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ELDER LAW & FEMINISM:

Moving Toward Equity in Aging

Emily M. Flesch

A Feminist Perspective:

Feminism is defined by Merriam-Webster as “the theory of the political, economic, and social equality of the sexes.”¹ However, the movement known as feminism is made up of multiple perspectives and theories which inform and shape the movement as a whole. The focus of this paper will be applying a feminist perspective to elder law broadly, and how this perspective will benefit not just older women, but older adults as a demographic. A variety of feminist theories and perspectives will be explored, followed by a closer look at specific areas of elder law that could most benefit from a renewed perspective.

A feminist perspective when applied to legal theories or ideas helps ensure that the experiences of those who are often overlooked or ill-served by the dominant paradigm are considered and validated because it relies heavily on both data and human stories. A feminist perspective is a holistic approach that involves ‘going deeper’ into an issue, and asking critical questions, like “who’s experience is this law based upon?” or “is this narrative reflective of most people, or simply reflective of those who hold power in our society?” A feminist perspective brings issues of implicit bias and male norms to light, which is especially important in an area such as elder law, and when the majority of elderly people in the United States are women. Many of the laws and policies in the United States, while seemingly neutral on the face, are deceptively androcentric – meaning that they are designed to fit male needs and/or male life experiences. These are seen as the norm, and are often unquestioned, but it is important to recognize that many laws and policies have been shaped almost entirely by men (who have traditionally held social and political power in our society) and therefore, may not mesh well in application with

¹ Merriam-Webster, n.d.

the lived experiences of those who are not male. Uncritically accepting male-centric standards in this area means that women's experiences are not being taken into account or considered, and as Martha Chamallas points out, once male-centric standards have gained legitimacy, it becomes especially difficult to challenge them.² Therefore, it is important to utilize a feminist approach to shaping public policy, especially in areas that disproportionately affect women, so that no one who could benefit from legal reform is inadvertently left behind.

Why is Aging a Feminist Issue? (The Current Generation of Older Americans)

Almost one in every seven, or 14.5% of the population is an older American. Generally, the elderly are defined as those 65 and older³, with the older adult population frequently broken down into further subgroups from there. According to the Administration on Aging (AoA), those aged 65 and older numbered 46.2 million in 2014, representing an increase of 10 million (28%) since 2004.⁴ Between 2000 and 2010, the demographic of those 65 and older grew at a faster rate than the total population.⁵ In 2010, the 65 and older demographic was “larger than in any other decennial census at 13.0 percent.”⁶

The study of aging, by sheer force of demographics, is necessarily a women's issue. Currently, women make up 63% of the people over 65 in the United States and close to 75% of the elderly poor⁷ with African American women experiencing poverty at twice the rate of white women⁸. By 2040, the population of people 65 and over will be 66 million — twice what it was

² Chamallas, 2012

³ Profile of Older Americans: 2015, 2016

⁴ Profile of Older Americans: 2015, 2016

⁵ Werner, 2011

⁶ Werner, 2011

⁷ Ovrebo & Minkler, 1993

⁸ Stoller, 1993

in 1990 — with approximately 69 men per 100 women at age 65, and 36 men per 100 women at age 85.⁹

The Administration on Aging notes that older women currently outnumber older men at 25.9 million older women to 20.4 million older men. Once people reach age 65 (and this number is increasing – the number of people who will reach age 65 over the next two decades increased by 17.8% between 2004 and 2014¹⁰), they have an average life expectancy of an additional 19.3 years (20.5 years for women, compared with 18 years for men).¹¹ While this gap is shrinking (the fastest growing population band of elders in the last census was males aged 90-94¹²), the fact remains that elder issues are women’s issues.

Older men are much more likely to be married than older women. 70% of older men are married, compared to just 45% of women.¹³ In 2015, 34% of older women were widows.¹⁴ From this data, coupled with the approximately 2 year difference in average life expectancy after age 65, we can assume that the discrepancy in marriage rates may be due in part to the lower life expectancy for men. Perhaps not surprisingly, almost twice as many older women than men live alone. Almost 29% or 13.3 million noninstitutionalized older adults live alone.¹⁵ 4.1 million are men, while the remaining 9.2 million are women,¹⁶ which again highlights the importance of ensuring that policies that affect elders take a multitude of perspectives and identities into account so as not to leave behind a significant majority of elders. The disparity in the numbers of

⁹ National Research Council, 1988

¹⁰ Profile of Older Americans: 2015, 2016

¹¹ Profile of Older Americans: 2015, 2016

¹² Scheller, 2016 (from an in-class powerpoint, Elder Law, Fall 2016)

¹³ Profile of Older Americans: 2015, 2016

¹⁴ Profile of Older Americans: 2015, 2016

¹⁵ Profile of Older Americans: 2015, 2016

¹⁶ Profile of Older Americans: 2015, 2016

men and women who live alone as elders is likely due in part to the differing life expectancies for men and women, but could also be attributed to factors such as the different socialization of men and women. Rigid gender roles may make men less comfortable living on their own if they have never formed the necessary ‘homemaking skills’ typically reserved for women in older generations, for example.

The increasing gender-based disparities within the elderly population exacerbate issues related to fairness and equity related to caregiving.¹⁷ The primary caregivers of this growing number of elderly are, and will continue to be, predominantly female — either wives and daughters¹⁸ or paid service workers.¹⁹ Not only that, but elderly people are also often caregivers themselves. In 2014, about 554,579 grandparents aged 65 and older had the primary responsibility for grandchildren who lived with them.²⁰ Based on the other data surrounding age and gender, we can assume that many of these grandparent-caregivers are women.

