

THE U.S. AU PAIR PROGRAM: LABOR EXPLOITATION AND THE MYTH OF CULTURAL EXCHANGE

JANIE A. CHUANG*

The Article exposes how the legal categorization of au pairs as “cultural exchange participants” is strategically used to sustain—and disguise—a government-created domestic worker program to provide flexible, in-home childcare for upper-middle-class families at below-market prices. The “cultural exchange” subterfuge has created an underclass of migrant domestic workers conceptually and structurally removed from the application of labor standards and the scrutiny of labor institutions. On the one hand, the “cultural exchange” rubric enables the U.S. government to house the program under the Department of State rather than Labor and to delegate oversight of this government program to private recruitment agencies that have strong financial incentives to overlook and even hide worker exploitation. On the other hand, the “cultural exchange” rhetoric used in the au pair program regulations and practice reifies harmful class, gender, and racial biases and tropes that feed society’s stubborn resistance to valuing domestic work as work worthy of labor protection. Together, these dynamics render au pairs vulnerable to abuse and threaten to undermine the tremendous gains otherwise being made on behalf of domestic workers’ rights. The Article concludes with a proposal to reform the au pair program with an eye toward promoting decent working conditions for all domestic workers.

<i>Introduction</i>	270
I. <i>The U.S. Au Pair Program</i>	275
A. <i>Childcare Needs of American Families</i>	277
B. <i>Women Migrating to Fill the Care Gap</i>	278
C. <i>Childcare as “Cultural Exchange”</i>	281

* Associate Professor of Law, American University, Washington College of Law, and Fellow (2011–12), Open Society Foundations. Sincere thanks to the Open Society Foundations Fellowship Program for their generous support of this project. Thanks also to the organizers and participants of the Law and Society Association 2012 Feminist Legal Theory CRN Workshop at George Washington University Law School and the junior faculty workshop at the Washington College of Law. I am very grateful for the comments on drafts of this article provided by Ann Shalleck, Daniela Kraiem, Noy Thrupkaew, Brishen Rogers, Ashley Parrish, Hila Shamir, Fernanda Nicola, Robin Lenhardt, Corey Shdaimah, Meredith Harbach, Jayesh Rathod, Benjamin Leff, Ezra Rosser, and Maxine Eichner. Many thanks to the au pairs, government officials, and au pair industry insiders who candidly shared their experiences and insights with me, and also to Florence Tiar, Jennifer Hagan, and Ruhee Vagle for their excellent research assistance.

II. <i>The Work of Cultural Exchange</i>	285
A. <i>Obscuring Work</i>	286
1. <i>Employers</i>	287
2. <i>Au Pairs</i>	290
3. <i>The State Department</i>	293
4. <i>Au Pair Agencies</i>	299
B. <i>Barriers to Accountability</i>	305
C. <i>Re-Entrenching Tropes</i>	308
1. <i>Not Work</i>	310
a. <i>False Kinship</i>	311
b. <i>American Largesse</i>	313
c. <i>"Anyone Can Do It" and For Very Little Money</i>	315
2. <i>A Private Matter</i>	316
III. <i>The Future of the Au Pair Program and Its Implications for Migrant Domestic Work</i>	318
A. <i>Inevitable Scrutiny</i>	321
B. <i>Reform Agenda</i>	325
1. <i>Working Conditions</i>	328
a. <i>Work Hours</i>	328
b. <i>Freedom to Change Employers and Agencies</i> ..	330
2. <i>Monitoring and Access to Justice</i>	332
a. <i>Monitoring Employers and Recruitment Agencies</i>	332
b. <i>Increasing Access to Justice</i>	336
C. <i>Broader Implications</i>	338
<i>Conclusion</i>	342

INTRODUCTION

During a weekly play date with my kids, Paola,¹ a young Venezuelan woman who cared for my friend's two children, broke down in tears. Visibly exhausted, Paola confided to me that in addition to caring for the children 75 hours a week during the day, she was responsible for waking up four to six times every night to care for the colicky infant. For her labor, she was paid less than minimum wage per hour and for only a fraction of the hours she had actually worked.

That Paola was overworked and underpaid can hardly come as a surprise to anyone who has studied domestic work. Scholars in law and social

¹ "Paola" is a pseudonym. Note that the names and certain identifying features of those involved in Paola's story have been changed to protect Paola against possible negative repercussions for exposing the details of her experiences as an au pair. Occasionally, the article cites government officials and au pair industry insiders who shared their first-hand knowledge of the au pair industry. Some of the names of interviewees have been omitted to protect the author's sources.

sciences have shed light on how and why migrant domestic workers are one of the most vulnerable worker populations in the world. That these workers do the work that makes all other work possible—enabling families to benefit from dual incomes, longer work hours, and more leisure time—has little bearing on how we as a society value their labor. Relegated to the informal sector, domestic workers are typically beyond the reach of most labor law protections, their vulnerability to abuse exacerbated by their (sometimes undocumented) migrant status.

The difference here, however, is that Paola was an au pair—a participant in an official U.S. State Department cultural exchange program. Like other au pairs, Paola had come to the United States hoping to experience American culture by living with an American host family and taking classes at post-secondary institutions, in exchange for which she agreed to provide up to 45 hours per week of childcare. Upon meeting Paola, I was quickly disabused of the popular stereotype of au pairs as socio-economically privileged, young Western European women looking to have a good time in the United States, yet I still assigned Paola privileged status in my mind. After all, unlike all other domestic work, au pair working conditions are subject to specific federal regulation and au pair agencies have staff responsible for monitoring and mediating the au pair-employer relationship. Most significantly, because au pairs are participants in an official State Department program and thus are subject to government oversight, they presumably have within their grasp—unlike other domestic workers²—ready means of obtaining redress for abuse.

I was wrong. Over the last year, while helping Paola find a new host family and seek compensation for the over \$10,000 in back wages owed to her, I have learned that au pairs are not so different from—and are arguably worse off in some respects than—other migrant domestic workers. The discourse and structure of this government-sponsored “cultural exchange” program render au pairs a worker population hidden from formal labor scrutiny. Moreover, the sense of difference and privilege created by the aura of “cultural exchange” has, until very recently, kept this population off the radar of domestic workers’ rights advocates.

Au pairs are even overlooked in the vibrant and rapidly growing academic literature on domestic work. A review of worldwide academic literature shows that only a handful of studies have examined au pairs as a distinct category.³ Of all the literature I encountered, only three studies focus on the

² Although the term “domestic work” covers a broad range of occupations (e.g., childcare, eldercare, housekeeping), this Article limits use of the term to refer to those involved in the provision of childcare.

³ See e.g., ZUZANA BŮRIKOVÁ & DANIEL MILLER, *AU PAIR* (2010) (sharing the social contexts of the stories of au pairs in Western Europe); CAMERON L. MACDONALD, *SHADOW MOTHERS* (2010) (examining the history of U.S. au pair programs and experiences of au pairs working in the United States); Bridget Anderson, *A Very Private Business: Exploring the Demand for Migrant Domestic Workers*, 14 *EUR. J. WOMEN'S STUD.* 247 (2007) (discussing the characteristics of the demand for foreign migrant domestic

situation of au pairs in the United States specifically,⁴ and none address it from a legal perspective.

This Article attempts to fill the gap. It exposes how the legal categorization of au pairs as “cultural exchange participants” is strategically used to sustain—and disguise—a domestic worker guestworker⁵ program designed to provide childcare for upper-middle-class families at below-market prices. But while the “cultural exchange” subterfuge⁶ has provided American families access to affordable, flexible, full-time in-home childcare, it has also created an underclass of migrant domestic workers conceptually and structurally removed from the reach of labor law protections.

