

# LGBT OLDER ADULTS, CHOSEN FAMILY, AND CAREGIVING

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## ABSTRACT

In the United States, informal elder care is principally the responsibility of younger relatives. Adult children perform the majority of elder care and non-relatives perform only 14 percent of care. Caregiving in the lesbian, gay, bisexual, and transgender, or LGBT, community follows a very different pattern that reflects the importance of “chosen family” in the lives of LGBT older adults. Instead of relying on relatives, LGBT older adults largely care for each other. Relatives provide only 11 percent of all elder care. This article explores the high level of caregiving by non-relatives in the LGBT community. It asks what motivates friends, neighbors, and community members to provide care for someone whom the law considers a legal stranger. It also asks what steps policy makers can take to facilitate and encourage this type of caregiving. Finally, it asks what lessons can be learned from LGBT older adults about the nature of both caregiving and community. As the aging population becomes more diverse, aging policies will have to become more inclusive to address the differing needs of various communities, including LGBT older adults. The potential lessons learned from the pattern of elder care in the LGBT community, however, extend far beyond a simple commitment to diversity.

KEYWORDS: LGBT, aging, caregiving, elder care

## INTRODUCTION

In the United States, an estimated 85 percent of all elder care is provided on an informal, that is, unpaid basis, mostly by younger relatives.<sup>1</sup> Valued at approximately \$522 billion annually, informal elder care is the mainstay of US aging policy.<sup>2</sup> As the baby boom generation ages, however, the relative number of available family caregivers will decrease significantly.<sup>3</sup> The result will be a serious gap in elder care that will strain family resources and social programs. When addressing this challenge, it is imperative to identify policies that support existing patterns of informal caregiving, but it is also important to ask the larger question of why individuals assume caregiving

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- 1 Susan C. Eaton, *Eldercare in the US: Inadequate, Inequitable, but Not a Lost Cause*, in WARM HANDS IN COLD AGE: GENDER AND AGING 38 (Nancy Folbre, Lois B. Shaw & Aneta Stark, eds., 2007). Informal elder care includes assistance with the “instrumental activities of daily living,” such as shopping and transportation, as well as more intimate personal care. See *infra* text accompanying notes 102–03.
  - 2 Amalavoyal V. Chari et al., *The Opportunity Costs of Informal Elder-Care in the United States: New Estimates from the American Time Use Survey*, 50 HEALTH RESEARCH SERVICES 871 (2015).
  - 3 Donald Redfoot et al., *The Aging of the Baby Boom and the Growing Care Gap: A Look at Future Declines in the Availability of Family Caregivers*, AARP PUBLIC POLICY INSTITUTE (Aug. 2013), [http://www.aarp.org/content/dam/aarp/research/public\\_policy\\_institute/lrc/2013/baby-boom-and-the-growing-care-gap-insight-AARP-ppi-lrc.pdf](http://www.aarp.org/content/dam/aarp/research/public_policy_institute/lrc/2013/baby-boom-and-the-growing-care-gap-insight-AARP-ppi-lrc.pdf).

responsibilities in the first place. By understanding these motivations, it may be possible to develop policies that will encourage others to take on the mantle of caregiver while expanding and strengthening the widely held values of community and fellowship.

Naomi Cahn and Amy Zietlow asked the larger question in their groundbreaking study of adult children who had provided care for their parents.<sup>4</sup> In “The Honor Commandment: Law, Religion, and the Challenge of Elder Care,” Cahn and Zietlow discuss the results of this study and make a number of valuable recommendations for policy reform.<sup>5</sup> Notably, they report that the honor commandment resonated strongly with the adult children they interviewed independent of any legal obligation to provide care.<sup>6</sup> Indeed, the intergenerational reciprocity at the heart of the honor commandment characterizes the vast majority of informal elder care in the United States.<sup>7</sup> More than 70 percent of all unpaid caregivers provide care for older relatives who are age fifty or older.<sup>8</sup> Adult children caring for their parents and parents-in-law represent more than one half of all informal elder care.<sup>9</sup> Accordingly, the lived experience of nearly 24 million Americans reflects the ethic that families should honor their elders.<sup>10</sup>

Caregiving within the lesbian, gay, bisexual, and transgender, or LGBT, community follows a very different pattern. LGBT older adults who are age fifty or older largely care for each other. Spouses, partners, and friends provide almost 90 percent of the care received by older LGBT adults, and adult children provide only 3 percent of the care.<sup>11</sup> To put this in perspective, spouses and partners in the LGBT community perform nearly five times as much care for individuals aged fifty and older as they do in the wider population, and friends and other non-relatives perform almost two and a half times as much care.<sup>12</sup> The increased caregiving by spouses and partners may not be surprising given that providing care to a spouse or partner embodies the bonds and promises inherent in a long-term romantic partnership.<sup>13</sup> LGBT older adults are also significantly less likely to have children than are their non-LGBT peers, meaning that fewer adult children are available to provide care.<sup>14</sup> However, the extent of caregiving provided by non-relatives in the LGBT community is

4 Amy Zietlow & Naomi Cahn, *The Honor Commandment: Law, Religion, and the Challenge of Elder Care*, 30 JOURNAL OF LAW AND RELIGION 229 (2015).

5 *Id.*

6 *Id.* at 231 (reporting “little knowledge of the secular law” on the part of the study participants).

7 *Id.* at 233 (explaining the commandment can apply to “any authority figure”).

8 *Caregivers of Older Adults: A Focused Look at Those Caring for Someone Age 50+*, NATIONAL ALLIANCE FOR CAREGIVING 9 (June 2015), [http://www.caregiving.org/wp-content/uploads/2015/05/2015\\_CaregivingintheUS\\_Care-Recipients-Over-50\\_WEB.pdf](http://www.caregiving.org/wp-content/uploads/2015/05/2015_CaregivingintheUS_Care-Recipients-Over-50_WEB.pdf). [hereinafter *Caregivers*].

9 *Id.*

10 This figure represents 70 percent of the estimated 34.2 million American adults who serve as an unpaid caregiver to someone age fifty or older. *Id.* at 1.

11 Karen I. Fredriksen-Goldsen et al., *The Aging and Health Report: Disparities and Resilience among Lesbian, Gay, Bisexual, and Transgender Older Adults* (2012), <http://depts.washington.edu/agepride/wordpress/wp-content/uploads/2012/10/Full-report10-25-12.pdf> [hereinafter Fredriksen-Goldsen, *The Report*]. As used in the article, the term “LGBT older adult” means someone age fifty or older.

12 *Id.* Fifty-four percent of LGBT individuals aged fifty or older who are receiving care are receiving care from their partners or spouses. *Id.* Thirty-four percent of LGBT individuals aged fifty or older who are receiving care are receiving care from friends or other nonrelatives. *Id.* In contrast, among the general population caregiving by spouses represents only 11 percent of all caregiving for adults aged fifty and older and caregiving by friends and non-relatives accounts for 14 percent of such caregiving. *Caregivers*, *supra* note 8, at 8.

13 See, e.g., THE BOOK OF COMMON PRAYER 423 (1979) (providing, as part of the marriage ceremony, a promise to love and care for each other “in sickness and in health”).

14 Fredriksen-Goldsen, *The Report*, *supra* note 11, at 12 (noting that 25 percent of LGBT older adults age fifty and older have children). In the general population, 86 percent of Americans aged forty-five and older have had

remarkable precisely because it exists outside the bonds of marriage or obligations of family. It is also largely performed by peers and, therefore, lacks the intergenerational imperative of the honor commandment.<sup>15</sup>

This article explores the high level of caregiving by non-relatives in the LGBT community.<sup>16</sup> It asks what motivates friends, neighbors, and community members to volunteer and provide care for someone whom the law considers a legal stranger. It also asks what steps policy makers can take to facilitate and encourage this type of caregiving.<sup>17</sup> Finally, it asks what lessons can be learned from LGBT older adults about the nature of both caregiving and community. Certain demographic and societal pressures have given rise to the distinctive pattern of elder care among LGBT older adults. The prevailing ethos of care emanates from a strong sense of shared identity and belonging. It reflects the importance of “chosen family” in the lives of LGBT older adults, who often rely primarily on friends for emotional, financial, and physical support. As the aging population becomes more diverse,<sup>18</sup> aging policies will have to become more inclusive to address the differing needs of various communities, including LGBT older adults. However, the potential lessons learned from the pattern of elder care in the LGBT community extend far beyond a simple commitment to diversity.