Defining Feminism:

In *A Feminist Approach to Elder Law*, Professor Kim Dayton lays out other feminist perspectives that have been applied in the legal field in the last several decades, including liberal feminism (or equality feminism, generally described as “evening the playing field), cultural or difference feminism, (which argues that regardless of any biological or culturally-induced gender differences between men and women, the “male approach should not be privileged or held out to as a universal norm”²¹), and radical feminism (which “claims that the law and all other cultural,

¹⁷ Korzec, 1997, p. 547

¹⁸ Dwyer & Coward, 1992

¹⁹ Abel & Nelson, 1990

²⁰ Profile of Older Americans: 2015, 2016

²¹ *A Feminist Approach to Elder Law*, 2009, p. 48

social, and political institutions perpetuate male dominance by simultaneously and paradoxically ignoring its existence and privileging it”²²). Radical feminism “contends that both equality theory and difference theory accept the concept of a male “norm” and attempt to work around that norm but not challenge it.”²³

Dayton notes that “frequent criti[ques] of much of the early foundational feminist scholarship is that it ignores or trivializes the unique perspectives of those who face discrimination and oppression not only because of their gender, but due to other aspects of self.”²⁴ Dayton suggests that “standpoint epistemology” or the positions we occupy in society based on our descriptors (or identities, to use the parlance of intersectional feminism), can help us better understand that other people with different descriptors may experience life vastly differently. In her example, Dayton frames wealthy white males as the “center of the universe” and suggests that the further an individual moves (or is positioned) from that center, the “better one’s understanding of the true nature of oppression.”²⁵

What Dayton seems to be pointing toward is an approach or theory known as intersectional feminism. Intersectional feminism is defined by Anna Carastathis as a “way of conceptualizing the relation between systems of oppression which construct our multiple identities and our social locations in hierarchies of power and privilege.”²⁶ The concept of intersectionality, originally introduced by Black feminist legal scholar Kimberlé Williams Crenshaw (also one of the founders of Critical Race Theory), serves to highlight the importance of multiple identities, and ensure that public policies (for example) are crafted to fit the needs of

²² Dayton A.K., 2009, p. 49

²³ Dayton A.K., 2009, p. 49

²⁴ A Feminist Approach to Elder Law, 2009, p. 49

²⁵ A Feminist Approach to Elder Law, 2009, p. 50

²⁶ The Concept of Intersectionality in Feminist Theory, 2014

as many intersecting identities as possible. Intersectionality is critically important when considering an issue as broad as aging or elderly care, because the identity of being an older adult is only one factor in how people experience aging. Older adult women have different experiences by virtue of both their age and gender than older adult men, and likewise, elderly women of color have different experiences than elderly white women do. Keeping these differences in mind allows for policy decisions that more precisely meet the needs of our elders when shaping the laws surrounding our elders. It is critical when shaping social policy that we recognize that not all women, or all elderly people, or all any one category of person share essential common experiences, because all people are shaped by social hierarchies that are varied and complex. Our multiple dimensions of experiences intersect to create complex personal identities (for example, poor, elderly, white, woman).²⁷ As Dayton astutely notes, ironically, “anti-essentialist feminist discussions usually overlook the role that aging plays in the oppression of all women, inasmuch as all women (if they live long enough) will become old.”²⁸ It is this sort of oversight that the application of intersectional feminism intends to avoid.

However, intersectionality is not necessarily (and should not be) exclusive of other theories and perspectives, especially in a realm as vast as what is commonly thought of as “Elder Law.” Other perspectives can and should be applied to best meet the needs of the growing demographic of older adults. Intersectionality is highlighted, because, as noted above, it is critical that the impact of multiple, intersecting identities is not forgotten when applying any of the other theories and perspectives.

²⁷ Chamallas, 2012

²⁸ A Feminist Approach to Elder Law, 2009, p. 50

Rethinking Traditional Approaches: The Ethic of Care, Vulnerability, and Beyond

In the past twenty years especially, the nexus between women and aging has been a source of both inspiration and concern for a variety of writers and critics. In general, as Korzec notes, American elder law is “traditional in approach,” and this traditional approach tends to “promote autonomy, personal responsibility, rationality and individualism.”²⁹ Feminist approaches, in particular the ‘feminist “ethic of care” associated with the work of Carol Gilligan, rejects these traditional concepts in favor of solidarity, empathy, and community responsibility.’³⁰ Korzec argues that this feminist ethic of care should “displace the traditional American approach to elder law.”³¹ The “ethic of care” idea has some roots in the “different voice” or cultural/difference feminism approach, and views the ethic of care as “a superior model of legal reasoning and societal organization.”³² This approach values interconnectedness and relationships over the “traditional ‘male’ characteristics of individualism and rights.”³³ Carol Gilligan, one of the primary proponents of the ‘ethic of care’ identified two main approaches to problem-solving: the traditional, and the ‘ethic of care’.