Young migrants, like Paola, who come to the United States seeking an American cultural experience, may thus find themselves overworked and underpaid, sexually harassed, and even deprived of food, among other harms. To be sure, the lack of ethnographic research and data prevents this Article from offering any empirical conclusions regarding the extent of au pair abuse in the United States. Anecdotal information from au pairs and industry insiders suggests that many au pairs enjoy their experiences living and working in the United States, benefiting from cultural enrichment and deep attachments to their host families. But reports also strongly suggest that au pair mistreatment is also quite common, and, more critically, that when it does occur, it is rarely addressed. The recent conviction of a Chicago sex trafficker who forced au pairs into prostitution⁷ reveals the extreme consequences of a program that, however well-intentioned in its creation, has fos-

workers in Europe); Rosie Cox & Rekha Narula, *Playing Happy Families: Rules and Relationships in Au Pair Employing Households in London, England*, 10 GENDER, PLACE & CULTURE 333 (2003) (examining the rules about use of rooms, guests, and eating practices within au pair employing households in London, England, and how these worked to structure employment relations); Sabine Hess & Annette Puckhaber, ‘Big Sisters’ Are Better Domestic Servants?! Comments on the Booming Au Pair Business, 77 FEMINIST REV. 65 (2004) (discussing the U.S. au pair program’s “cultural exchange” label leaves young au pair women vulnerable to exploitation); Laura Mellini, Carrie Yodanis & Alberto Godenzi, ‘On Par’? The Role of the Au Pair in Switzerland and France, 9 EUR. SOC’YS 45 (2007) (discussing au pairs in France and Switzerland define their roles and how that definition is influenced by relations with the host family); Carrie Yodanis & Sean R. Lauer, *Foreign Visitor, Exchange Student, or Family Member? A Study of Au Pair Policies in the United States, United Kingdom, and Australia*, 25 INT’L J. SOC. & SOC. POL’Y 41 (2005) (discussing how U.S. au pair programs’ framing of au pairs as “family members” enables employers to bypass immigration and labor regulations).

⁴ Hess & Puckhaber, *supra* note 3; Yodanis & Lauer, *supra* note 3; MACDONALD, *supra* note 3.

⁵ A “guestworker” is an individual with special permission to work on a temporary basis in another country when a shortage of labor occurs.

⁶ Policy makers often employ subterfuges—fictions that shield tough choices—that offend deeply-held values. See Eleanor Marie Lawrence Brown, *Visa as Property, Visa as Collateral*, 64 VAND. L. REV. 1047, 1049 (2011) (citing GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 88 (1985) (examining commodification of U.S. visas)).

⁷ During the sentencing hearing for the defendant, Alex Campbell, Judge Robert Gettleman apparently “questioned the actions of the au pair agency ‘Au Pair in America,’ which helped the women get their visas to come to the U.S. from Eastern Europe, then abandoned them.” Kim Janssen, *Sex trafficker who forced immigrants into prostitution sentenced to life in prison*, CHIC. SUN-TIMES, (Nov. 26, 2012), www.suntimes.com/news/

tered structural vulnerability to a broad range of exploitative practices, from underpayment of wages to slavery-like conditions. This case has only served to augment concerns recently expressed by the State Department Inspector General in questioning the appropriateness of maintaining the au pair program under State, rather than Labor, Department oversight.⁸

Without offering any empirical conclusions, this Article provides an in-depth structural analysis of how the U.S. au pair program's regulatory loopholes and implementation failures, and the harmful social norms promoted by the program, render au pairs vulnerable to exploitation⁹ and undermine their ability to access legal remedies. To help illustrate how this system disenfranchises au pairs, the Article recounts the experiences of "Paola," the au pair whose mistreatment and subsequent struggle to seek accountability I witnessed firsthand.

Paola's story and the analysis of the au pair program structure and practice presented in this Article offer a cautionary tale of the pitfalls of adopting seemingly "quick fixes" to address America's care deficit. These lessons are both timely and significant. Affordable, flexible childcare remains in far greater demand than supply, and childcare providers are increasingly tasked with the added responsibility of caring for America's rapidly growing elderly population. The resulting eldercare crisis has presented an important opportunity for rights advocates to build upon recent and significant gains made on behalf of domestic workers' rights. These include, for example, the landmark adoption of an international treaty on domestic workers' rights,¹⁰ the passage of the New York Bill of Rights for Domestic Workers, and ongoing efforts in California and Maryland to secure domestic-worker-protective state and local laws.¹¹ As some domestic workers rights' advocates are just beginning to realize, adding au pair program reforms to the mix provides a unique opportunity to both deepen and actualize commitments to domestic workers' rights protection. This Article aims to demonstrate how and why this is so.

metro/16639769-418/sex-trafficker-who-forced-immigrants-into-prostitution-sentenced-to-life-in-prison.html.

⁸ U.S. DEP'T OF STATE & BROADCASTING BD. OF GOVERNORS OFFICE OF INSPECTOR GEN., INSPECTION OF THE BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS (2012) [hereinafter 2012 INSPECTION REPORT].

⁹ Note that I use the term "exploitation" in this Article as an umbrella term to describe a broad spectrum of unjust practices, ranging from minor mistreatment to severe abuse. While the term "exploitation" can have a positive connotation—e.g., the "productive working" of something—the term is commonly (and increasingly) used in relation to anti-human-trafficking law and policy to describe a range of unfair and abusive working conditions.

¹⁰ Int'l Labor Organization [ILO], *C189-Domestic Workers Convention, 2011*, ILO Convention No. 189 (June 16, 2011), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:2736129360700071::NO:12100:P12100_ILO_CODE:C189:NO.

¹¹ For an overview of these advocacy efforts, see Hina Shah & Marci Seville, *Domestic Worker Organizing: Building a Contemporary Movement for Dignity and Power*, 75 ALB. L. REV. 413 (2011).

Part I traces the controversial history of the au pair program's creation as a "cultural exchange" program under the State Department rather than as a formal guestworker program under the Labor Department. Through the back door of "cultural exchange," Congress avoided the messy politics and costs of guestworker program creation, but drew trenchant criticism from both within and outside the government for the sleight of hand. The program nonetheless survived, providing American families access to affordable, flexible, in-home childcare at a time when the nation's childcare deficit was rapidly growing in response to women's increased workforce participation.

Part II assesses the consequences of treating the au pair program as a "cultural exchange." It demonstrates how the "cultural exchange" misnomer obscures the work component of the program, to the benefit of host families and au pair agencies, and to the detriment of au pairs. Labeling the program a "cultural exchange" permits American families access to flexible, in-home childcare at artificially low prices. It also leaves au pair agencies free to operate without meaningful government scrutiny and according to profit-maximizing objectives that hold little concern for au pair welfare. Moreover, by recasting the host family-au pair relationship as kinship and/or American largesse in action rather than employment, the program reifies the harmful gender, race, and class biases and stereotypes that underlie society's resistance to bringing domestic work within the labor protections afforded to other workers.

Having exposed the lie of "cultural exchange," Part III of the Article sets forth a proposal for reform. This proposal does not aspire to transform the au pair program into a legitimate cultural exchange. Doing so would require such radical reform that the program might as well be abolished—a legitimate, but politically impossible outcome given America's continued childcare deficit and the program's established place in the landscape of childcare options.¹² Instead, the proposed reforms establish key provisions to ensure decent working conditions for au pairs within the existing structure of the program. The transformative potential of these reforms extends beyond the program confines, however. Utilizing the au pair program's unique status as a government-created and government-run program, these proposed re-

¹² At roughly 22,000, the au pair population in the United States is approximately ten percent of the total population of childcare workers. See Telephone Interview with Au Pair Industry Insider No. 1 (Nov. 28, 2011) (citing the au pair population at 22,000); *Occupational Employment Statistics, Occupational Employment and Wages, May 2010, 39-9011 Childcare Workers*, U.S. BUREAU OF LABOR STATISTICS (May 17, 2011), <http://www.bls.gov/oes/2010/may/oes399011.htm> (estimating the number of workers providing "child day care services" at 286,250). This statistic likely includes childcare workers in institutional, in addition to private household, settings. Note, however, that statistics regarding the domestic worker population in the United States are notoriously unreliable, given that the Census Bureau typically undercounts undocumented immigrants due to their reluctance to share information with government entities. See LINDA BURNHAM & NIK THEODORE, *HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK* 10 (2012).

forms lay crucial groundwork for ensuring labor rights protections for *all* domestic workers.