The first part of this article describes the current cohort of LGBT older adults, including the historical and demographic factors that have contributed to the emergence of chosen family. It also addresses the lingering effects of pre-Stonewall views on homosexuality and gender that make LGBT older adults less likely to access supportive services and increases the need for informal care.<sup>19</sup> The second part examines the emergence of chosen family as a building block of the LGBT community and discusses the current pattern of informal elder care among LGBT older adults. Part three addresses needed policy reforms, including broad-based nondiscrimination laws, increased recognition for chosen family, and cultural competency training. It also notes that advance planning remains the most important step that LGBT older adults can take to memorialize their wishes and protect their chosen family. The conclusion recognizes that the experience of aging will likely change for future generations of LGBT older adults who have been able to reap the benefits of marriage equality and greater social acceptance, but it suggests that the current pattern

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children. Frank Newport & Joy Wilke, *Desire for Children Still the Norm* (Sept. 24, 2013), <http://www.gallup.com/poll/164618/desire-children-norm.aspx>. For younger LGBT generations, the rate of childrearing is considerably higher than it is for LGBT older adults. Gary J. Gates, *LGBT Parenting in the United States* (Feb. 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>. For LGBT individuals under age fifty, 48 percent of lesbians and 20 percent of gay men are raising a child under the age of eighteen. *Id.* at 1.

15 *Id.* at 51 (“most LGBT older adults care for one another”).

16 *The Report* uses statistics from 2010. Fredriksen-Goldsen, *The Report*, *supra* note 11, at 57. Accordingly, the category described as “spouses and partners” was primarily composed of partners (that is, non-relatives) because same-sex marriage was recognized in only five states in 2010: Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont. *Maps of State Laws and Policies*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps) (last visited Sept. 29, 2015) [hereafter *Maps of State Laws*].

17 *The State of Aging in America 2013*, CENTERS FOR DISEASE CONTROL AND PREVENTION 11, available at [http://www.cdc.gov/features/agingandhealth/state\\_of\\_aging\\_and\\_health\\_in\\_america\\_2013.pdf](http://www.cdc.gov/features/agingandhealth/state_of_aging_and_health_in_america_2013.pdf) (last visited Sept. 29, 2015).

18 *Diversity*, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES: ADMINISTRATION ON AGING, [http://www.aoa.gov/AoA\\_programs/Tools\\_Resources/diversity.aspx#LGBT](http://www.aoa.gov/AoA_programs/Tools_Resources/diversity.aspx#LGBT) (last accessed Sept. 29, 2015) (“[O]lder minority population, aged 65+, is projected to increase by 217 percent, compared with 81 percent for older white population.”).

19 The term *Stonewall* refers to the Stonewall riots that began on June 27, 1969, when police raided a gay bar, the Stonewall Inn, in Greenwich Village. See generally MARTIN DUBERMAN, *STONEWALL 203-09 (1993)* (discussing history of Stonewall). The Stonewall riots are used to mark the beginning of the contemporary gay rights movement. ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION 30-31 (1996)*.

of elder care in the LGBT community may offer important insights that could help bridge the looming elder-care gap.

## LGBT OLDER ADULTS

The U.S. Administration on Aging estimates that there are between 1.75 and 4 million LGBT Americans who are aged sixty or older.<sup>20</sup> This number will increase significantly as the baby boom generations ages and the senior population more than doubles by 2060.<sup>21</sup> Today's LGBT older adults have exhibited great resilience. They are long-term survivors of homophobia and transphobia. They came of age at time when homosexuality was criminalized and gender variance was strictly policed.<sup>22</sup> Many of them were young adults during the period when homosexuality was pathologized as severe mental illness.<sup>23</sup> They created chosen family and community in the face of rejecting families and a hostile society.<sup>24</sup> They were on the vanguard of the contemporary LGBT rights movement.<sup>25</sup> These experiences, however, have also contributed to certain demographic patterns and behaviors that can compromise healthy aging. Although legal reforms and increased social acceptance will undoubtedly improve the aging experience for future generations of LGBT older adults, in many ways, the current generation of LGBT older adults continues to shoulder the weight of pre-Stonewall views on homosexuality and gender variance.

This section explains how these demographic factors and disparities influence informal elder care in the LGBT community. It also explores two related issues that impair the willingness of LGBT older adults to access aging services: the fear of encountering anti-LGBT bias and the pressure to conceal their LGBT identity.

### *Demographics and Disparities*

Studies have established that LGBT older adults are much more likely than their non-LGBT peers to be single and to live alone.<sup>26</sup> They are also much less likely to have

20 *Diversity*, *supra* note 18. The range in estimates reflects the difficulty in approximating the overall portion of the population who identify as LGBT. As noted earlier, this article uses the term "LGBT older adult" to mean an LGBT individual who is aged fifty or older. The use of age fifty as the dividing line is consistent with the age used in *The Report*, which is the source of the data on LGBT caregiving used in this article. Fredriksen-Goldsen, *The Report*, *supra* note 11.

21 *Aging Statistics*, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES: ADMINISTRATION ON AGING, [http://www.aoa.gov/Aging\\_Statistics/](http://www.aoa.gov/Aging_Statistics/) (last visited Sept. 29, 2015).

22 Homosexual acts were criminalized in some states until 2003. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (declaring Texas homosexual sodomy law unconstitutional).

23 Homosexuality was classified as a mental illness until 1973. RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1987) (describing the history of the deletion of homosexuality from the *Diagnostic and Statistical Manual III*).

24 KATH WESTON, *FAMILIES WE CHOOSE* 17 (1997) (explaining why LGBT families are "also called 'families we choose'").

25 See JAGOSE, *supra* note 19, at 30–43 (1996) (discussing birth of gay liberation movement).

26 Fifty-five percent of LGBT older adults live alone compared with 28 percent of the general older population. Fredriksen-Goldsen, *The Report*, *supra* note 11, at 13; *A Profile of Older Americans*, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES: ADMINISTRATION ON AGING, [http://www.aoa.gov/Aging\\_Statistics/Profile/2012/docs/2012profile.pdf](http://www.aoa.gov/Aging_Statistics/Profile/2012/docs/2012profile.pdf) (last visited Sept. 29, 2015). See also Brian de Vries & John A. Blando, *The Study of Gay and Lesbian Aging: Lessons for Social Gerontology*, in *GAY AND LESBIAN AGING: RESEARCH AND*

children.<sup>27</sup> It is common for LGBT older adults to be estranged from their family of origin, thus leaving many of them without family at least in the traditional sense.<sup>28</sup> These demographic factors place LGBT older adults at a disadvantage when attempting to navigate the aging process and increase their risk for social isolation and neglect.<sup>29</sup>

LGBT older adults also experience significant financial and health disparities that can impede healthy aging and exacerbate the need for informal caregiving. LGBT older adults report much higher rates of disability, with nearly one-half of all LGBT older adults aged fifty and older reporting a disability.<sup>30</sup> In the general population, this rate is comparable to the prevalence of disability among individuals seventy-five years of age and older.<sup>31</sup> LGBT older adults also experience high rates of chronic health conditions and report higher rates of mental stress than their non-LGBT peers.<sup>32</sup> For example, the rate of depression among LGBT older adults is more than four times that of the wider population.<sup>33</sup> They also report higher rates of loneliness, anxiety, and suicidal thoughts.<sup>34</sup> Nearly one in four LGBT older adults reports that he or she has seriously considered taking his or her own life.<sup>35</sup> In terms of financial security, Census data on same-sex partnered households shows that they lag behind different-sex married households on all major economic indicators.<sup>36</sup> Older female same-sex-partnered households are almost twice as likely to live below the poverty level as older different-sex-married households.<sup>37</sup>

Studies have also identified a number of points of resilience that may help LGBT older adults address some of these challenges. For example, an overwhelming majority of LGBT older adults report that they feel good about being part of the LGBT community.<sup>38</sup> They also regularly engage in wellness activities and moderate physical activity.<sup>39</sup> Close to one in four LGBT older adults

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FUTURE DIRECTIONS 3, 7 (Gilbert Herdt & Brian de Vries eds., 2004) (describing how gay men and lesbians are more likely to be single).