The traditional model, one that has historically “monopolized American jurisprudence”³⁴ is “rights-based, emphasizing the use of generalized principals and rules to settle disputes between individuals.”³⁵ Typically, this approach is characterized by a “justice-oriented, ‘neutral’ problem-solver/decision-maker” who “embodies a heightened moral development.”³⁶ Examples

²⁹ A Feminist View of American Elder Law, 1997

³⁰ Korzec, 1997, p. 549

³¹ A Feminist View of American Elder Law, 1997, p. 549

³² Korzec, 1997, p. 549

³³ A Feminist View of American Elder Law, 1997, p. 550

³⁴ Korzec, 1997, p. 550

³⁵ Korzec, 1997, p. 550

³⁶ Korzec, 1997, p. 550

of this approach are commonplace, but in the elder law context could be seen as the judge granting a guardianship/conservatorship, the attorney who pushes a client toward a typical or generalized solution without taking into account the client's unique needs, or a family member acting as caregiver who usurps the agency of the cared-for by making decisions for that person without their input. More broadly, this type of approach is seen in the laws that regulate the disbursement of social security funds, or in 'one-size-fits-all' approaches to Medical Assistance eligibility rules in Minnesota and beyond.

By contrast, the ethic of care approach focuses "on the unique factual context as well as on the parties' interdependencies and interpersonal responsibilities and rights."³⁷ It tends to reject "adversarial disputes in favor of preserving on-going relationship and forging cooperative solutions grounded in the specific facts of the problem at hand."³⁸ Korzec notes that one of Gilligan's significant arguments in this regard are that while both "men and women employ care concerns, women employ them more often and more consistently because they tend to focus more energy and time on personal relationships" while for men, "the moral imperative appears rather as an injunction to respect the rights of others and thus to protect from interference the rights to life and self-fulfillment."³⁹

What might the "ethic of care" look like in practice? Fortunately, as an individual attorney, it is rather simple to apply when working with clients. Even better, this approach can be taught as part of law-school curriculum or in mentoring scenarios – and it does not need to necessarily be labeled as a 'feminist perspective' or approach. The ethic of care, in practice is, in many respects, simply good lawyering. Indeed, Marla Mitchell-Cichon touches on many of these

³⁷ Korzec, 1997, p. 550

³⁸ Korzec, 1997, p. 550

³⁹ Korzec, 1997, p. 550 (quoting Gilligan, regarding cultural feminism/"the ethic of care")

ideas in her excellent article *What Mom Would Have Wanted: Lessons Learned From an Elder Law Clinic About Achieving Clients' Estate-Planning Goals*, in which she lays out several lessons for working with older adult clients, including “Encourage Clients to Articulate Their Goals in Factual Terms,”⁴⁰ and “Do Not Make Factual Choices for the Client,”⁴¹ coupled with “Assist Clients in Making Wise Decisions.”⁴² Mitchell-Cichon explains that beyond our ethical responsibility as attorneys, there are other considerations when helping clients make decisions, and that the tendency to tell clients what to do is harmful. In fact, “it is not advisable to take a ‘godfather’ or ‘guru’ approach . . . the client, not the lawyer, has more insight into the nonlegal implications of the decision.”⁴³ Regarding the client “as the expert may be the impetus the client needs to make the decision.”⁴⁴ This comports well with the ethic of care approach, because it ensures the client’s autonomy, and allows the attorney and client to collaborate to reach the desired and best outcome for each and every client. Mitchell-Cichon provides numerous other practice tips for working with older adult clients that mesh well with an ethic of care approach, such as probing the client’s choices with interactive techniques such as role-playing conversations between the client and the client’s children based on the client’s anticipated responses (this technique would also allow the lawyer the experience of walking in the client’s shoes, so to speak), or helping the client discuss the matter with their children. At each step, Mitchell-Cichon urges honoring the client’s wishes and decisions. The crux of each of the lessons presented is helping the client achieve his or her goals, through an individualized, fact-

⁴⁰ 2002, p. 297

⁴¹ *What Mom Would Have Wanted: Lessons Learned from an Elder Law Clinic About Achieving Client's Estate Planning Goals*, 2002, p. 304

⁴² Mitchell-Cichon, 2002, p. 309

⁴³ *What Mom Would Have Wanted: Lessons Learned from an Elder Law Clinic About Achieving Client's Estate Planning Goals*, 2002, p. 306

⁴⁴ Mitchell-Cichon, 2002, p. 306

based assessment and approach, and working with the client cooperatively, rather than asserting oneself as the expert, or imposing a normative set of ideas or guidelines on the client. Mitchell-Cichon notes that “the presumption is that the lawyer is the expert when it comes to the legal implications of a decision, and the client is the expert when it comes to the nonlegal implications of a decision. The dynamics of the attorney-client relationship . . . are such that the lawyer and client can assist each other in their respective roles. . . thus, when possible, adopt a collaborative approach when assisting a client with decision making.”⁴⁵

Another example of the ethic of care idea being implemented fairly seamlessly into existing legal practice is the growing trend of using mediation in certain contexts in the elder law practice area. This is a somewhat controversial premise, as many elder law attorneys do not agree that mediation makes sense in an elder law context. To be certain, mediation as a tool could backfire in circumstances where the client feels they are at the mercy of a loved-one or caregiver, for example, and therefore not free to articulate their beliefs. There could also be concerns about the role of the lawyer (who is the client) that become muddied in the mediation process. However, there are also situations in which mediation might make sense. For example, a family trying to determine which adult child will become the primary caregiver for an older parent may benefit from mediation (perhaps in a more casual, low-key format than is generally conceived) in which an attorney or mediator can guide the parties as they discuss the options. Mediation could be successful in a situation where a client is appointing a power of attorney, and wants to ensure that all interested parties are informed and on the same page about the grant of the powers, and the expectations of the grantor, for example. The key to a successful use of the

⁴⁵ What Mom Would Have Wanted: Lessons Learned from an Elder Law Clinic About Achieving Client's Estate Planning Goals, 2002, p. 309

ethic of care, or mediation is amplifying the voice of the older adult at all stages, and insuring that their wishes are at the forefront of the conversation. Mediation would not make sense in a situation involving abuse or exploitation, but can be and has been used successfully in other contexts.

