacity to take the perspective of others.[79] Perspective-taking might take the form of true identification or empathy with another—mentally imagining oneself to be the other—but absent a fair degree of knowledge about the other person, this may be difficult or impossible. More commonly, people take the perspective of others by "projection," i.e., imagining what they would have done and thought if put in the role of the other.[80] As a judgmental heuristic, self-projection enables people to make predictions about others that are often accurate.[81]

Both forms of social cognition can give rise to pro-social behavior. Empathy in response to the needs or distress of others can drive individuals to help (or decline to help). Researchers debate whether what appears to be other-regarding behavior truly reflects pure altruism. For example, voluntarily helping someone in need may reflect a truly empathic, other-oriented response, or it may reflect an egoistic desire to reduce personal distress induced by seeing another in distress.[82] Regardless of the precise mix of egoism and altruism that drives it, the fact remains that some portion of the population *can* be motivated to help others without promise of pecuniary reward.

The cognitive mechanism of self-projection carries over to the group level. "Social identity theory" posits that people's identity is significantly organized around their membership in salient groups.[83] People are more likely to project onto others who are in their own social group than they are onto people from different groups.[84] Self-anchoring may lead them to reason that similar others will think and behave more like

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[78] *See generally,* Jane Allyn Piliavin & Hong-Wen Charng, *Altruism: A Review of Recent Literature*, 16 ANNU. REV. SOCIOL. 27 (1990); Ernst Fehr & Klaus M. Schmidt, *The Economics of Fairness, Reciprocity and Altruism – Experimental Evidence and New Theories*, in KOLM & YTHIER, HANDBOOK, vol. 1 615-691; Ernst Fehr & Herbert Gintis, *Human Motivation and Social Cooperation: Experimental and Analytic Foundations*, 33 ANN. REV. SOC. 43 (2007).

[79] Louis Levy-Garboua, Claude Meidinger & Benoit Rapoport, *The Formation of Social Preferences: Some Lessons from Psychology and Biology*, *in* KOLM & YTHIER, HANDBOOK, vol. 1, 545-613, 573-81 (2006).

[80] *Id*., at 574-75.

[81] Note, however, that the egocentric foundation of the heuristic may lead people to overestimate the extent to which others have the same beliefs, the so-called "false consensus" effect. *Id*., at 576.

[82] Robert B. Cialdini, *et al*., *Empathy-Based Helping: Is it Selfishly or Selflessly Motivated?* 52 J. PERSONALITY AND SOC. PSYCH. 749 (1987) (offering examples an egoistic motive of distress-reduction).

[83] H. Tajfel & J.C. Turner, *The Social Identity Theory of Intergroup Behavior*, *in* S. WORCHEL & W.G. AUSTIN (EDS.), PSYCHOLOGY OF INTERGROUP RELATIONS 7-17 (1986).

[84] *See generally*, Jordan M. Robbins & Joachim I. Kreuger, *Social Projection to Ingroups and Outgroups: A Review and Meta-Analysis*, 9 PERSONALITY & SOC. PSYCH. REV. 32 (2005).

themselves than dissimilar others.[85] The use of the self-projection heuristic at the group level gives rise to a number of social phenomena. People perceive more cohesion, expect more reciprocal behavior, and are, in turn, likely to be more generous and cooperative towards members of their own group.[86]

Meanwhile, context also matters. It is well established that people will express different social preferences depending on how an issue is presented or "framed."[87] The framing of a social problem can influence who takes an interest in the problem, and how different members of the public perceive their own role. Importantly, social groups can be framed in different ways – they can be defined narrowly, at the level of classmate or neighborhood, or more broadly, at the level of nation. Any given person will belong to multiple groups, and membership in a particular group will have salience in some contexts but not others.[88] A key finding of the research, when viewed from a policy perspective, is that group status is mutable: in-group favoritism can be altered depending on the level at which groups and social categories are made salient.[89]

If one's goal is to marshal support for a paid leave program, mindfulness of groupism might counsel different decisions in terms of framing the public debate than one would initially imagine. Although much of this chapter argues for the importance of paid leave for the growing proportion of older workforce participants, appealing to the special needs of older workers might not be the optimal way to garner public support. It is possible, for example, that doing so would increase the salience of elderliness as a social category that divides "in-group" (younger) contributors from "out-group" (older) beneficiaries.

More generally, the fact that paid leave benefits would be used by older workers primarily for health-related work interruptions could mean that perceptions of "older workers" would become associated with "poor health," an image that activates stereotypes about the "frail elderly" and could increase hiring discrimination, notwithstanding the formal protection of laws against age-based discrimination.[90] It also

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[85] Levy-Garboua, *et al*., *supra*, note 79 at 589.

[86] *Id*., at 593; Robbins & Kreuger, supra, note 84 at 43-44.

[87] *See generally* Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L. J. 1, 42-43 (2004); Daniel Kahneman, *A Perpective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCHOLOGIST 697, 702-703 (2003) (describing his research with Amos Tversky in the 1970s and 1980s that illustrated the effects of framing).

[88] This phenomenon can be morally problematic; indeed, much of the literature on groupism has focused on its role in the formation of racist attitudes. American benevolent societies, which created some of the first forms of social insurance, were premised on the formation of an identity that excluded those outside the brotherhood of members. Brian J. Glenn, *Understanding Mutual Benefit Societies*, 1869-1960, 26 J. HEALTH POLITICS, POL'Y & L. 638, 645 (2001).