27 Fredriksen-Goldsen, *The Report*, *supra* note 11, at 3; *see also supra* note 14 (comparing percentage of LGBT older adults with children to both the general population and to LGBT younger adults under age fifty).

28 See Judith C. Barker, *Lesbian Aging: An Agenda for Social Research*, in GAY AND LESBIAN AGING, *supra* note 26, at 61–62. Estrangement is a natural consequence of pre-Stonewall views and beliefs.

29 Jaime M. Grant et al., NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, OUTING AGE 2010: PUBLIC POLICY ISSUES AFFECTING LESBIAN, GAY, BISEXUAL AND TRANSGENDER ELDERS 91–92 (2010), available at [http://www.thetaskforce.org/downloads/reports/reports/outingage\\_final.pdf](http://www.thetaskforce.org/downloads/reports/reports/outingage_final.pdf) (explaining that isolation occurs when a person cannot access needed social and medical support services).

30 Fredriksen-Goldsen, *The Report*, *supra* note 11, at 22 (noting that 47 percent of LGBT older adults report a disability).

31 2012 *Disability Status Report*, EMPLOYMENT & DISABILITY INSTITUTE 21 (2014), available at [http://www.disabilitystatistics.org/StatusReports/2012-PDF/2012-StatusReport\\_US.pdf](http://www.disabilitystatistics.org/StatusReports/2012-PDF/2012-StatusReport_US.pdf).

32 Fredriksen-Goldsen, *The Report*, *supra* note 11, at 26.

33 *Id.* (reporting 31 percent of LGBT older adults); *The State of Mental Health and Aging in America*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2008), available at [http://www.cdc.gov/aging/pdf/mental\\_health.pdf](http://www.cdc.gov/aging/pdf/mental_health.pdf) (reporting 7.7 percent of all older adults).

34 Fredriksen-Goldsen, *The Report*, *supra* note 11, at 26–27.

35 *Id.*

36 Randy Albelda et al., *Poverty in the Lesbian, Gay, and Bisexual Community*, WILLIAMS INSTITUTE at ii (2009), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf> (detailing economic factors).

37 *Id.*

38 Fredriksen-Goldsen, *The Report*, *supra* note 11, at 16 (reporting 89 percent of LGBT older adults).

39 *Id.* at 34 (reporting 91 percent and 82 percent respectively).

attends religious services or spiritual activities on a regular basis.<sup>40</sup> LGBT older adults are also more likely than their non-LGBT peers to have engaged in advanced planning by executing legal documents, such as wills and durable powers of attorney.<sup>41</sup>

### *Anti-LGBT Bias*

Over the course of their lives, LGBT older adults have experienced an alarmingly high incidence of victimization and discrimination.<sup>42</sup> More than eight out of ten LGBT older adults report at least one incident of victimization, and more than half report being discriminated against in employment or housing on account of their sexual orientation or gender identity.<sup>43</sup> Given this history, it is not surprising that LGBT older adults frequently express concern that they will encounter anti-LGBT bias in the areas of housing, health care, and aging services.<sup>44</sup> According to a large nationwide survey, the number one priority for LGBT older adults is to increase the availability of LGBT-friendly senior housing where they will not have to hide their LGBT identities.<sup>45</sup>

The concern over encountering anti-LGBT bias increases the demand for informal caregiving because LGBT older adults will go to great lengths to avoid entering senior housing and are often determined to “age in place” at all costs.<sup>46</sup> They are also less likely to access supportive services designed to assist individuals who are aging in place, such as home health aides.<sup>47</sup> Understandably, they do not relish the idea of potentially inviting a bigot into their home, especially when they may be at their most vulnerable.

Studies suggest that the fear expressed by LGBT older adults is not misplaced. In the aging and health care context, LGBT older adults have reported incidents of anti-LGBT bias at the hands of service providers that range from simple ignorance to outright hostility and violence.<sup>48</sup> Health care providers sometimes fail to respect partners or other chosen family and instead defer to the wishes of next of kin.<sup>49</sup> LGBT older adults have reported incidents in which facilities have separated partners.<sup>50</sup> Long-term care facilities have required transgender residents to wear gender-inappropriate

40 *Id.* at 17 (reporting 38 percent). The rate is comparable to that of the general population. Frank Newport, *In U.S., Four in 10 Report Attending Church in Last Week*, GALLUP (Dec. 23, 2013), <http://www.gallup.com/poll/166613/four-report-attending-church-last-week.aspx>.

41 More than two-thirds of LGBT older adults have a will and nearly as many indicate that they have a durable power of attorney. Fredriksen-Goldsen, *The Report*, *supra* note 11, at 39 (70 percent of LGBT older adults have a will and 64 percent have a durable power of attorney); *Where There Is a Will ... Legal Documents Among the 50+ Generation: Findings From an AARP Survey*, AARP RESEARCH GROUP (April 2000), <http://assets.aarp.org/rgcenter/econ/will.pdf> (reporting that 60 percent of people fifty years of age and older have a will and 45 percent have a durable power of attorney).

42 Fredriksen-Goldsen, *The Report*, *supra* note 11, at 19.

43 *Id.* at 19 (stating that 82 percent report victimization).

44 Jonathan Starkey, *Out of Isolation: Advocacy Group Assists Long Island Gays and Lesbians Who Grew Up in Less Accepting Times*, NEWSDAY, Feb. 1, 2008, at B6.

45 Fredriksen-Goldsen, *The Report*, *supra* note 11, at 38.

46 The Centers for Disease Control and Prevention defines “aging in place” as “the ability to live in one’s own home and community safely, independently, and comfortably, regardless of age, income, or ability level.” *Healthy Places Terminology*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/healthyplaces/terminology.htm> (last visited Sept. 29, 2015).

47 Fredriksen-Goldsen, *The Report*, *supra* note 11, at 38.

48 NATIONAL SENIOR CITIZENS LAW CENTER, *LGBT OLDER ADULTS IN LONG-TERM CARE FACILITIES: STORIES FROM THE FIELD 11* (2011), [http://www.lgbtagingcenter.org/resources/pdfs/NSCLC\\_LGBT\\_report.pdf](http://www.lgbtagingcenter.org/resources/pdfs/NSCLC_LGBT_report.pdf).

49 *Id.* at 9.

50 *Id.*

clothing, and staff members have persisted in addressing transgender residents by the wrong name and incorrect pronouns.<sup>51</sup> LGBT older adults report that some health care workers refuse to provide intimate care, openly expressing distaste over having to touch an LGBT person.<sup>52</sup> Religiously motivated workers have been known to harangue LGBT elders who are in their care and urge them to repent before it is too late.<sup>53</sup> Non-LGBT residents represent another source of anti-LGBT bias and sometimes engage in shunning and bullying behaviors.<sup>54</sup>

In a 2007 article, the *New York Times* reported a particularly egregious practice where long-term care facilities will move residents who are perceived to be LGBT to secure “memory” or dementia wards in response to complaints from other residents or their families.<sup>55</sup> The article reported an instance where an older gay man was wrongfully confined to a dementia ward and eventually committed suicide.<sup>56</sup> The following year, Sonoma County, California, used a secure “memory” ward to separate long-time partners Harold Scull aged eighty-eight and Clay Greene aged seventy-six.<sup>57</sup> Although Scull and Greene were not registered domestic partners under California law, they had taken steps to secure their relationship by executing reciprocal wills and durable powers of attorney—documents that the county allegedly disregarded.<sup>58</sup>

The long-time partners came to the attention of the county when Greene called 911 after Scull fell on the front porch steps of their home.<sup>59</sup> The emergency medical team that responded immediately took both men into care and separated them, citing neglect and possible abuse.<sup>60</sup> Without the necessary medical screening and against his will, Greene was placed in a secure facility for individuals with dementia.<sup>61</sup> Scull died alone four months later.<sup>62</sup> Greene continued to be held in the secure facility until early 2009, when his court-appointed attorney was finally able to secure his release.<sup>63</sup> In 2010 Sonoma County settled a suit brought by Scull’s estate and Greene that had claimed the county’s actions were motivated by antigay bias.<sup>64</sup> According to his attorney, Greene remains worried that county workers will come to his home and harm him.<sup>65</sup>

51 *Id.* at 12–13.

52 *Id.* at 13–15.

53 *Id.* at 11.