What all of these concepts have in common with the ethic of care is the focus on collaborative and creative solutions that are based on the specific facts of each client's situation. The focus is on improving and maintaining the important relationships a client or older adult has, and fostering healthy and successful communication between all parties. The client, or older adult's needs and desires should always be at the forefront of the discussion. Note that while many outcomes may be the same as when a more traditional approach is applied, the focus is not on solving or fixing a problem, but rather on assisting the older adult identify his or her unique and specific needs, and working with them, at their level to meet those needs. This shift of focus may seem like simple semantics, but in practice, this "client-centered approach" makes a world of difference.⁴⁶

In "*Elderly as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*", Martha Fineman takes on the perception of vulnerability, and how this notion can be used to unfairly and inappropriately categorize older adults, or treat them as a monolithic category, when in fact, their needs, experiences, and desires are better represented across a diverse spectrum. Her thesis is that the categorization of some groups of people as 'vulnerable' breeds paternalism, which threatens autonomy, and that there is a pervasive belief that vulnerability connotes weakness.⁴⁷ Fineman suggests that our society groups people into

⁴⁶ Mitchell-Cichon, 2002, p. 309

⁴⁷ "Elderly" As Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 2012, p. 91

categories – autonomous individuals who are capable of making choices and being independent and self-sufficient, and those who are not perceived as sufficiently autonomous. Fineman asserts that those whom society feels uncomfortable demanding conformity with “the mandates of self-sufficiency and independence,”⁴⁸ generally, those who are young, ill, disabled, or old, are “perceived as needing protection, and paternalism guides society’s response – which is to withhold agency, as in the case with children, or take away agency based on assumption about lack of capacity, as we do with many of the elderly.”⁴⁹ Fineman critiques this idea as inappropriately ignoring the universality of vulnerability, and inappropriately constructing “relationships of difference and distance between individuals and groups.”⁵⁰ This sets up so-called vulnerable populations in competition with one another for those resources “specifically set aside for social welfare payments in our very wealthy nation.”⁵¹ Not only does this create an intergenerational conflict between older adults and children (as an example), but this construction insures that these groups are pitted against each other in the competition for limited resources. The perception, for example, of social security as an “entitlement program” even though its recipients work and contribute to this program throughout the majority of their lives even absolves the guilt of those who wish to restrict this funding by its very label.

Fineman makes the point that in many areas of elder law there is tension between the promotion of autonomy, and the perceived need to protect older adults, and posits that “protection is not necessarily constructed as a positive response, and protective laws are used as an example of the assumption made about the ‘weakness, frailty, and dependence of older

⁴⁸ "Elderly" As Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 2012, p. 85

⁴⁹ "Elderly" As Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 2012, p. 89

⁵⁰ "Elderly" As Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 2012, p. 85

⁵¹ "Elderly" As Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 2012, p. 86

adults.”⁵² Fineman makes the excellent point that while many discussions of vulnerability and autonomy in regard to policy and politics are framed as all-or-nothing scenarios, the actual and practical reality is much different. In fact, people’s lives are “much more complex and nuanced.”⁵³ Fineman asserts that the tension between autonomy and safety is not a given, but rather, is an illusion, noting that a vulnerability approach “might well reveal the ways in which safety and security are prerequisites for the meaningful exercise of autonomy, not in conflict with it. Safety and security are necessary to have the ability to fully and freely exercise options and make choices.”⁵⁴

Fineman and Dayton (along with others) have also taken care to point out some of the problems that go along with the term ‘elderly’ as a classification for older adults. Fineman points to the Interim Report of the Law Commission of Ontario, and their rejection of the term elderly as problematic because “of possible confusion with the use of elders in regard to Aboriginal Elders and because it ‘has connotations of frailty and dependence that may reinforce stereotypes,’”⁵⁵ noting that the Commission instead utilizes the terms “‘older adults’ and ‘older persons’ because those terms ‘emphasize the relative nature of aging and avoid the negative connotations associate with some other terms.’”⁵⁶ Dayton especially takes issue with the characterization of the growing population of older adults in the media as the “grey dawn” or “tsunami” which “threatens the global economy,”⁵⁷ noting that these “apocalyptic vision[s] of current demographic trends [are] problematic, because [they] invite a perception of the world’s elderly not as an important resource to be valued and cherished, but as a drain on ‘the rest of us’

⁵² "Elderly" As Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 2012, p. 92

⁵³ "Elderly" As Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 2012, p. 92

⁵⁴ "Elderly" As Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 2012, p. 92

⁵⁵ "Elderly" As Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 2012, p. 89

⁵⁶ Fineman, 2012, p. 90

⁵⁷ A Feminist Approach to Elder Law, 2009, p. 45

and a target of fear and loathing.”⁵⁸ Dayton posits that such characterizations operate to cultivate and legitimize ageism, and serve to divert attention from helpful discussions about how resources can and should be used.