I. THE U.S. AU PAIR PROGRAM

“Au pair” is a French term meaning “on par with,” and refers to a European practice of having a young person come to a foreign country to learn the language and experience the culture through immersion in the home life of a host family while assisting with childcare and light housework.¹³ The practice became widespread during post-World War II Europe, when, for the first time, large numbers of young women were moving abroad for work.¹⁴ Concerned that moral decline would accompany this new-found independence, churches and other groups encouraged young women to live with and work for families, and thereby acquire household skills and improve their foreign language abilities.¹⁵ By 1969, the practice involved tens of thousands of young people traveling throughout Europe, prompting the Council of Europe to promulgate a treaty to regulate “this international problem” of “uncontrolled development of such temporary migration.”¹⁶

The United States did not enter the au pair market until 1986 when, in response to a proposal from a private U.S. company, the American Institute of Foreign Study (AIFS), the then-U.S. Information Agency (USIA) established a pilot au pair program to bring approximately 3,000 young Western Europeans to come live in the United States as au pairs on a two-year trial basis.¹⁷ Twenty-six years later, the U.S. au pair program has enabled hundreds of thousands of young (mostly female) people to come to the United States to provide childcare for American families.

Au pairs enter the United States not as guestworkers under the U.S. Department of Labor program but rather as “cultural exchange participants” under the auspices of the U.S. State Department’s J-1 Exchange Visitor Program.¹⁸ The U.S. au pair program permits an 18 to 26 year-old person¹⁹ to

¹³ BRIDGET ANDERSON, *DOING THE DIRTY WORK* 23–24 (2000).

¹⁴ See EUROPEAN AGREEMENT ON AU PAIR PLACEMENT, pmbl., Nov. 24, 1969, E.T.S. 68, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/068.htm>; SUSAN GRIFFITH & SHARON LEGG, *THE AU PAIR AND NANNY’S GUIDE* 9–10 (2006).

¹⁵ GRIFFITH & LEGG, *supra* note 14, at 10.

¹⁶ COUNCIL OF EUROPE, EXPLANATORY REPORT ON THE EUROPEAN AGREEMENT ON “AU PAIR” PLACEMENT (1972), <http://conventions.coe.int/treaty/en/Reports/Html/068.htm>.

¹⁷ SUSAN B. EPSTEIN, CONG. RESEARCH SERV., RL 95-256, *THE AU PAIR PROGRAM*, 2–3 (1998).

¹⁸ According to the U.S. Department of State, the J-1 program brings around 350,000 foreign nationals to the United States each year. Ann Stock, *Launching the New J-1 Visa Exchange Visitor Program Website*, DIPNOTE: U.S. DEP’T OF STATE OFFICIAL BLOG (June 1, 2011), http://blogs.state.gov/index.php/site/entry/j1_visa_exchange_visitor_web site. These J-1 program participants are brought in “to teach, study, conduct research, demonstrate special skills or receive on the job training for periods ranging from a few weeks to several years,” e.g., as camp counselors, college students, research scholars, and

live in the United States with a “host family” and provide childcare²⁰ in exchange for room, board, and a weekly stipend²¹ for a period of one to two years.²² Au pairs provide up to 45 hours of childcare per week, with a limit of 10 hours per day, and are entitled to 1.5 days off per week, one full weekend per month, and two weeks of paid vacation each year. They are not, however, entitled to any federal holidays.²³ In exchange for this labor, au pairs receive a weekly stipend calculated at minimum wage for 45 hours per week, minus 40% for the cost of room and board (in 2012, \$195.75 per week).²⁴ Au pairs are required to attend classes worth at least six semester hours of academic credit at a post-secondary institution, for which the host family is required to reimburse costs up to \$500.²⁵

Although the au pair program is an official U.S. State Department cultural exchange program, the government has outsourced its implementation of the program to fourteen State Department-designated “sponsor” au pair agencies.²⁶ Most of these agencies are non-profit organizations—or non-profit entities of for-profit companies—that generate significant revenue from the program fees paid by the host families and au pairs.²⁷ With minimal oversight from the State Department, as discussed below, these agencies handle the recruitment and placement of au pairs and (ostensibly) monitor the host family-au pair relationship to ensure compliance with the State Department regulations.

The program structure and regulations have scarcely changed since program inception, but the program has expanded significantly over the last

physicians. *J-1 Visa Exchange Visitor Program*, U.S. DEP’T OF STATE, <http://j1visa.state.gov/programs> (last visited Mar. 9, 2013).

¹⁹ 22 C.F.R. § 62.31(d)(1) (2012).

²⁰ 22 C.F.R. § 62.31(a) (2012).

²¹ 22 C.F.R. § 62.31(e), (j), (k) (2012).

²² 22 C.F.R. § 62.31(o). An au pair can participate in the program a second time after two years of living outside the United States. 22 C.F.R. § 62.31(p) (2012).

²³ 22 C.F.R. § 62.31(j) (2012).

²⁴ 22 C.F.R. § 62.31(j) (2012); U.S. DEP’T OF STATE, NOTICE: FEDERAL MINIMUM WAGE INCREASE (2007), http://j1visa.state.gov/wp-content/uploads/2012/09/aupair_wage_increase.pdf [hereinafter MINIMUM WAGE NOTICE]

²⁵ 22 C.F.R. § 62.31(k)(1) (2012).

²⁶ “Almost any governmental, non-profit, or for-profit can become a sponsor so long as it pays a non-refundable application fee of \$2,700” (which goes towards funding administration of the J-1 Visitor Exchange Program) and its application is approved by the State Department. DANIEL COSTA, GUESTWORKER DIPLOMACY 7 (2011) (citing Form DS-3036, Exchange Visitor Program Application). See also 22 C.F.R. §§ 62.2, 62.3, 62.17 (2012); U.S. DEPT. OF HOMELAND SECURITY, USER MANUAL FOR TEMPORARY USERS OF SEVIS VERSION 6.10 (HOW TO COMPLETE AND SUBMIT THE FORM DS-3036, EXCHANGE VISITOR PROGRAM APPLICATION) 3–4 (2012), http://j1visa.state.gov/wp-content/uploads/2012/04/Temp-User_6.10_042012.pdf.

²⁷ According to IRS filings, for example, revenues reported by au pair agencies in fiscal year 2010 included: Cultural Homestay International (\$9,919,591) and EurAuPair International, Inc. (\$4,534,370). See *Cultural Homestay International*, GUIDESTAR REPORT, <http://www.guidestar.org/ReportOrganization.aspx?ein=94-2404633> (last visited Mar. 9, 2013); *EurAuPair International, Inc.*, GUIDESTAR REPORT, <http://www.guidestar.org/ReportOrganization.aspx?ein=33-0316910> (last visited Mar. 9, 2013).

quarter century. Now bringing upwards of 22,000 people from all over the world each year,²⁸ au pairs have become an established feature of the childcare landscape in the United States.