54 See Jane Gross, *Aging and Gay, and Facing Prejudice in Twilight*, *NEW YORK TIMES*, Oct. 9, 2007, at A1.

55 *Id.*

56 *Id.*

57 Gerry Shih, *Suit Charges Elderly Gay Partners Were Forced Apart*, *NEW YORK TIMES*, Apr. 20, 2010, <http://bayarea.blogs.nytimes.com/2010/04/20/suit-charges-elderly-gay-couple-was-forced-apart/>.

58 *Id.*

59 Lois Pearlman, *No Reason to Separate Gay Couple, Friend Says*, *BAY AREA REPORTER*, Apr. 29, 2010, <http://www.ebar.com/news/article.php?sec=news&article=4748>.

60 Paul Payne, *Gay Rights Lawsuit Includes Evidence of Domestic Violence*, *PRESS DEMOCRAT*, Apr. 21, 2010, available at <http://www.pressdemocrat.com/csp/mediapool/sites/PressDemocrat/News/story.csp?cid=2246354&sid=555&fid=181>.

61 Mac McClelland, *Plot Thickens in Sonoma Discrimination Case*, *MOTHER JONES*, Apr. 29, 2010, available at <http://www.motherjones.com/rights-stuff/2010/04/plot-thickens-sonoma-discrimination-case>.

62 Pearlman, *supra* note 59.

63 First Amended Complaint, *Green v. County of Sonoma*, 11–12 (Cal. App. Dep’t Super. Ct. Mar. 22, 2010) (No. SPR-81815), available at [http://lizditz.typepad.com/files/greene\\_v\\_sonoma\\_county.pdf](http://lizditz.typepad.com/files/greene_v_sonoma_county.pdf).

64 Bob Egelko, *Suit by Elderly Gay Couple to Be Settled*, *SAN FRANCISCO CHRONICLE*, July 25, 2010, at C2.

65 See Scott James, *An Unlikely Plaintiff. At Issue? He Dares Not Speak Its Name*, *NEW YORK TIMES*, May 7, 2010, at A19.

### *The Costs of Concealment*

When many members of the current generation of LGBT older adults were growing up, there was no concept of “coming out” to family and friends because disclosure could result in involuntary institutionalization.<sup>66</sup> Concealing one’s identity—being “closeted”—was simply a way of life, a matter of survival.<sup>67</sup> As one researcher observed, today’s LGBT older adults are “the last generation to have lived their adolescence and young adulthood in hiding.”<sup>68</sup> Even with the increasing social and legal acceptance of LGBT individuals, some LGBT older adults have never chosen to be “out” and have remained closeted about their LGBT identity to all but a few close friends.<sup>69</sup> Other LGBT older adults, especially those who are members of the baby boom generation, have lived openly but now report a strong pressure to “re-closet” as they age.<sup>70</sup> Reflecting on his future, one openly gay man explained, “as strong as I am today . . . when I am in front of the gate of the nursing home, the closet door is going to slam shut behind me.”<sup>71</sup>

Today, relatively few LGBT older adults are completely closeted. In a large nationwide study, more than nine out of ten LGBT older adults responded that they were open about their identity to at least one close friend.<sup>72</sup> However, large percentages of LGBT older adults still report that they are closeted in other aspects of their lives. For example, only slightly more than one-half of the respondents reported that they had been out to their father.<sup>73</sup> In the wider community, almost one-third were closeted in their last job, one-third are not out to any of their neighbors, and over one-quarter are not out in their faith communities.<sup>74</sup> Over one-fifth of LGBT older adults are not out to their primary care physician.<sup>75</sup> For transgender elders, concealment is not always an option in the aging and health care context because the majority of transgender individuals have not had gender-conforming surgery.<sup>76</sup> As a result, a transgender older adult’s physical characteristics may not be consistent with his or her gender identity and performance, thereby making the older adult vulnerable to the prejudice and hostility of personal health aides and other medical personnel.<sup>77</sup>

Being closeted exacts an emotional and a physical toll on LGBT older adults. It can make them less likely to access senior services and may compromise their medical care when they are not forthcoming with medical providers.<sup>78</sup> Some LGBT older adults in long-term care facilities report that they will refer to their partner as a sibling or a “best friend” and create an alternate set of memories to share with non-LGBT residents and service providers.<sup>79</sup> As the chief of geriatric psychiatry at a New York City hospital explained, closeted LGBT elders face “a faster pathway to depression,

66 WESTON, *supra* note 24, at 44 (noting possibility of medical intervention).

67 FUNDERS FOR LESBIAN & GAY ISSUES, *AGING IN EQUITY: LGBT ELDERS IN AMERICA 5* (2004), available at <http://www.lgbtfunders.org/files/AgingInEquity.pdf> (“[P]assing’ as heterosexual has been a lifelong survival strategy.”).

68 SKI HUNTER, *MIDLIFE AND OLDER LGBT ADULTS: KNOWLEDGE AND AFFIRMATIVE PRACTICES FOR THE SOCIAL SERVICES*, 13–14 (2005).

69 Fredriksen-Goldsen, *The Report*, *supra* note 11, at 15 (reporting 92 percent out to a close friend).

70 Gabriel Arana, *When I’m Old and Gay*, *THE AMERICAN PROSPECT*, Aug. 22, 2013, available at <http://prospect.org/article/when-im-old-and-gay>.

71 Gross, *supra* note 54 (quoting LGBT older adult).

72 Fredriksen-Goldsen, *The Report*, *supra* note 11, at 15.

73 *Id.* (reporting 54 percent).

74 *Id.* (reporting 31 percent, 33 percent, and 27 percent, respectively).

75 *Id.* (reporting 21 percent).

76 Loree Cook-Daniels, *Trans Aging*, in *LESBIAN, GAY, BISEXUAL AND TRANSGENDER AGING* 20, 27–28 (Douglas Kimmel et al. eds., 2006).

77 See *supra* text accompanying notes 48–53.

78 Fredriksen-Goldsen, *The Report*, *supra* note 11, at 15.

79 Gross, *supra* note 54.



failure to thrive and even premature death” because “there is something special about having to hide this part of your identity at a time when your entire identity is threatened.”<sup>80</sup>

CHOSEN FAMILY AND CAREGIVING

In the general population, informal elder care is principally the responsibility of younger relatives and a disproportionate amount of the care is provided by adult daughters.<sup>81</sup> Non-relatives perform only 14 percent of all elder care.<sup>82</sup> In the LGBT community, however, the allocation of elder care is reversed. Relatives provide only 11 percent of all care.<sup>83</sup> Instead, spouses, partners, and friends shoulder most of the responsibility for elder care.<sup>84</sup> Caregiving obligations are frequently mutual and overlapping.<sup>85</sup> More than four out of ten LGBT older adults who are receiving care are also caregivers themselves.<sup>86</sup> In other words, LGBT older adults largely care for each other.

This section explores the current pattern of elder care in the LGBT community and the importance of chosen family in the lives of the current generation of LGBT older adults.<sup>87</sup> In a nationwide survey of LGBT older adults aged forty-five to sixty-four, nearly two-thirds reported that they had a “chosen family,” which the survey defined as “a group of people to whom you are emotionally close and consider ‘family’ even though you are not biologically or legally related.”<sup>88</sup>

*Chosen Family*

The concept of chosen family has historically played a central role in the LGBT community.<sup>89</sup> As discussed in the prior section, many LGBT older adults are estranged from their families of origin, and they are much less likely to have children than their non-LGBT peers.<sup>90</sup> Until very recently, same-sex couples were not permitted to marry, leaving LGBT individuals uniquely without family, at least in a traditional sense.<sup>91</sup> In her influential book *Families We Choose*, the anthropologist Kath Weston explains,

80 *Id.*

81 *Caregivers*, *supra* note 8, at 1, 10. For more on the burden of caregiving for adult daughters, see M. Christian Green’s article, “‘Graceful Pillars’: Law, Religion, and the Ethics of the ‘Daughter Track,’” in this symposium issue.

82 *Id.* at 1.

83 Fredriksen-Goldsen, *The Report*, *supra* note 11, at 46.

84 *Id.*

85 *Id.* at 47.

86 *Id.*

87 Douglas C. Kimmel, *Issues to Consider in Studies of Midlife and Older Sexual Minorities*, in *GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS* 268 (Gilbert Herdt & Brian de Vries eds., 2004) (defining chosen family as “groups of friends who function as if they were kin” and who “provide more support, in many cases, than the individual’s biological or legal ‘family’”).