Elder Abuse

Because so many older adults are women, it follows that elder abuse, like elder law generally, is necessarily a women’s issue. Just like women are more likely to experience domestic, sexual, and other forms of abuse, older adult women are more likely to experience elder abuse of all types. Elder abuse is generally divided into four main categories: physical abuse, psychological abuse, financial exploitation, and neglect.⁵⁹ As Moskowitz explains in his 2001 Loyola Law Review Article, *Symposium on Integrating Responses to Domestic Violence: Reflecting Reality: Adding Elder Abuse and Neglect to Legal Education*, few of these cases are reported to state authorities, and “only a minute number result in criminal prosecution or civil litigation. In our civil courts and criminal justice system, mistreated elderly persons are truly voiceless and their suffering invisible.”⁶⁰ While it is true, as Moskowitz goes on to explain, that elder mistreatment “occurs in all segments of our population, irrespective of race, sex, ethnic or socioeconomic background,”⁶¹ it is clear that just like domestic violence predominately victimizes women, elder abuse, while perhaps more widespread across genders, does disproportionately impact women, perhaps in part because there are simply more elderly women than men.

⁵⁸ A Feminist Approach to Elder Law, 2009, p. 45

⁵⁹ Reflecting Reality: Adding Elder Abuse and Neglect to Legal Education, 2001

⁶⁰ Reflecting Reality: Adding Elder Abuse and Neglect to Legal Education, 2001

⁶¹ Reflecting Reality: Adding Elder Abuse and Neglect to Legal Education, 2001

As Moskowitz points out, elder abuse and mistreatment is often characterized or imagined as physical abuse, but “more often it takes the form of less dramatic but equally damaging behaviors – psychological or emotional abuse, financial exploitation, and neglect of care-taking obligations.”⁶² We know that this is often true of domestic violence or gender-based violence as well – it comes in many forms and is often pictured as only physical. That conception masks the broader spectrum of both domestic and elder abuse, and Moskowitz is right to draw attention to the breadth of the elder abuse issue.

Moskowitz goes on to explain that despite the prevalence of elder abuse and neglect, victims rarely report it.⁶³ While there are many mandatory reporters in institutional settings, older adults who live in the community may not regularly come into contact with these reporters, and their cases may go unreported. Other reasons for not reporting are as varied and complex as the individuals affected by this problem, but could include the feeling that the abusive treatment is ordinary or normal, or that legal recourse is “unavailable or unavailing.”⁶⁴ Others may be isolated by their caregiver, or reluctant to proceed against family members or close friends.⁶⁵

Moskowitz compares elder abuse with other forms of family violence, and explains that while almost all states have some sort of statutes or adult protective services laws which involve mandated reporting, implementation and enforcement seems to be lacking, largely, Moskowitz explains due to lack of financial support.⁶⁶ At the time of publication of his article, there was a

⁶² Reflecting Reality: Adding Elder Abuse and Neglect to Legal Education, 2001

⁶³ Moskowitz, 2001

⁶⁴ Moskowitz, 2001

⁶⁵ Moskowitz, 2001

⁶⁶ Moskowitz, 2001

dramatic disparity between funds for adult protective services and those provided for child abuse nationwide, and seem to actually be dropping off.⁶⁷

Aside from the funding issues surrounding dealing with the abuse and exploitation of older adults, and the competition for resources that Fineman notes, it is likely or at least possible that long-standing gender roles and family ties play a role in elder abuse. Older adults may have difficulty identifying or recognizing abuse or exploitation when it occurs, especially if perpetrated by a family member (and especially if the family member is an adult child). The continued stigma surrounding older adults may cause caregivers or those in proximity to the older adult to feel resentment. Theoretically, a filial statute which forces financial responsibility for an older adult on that person's children could result in resentment and potentially maltreatment as well. Another potential outcome of this stigma is to make the older adult feel like a burden, which could lead to feeling that he or she deserves the abusive treatment.

It is also worth noting that as the majority of both paid and family caregivers for older adults are women, many of whom have caregiving obligations toward children as well as older adults, many instances of elder abuse may occur as a result of caregiver burnout. In fact, unlike other types of abuse (domestic, sexual), elder abuse is a much more broad category that encompasses many different situations. Some behaviors that would fall under the umbrella of elder maltreatment may stem not from malice, but from caregiver fatigue. Many instances of financial exploitation, for example, result from a lack of knowledge about complex legal and financial systems (such as an attorney-in-fact improperly reimbursing him or herself for an expense).

⁶⁷ Moskowitz, 2001

Perhaps the most insidious type of elder mistreatment is the persistent characterization of older adults as lacking agency. This, in turn, creates situations in which caregivers, even with the best intentions, presume they know best, and impose their will on the cared-for. Dayton touches on this in the context of the attorney-client relationship, but this dynamic is visible in the caregiver/cared-for relationship. The denial of the basic autonomy of older adults, if not in and of itself maltreatment, is certainly a stepping stone toward the maltreatment and abuse of older adults. The feminist ethic of care provides a healthy and necessary framework for more positively maintaining these relationships. Shifting our societal understanding of older adults from that of a monolithic group to individuals with a vast array of intersecting identities, needs, and desires is critical for addressing at least some instances of elder abuse and maltreatment. Further, a shift in societal attitudes and a reframing of our understanding of older adults may make resources more available for adult protection and could make it easier for older adults to identify and disclose abuse or maltreatment.