A. *Childcare Needs of American Families*

The au pair program's rapid expansion paralleled dramatic increases in labor force participation of women with children in the United States. Seventy percent of all mothers now work outside the home.²⁹ Between 1975 and 2008, the percentage of women in the workforce with preschool-aged children rose from thirty-nine percent to sixty-three percent; for those with children between six and seventeen, it increased from fifty-five percent to seventy-five percent.³⁰ The typical American middle-income family is also working longer hours, putting in an average of eleven more hours of work per week in 2006 than in 1979³¹—substantially longer working hours than other wealthy countries.³² But the U.S. government has responded with very few policies to ameliorate the work-family conflict that the influx of women into the workforce and longer American working hours have created.³³ Unlike working families in many other wealthy nations, Americans are not guaranteed, under U.S. law, paid maternity leave, paid sick days, limits on mandatory overtime, the right to request work-time flexibility without retaliation, and proportional wages for part-time work.³⁴

Consequently, over eleven million children under age five spend an average of thirty-five hours per week in some form of non-parental childcare.³⁵ About one-third of these children are in multiple childcare arrangements so that parents can meet the need for childcare during traditional and nontraditional working hours.³⁶ Middle and upper-middle class working parents tend to prefer in-home care (i.e., nannies and au pairs) over center-based care,³⁷ in part due to perceptions of day care settings as being insufficiently regulated and not as developmentally enriching.³⁸ But the preference for in-home care is also largely due to social pressures to engage in “intensive mothering”—

²⁸ MACDONALD, *supra* note 3, at 51.

²⁹ *Id.* at 1.

³⁰ MAXINE EICHNER, *THE SUPPORTIVE STATE* 6 (2010).

³¹ JOAN C. WILLIAMS & HEATHER BOUSHEY, *THE THREE FACES OF WORK-FAMILY CONFLICT* 1 (2010).

³² The average American works 1966 hours per year, which amounts to roughly ten more weeks of work per year than Swedish workers, and six weeks more than workers in Canada and the United Kingdom. EICHNER, *supra* note 30, at 39.

³³ *Id.* at 6.

³⁴ WILLIAMS & BOUSHEY, *supra* note 31, at 1.

³⁵ NAT'L ASS'N OF CHILD CARE RES. & REFERRAL AGENCIES, *CHILD CARE IN AMERICA: 2011 STATE FACT SHEETS* 3 (2011) [hereinafter *NACCRA 2011 FACT SHEETS*].

³⁶ *Id.*; EICHNER, *supra* note 30, at 40.

³⁷ MACDONALD, *supra* note 3, at 3, 13.

³⁸ For example, one study found that only roughly one in seven daycare facilities provide care that is deemed developmentally enriching. See EICHNER, *supra* note 30, at

i.e., the “child-centered, expert-guided, emotionally absorbing, labor intensive, and financially expensive” approach that dominates childrearing in the United States today.³⁹ Professional class moms view class transmission as their job and work to ensure that their kids are equipped to maintain or improve their social class standing.⁴⁰ The belief that the best way to raise children involves “the ever-present, continually attentive, at-home mother” has become increasingly strident in response to women’s increased labor force participation.⁴¹ As sociologist Cameron MacDonald explains, “[c]aught in a vise between the cultural pressure of the ideology of intensive mothering and the structural rigidity of male-pattern careers, and with no public policy shifts on the horizon, [these mothers have] turned to a private solution to a public problem. They [have] hired a wife.”⁴²

B. *Women Migrating to Fill the Care Gap*

Increasingly, immigrant women are meeting American childcare demands, with domestic work as arguably the largest sector of the global economy that pulls women to migrate.⁴³ Wealthy countries rely on this “exported” labor to address the “care deficit”—i.e., the paradox that for women in wealthier countries to enter the paid work force, they need domestic workers to handle the work in their homes.⁴⁴ This reliance on migrant labor coincides with increasing privatization of care in wealthier countries. Meanwhile, resource-poor countries actively encourage their female workers to migrate abroad for domestic work as a development strategy, offsetting unemployment problems at home while growing the economy by accumulating foreign exchange reserves through worker remittances.⁴⁵ Migrant domes-

40 (citing SUZANNE HELBURN & CAROLLEE HAWES, *COST, QUALITY, AND CHILD OUTCOMES IN CHILD CARE CENTERS: PUBLIC REPORT 319* (1995)).

³⁹ MACDONALD, *supra* note 3, at 22 (quoting SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* 69 (1996)).

⁴⁰ See MACDONALD, *supra* note 3, at 21 (noting that this parenting philosophy has accelerated in recent decades, admonishing middle-class mothers “to prepare their infants and toddlers to compete for the coveted slots at preschool that will ultimately destine them for Harvard.”).

⁴¹ See *id.* at 3.

⁴² *Id.* at 41.

⁴³ RHACEL SALAZAR PARREÑAS, *THE FORCE OF DOMESTICITY: FILIPINA MIGRANTS AND GLOBALIZATION* 3 (2008). Many studies suggest that almost all nannies are immigrant women. MACDONALD, *supra* note 3, at 45. Note however, that these studies may discount the number of American-born nannies once in-home childcare workers are considered separately from other forms of domestic work (i.e., that involve “menial labor” like housekeeping in addition to or instead of “caring labor”). *Id.* at 45–46.

⁴⁴ Barbara Ehrenreich & Arlie Russell Hochschild, *Introduction*, in *GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY* 1, 7–8 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2002) [hereinafter *GLOBAL WOMAN*].

⁴⁵ HUMAN RIGHTS WATCH, *SWEPT UNDER THE RUG: ABUSES AGAINST DOMESTIC WORKERS AROUND THE WORLD* 67 (2006) [hereinafter *SWEPT UNDER THE RUG*]; PARREÑAS, *supra* note 43, at 2 (noting how Indonesia, Sri Lanka, the Philippines, and Vietnam promote the labor migration of women); Saskia Sassen, *Women’s Burden: Counter-*

tic workers have become “crucial agents” in these “global survival circuits.”⁴⁶ The remittances sent home are “key to the survival of household, community, and country” in a number of developing countries. This dynamic creates “global care chains” between the workers in wealthier countries requiring domestic work and the temporary migrants from resource-poor countries who provide it, and, in turn, must entrust care of their own families to others.⁴⁷ These care chains and survival circuits are part and parcel of what commentators have come to refer to as “the new world domestic order.”⁴⁸

The United States not only actively participates in this international division of labor, but it also perpetuates it through the selective enforcement of the different legal regimes triggered by the migration. The U.S. government’s policy of relegating care work to the realm of either the family or the private market has led to a concentration of migrant women in care work, replacing American women in their traditional care roles.⁴⁹ On paper, the United States jealously guards its borders through restrictive immigration laws that, with few exceptions, prohibit entry of migrant domestic workers.⁵⁰ In practice, however, domestic work remains a “softly regulated” sector, characterized by “a high tolerance” for employment and immigration law violations.⁵¹ Hiring undocumented domestic workers and failing to pay employer taxes (i.e., Social Security and Medicare contributions), for example,

Geographies of Globalization and the Feminization of Survival, 71 NORDIC J. INT’L L. 255, 270–71 (2002) [hereinafter Sassen, *Women’s Burden*].

⁴⁶ Judy Fudge, *Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada*, 23 CAN. J. WOMEN & L. 235, 239 (2011) (citing Saskia Sassen, *Global Cities and Survival Circuits*, in GLOBAL WOMAN, *supra* note 44, at 255). *See also* Sassen, *Women’s Burden*, *supra* note 45, at 263–65.

⁴⁷ This dynamic can come at great emotional cost to the migrant worker (and her family) because she has to leave her own family in the care of others, for years at a time. *See, e.g.*, Rhacel Salazar Parreñas, *The Care Crisis in the Philippines: Children and Transnational Families in the New Global Economy*, in GLOBAL WOMAN, *supra* note 44, at 39, 39–54.

⁴⁸ *See* PIERRETTE HONDAGNEU-SOTELO, DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE xix (2001).

⁴⁹ *See* MACDONALD, *supra* note 3, at 45–49; DOMESTIC WORKERS UNITED, HOME IS WHERE THE WORK IS 9–11 (2006); Hila Shamir, *What’s the Border Got To Do With It? How Immigration Regimes Affect Familial Care Provision—A Comparative Analysis*, 19 AM. U. J. GENDER SOC. POL’Y & L. 601, 629–30 (2011) [hereinafter Shamir, *What’s the Border Got To Do With It?*].