88 STILL OUT, STILL AGING: THE METLIFE STUDY OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER BABY BOOMERS, METLIFE 16 (Mar. 2010), available at <https://www.metlife.com/assets/cao/mmi/publications/studies/2010/mmi-still-out-still-aging.pdf> [hereinafter METLIFE] (reporting 64 percent).

89 WESTON, *supra* note 24.

90 See *supra* note 27.

91 *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

Looking backward and forward across the life cycle, people who equated their adoption of a lesbian or gay identity with renunciation of family did so in the double sided sense of fearing rejection by the families in which they had grown up, and not expecting to marry or have children as adults.<sup>92</sup>

Chosen family represented a creative alternative to the traditional multigenerational family formed through marriage, biology, or adoption. It was a way to build community and provide support and solidarity in the face of a hostile society. A chosen family assumed the supportive functions of a family by providing a sense of belonging, strength, and solidarity.<sup>93</sup> Unlike a traditional family, however, the members of a chosen family tend to be of the same generation and often include former partners.<sup>94</sup> Accordingly, chosen families are uniquely a gathering of brothers and sisters without children or parents.<sup>95</sup>

Studies show that LGBT older adults rely on “close friends” or chosen family much more than do their non-LGBT peers for emotional, financial, and physical support.<sup>96</sup> The ability to build such strong relationships is another example of the resilience of LGBT older adults. Chosen family structures, however, have some inherent limitations, both in terms of their composition and legal standing. The single-generational character of most chosen families means that the “brothers” and “sisters” will all age in unison, giving rise to multiple and simultaneous care needs. Moreover, there will come a time when a chosen family is so depleted that it will no longer be able to provide support for its remaining members.<sup>97</sup> The natural depletion of a chosen family can place an LGBT older adult at an increased risk for social isolation and neglect, resulting in what gerontologists refer to as an “unbefriended elder.”<sup>98</sup>

Chosen family also lacks legal recognition. The default rules governing substituted decision making, guardianship, and inheritance still privilege the interests of relatives defined by blood, marriage, or adoption. Marriage equality has made it possible for LGBT older adults to marry their partners, but it does not in any way alter their legal relationship with other members of a chosen family. As explained in the section that follows, in the absence of advance planning documents, it remains likely that chosen family will be considered mere legal strangers without legal standing to consent to or refuse medical treatment or make other decisions on behalf of their chosen family member.

Despite the significance of marriage equality, it is important to recognize that marriage equality does not address the legal fragility of chosen families or many of the other key concerns facing LGBT older adults, such as the need for comprehensive antidiscrimination protections and cultural competency training in the health- and senior-care contexts. It also remains to be seen how many LGBT older adults will choose to marry. As noted earlier, LGBT older adults are more likely to not have a partner than their non-LGBT peers, meaning that fewer of them are in a position to get married.<sup>99</sup> For those LGBT older adults who are partnered, there are also financial as well as

92 WESTON, *supra* note 24, at 25.

93 *Id.*

94 *Id.* at 111. See also Fredriksen-Goldsen, *The Report*, *supra* note 11, at 48.

95 WESTON, *supra* note 24, at 117.

96 METLIFE, *supra* note 88, at 16.

97 The first wave of the AIDS/HIV pandemic hit the current generation of LGBT older adults especially hard. As a result, some gay men have already experienced multiple losses of partners and members of their chosen families.

98 Paula Span, *Near the End, It Is Best To Be “Friended,”* NEW YORK TIMES, Sept. 25, 2015, <http://www.nytimes.com/2015/09/29/health/near-the-end-its-best-to-be-friended.html>.

99 See *supra* note 25 (discussing that LGBT older adults are more likely to be single).

ideological reasons that they may choose not to take advantage of nation-wide marriage equality.<sup>100</sup> It is also possible that marriage equality will further marginalize same-sex couple who choose not marry and reduce the availability of non-marital forms of recognition for same-sex couples, such as domestic partner benefits.<sup>101</sup>

*Caregiving*

U.S. aging policy is based on the assumption that the majority of caregiving will be performed on an informal, that is, unpaid, basis, mostly by younger relatives. Informal caregiving is a critical component of aging policy because it allows the care recipient to remain in the community and age “in place,” thereby serving as an alternative to a long-term care facility or other institutional setting. Caregiving assistance runs the gamut from the mundane to the highly intimate. It includes help with “instrumental activities of daily life,” such as transportation, grocery shopping, and housekeeping.<sup>102</sup> It may also include help with “activities of daily life,” such as bathing, dressing, and toileting.<sup>103</sup> In the population at large, nearly one in seven adults is providing informal care to an individual aged fifty and older.<sup>104</sup> Eighty-six percent of this care is performed by relatives, most of whom are younger than the care recipient.<sup>105</sup> Adult children perform the lion’s share of elder care, followed by spouses, and then by other relatives.<sup>106</sup> Not surprisingly, women provide a disproportionate amount of caregiving: 60 percent as opposed to 40 percent performed by men.<sup>107</sup>

In the LGBT community, however, the elder-care pattern is very different. When LGBT older adults are asked whom they would rely on for caregiving, they list partners first, followed by friends, followed by relatives.<sup>108</sup> The statistics on caregiving reflect these preferences. Spouses and partners provide more than half of the caregiving to LGBT older adults.<sup>109</sup> Friends and other non-relatives provide over one-third of the care.<sup>110</sup> Adult children, in contrast, provide only 3 percent of elder care within the LGBT community.<sup>111</sup> Although LGBT older adults are less likely to have children and those who do have children may be estranged, the same study

100 See, e.g., Nancy J. Knauer, *LGBT Elders in a Post-Windsor World: The Promise and Limits of Marriage Equality*, 24 TEXAS JOURNAL OF WOMEN GENDER & LAW 1, 42 (2014). In addition, it is possible that the existence of marriage equality may further marginalize same-sex couples who choose not to marry. *Id.* at 60. It may also reduce the legal recognition for nonmarital partnerships. *Id.*

101 *Id.*

102 *Long-Term Care for the Functionally Dependent Elderly*, CENTERS FOR DISEASE CONTROL AND PREVENTION 1 (Sept. 1990), [http://www.cdc.gov/nchs/data/series/sr\\_13/sr13\\_104.pdf](http://www.cdc.gov/nchs/data/series/sr_13/sr13_104.pdf).

103 *Caregivers*, *supra* note 8, at 2.

104 *Id.* at 4 (reporting that 14.3 percent of all adults in the United States have provided care to a person aged fifty or older in the last twelve months). Kim Parker and Eileen Patten, *The Sandwich Generation: Rising Financial Burdens for Middle-Aged Americans*, PEW RESEARCH CENTER (Jan. 30, 2013), <http://www.pewsocialtrends.org/2013/01/30/the-sandwich-generation/>.

105 *Caregivers*, *supra* note 8, at 1.

106 *Id.* at 8.

107 *Id.* at 4.

108 Anna Muraco & Karen Fredriksen-Goldsen, “*That’s What Friends Do*”: *Informal Caregiving for Chronically Ill Midlife and Older Lesbian, Gay, and Bisexual Adults*, 28 JOURNAL OF PERSONAL AND SOCIAL RELATIONSHIPS 1073, 1075–76 (2011).

109 Fredriksen-Goldsen, *The Report*, *supra* note 11, at 46 (reporting 54 percent). *The Report* does not differentiate between spouses and partners. *Id.*

110 *Id.* (reporting 34 percent).

111 *Id.*

reported that one-quarter of the respondents had children.<sup>112</sup> Accordingly, it is not clear what accounts for the low level of caregiving by adult children of LGBT parents. In another apparent disparity, only one in nine LGBT older adults receive care from relatives, but of those LGBT older adults who provide elder care one in four is providing care to a relative, most often a parent.<sup>113</sup>

One of the most striking characteristics of elder care within the LGBT community is its mutuality. Two out of five LGBT older adults who are receiving care are also providing care.<sup>114</sup> A similar number of the LGBT older adults providing care reported that the person they were helping was also the person whom they would turn to if they needed assistance.<sup>115</sup> In addition, the rate of caregiving among LGBT older adults is much higher than the general population, with more than one in four LGBT older adults serving as a caregiver.<sup>116</sup> Also, gender differences are not as pronounced. Women are only slightly more likely than men to provide care.<sup>117</sup>

It is not necessarily surprising to see such a high rate of caregiving by spouses and partners, even though it differs markedly from the wider population, where spouses provide only 11 percent of the care.<sup>118</sup> Caregiving is an implicit expectation in a long-term romantic relationship and an explicit part of many marriage vows.<sup>119</sup> Spouse or partner caregiving could also be more common in the LGBT community due to the relative absence of gender difference that arguably gives rise to more egalitarian relationships.<sup>120</sup> Given the lack of adult children, spouses could be under greater pressure to provide caregiving because they cannot rely on younger, and presumably more able, adult children or grandchildren.