[89] Robbins & Kreuger, *supra*, note 84 at 42; S.L. Gaertner, J. Mann, A. Murrell & J.F. Dovidio, *Reducing Intergroup Bias: The Benefits of Recategorization*, *in* M.A. HOGG AND D. ABRAMS (EDS.), INTERGROUP RELATIONS: ESSENTIAL READINGS 356-69 (2001) (reviewing literature on recategorization of social groups); PENELOPE J. OAKES, S. ALEXANDER HASLAM & JOHN C. TURNER, STEREOTYPING AND SOCIAL REALITY 147-51 (1994) (reviewing studies on the role of context, or frame of reference, in self-categorization).

[90] *See* Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, *in* TODD D. NELSON, ED., AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 49-75 at 66-67 (2002) [*hereafter* NELSON,

conflicts with the positive self-identity of many older people, especially older workers,[91] and might alienate them rather than garnering their support for intervention.

It is true that older people have often been identified as a "deserving" group in public opinion surveys relating to Social Insurance and Medicare.[92] People express stronger support for redistribution if they believe that the recipient's need is caused by circumstances beyond his or her control.[93] In cross-national studies, those deemed most "deserving" across cultures tend to be the elderly, followed by the sick and disabled, followed by needy families with children and the unemployed.[94] The inclusion of the elderly in this group, however, has been linked to the assumption that the retired elderly cannot be expected to work. The new non-retirees who remain in the workforce do not fit with this assumption, and thus may be perceived as less deserving than if they were faultlessly unable to fend for themselves. One could even imagine hostility generated out of the perception that by remaining in the workforce beyond the traditional retirement age, older workers are imposing the costs of their failing health on co-workers.

Given these considerations, we might instead think of ways to frame a public debate about paid leave in such as way as to emphasize commonality rather than difference among members of public.

I mentioned in the introduction that most public attention and advocacy on the issue of paid leave has emphasized working parents with dependent children. This may have much to do with the history of the implementation of the Family and Medical Leave Act, which was driven in large measure by concerns about gender equality. This skew of the literature may have had the effect of framing the existing debate surrounding paid family leave as predominantly a women's issue, or an issue for "families with children." It is noteworthy, however, that the framing of the needs of caregivers, especially women, as the group with significant need for paid leave has tended to conflate the role of caregiver together with the role of parent of young children, largely overlooking the potential implication of *all* adult children in the caregiving needs of their aging parents.

The successful framing of a paid leave proposal might do well to de-emphasize particular "needy" groups, such as older workers, who might need the benefit most acutely. The need for income continuity when personal health or family caregiving needs

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AGEISM] (noting most negative stereotypes about aging relate to mental or physical debilitation as a precursor to death).

[91] Susan Krauss Whitbourne & Joel R. Sneed, *The Paradox of Well-Being, Identity Processes, and Stereotype Threat: Ageism and its Potential Relationships to the Self in Later Life*, *in* NELSON, AGEISM, *id*., at 245-273 at 250 (describing the "paradox of well-being," whereby most older adults have a positive sense of subjective well-being).

[92] A classic study is RICHARD M. COUGHLIN, IDEOLOGY, PUBLIC OPINION, AND WELFARE POLICY: ATTITUDES TOWARDS TAXES AND SPENDING IN INDUSTRIAL SOCIETIES (1980).

[93] Jeffrey A. Will, *The Dimensions of Poverty: Public Perceptions of the Deserving Poor*, 22 SOC. SCI. RES. 312, 329 (1993) (polling American subjects); Wim van Oorschot, *Who Should Get What and Why? On Deservingness Criteria and the Conditionality of Solidarity Among the Public*, 28 POL'Y & POLITICS 33, 38-39 (2000) (polling Dutch subjects, whether the recipient had control over his needy status was the most significant factor among several in its influence on support for welfare transfers).

[94] *Id*. at 36.

disrupt work might fruitfully be reframed as something that is not an old people's problem, nor a young family's problem, nor a women's problem, nor a poor people's problem – it is a basic human challenge we all face, if not now, then some time in our lives. This framing might not only make common experience of life-cycle risks *more* salient, but also reduce the salience of perceived "taxpayer" versus "beneficiary" group status.[95]

One must be cautious not to overstate the possibilities for successful reframing of group status in this regard: as the group becomes larger and more diffuse, as it would be in the context of a large social insurance scheme, the degree of identification with the group becomes more attenuated. Nevertheless, it might do some work towards generating public acceptance of shared risk.

[95] My argument is lodged in ideas about group-based identification and empathy. However, another, distinct, process might also do some work towards fostering public support if proposals are framed in terms of common "life cycle" risks. Younger citizens might also support programs that accommodate older workers on the basis of intergenerational reciprocity. Each generation recognizes that it must give care twice, once for the previous generation and once for the next generation, and that it, in turn, will receive care twice. A. Lars Bovenberg, *The Life-Course Perspective and Social Policies: An Overview of the Issues*, 54 CESIFO ECONOMIC STUDIES 593, 601 (2008). See generally, Alessandro Cigno, *The Political Economy of Intergenerational Reciprocity*, *in* SERGE-CHRISTOPHE KOLM & JEAN MERCIER YTHIER (EDS.), HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY [hereinafter, KOLM & YTHIER, HANDBOOK], vol. 2, 1505-1538 (2006). This recognition can give rise to a kind of social compact that encourages public adoption of insurance against life-cycle risks for which citizens at various stages of their lives will be either net contributors or net beneficiaries.