⁵⁰ Under current U.S. immigration law the only visas available to those entering the United States to perform domestic work are under the A-3 (to accompany foreign diplomats), G-5 (to accompany employees of international organizations), NATO-7 (to accompany NATO personnel) and B-1 (to accompany U.S. employers permanently residing or stationed abroad, who come to the United States temporarily) visa categories. *See* *Travel.State.Gov, A Service of the Bureau of Consular Affairs*, U.S. DEP’T OF STATE, <http://travel.state.gov/visa/> (last visited Mar. 9, 2013).

⁵¹ Hila Shamir, *The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States*, 58 AM. J. COMP. L. 953, 969 (2010).

remain common practices,⁵² notwithstanding concerns over “nannygate” exposure.⁵³ Enforcement problems aside, this worker population suffers from deficient baseline protections under labor law.⁵⁴ Domestic workers are explicitly excluded from the protection of the right to organize and collectively bargain under the National Labor Relations Act,⁵⁵ the application of workplace safety standards under the Occupational Safety and Health Act,⁵⁶ and the overtime wage protections (at least for live-in domestic workers) of the Fair Labor Standards Act.⁵⁷ Workers’ underreporting of violations combined with the perceived challenges of addressing labor violations in the context of

⁵² A quick perusal of the nanny listings page on the D.C. Urban Moms and Dads website, popular among parents residing in the Washington, D.C. area, illustrates this phenomenon. Undocumented nannies offering their services dominate this site, their status difference punctuated by the explicit reference to immigration status in ads posted by documented nannies. DC URBAN MOMS AND DADS (last visited Mar. 9, 2013), <http://www.dcurbanmom.com/nanny-forum/forums/show/9.page;jsessionid=D654C0CDD06B4FE351445C7C821F3B3B>. The specter of “nannygate” problems arguably makes Washington, D.C.-based professionals, a significant portion of whom either work for or aspire to work for the U.S. government, more scrupulous regarding the hiring of documented domestic workers.

⁵³ The 1993 “Zoe Baird incident” underscored the risks of hiring an undocumented nanny. Zoe Baird, nominated by President Clinton for U.S. Attorney General, withdrew her name from consideration after the Senate Judiciary Committee found that she had hired two undocumented workers, a nanny and a chauffeur, and failed to pay the required employment taxes. The incident increased public awareness concerning the tax and immigration implications of hiring migrant domestic workers. See, e.g., MONA HARRINGTON, CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS 11–24 (1999); Ben Wildavsky, *More Calls to IRS about Domestic Help Zoe Baird Case Has Raised Public Awareness*, S.F. CHRON., Jan. 23, 1993, at C10; Hugo Martin, *Nannies Criticize Outcry over Zoe Baird Nomination*, L.A. TIMES, Jan. 23, 1993, at B1.

⁵⁴ In addition to the explicit exclusions under labor law, domestic workers are functionally excluded from Title VII sexual harassment prohibitions and job security protections of the Family Medical Leave Act because private households rarely meet the threshold number of employees required to trigger their application. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2006) (defining “employer” as employing fifteen or more workers); Family Medical Leave Act, 29 U.S.C. § 2611(4) (2006) (defining “employer” as employing fifty or more workers).

⁵⁵ The NLRA defines the term “employee” to exclude “any individual employed . . . in the domestic service of any family or person at his home” Pub. L. No. 74-198, § 2(3), 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 152(3) (2006)). This exclusion has been linked to the fact that domestic workers were predominantly black and that Southern politicians feared expanding domestic workers’ rights would upset the racial status quo. See Eileen Boris, *Labor’s Welfare State: Defining Workers, Constructing Citizens*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 319, 343–44 (Michael Grossberg & Christopher Tomlins eds., 2008).

⁵⁶ 29 U.S.C. §§ 651–78 (2006). The Occupational Safety and Health Administration exempts from the Act anyone who privately employs someone in a residence “for the purpose of performing . . . what are commonly regarded as ordinary domestic household tasks, such as house cleaning, cooking, and caring for children” 29 C.F.R. § 1975.6 (2009).

⁵⁷ 29 U.S.C. §§ 201–19 (2006). The Fair Labor Standards Act (FLSA) exempts from overtime pay requirements “any employee who is employed in domestic service in a household and who resides in such household” 29 U.S.C. § 213(b)(21) (emphasis added).

such intimate relationships undermine meaningful enforcement of the few labor protections that do apply to domestic work.⁵⁸

Against this backdrop, a U.S.-government-sponsored au pair program to bring in young migrants to provide affordable and flexible in-home care brings instant legitimacy to work in a sector that often operates in the shadow of the law. Such a program could never have been created, however, without the labeling of the au pair program as a “cultural exchange” rather than a labor program. As discussed below, the “cultural exchange” frame followed from longstanding European practice, but it also proved to be a highly strategic move that enabled what is essentially a temporary guestworker program to be created under the radar.

C. Childcare as “Cultural Exchange”

In pitching the au pair program to the U.S. government, the AIFS purposely targeted the then-U.S. Information Agency (USIA) because it held exclusive power to authorize issuance of cultural exchange visas to foreigners through its oversight of the J-1 Exchange Visitor Program. Congress had established the J-1 program in 1961 to facilitate exchanges of scientific and cultural knowledge and “to increase mutual understanding between the people of the United States and . . . of other countries . . . and thus to assist in the development of friendly, sympathetic, and peaceful relations between the United States and other countries of the world.”⁵⁹ Members of Congress viewed the program as an opportunity for “middle-income successor generation Europeans” to experience a homestay cultural exchange with middle-income American families.⁶⁰ Moreover, because American host families would pay all of the program fees, the program would cost the U.S. government virtually nothing.⁶¹

From its inception, however, the au pair program was plagued with criticisms regarding the appropriateness of the “cultural exchange” label. Early on, labor and immigration officials argued—and the General Accounting Office (GAO) later reiterated⁶²—that a program requiring up to 45 hours of childcare per week possesses all the indications of a fulltime employment

⁵⁸ All domestic workers are entitled to minimum wage for every hour worked, and live-out domestic workers are also entitled to overtime pay for hours worked beyond 40 hours per week. 29 U.S.C. § 213(b)(21).

⁵⁹ Mutual Educational and Cultural Exchange Act of 1961, 22 U.S.C. § 2451 (2006).

⁶⁰ *Immigration Act of 1989: Joint Hearings on S. 358, H.R. 672, H.R. 2448, H.R. 2646, and H.R. 4165 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary and the Immigration Task Force of the H. Comm. on Educ. and Labor*, 101st Cong. 393-94 (1990) [hereinafter *Hearings*].

⁶¹ *Id.* at 389, 394.

⁶² U.S. INFO. AGENCY, U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-90-61, INAPPROPRIATE USES OF EDUCATIONAL AND CULTURAL EXCHANGE VISAS 19–20, 29 (1990) [hereinafter GAO REPORT] (noting that the au pair program was “essentially [a] child care work program[]” that would normally be subject to Department of Labor administrative review and certification).

program and should not be continued under the J-visa.⁶³ Confronted, therefore, with a USIA proposal that the work hours be reduced to 30 hours per week,⁶⁴ the AIFS took the matter directly to Congress. It argued that the 45-hour-per-week work portion of the program “was the engine . . . that carried the program along,” made it affordable for the host families, and was critical to the program’s continuation because most host parents worked full-time.⁶⁵ Indeed, bolstered with letters from Members of Congress,⁶⁶ the AIFS proposed that au pairs could help provide relief for America’s “tremendous need” for affordable childcare:

With more mothers entering the job market, the national child care shortage is increasing every year. . . . Statistics show that 67% of women with children work, as do 45% of mothers with children under age one—a 50% increase since 1980. . . . [The AIFS program] . . . barely makes a dent in meeting the child care needs of American families generally, a figure which conservatively numbers several hundreds of thousands.⁶⁷

Despite acknowledging that the au pair program served an unmet need for childcare services, AIFS resisted the notion that au pairs are workers: “Au pairs are not laborers; they are members of their host family. . . . [C]hild care hours are not at the expense of the extensive educational and cultural activities [integral to the program].”⁶⁸ Regulating the program as a labor program would “strangle the special relationship between the host family and the au pair and damage [the] mission of educational and cultural exchange.”⁶⁹ Moreover, Department of Labor oversight—which would require labor certification of the au pairs to ensure that noncitizens do not displace Americans in employment opportunities⁷⁰—was unnecessary. AIFS’s “modest program of less than 3,000 visas does not represent a threat to any American citizens seeking child care employment”—a sector AIFS (over-)estimated as employing some two million people by including center-based workers. Indeed, the au pair program would actually reduce reliance on undocumented nannies, AIFS argued, since over 99% of the program’s au pairs

⁶³ Peter Cary et. al., *Should the USIA Be Importing Nannies?*, U.S. NEWS & WORLD REP., Mar. 21, 1988, at 21, 23.