The high rate of non-relative caregiving is more difficult to explain and requires an understanding of the historical importance of chosen family within the LGBT community. General friendship norms of emotional support and reciprocity do not necessarily translate into regular caregiving assistance that includes providing material as well as physical support. Studies focused on non-relative caregiving in the general population have found that caregiving by friends tends to be of short duration and is generally intended to supplement regular care being provided by relatives.<sup>121</sup> This is not the case in the LGBT community. Far from being supplemental, many LGBT older adults receive support only from non-relatives and the care provided is often of extended duration.<sup>122</sup> Studies on caregiving among LGBT older adults reveal that the friends who perform caregiving are often identified as “chosen family.”<sup>123</sup> These friends who are also chosen family consider

112 *Id.* at 12.

113 *Id.* at 46 (reporting 16 percent are providing care to parents). With respect to LGBT older adults who are providing care, 8 percent are providing care to relatives. *Id.* Sixteen percent are providing care to a parent or parent-in-law. *Id.* Accordingly, one in six LGBT older adults who are providing care are providing care for their parents or parents-in-law, but only a handful are receiving care from adult children. *Id.*

114 *Id.* at 47 (reporting 41 percent).

115 *Id.* at 46 (reporting 44 percent).

116 *Id.* at 45 (reporting 27 percent). In contrast, approximately one in seven adults in the general population is providing care to a person aged fifty or older. *See Caregiving supra* note 8, at 4 (reporting rate of caregiving at 14.3 percent).

117 *Id.* at 4 (reporting 30 percent for women and 26 percent for men); *see also* Muraco & Fredriksen-Goldsen, *supra* note 108, at 1088.

118 *Caregivers, supra* note 8, at 8.

119 *See, e.g.,* THE BOOK OF COMMON PRAYER 423 (1979) (“Will you love [him/her], comfort [him/her], honor and keep [him/her], in sickness and in health . . . ?”).

120 Muraco & Fredriksen-Goldsen, *supra* note 108, at 1076 (discussing gender roles).

121 *Id.* at 1074.

122 *Id.* at 1087.

123 *Id.* at 1083.

caregiving “to be a natural part of friendship and not an extraordinary act.”<sup>124</sup> Both caregivers and the care recipients report that they benefit from the relationship,<sup>125</sup> and in one study the majority of caregivers undertook the care without being asked by the care recipient.<sup>126</sup> Accordingly, caregiving among friends may not be typical, but caregiving among “friends as family” seems to be what binds the “families we choose.”<sup>127</sup>

*Building Community*

Researchers who have studied the patterns of caregiving among LGBT older adults have generally sidestepped the question of why there is such a high level of mutual caregiving performed by non-relatives—chosen family. The obvious answer would seem to be expediency. LGBT older adults may have little choice but to rely on partners and chosen family because they are often estranged from their families of origin, reluctant to access aging services, and without adult children.<sup>128</sup> Although this may explain why LGBT older adults turn to chosen family for support, it does not explain why chosen family members take on the responsibility of caregiving.<sup>129</sup> It is not dictated by general friendship norms. There are no strong religious or moral imperatives, comparable to the honor commandment, that direct friends to care for one another.<sup>130</sup> Chosen family members certainly have no legal responsibility to provide care: there are no filial support laws lurking to snare a best friend.

Some researchers have analyzed the behavior of LGBT caregiving “dyads” on the individual level through the lens of social capital theory<sup>131</sup> and communal exchange theory<sup>132</sup> to explain the mutual and overlapping obligations of care. In both instances, however, the theories are largely descriptive. They do not incorporate the social and historic context that gave rise to the chosen family structure nor do they adequately explain the origin of the shared caregiving norm. Other researchers who have focused on community norms have suggested that the high level of informal elder care within the LGBT community is the result of a “culture of care” that began in the 1980s during the early years of the HIV/AIDS pandemic, when the LGBT community mobilized to provide informal care and services in the face of governmental indifference and societal condemnation.<sup>133</sup> One study on HIV/AIDS caregiving during this period found that 80 percent of the caregivers were identified as “friends” by the care recipients.<sup>134</sup>

124 *Id.* at 1082.

125 *Id.* at 1083 (quoting a non-relative caregiver for an LGBT older adult: “[T]hat’s what friends do. I know I’m doing the right thing and I feel good about it.”).

126 *Id.* at 1087.

127 WESTON, *supra* note 24.

128 Anna Muraco & Karen Fredriksen-Goldsen, *The Highs and Lows of Caregiving for Chronically Ill Lesbian, Gay, and Bisexual Elders*, 57 JOURNAL OF GERONTOLOGICAL SOCIAL WORK 251, 253 (2013).

129 Muraco & Fredriksen-Goldsen, *supra* note 108, at 1086–7 (discussing that friendship norms do not fully explain why individuals undertake caregiving).

130 See generally JEFFREY WATTLES, THE GOLDEN RULE 4 (1996) (exploring different formulations of the rule across religions and cultures).

131 Elena A. Eroshval et al., *Social Networks of Lesbian, Gay, Bisexual, and Transgender Older Adults*, RESEARCH ON AGING 1, 3 (2015).

132 Muraco & Fredriksen-Goldsen, *supra* note 128, at 254 (describing communal relations theory).

133 Muraco & Fredriksen-Goldsen, *supra* note 108, at 1088 (“The legacy of AIDS caregiving may have shaped social norms in LGB circles such that there is a culture of care for community members, which lasts through middle and older adulthood.”).

134 *Id.* at 1076.

Even the “culture of care” explanation, however, does not explain how or why the ethos of care arose in the first place. Studies consistently show that gay men and lesbians express a willingness to perform care within their communities, which extends their obligations beyond the bounds of their chosen family.<sup>135</sup> During the early part of the HIV/AIDS pandemic, LGBT individuals certainly provided care within their chosen families, but many members of the community also volunteered to provide care for strangers.<sup>136</sup> These volunteers (that is, non-relative caregivers) were not working through a “personification of friendship and chosen family.”<sup>137</sup> They were the embodiment of community—a fellowship of shared experiences, values, and goals.

LGBT chosen families are the building blocks of this community.<sup>138</sup> Serving as a caregiver for chosen family may indeed be the “personification of friendship and chosen family,” but it is also an act of shared identity and solidarity with the larger LGBT community. Studies show that caregivers who are providing care for community members consider it to be a sign of strength and commitment.<sup>139</sup> Perhaps the strength of chosen family or community caregiving is the empathy that flows from the fellowship of shared experiences, values, and goals.<sup>140</sup> Through elder care, chosen families continue to help minimize minority stress and provide a buffer against anti-LGBT bias as their members age. Most importantly, informal elder care allows LGBT older adults to age in the community where they can remain true to themselves and among family.

## SUPPORTING LGBT CAREGIVING

The high level of informal caregiving among LGBT older adults stands out as an example of their resilience, as well as a testament to their sense of community. This section recommends ways to support LGBT elder care through legal reforms, expanded services and cultural competency training, and individual advance planning.

### *Legal Reforms*

As noted earlier, for good reason, LGBT older adults fear encountering anti-LGBT bias in senior-specific settings, such as housing and health care. This fear makes LGBT older adults less likely to access important supportive services and places a greater burden on informal elder care providers.<sup>141</sup> It also causes them to conceal their LGBT identity, which can compromise care and result in increased emotional and physical stress.<sup>142</sup> The first step to supporting LGBT caregiving is to

135 *Id.* (“Most studies show that gay men and lesbians are particularly willing to provide caregiving support within their own communities.”).

136 *Id.*

137 *Id.* at 1089.

138 WESTON, *supra* note 24, at 27.

139 Muraco & Fredriksen-Goldsen, *supra* note 108, at 1076 (“reinforces a community identity that preserves a sense of political and social solidarity”).