Finally, reshaping gender roles around caregiving, along with how the caregiving relationship is perceived (a shift from the paternalistic to the collaborative) could result in less caregiver fatigue or burnout. This shift could also get men more engaged in caregiving, in turn reducing the economic impact of such caregiving on women. This would create a scenario in which fewer women are living in poverty as older adults, and therefore make them less susceptible to abuse.

Due to the multifaceted and complex nature of this issue, it is impossible to identify a single cause or solution. The application of a feminist perspective in this area is certainly not a cure-all, but could help reduce the seemingly vicious cycle that ties all of these older adult or “elder law” issues together.

Social Security

One area of elder law that has long been ripe for and subject to feminist critique is the public pension system, or Social Security in the United States. The current “pay-as-you-go” system in the United States has been subject to numerous critiques for the disadvantages it poses to women, most specifically women who have left the workforce at any point to raise children. While it is beyond the scope of this paper to thoroughly examine the multitude of both disadvantages and proposed solutions to this system, there are some obvious examples of how Social Security could be improved through the application of a feminist perspective.

Social Security plays a critical role in the lives of the majority of older adults in America. In 2010, 86% of older adults reported Social Security as a major source of income, and Social Security benefits accounted for 37% of the aggregate income of older adults. By contrast, only 56% and 27% respectively reported assets or private pensions as major sources of income, and even fewer older adults reported income from government employee pensions or wages. “Social Security made up 90% or more of the income received by 36% of beneficiaries.”⁶⁸ Under our current Social Security system, benefits correspond with the lifetime earnings of the beneficiary. This renders our Social Security system extremely vulnerable to feminist critique as Dayton points out, for several reasons. First, the imposition of a flat payroll tax on the first \$100,000 of earnings has the effect of being extremely regressive on low-wage workers because they are less likely to exceed the \$100,000 threshold to receive benefits tax free. Women disproportionately make up the low-wage earning group, and therefore, this tax falls even more heavily on women.⁶⁹ This is frustrating enough, but those who withdraw benefits earlier than retirement age

⁶⁸ Kohn, 2014, p. 196

⁶⁹ A Feminist Approach to Elder Law, 2009, p. 55

are penalized, and because we know that women are more likely to be part of the ‘sandwich generation’ or those caring for children and older adult parents, or older adult parents and grandchildren at the same time, it is likely that these penalties may disproportionately affect women as well. For those who are considering early retirement in order to care for grandchildren full time (and this number is significant), this penalty could be the deciding factor between providing a stable, loving, and familiar home for a grandchild and suffering long-term financial consequences, or making other arrangements for the grandchild to protect an already limited income stream. Unfortunately, these decisions are likely to fall more heavily on the shoulders of older adult women due to sheer demographics, as well as the currently gendered nature of caregiving.

Beyond the issues raised above, the method of calculating Social Security benefits also results in women being disadvantaged. Social Security benefits are calculated based on the average of a person’s earnings over their thirty highest paid years of employment.⁷⁰ The higher that this average is, the higher the benefit the person receives. If a person has less than thirty years of paid work, they are attributed zero wages for the number of years needed to reach thirty, and those unpaid years are included when calculating the average earnings.⁷¹ That means that our Social Security system provides a distinct advantage to those who make the most money, and also those who have worked in a documented job for all or most of their adult life. Dayton points out that because the calculation includes the years in which a person receives no wages, this benefit calculation method “severely penalizes those who have not worked in the public sphere for at least thirty years.”⁷² This necessarily has the effect of disadvantaging women, who earn

⁷⁰ Dayton A. , 2009, p. 55

⁷¹ Dayton A. , 2009, p. 55

⁷² Dayton A. , 2009, p. 55

less than men over the course of their lifetimes due to the pay gap, but also, as Dayton asserts, because the work that women do is valued differently (read: less) than the work that men do, “even when the work requires similar education, training, and effort as the jobs men tend to do, and because as a group, they are more likely to take time off from work than men to provide caregiving to dependent or ill relatives.”⁷³ Dayton concludes that “any pension system that pays higher benefits in retirement to those workers who earned more wages during their working years will inevitably produce inequality between elderly men and elderly women.”⁷⁴ This issue is exacerbated when the fact that men are more likely to have access to an employer-sponsored pension than women is taken into account. Korzec agrees, stating that “Women's economic disadvantages translate to lesser lifetime earnings and smaller pensions. These economic facts help explain the growing poverty suffered by elderly women. Ultimately, women's work interruptions for childbirth, childrearing, and family responsibilities result from the gendered nature of family roles in American family life. These roles impoverish women financially. The data bears this out, as the US poverty rate for older adult females is almost twice that of older adult males⁷⁵, and the older adult poverty rate disproportionately affects people of color.⁷⁶

Fortunately, there are a multitude of ways in which our Social Security system could be made gender neutral, or at least be reformed to remedy these disparities. Dayton sets forth an option implemented in some Scandinavian countries that gives credit toward retirement benefits “for unpaid work that is deemed valuable to society – most notably, child-rearing.”⁷⁷ This would certainly pass muster with cultural feminists. A more aggressive approach could be something