⁶⁴ EPSTEIN, *supra* note 17, at 3.

⁶⁵ *Id.* See also GAO REPORT, *supra* note 62, at 19.

⁶⁶ *Hearings*, *supra* note 60, at 376–392.

⁶⁷ *Id.* at 384. Kahn noted that his organization had received requests for information from over 50,000 families, with a similar number contacting AIFS’s European office. *Id.* at 382.

⁶⁸ *Id.* at 388.

⁶⁹ *Id.* at 377.

⁷⁰ See GAO REPORT, *supra* note 62, at 29.

had returned to their home countries⁷¹ and benefited from the cultural exchange aspects of the program.⁷²

Holding to the “cultural exchange” line, Congress not only rejected all reform proposals, but it both *prohibited* the USIA from making any changes to the program,⁷³ and *expanded* the program, giving the USIA oversight of an additional six au pair agencies.⁷⁴ The USIA continued to view the au pair program as inimical to the cultural exchange goals of the J-1 program and questioned its statutory authority to oversee what it believed to be a child-care program.⁷⁵ But the USIA was nonetheless saddled with a program with an educational component that failed to provide sufficient cultural exchange, and a work component that failed to comply with the minimum wage protections under the Fair Labor Standards Act.⁷⁶

It was not until 1994, after an infant was shaken to death by a 19-year-old au pair,⁷⁷ that Congress granted the USIA rule-making authority over the program, which by then had grown to 10,000 participants.⁷⁸ Exercising this new authority, the USIA proposed regulations to address some of its concerns regarding the program—e.g., establishing a daily limit on work hours, age limits for infant care, mandated training and background checks, higher reimbursements for au pairs’ tuition costs, and an increased weekly stipend.⁷⁹

⁷¹ *Hearings, supra* note 60, at 397–98 (appended letter jointly signed by Senators Dodd, Helms, Pell, Moynihan, and Tribble). Note that information from U.S. embassies abroad now suggests that the 99% au pair return rate Kahn boasted likely no longer applies. Concern over au pair “overstays” in the United States has resulted in U.S. embassies abroad conducting “validation studies” to examine au pairs’ rate of return to their home countries and to determine the means by which au pairs have “overstayed” the J-1 visa. See e.g., *Cable from U.S. Embassy in La Paz (Bolivia)*, 10LAPAZ144: *Embassy La Paz Validation Study Results*, WIKILEAKS (Jan. 26, 2010), <http://wikileaks.org/cable/2010/01/10LAPAZ144.html>; *Cable from U.S. Embassy Sarajevo (Bosnia)*, 09SARAJEVO464: *Half of Bosnian Au-pairs remain in America*, WIKILEAKS (Apr. 14, 2009), <http://www.cablegatesearch.net/cable.php?id=09SARAJEVO464>.

⁷² *Hearings, supra* note 60, at 406–12.

⁷³ Eisenhower Exchange Fellowship Act of 1990, Pub. L. No. 101-454, 104 Stat. 1063 (Oct. 24, 1990) (codified at 20 U.S.C. § 5201 (2012)).

⁷⁴ EPSTEIN, *supra* note 17, at 3–4.

⁷⁵ See GAO REPORT, *supra* note 62, at 19; EPSTEIN, *supra* note 17, at 3; Debbi Wilgoren & Michael D. Shear, *Regulation of Au Pairs Out of Step with Reality*, WASH. POST, August 14, 1994, at B1 (quoting the then-USIA director Joseph Duffy as stating publicly, in 1994, that the au pair program “appears to be going in the direction of full-time nanny care and that’s not what it was intended to do.”).

⁷⁶ Exchange Visitor Program, 60 Fed. Reg. 8547, 8548 (Feb. 15, 1995) (to be codified at 22 C.F.R. pt. 514).

⁷⁷ See Ruben Castaneda, *Nanny Charged in Death of Loudoun Baby*, WASHINGTON POST, Aug. 8, 1994, at D3.

⁷⁸ An Act to Make Certain Technical Amendments Relating to the State Department Basic Authorities Act of 1956, the United States Information and Educational Exchange Act of 1948, and Other Provisions of Law, sec. 1(v) (technical and conforming amendments), Pub. L. No. 103-415, 108 Stat. 4299 (1994) (codified at 22 U.S.C. § 3926 (1995)); Exchange Visitor Program, 60 Fed. Reg. at 8549 (noting growth of program from 300 au pairs annually in 1986 to 10,000 au pairs annually).

⁷⁹ The USIA initially proposed to eliminate infant care from the program or require au pairs to be over 21 and have six months of documented infant care experience before being allowed to care for children under two-years-old; to raise the weekly stipend from

It did not go so far as to create a complaints mechanism or any other recourse for addressing exploitation allegations.⁸⁰ Yet, the pressure exerted by host families and registered lobbyists retained by the au pair agencies⁸¹ during the 30-day comment period—for example, an orchestrated letter-writing campaign that flooded Congress with 3,000 requests⁸² to “save” the au pair program from regulations⁸³—resulted in a watered-down version of the proposed regulations.⁸⁴

The regulations did, however, create an important conceptual shift in that they officially recognized the host family-au pair relationship as an employer-employee relationship, and thus as subject to minimum wage requirements under the Fair Labor Standards Act.⁸⁵ As the USIA explained, “employees are those who as a matter of economic reality are dependent upon the business to which they render service”⁸⁶ and where the employer exercises “pervasive control” over the work performed.⁸⁷ In exchanging childcare services in return for a weekly stipend and room and board, the au pair is dependent on the host family for subsistence; moreover, the family exercises “pervasive control” in determining which tasks and for what hours of the day the au pair will be performing.⁸⁸ As the USIA explicitly noted, the fact that the program refers to au pair compensation as “pocket money” and the employer as a “family member” cannot be used to avoid the employer/employee relationship.⁸⁹ Accordingly, under the new regulations, au pairs would be entitled as “employees” to minimum wage for each hour worked, though employers would be permitted an approximately 40% reduction for the cost of room and board.⁹⁰

In letters sent to new au pairs and host families to welcome them to the au pair program, the State Department informs au pairs that they will “live as an *employee* and a guest” in the host family’s home, and reminds host

\$100 to \$155 per week; to increase families’ tuition costs from \$300 to \$500. See 22 C.F.R. pt. 514 (1995) (interim rule with request for comment); Exchange Visitor Program, 59 Fed. Reg. 64,296, 62,296–301 (proposed Dec 14, 1994) (to be codified at 22 C.F.R. pt. 514).

⁸⁰ Exchange Visitor Program, 60 Fed. Reg. at 8547–53.

⁸¹ Warren Cohen, *Home Wreckers: Congress’s role in the au pair tragedy*, NEW REPUBLIC, Nov. 24, 1997, at 18, 20.