140 Despite all the limitations of chosen families, the percentage of LGBT older adults who experience neglect is smaller than the national average. Fredriksen-Goldsen, *The Report*, *supra* note 11, at 28 (reporting 3 percent of LGBT older adults). Ron Acierno et al., *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, 100 AMERICAN JOURNAL OF PUBLIC HEALTH 292 (2010) (reporting 5.1 percent of the general population).

141 Fredriksen-Goldsen, *The Report*, *supra* note 11, at 38.

142 See *supra* text accompanying notes 78–80 (discussing costs of concealment).

enact broad non-discrimination laws to protect LGBT older adults in housing, medical care, and the provision of senior services. Federal nondiscrimination laws do not include protections based on sexual orientation or gender identity nor do the majority of state laws.<sup>143</sup> The newly introduced federal Equality Act would amend the Civil Rights Act of 1964 and the Fair Housing Act of 1968 to include sexual orientation and gender identity as protected classes.<sup>144</sup> Similar bills should be enacted on the state level.

With respect to legislative reforms specific to LGBT older adults, it is also important to amend the Older American's Act to ensure that LGBT older adults and elders receive equal access to senior services and resources.<sup>145</sup> The amendment could prohibit discrimination on account of sexual orientation and gender identity and require LGBT-specific services, training, and research.<sup>146</sup> California is the only state with special legislation designed to protect LGBT older adults.<sup>147</sup> There are numerous opportunities on both the state and local level to address concerns of LGBT older adults with respect to health care, senior services, and housing through licensing and regulations.

The lack of legal standing for chosen family also disadvantages LGBT older adults. Many of the most hard-fought struggles in the LGBT rights movement have been dedicated to securing legal recognition for chosen family. LGBT advocates have worked tirelessly to ensure legal recognition for same-sex relationships and access to second-parent adoptions for non-biological parents.<sup>148</sup> Thanks to marriage equality, an individual can now make her same-sex partner a member of her family, but there is no comparable way that she can make her best friend a member of her family.<sup>149</sup> In other words, although marriage equality provides an avenue to secure legal recognition for partners, it does not alter the status of other chosen family members. As a result, chosen family members will remain legal strangers—even after *Obergefell v. Hodges*.<sup>150</sup> It has also been suggested that the advent of marriage equality may further marginalize those same-sex couples who do not choose to formalize their relationships and make nonmarital forms of recognition, such as domestic partnership benefits, less available.<sup>151</sup>

In the context of caregiving, chosen family members who lack legal recognition will be at a disadvantage in the important area of substituted decision making, especially medical decision making.<sup>152</sup> Issues related to substituted decision making and guardianship are governed by state law. Each state prescribes, in order of priority, a list of the individuals authorized to make decisions

143 *Maps of State Laws*, *supra* note 16.

144 Equality Act of 2015, H.R. 3185, S.1835, 114th Congress (2015).

145 *Older Americans Act*, SAGE, <http://www.sageusa.org/issues/oa.cfm> (last visited Sept. 29, 2015).

146 *Id.*

147 California Assembly Bill 663 required LGBT-cultural-competency training for residential care facility administrators. *California Legislature Passes Bill to Ensure LGBT Seniors Receive Respectful, Competent Elder Care*, EQUALITY CALIFORNIA (Sept. 3, 2013), <http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=5609563&ct=13257279&notoc=1>.

148 For a graphic history of the struggle for relationship recognition see *Maps of State Laws*, *supra* note 16. For an overview of the importance of a second parent for same-sex couples, see *Second Parent Adoption*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/second-parent-adoption> (last visited Nov. 15, 2015).

149 See, e.g., COLORADO REVISED STATUTE § 15-22-101 (2013) (granting limited rights to “designated beneficiaries”).

150 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

151 Knauer, *supra* note 100, at 60. It may also make nonmarital recognition of same-sex relationships less available. *Id.* For example, many employers have discontinued domestic partnership benefits citing that they are no longer needed to correct for the absence of marriage equality. *Id.*

152 See generally UNIFIED HEALTH-CARE DECISIONS ACT § 2 (1993) (stating rules regarding advance health-care directives).

in the event of incapacity.<sup>153</sup> Although these laws uniformly privilege close relatives, twenty-four states have added the category of “close friend” that could apply to a chosen family member or even an unmarried partner.<sup>154</sup> The category is generally assigned a low priority, often just before the state itself, but it still empowers non-relative caregivers where there is no legally recognized next of kin.<sup>155</sup> On the federal level, amending the Family Medical Leave Act to include a “close friend” would also help support LGBT caregiving.<sup>156</sup> The addition of “close friend” to medical decision laws signals an increased willingness to look beyond the traditional family for support and represents an important step toward legal recognition of chosen family.

### *Inclusive Services and Cultural Competency*

Independent of legal reform, significant change can be accomplished through the adoption of inclusive policies and cultural competency training designed to encourage LGBT older adults to utilize supportive services. For example, the perceived lack of LGBT-friendly senior housing options greatly increases the demand for informal elder care because LGBT older adults are determined to age in place at any cost. Although the market has begun to respond to the concerns of LGBT older adults by creating LGBT-friendly or even LGBT-centered senior housing developments,<sup>157</sup> the demand for such housing far outstrips supply, especially for affordable housing options.<sup>158</sup> As industry norms regarding LGBT issues continue to evolve, senior living facilities and service providers will have an increased incentive to adopt antidiscrimination policies and LGBT-inclusive policies, including anti-bullying rules.<sup>159</sup> Ideally, this information will be widely available to LGBT consumers allowing them to make informed decisions regarding their housing options.<sup>160</sup>

In order to help implement these policies, cultural competency training programs are available to educate service providers about the unique characteristics of LGBT older adults, including the importance of chosen family and the likelihood that some LGBT older adults will be closeted.<sup>161</sup> Caregiver support services should also be sensitive to the particular needs of LGBT older

153 See, e.g., KENTUCKY REVISED STATUTES § 311.631(1) (listing relatives authorized to make medical decisions in order of priority).

154 See, e.g., UNIFORM HEALTH CARE DECISIONS ACT § 5(c) (“[A]n adult who has exhibited special care and concern for the patient, who is familiar with the patient’s personal values, and who is reasonably available may act as surrogate.”).

155 UNIFORM PROBATE CODE § 2-105 (2015) (providing rules governing escheat).

156 Family Medical Leave Act of 1993, Public Law 103-3; 29 U.S.C. § 2601.

157 See, e.g., Mickey Rapkin, *The Gay Retiree Utopia*, BLOOMBERG, MAY 16, 2013, available at <http://www.businessweek.com/articles/2013-05-16/the-gay-retiree-utopia>.

158 *Id.*; see also Catherine Trevison, *Gay Retirement Homes Still Difficult to Market*, ST. PAUL PIONEER PRESS (Minn.), Mar. 20, 2008, at 7E (noting some developments have “difficulty filling”).

159 Ninety-one percent of all Fortune 500 companies have nondiscrimination policies for sexual orientation. *Corporate America Champions LGBT Equality in Record Numbers*, HUMAN RIGHTS CAMPAIGN, Dec. 9, 2013, available at <http://www.hrc.org/press-releases/entry/corporate-america-champions-lgbt-equality-in-record-numbers>.

160 The Human Right Campaign maintains the Health Care Equality Index, which rates health care facilities with respect to their responsiveness to LGBT concerns, including long-term care facilities. *Health Care Equality Index*, HUMAN RIGHTS CAMPAIGN, available at <http://www.hrc.org/campaigns/healthcare-equality-index> (last visited Nov. 15, 2015).