⁷³ Dayton A. , 2009, p. 55-56

⁷⁴ Dayton A. , 2009, p. 56

⁷⁵ Dayton A. , 2009, p. 56

⁷⁶ Kohn, 2014, p. 196

⁷⁷ A Feminist Approach to Elder Law, 2009, p. 56

along the lines of “adjusting pension systems to account for women’s lack of access to other sources of income and their socially-imposed obligation to withdraw from paid work . . . so that they can provide care, and by artificially adjusting the payments made to those who provide care to children,”⁷⁸ and older adults. Dayton notes that it would be politically (and likely practically) impossible to calculate or award sufficient “credit” for family caregiving. While it is probably true that it would be functionally difficult to accurately calculate the true cost of family caregiving (especially for older adults, as the best cost comparisons would be made with long-term care facilities resulting in staggering numbers), even a low number would go a long way toward resolving this disparity. For example, if instead of recording zero income for the years when a person is out of the workforce due to caregiving responsibilities, these years were calculated with a minimum wage base income, that would go a long way toward bridging the gap. The counter argument is that because caregivers are not paying into the system during this time, they should not be “entitled” to benefits. However, caregiving is critical to the health and well-being of our society as a whole. Furthermore, the unpaid care provided reduces costs to taxpayers and removes some of the burden on already burdened systems. Clearly, this is an area that could benefit substantially from the application of a vulnerabilities or ethics of care perspective. Intersectionality is crucial in recognizing the disparities between white women and women of color. While what is proposed above is by no means a perfect solution, it is certainly a step in the right direction.

Other ways these disparities could be remedied include narrowing (and eventually resolving) the gender pay gap, and changing societal attitudes around the gender of care giving. Wages for caregivers can and should be raised to reflect the value of their contribution to society.

⁷⁸ Dayton A. , 2009, p. 56

Countries such as Australia have implemented systems in which all older adults receive a minimum monthly or annual income, regardless of past work history or access to other income. Some of these solutions are more practical for our current state than others. Unfortunately, even the most feasible of these ideas may be up in the air for the foreseeable future, as some current and incoming politicians have communicated their intent to make widespread cuts to Social Security, or have proposed fundamental reforms. Dayton states that “the contribution of a feminist vision of pension reform is not necessarily to achieve full equality in one fell swoop, but instead to contribute to a broader discussion of the issues that acknowledge and account for the historic and continuing economic oppression of women at home, at work, and in their ‘golden years.’” While that is certainly a factor, with the overwhelming numbers of older adults who rely on Social Security as a major or primary source of income, and the disproportionate number of these adults who are women, it is critical that their plight is made very visible to our leaders. Widespread cuts or reforms to Social Security that are made without insight into the gender (and racial and class-based) disparities at work in this system would be practically devastating for many older Americans. A feminist vision for Social Security reform is essential in ensuring that the majority of those who use the Social Security system can enjoy its benefits. It is unjust and immoral to subject women to such a profound financial disadvantage, especially in light of the fact that many women are disadvantaged because they have been doing unpaid labor as caregivers.

Gender, Care, and Paying for Long Term Care

Once again, the economic disadvantages to which women are subject to throughout their lifetime come into play when it comes to paying for or providing long term care. The AARP Public Policy Institute has estimated that unpaid or “informal” adult caregivers’ contributions to

other adults totaled \$450 billion of annual economic value in 2009.⁷⁹ As noted previously, women are statistically much more likely to care for those around them – children, older adult parents and other relatives, and later in life, even grandchildren. Paid caregivers are also more likely to be women. Not only does this shape the way our society views women, it also translates into economic disadvantages for women throughout their lifetime. Not only do women earn less during their working years, it also results in smaller pensions for women, and eventually in the growing poverty rate suffered by older adult women.⁸⁰ Korzec argues that interruptions in women’s work for childbirth, rearing, and other responsibilities to the family are the natural result of gendered family roles in typical American family life. Not only do these roles impoverish women financially, they may also “psychologically and socially impoverish both men and women by discouraging the creation of balanced personal and professional lives.”⁸¹

These gender roles extend into the relationships between adult children and older adult parents. Korzec notes that adult sons generally focus on stereotypically “masculine” activities like earning money “at the expense of emotional ties, including those to their parents.”⁸² Generally, in American society, one adult child becomes the primary caregiver of the older adult parent, and takes on responsibility for daily support and the tasks necessary to allow the older adult to remain living in the community. These tasks include the physical caretaking activities, such as feeding, dressing, bathing, but also include the emotional labor of providing constant or frequent care to another human being. Most often, if the older adult does not have a spouse, these caretaking responsibilities fall on the daughter, daughter-in-law, or niece. These primary

⁷⁹ Kohn, 2014, p. 228

⁸⁰ Korzec, 1997, p. 555

⁸¹ Korzec, 1997, p. 555

⁸² A Feminist View of American Elder Law, 1997, p. 556

caregivers may not only be caring for an older adult relative, but also for children of their own. Caregivers in this position are known as the ‘sandwich generation,’ which more often than not is made up of women attempting to balance the “competing demands of responsibilities to their careers, husbands, children, and parents.”⁸³ In fact, as Dayton notes, a great many women will spend more years providing care to their parents than to their children.⁸⁴

As was true in 1997 when Korzec wrote her *Feminist View of Elder Law*, the Family and Medical Leave Act still does not remediate these issues. At the time of Korzec’s writing, “the practical effect of the act was felt more in the area of maternity leave than in the caregiving of elderly parents.”⁸⁵ While the same seems to hold true today, the fact remains that nearly two decades later, the FMLA still is not equipped to meet the long term needs of older adults as grandparent caregivers, or adult children as caregivers for their older adult parents. With the growing population of older adults combined with the decline in birth rates, and the increase in women joining the workforce, “this model for serving the long term care needs of the senior population becomes problematic: there are not enough stay-at-home caregivers (that is, adult daughters and daughters-in-law) to provide support for all those elderly who need assistance.”⁸⁶

Korzec offers several international perspectives as helpful counterpoints, referencing Sweden’s parental leave, and a proposal in Japan to create a new pension system for women that tried to compensate for women’s absence from the workforce while they raise children. That proposal was not adopted, though the Japanese Civil Code that provides that the care and support of older adults are the responsibility of the older adult’s relatives is still in place.