⁸² Exchange Visitor Program, 60 Fed. Reg. at 8548.

⁸³ Cheryl Wetzstein, *Families Organize to Fight New USIA Au Pair Rules*, WASH. TIMES, Jan. 8, 1995, at A4.

⁸⁴ For example, the USIA dropped its proposal that au pairs be at least 21 years of age before being permitted to care for infants, and only required au pairs receive eight instead of 16 hours of child safety training. Exchange Visitor Program, 60 Fed. Reg. at 8549.

⁸⁵ *Id.* at 8550.

⁸⁶ *Id.* (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)).

⁸⁷ *Id.* (citing *Goldberg v. Whitaker House Corp.*, 366 U.S. 28 (1961)).

⁸⁸ *Id.* at 8551.

⁸⁹ 60 Fed. Reg. at 8550–51.

⁹⁰ *Id.* at 8551.

families that they are “*employer[s]* of the young person.”⁹¹ Notwithstanding formal recognition of the au pair-host family relationship as an employment relationship, however, the au pair program remains officially billed as a cultural exchange program under the auspices of the State Department J-1 Exchange Visitor Program.

Housed in the State Department, the au pair program not only offers rare access to affordable, flexible in-home childcare, but it also affords American families this benefit without the costs typically required of employers of migrant labor. The desire to retain these benefits combined with the sustained American demand for affordable and flexible in-home childcare has entrenched political resistance to changing, much less abolishing, the program. Yet, as discussed below, concerns over the legitimacy of labeling this childcare program a “cultural exchange” remain as vexing today—if not more so—than they were at program inception.

II. THE WORK OF CULTURAL EXCHANGE

The marketing of the au pair program as “cultural exchange” conjures images of young Western European women coming to the United States to experience life in America while, at the same time, exposing their young charges to foreign language and culture. While this imagery may ring true in some instances, available ethnographies suggest that the au pair experience may be more accurately described as that of an (over) full-time childcare provider who rarely earns enough money to experience the American life she or he envisioned.⁹² The notion of the au pair and host family being “on par” tends to be more an ideal than a reality.⁹³ The au pair’s experience—whether more weighted toward cultural exchange or toward childcare provision—is entirely contingent upon the demands of host families.⁹⁴

Close examination of the program reveals that, contrary to its “cultural exchange” rhetorical cornerstone, the program’s primary emphasis is on the au pair’s role as provider of affordable, flexible childcare for American families. But the “cultural exchange” rubric does crucial work in masking the heavy labor component of the program in at least two respects. First, classi-

⁹¹ Letter from Rick A. Ruth, Deputy Assistant Secretary for Private Sector Exchange, Acting, U.S. Department of State, Bureau of Educational and Cultural Affairs, to American Host Family, *available at* <http://j1visa.state.gov/wp-content/uploads/2012/09/au-pair-host-family-letter-december-2010.pdf> (last visited Mar. 27, 2013) (emphasis added) [hereinafter State Department Welcome Letter to Host Families]; Letter from Rick A. Ruth, Deputy Assistant Secretary for Private Sector Exchange, Acting, U.S. Department of State, Bureau of Educational and Cultural Affairs, to Au Pair Program Participant, *available at* <http://j1visa.state.gov/wp-content/uploads/2012/09/au-pair-pgm-participant-letter.pdf> (last visited March 27, 2013) (emphasis added).

⁹² See sources cited *supra* note 3.

⁹³ See sources cited *supra* note 3.

⁹⁴ CECILIE ØIEN, ON EQUAL TERMS? AN EVALUATION OF THE NORWEGIAN AU PAIR SCHEME 14–15 (2009).

ifying the program as “cultural exchange” obscures the work component by rationalizing the program’s displacement from the purview of the Labor Department to that of the State Department, effectively shielding the au pair-host family relationship from labor scrutiny. Second, the “cultural exchange” rubric affirms—through “host family” rhetoric embedded in the regulations and utilized by program participants in daily interactions—that what the au pair does is something *other* than work.

These dynamics have negative implications not only for au pairing, but also for migrant domestic work more generally. The “cultural exchange” rubric has created and sustained an institutional structure that obstructs access to remedies for labor violations. While certainly not all—or even necessarily most—au pair-host family relationships are exploitative, any exploitation that might occur is readily ignored by the au pair agencies, unnoticed by the State Department, withstood by the au pairs, and perpetrated by host families with impunity. By framing au pairing as something other than *work*, the au pair program signals that accessing justice for labor violations is both unnecessary and inappropriate. The “cultural exchange” label not only frees this childcare program from regulation, it also avoids messy guestworker program politics and evades difficult questions regarding the nature and role of migrant domestic work in sustaining American middle and upper-middle-class lifestyles.

A. *Obscuring Work*

The dissonance between the program’s marketing as cultural exchange and its operations as a labor program invites a clash of expectations between au pairs and their host families.⁹⁵ Admittedly, whether au pairs and host families experience the program as cultural exchange or cheap labor depends on the particular mix of values and expectations held by the individual participants. But available ethnographic data suggests that au pairs typically arrive expecting plentiful opportunities to improve their English and to make friends and socialize, only to find themselves surprised at the difficulty and monotony of their long workdays.⁹⁶ This reaction in turn is often looked upon with surprise, if not disdain, by host families who have been primed by program marketing to expect trained and qualified childcare providers.⁹⁷

The disconnect is not simply attributable to a marketing bait and switch. Close examination of what the program offers and provides each participant—au pair, employer, State Department, agency—reveals an underlying regulatory structure designed to obscure the essential nature of the program as a source of affordable childcare. Permitting what is functionally a labor program to masquerade as a cultural exchange benefits American families,

⁹⁵ See sources cited *supra* note 3.

⁹⁶ See Hess & Puckhaber, *supra* note 3, at 71–75.

⁹⁷ See *id.*

who gain access to flexible, full-time, in-home childcare at bargain-basement prices. In making this option available to American families, the U.S. government enhances its reputation as providing for American families, while avoiding the administrative burdens, financial costs, and political controversy of instituting a formal domestic worker/guestworker program. But it is the au pair agencies that profit most from the subterfuge. The State Department's incapacity to oversee labor programs effectively liberates the au pair agencies from government oversight, affording them astonishingly broad discretion in practice over whether and how to implement the program regulations. As participants in a competitive market in which the host families are the target commodity, au pair agencies have little incentive to identify, much less address, host family mistreatment of au pairs. This dynamic renders au pairs extremely vulnerable to abuse and with little access to legal remedies.

1. *Employers*

“Childcare that averages \$345 a week for 3 kids—it’s a no-brainer. Daycare would cost twice as much.” – Amy Hunt, host mom in OH (Cultural Care website)⁹⁸

Senior lawyers in major national law firms, Alice and Robert Johnson found dropping off and picking up their 3-year-old daughter from daycare on time a challenge. With another child on the way, the Johnsons decided in-home care would better suit their schedules. A nanny search proved too time-consuming, the nanny salaries higher than the Johnsons wanted to pay, and nanny work hours too limited for their needs. They therefore decided instead to hire an au pair to provide the early morning and evening care the Johnsons required. They requested a Venezuelan au pair, who would then share Mrs. Johnson’s cultural heritage and provide the children an opportunity for Spanish immersion. Almost a month after the Johnsons’ second child, Sofia, was born, Paola arrived from Venezuela.

Cultural exchange is seldom the fundamental reason why families choose to hire an au pair. Nor is the prospect of gaining a pseudo-family member typically a prime motivating factor.⁹⁹ For some, the pseudo-kinship role au pairs are to assume can alleviate parents’ concern over handing the

⁹⁸ Flexible childcare for every budget, CULTURAL CARE AU PAIR, <http://pages.culturalcare.com/affordability-submit> (last visited Mar. 10, 2013).