161 The U.S. Administration on Aging has developed LGBT-cultural competency training materials for long-term care and other service providers. *Building Respect for LGBT Elders*, UNITED STATES DEPARTMENT OF HEALTH: ADMINISTRATION ON AGING, available at <http://www.lgbtagingcenter.org/training/buildingrespect/index.cfm> (last visited Sept. 29, 2015).



adults—both caregivers and care recipients.<sup>162</sup> Intake forms should use inclusive language and policies should be reviewed to make sure they do not disadvantage LGBT older adults.<sup>163</sup> For example, many retirement communities have policies that do not allow two unrelated individuals to buy into the living unit, which adversely impact chosen family as well as unmarried partners.<sup>164</sup>

There are also steps that the LGBT community can take to support LGBT older adults. Although the LGBT community provides a high level of informal elder care, intergenerational involvement is largely absent. Increased services for LGBT older adults could include younger volunteer caregivers to help alleviate some of the overlapping care responsibilities shouldered by LGBT older adults.<sup>165</sup> The mobilization of community resources would be similar to the volunteer efforts that were marshaled during the 1980s in response to the AIDS/HIV pandemic.<sup>166</sup>

### *Advance Planning*

Advance planning documents offer LGBT older adults an opportunity to memorialize their wishes and empower their caregivers. They are essential for anyone who relies on chosen family because the default rules governing substituted decision making, fiduciary appointments, and property distribution privilege traditional next of kin over chosen family.<sup>167</sup> In this way, LGBT older adults cannot rely on the legal default settings in place in the areas of estate planning and decision making to protect their interests and reflect their priorities.<sup>168</sup> The LGBT community has placed strong emphasis on advance planning as a means to protect chosen family, especially unmarried partners. Studies show that more LGBT older adults have wills and durable powers of attorneys than their non-LGBT peers,<sup>169</sup> perhaps reflecting the high degree of “legal consciousness” that has been documented among LGBT individuals.<sup>170</sup>

LGBT older adults should consider supplementing the traditional estate-planning documents—will, durable power of attorney, advance directive—with an integrated elder-care plan that provides clear written instructions with respect to caregivers, housing, visitation, burial, gender identity, and anything else an individual feels strongly about, such as the care of pets or organ donation.<sup>171</sup> Developing the plan may require the assistance of financial advisers and medical service providers,

162 *Special Concerns of LGBT Caregivers*, FAMILY CAREGIVER ALLIANCE (2015), <https://caregiver.org/special-concerns-lgbt-caregivers>.

163 See DARLENE YEE-MELICHAR ET AL., ASSISTED LIVING ADMINISTRATION AND MANAGEMENT: EFFECTIVE PRACTICES AND MODEL PROGRAMS IN ELDER CARE 350 (2011) (noting that the “inequities” LGBT elders face include discriminatory policies); see *Opening Doors: An Investigation of Barriers to Senior Housing for Same-Sex Couples*, EQUAL RIGHTS CENTER (2014), available at [http://www.equalrightscenter.org/site/DocServer/Senior\\_Housing\\_Report.pdf](http://www.equalrightscenter.org/site/DocServer/Senior_Housing_Report.pdf) (reporting widespread housing discrimination against LGBT older adults).

164 *Id.*

165 Rafael Guerrero, *Buddies Give LGBT Seniors Joy*, BEVERLY PRESS, Feb. 17, 2011, <http://beverlypress.com/2011/02/buddies-give-lgbt-seniors-joy/>.

166 Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARVARD JOURNAL OF LAW & GENDER 1, 32–33 (2009).

167 See, e.g., UNIFORM PROBATE CODE § 2–101 (2014) (covering rules governing distribution by intestacy).

168 See *contra* Zietlow and Cahn, *supra* note 4, at 250 (“Although most of those interviewed knew nothing about the legal framework, the law, in effect, mirrored their assumptions about who would assume the decision-making role.”).

169 See *supra* note 41.

170 ROSIE HARDING, REGULATING SEXUALITY: LEGAL CONSCIOUSNESS IN LESBIAN AND GAY LIVES 22–24 (2010).

171 Nancy J. Knauer, “*Gen Silent: Advocating for LGBT Elders*,” 19 ELDER LAW JOURNAL 289, 323–36 (2011) (describing an integrated elder-care plan).

as well as the coordination of informal caregivers. In many instances, the actual legal force of these instructions may be unclear, but, at the very least, the documents will provide some indicia of what the LGBT older adult would have wanted had she been able to express her wishes.

#### CONCLUSION: BRIDGING THE ELDER-CARE GAP

In the United States, the population aged sixty-five and older is projected to more than double by 2060.<sup>172</sup> At the same time, the older population is also becoming much more diverse, thereby presenting new challenges for policy makers as they attempt to address the needs of different groups of older adults. The example of LGBT older adults demonstrates why it is not possible to devise a one-size-fits-all aging policy. Although the intergenerational reciprocity of the honor commandment reflects the lived experience of many Americans, it is not the whole story.

LGBT older adults rely predominantly on each other for informal elder care. The unique pattern of informal elder care within the LGBT community has been influenced by certain demographic factors, as well as the legacy of pre-Stonewall views on homosexuality and gender. Younger generations of LGBT individuals will not experience aging in the same way and, one hopes, will not face the same challenges. Younger LGBT individuals have benefited from greater freedom and legal protections, including marriage equality.<sup>173</sup> They are less likely to be estranged from their families of origin and more likely to parent by creating intentional LGBT families.<sup>174</sup> Only one-quarter of all LGBT older adults aged fifty and older have children, whereas nearly one half of lesbians and one-fifth of gay men under age fifty are raising children.<sup>175</sup> In this way, the current pattern of elder care in the LGBT community reflects the strengths and needs of a particular age cohort. It is essential to address the specific needs of LGBT older adults when developing caregiving policies, but it is also important to ask what insights the experience of LGBT older adults can offer to the larger society as it begins to grapple with a looming elder-care gap.<sup>176</sup>

The older population in the United States is not only growing in number. It is growing faster than the rest of the population.<sup>177</sup> By the year 2030, one out of every five Americans will be age sixty-five or older.<sup>178</sup> As the dependency ratio rises, there will be far fewer younger family members relative to the number of older adults in the population who will be available to provide care.<sup>179</sup> The changing demographic patterns of the American family will also contribute to the elder-care gap. For example, 20 percent of women are now choosing not to have children.<sup>180</sup> Multiple marriages and blended families are creating new configurations of family life made up of multiple in-laws, stepparents, and former spouses.<sup>181</sup> These new and emerging family formations will

172 *Aging Statistics*, *supra* note 21.

173 *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

174 Gary J. Gates, *LGBT Parenting in the United States*, WILLIAMS INSTITUTE 4 (Feb. 2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>.

175 *Id.* at 1.

176 Redfoot et al., *supra* note 3.

177 *Aging Statistics*, *supra* note 21.

178 Jennifer M. Ortman et al., *An Aging Nation: The Older Population in the United States*, U.S. CENSUS BUREAU 3 (May 2014), <https://www.census.gov/prod/2014pubs/p25-1140.pdf>.

179 *Id.* at 11.

180 Natalie Angier, *The Changing American Family*, NEW YORK TIMES, Nov. 25, 2013, [http://www.nytimes.com/2013/11/26/health/families.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/11/26/health/families.html?pagewanted=all&_r=0).

181 *Id.*

expand both the concept and the importance of chosen family beyond the LGBT community. As nontraditional family ties continue to grow, so will the number of chosen family caregivers, along with the associated legal shortcomings and the potential for an increase in unbefriended elders.<sup>182</sup> Accordingly, the next generation of non-relative caregivers will need many of the reforms advocated to strengthen caregiving among LGBT older adults, including expanded legal recognition of chosen family to include these nontraditional relationships.

Moreover, the current pattern of elder care in the LGBT community demonstrates the potential role that non-relative care can play in meeting the needs of older adults. As the elder-care gap strains family resources and social programs, it will be essential to expand the ranks of available caregivers and look beyond the traditional family. In the LGBT community, the rate of non-relative caregiving is almost two and half times more than the rate in the general population.<sup>183</sup> Although this pattern was partly created by necessity, it also reflects a strong ethos of community and fellowship. More research is needed to identify ways to foster this ethos in other settings and encourage friends, neighbors, and volunteers to help older adults remain a vital part of the community.<sup>184</sup>

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182 Span, *supra* note 98; see also Jessica E. Brill Ortiz, *Advocating for the Unbefriended Elderly*, NATIONAL CONSUMER VOICE (Aug. 2010), [http://tombudsman.org/uploads/files/issues/Informational-Brief-on-Unbefriended-Elders\\_o.pdf](http://tombudsman.org/uploads/files/issues/Informational-Brief-on-Unbefriended-Elders_o.pdf).

183 See *supra* note 12 (describing rate of non-relative caregiving in LGBT community).

184 One option is the “naturally occurring retirement community,” or NORC, where a group of individuals choose to age in place and leverage social services and other forms of assistance. *NORC Public Policy*, NATURALLY OCCURRING RETIREMENT COMMUNITIES, <http://norcs.org/norc-national-initiative/public-policy#3> (last visited Sept. 29, 2015).