⁸³ Korzec, 1997, p. 556

⁸⁴ A Feminist Approach to Elder Law, 2009, p. 51

⁸⁵ A Feminist View of American Elder Law, 1997, p. 557

⁸⁶ A Feminist Approach to Elder Law, 2009, p. 51

While family support is typically voluntary in nature, many states in the US have similar “filial statutes” which require adult children to support their older adult parents in specific situations. Only about half of these specifically condition this duty on ability to pay, and only about one third make the failure to provide support a criminal act.⁸⁷ While these filial statutes may seem to alleviate some of the problems associated with older adult care, when viewed through a feminist lens, several issues become obvious.

One, of course, is the likelihood that these statutes will simply reinforce what is already an extremely gendered issue. Female relatives are much more likely to become caregivers for their older adult relatives, and without more support or incentives for men to step into these roles, that is likely to continue under the filial statutes. This creates an even greater financial burden for women who are already likely to be at an economic disadvantage by making them financially responsible for the older adult relative. What’s more is that filial statutes fall into the extremely common trap of assuming that the older adults in question would choose their adult children as financial supports or caregivers, thereby denying them agency to make their own decisions. Filial statutes also continue the unfortunate trend of stigmatizing older adults as a burden that their relatives must be forced, by law, into caring for. Dayton agrees, noting that while such laws do not distinguish between male and female children and appear to be gender-neutral, in practice that is not the case. The “inevitable effect of such laws will be to discourage elderly persons from obtaining professional care – either in their homes or in a facility – due to the heavy financial burden this would impose on their families.”⁸⁸ The data shows that because women already assume a disproportionate share of care responsibilities, “imposing financial

⁸⁷ Kohn, 2014, p. 228

⁸⁸ A Feminist Approach to Elder Law, 2009, p. 51

responsibility on children does little more than shift additional responsibility to them, exacerbating these caregivers' long-term financial and personal vulnerability and, in many instances, compromising the quality of care provided to elders whose physical or cognitive impairments call for a level of care that cannot adequately be provided by non-professionals.”⁸⁹ Once again, this puts older adults in a no-win situation. Dayton asserts that the expansion of filial responsibility for long-term care is “not acceptable unless those women who will take on the bulk of the legal obligation to provide care are, at a minimum, accommodated in the workplace, as with tax credits, paid leaves, or other forms of compensation that will counterbalance the financial implications of what has traditionally been unpaid caregiving.”⁹⁰

While these statutes are not generally enforced in the US today⁹¹, it is possible that with the incoming administration, and the potential cuts to Medicare, Medicaid, and Social Security that these types of statutes would see a resurgence. In Pennsylvania, a “long dormant”⁹² filial statute has been brought back to life, and strengthened with language that more explicitly defines the financial obligations children may have to reimburse the state for expenses related to long term care for their parents.

A better alternative would involve incentivizing people, regardless of gender, to care for their older adult relatives if it makes sense for them to do so, in the way that best meets the needs of both caregivers and the cared-for. This could be accomplished through the FMLA by expanding and extending the situations or time limits in which the leave could be utilized. It could also come in the form of tax credits for caregivers. Less concretely, by working to ensure

⁸⁹ Dayton A. , 2009, p. 51

⁹⁰ A Feminist Approach to Elder Law, 2009, p. 51

⁹¹ Kohn, 2014, p. 228

⁹² Dayton A. , 2009, p. 51

that the ethics of care are enshrined in our society as a positive value regardless of gender, and by continuing the work of dismantling gender roles, we can slowly shape a society where caregiving is not seen as a gendered activity, but something necessary and valuable to our society as a whole. Further, by reframing our perspective of older adults from the ideas perpetuated by the language surrounding vulnerability, we can instead offer them increased agency and autonomy, and work with them, rather than dictate to them to set up systems that will best meet their needs.

Conclusion

As elder law as a practice area continues to grow along with the demographic expansion of older adults, the issues of elder abuse, Social Security reform, long-term care, and many others will need to grow as well. The gender disparity among older adults, along with the gendered implications that these and other areas of elder law have on women specifically must not go unaddressed as public policy is shaped in this area. Even laws that appear gender neutral, such as the manner in which Social Security benefits are calculated, for example, have far-reaching effects on the lives of women, and feed into a vicious cycle where women simply cannot get ahead. While there are no perfect solutions or magic bullets in any of these arenas, by applying feminist perspectives when thinking about, discussing, and ultimately crafting public policy in these areas (and many others), over time we can move toward a more equitable future for all older adults.

Beyond public policy, changing the way we view older adults will create a more healthy and vibrant society for everyone. By shifting the focus and our language from regarding older adults as a monolithic group that is comprised of the “elderly” or as “burdens” we can begin to view older adults as unique individuals with varied differences that can and should be celebrated.

When public policy makers and society as a whole begins to embrace and understand the ways in which our current systems and beliefs unfairly burden and oppress women, the poor, and minorities, we can begin to move forward into a more just society.

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