⁹⁹ There may even be specific resistance to the notion of incorporating the au pair as family member. BÚRIKOVÁ & MILLER, *supra* note 3, at 34; COX & Narula, *supra* note 3, at 335–36.

care of their children to a stranger.¹⁰⁰ The prospect of exposing their children to a different language and cultural tradition may also be appealing.¹⁰¹ But for most, the possibility of pseudo-kinship and cultural enrichment for the children is at most an additional perk on top of the program's central appeal: an affordable and flexible in-home childcare option for working families.¹⁰²

In Washington, D.C., for example, legally hiring the services of a full-time nanny costs upwards of \$45,000 per year.¹⁰³ Hiring an au pair to provide in-home care costs less than \$25,000 per year—consisting of approximately \$7000 in au pair agency fees, \$195.75 per week au pair stipend (as of 2012), \$135 per week for room and board, and a \$500 reimbursement for the au pair's required coursework.¹⁰⁴ As compared to daycare options, which are generally less expensive than in-home care,¹⁰⁵ the au pair program can offer substantial cost savings for families with multiple children because the au pair's weekly stipend is the same regardless of the number of children.¹⁰⁶

Au pair program design prioritizes host families' need for flexible, affordable childcare over au pairs' interest in cultural exchange. The *only* formal cultural/educational exchange requirement of the program is the requirement to attend courses equivalent to six hours of academic credit.¹⁰⁷ The work component of the program, on the other hand, boasts extensive requirements establishing au pairs' qualifications and responsibilities as childcare providers. For example, au pair agencies are required to provide a

¹⁰⁰ This is linked to commodification anxiety, discussed *infra* in text accompanying notes 215–216.

¹⁰¹ Indeed, the fact of participating in a State Department cultural exchange program may bring a certain “cultural cache” to the hiring of an au pair; hiring an “imported” foreign nanny for a fee may carry a certain sense of exclusivity not found in the hiring of other migrant domestic workers.

¹⁰² See Wilgoren & Shear, *supra* note 75, at B1. See generally sources cited *supra* note 3.

¹⁰³ INT'L NANNY ASS'N, 2011 INTERNATIONAL NANNY ASSOCIATION SALARY AND BENEFITS SURVEY (2011) (figure based on 45–50 hours per week, at \$16 to \$20 per hour). Note that there is a substantial market of undocumented nannies who may have lower hourly rates, and a substantial number of employers who do not pay employment taxes (e.g., Medicare, Social Security) regardless of whether their nannies are documented. HOME ECONOMICS, *supra* note 12, at xi.

¹⁰⁴ Based on the 2012 au pair weekly stipend rate (\$195.75), which is pegged at minimum wage per hour minus a 40% deduction for room and board, an au pair's annual gross income is \$10,179. MINIMUM WAGE NOTICE, *supra* note 24. Based on this formula, the additional cost of room and board would be approximately \$7,635.

¹⁰⁵ Washington, D.C. is the most expensive area in the United States for daycare. Full-time daycare for an infant costs an average of \$20,178 while full-time daycare for a four-year-old costs an average of \$15,437 per year. CHILD CARE AWARE OF AMERICA, 2012 CHILD CARE IN THE STATE OF: DISTRICT OF COLUMBIA, 1, 2 (2012), http://www.naccra.org/sites/default/files/default_site_pages/2012/dc_060612-3.pdf.

¹⁰⁶ MINIMUM WAGE NOTICE, *supra* note 24 (setting weekly stipend for all au pairs).

¹⁰⁷ 22 C.F.R. 62.31(k) (2012). That families and sponsors lobbied against these requirements—arguing that au pair interactions with the host family were sufficient educational/cultural exchange—reflects resistance to the program's key articulated goal. Exchange Visitor Program, 60 Fed. Reg. 8547, 8548 (Feb. 15, 1995) (to be codified at 22 C.F.R. pt. 514).

host family with interview notes from its interviews of au pair applicants¹⁰⁸ and the results of psychometric personality tests conducted to determine whether an au pair possesses “those characteristics considered most important to successfully participate in the au pair program.”¹⁰⁹ Au pairs are required to undergo at least 32 hours of child safety and child development training,¹¹⁰ and only those with 200 hours of documented infant childcare experience are permitted to provide infant care.¹¹¹ If an au pair fails to meet host family expectations, the host family can request that the agency replace the au pair.¹¹²

Despite host families’ functioning as employers, the program’s putative “cultural exchange” component frees host families from standard employer responsibilities. Unlike other employers of immigrant workers, host-family-employers do not have to obtain Department of Labor certification—i.e., that enough qualified U.S. workers were unavailable and that the wages and working conditions attached to job offers would not adversely affect similarly employed U.S. workers.¹¹³ Host-family-employers do not have to pay au pairs according to the “prevailing wage” standard that is required even of some other employers in the J-1 program.¹¹⁴ Nor do they have to pay the employer contributions to Medicare and Social Security, workers’ compensation, or unemployment insurance.¹¹⁵ In addition to reprieve from these financial obligations, host-family-employers can even claim a childcare tax credit based on the cost of employing an au pair.¹¹⁶

¹⁰⁸ 22 C.F.R. § 62.31(d)(5) (2012).

¹⁰⁹ 22 C.F.R. § 62.31(d)(6) (2012).

¹¹⁰ 22 C.F.R. § 62.31(g) (2012).

¹¹¹ 22 C.F.R. § 62.31(e)(3) (2012).

¹¹² For example, Au Pair Care has a policy that “If the Host Family is within the first 6 months of a 12 month program Au Pair Care will provide Host Family with ONE replacement au pair without requiring Host to reapply to the program and pay new fees.” See Paula Boutwell, *REMATCHING done right*, AUPAIRCARE BLOG, (Sept. 2, 2010), <http://www.aupaircare.com/blog/tags/rematch> (last visited Feb. 23, 2013).

¹¹³ The au pair program is under the purview of the State Department. 22 C.F.R. § 62.31 (2012). For information regarding the U.S. Department of Labor foreign labor certification process, see *About Foreign Labor Certification*, U.S. DEP’T OF LABOR, <http://www.foreignlaborcert.doleta.gov/about.cfm> (last visited Mar. 10, 2013). Regarding prevailing wage rate determination process, see *Information and Resources, Online Wage Library*, U.S. DEP’T OF LABOR, <http://www.foreignlaborcert.doleta.gov/wages.cfm> (last visited Mar. 10, 2012).

¹¹⁴ *Compare* 22 C.F.R. § 62.31(j) (2012) (setting out the minimum wage requirements for au pairs), with Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593, 27,610 (Dep’t of State May 11, 2012) (to be codified at 22 C.F.R. pt. 62) (setting out the interim regulations for the Summer Work Travel (SWT) Program recently proposed by the State Department suggesting that SWT participants be compensated with “pay and benefits commensurate with those offered to their similarly situated U.S. counterparts.”).

¹¹⁵ See 22 C.F.R. § 62.31 (2012).

¹¹⁶ *Ten Things to Know About Child and Dependent Care Credit*, IRS (Mar. 7, 2011), <http://www.irs.gov/newsroom/article/0,,id=106189,00.html>. See also *Tax Information, EURAUPAIR*, <http://www.euraupair.com/taxes.html> (last updated Feb. 8, 2013); *Tax Information for Host Families*, AUPAIRCARE BLOG, <http://www.aupaircare.com/current-host-families/tax-information> (last visited Mar. 10, 2013).

Moreover, aside from the program requirements regarding days off and maximum work hour limits,¹¹⁷ host-family-employers retain complete discretion over au pair working hours and living conditions, as nothing in the regulations bars the host-family-employers from requiring their au pair to work on federal holidays or to work irregular, sporadic hours with no advanced notice.¹¹⁸ Not only are host-family-employers subject to few regulations regarding au pair work schedules, they are encouraged by agencies to establish “house rules” governing au pair conduct in the household—e.g., curfews and rules governing when, what, and how much of the household food au pairs are permitted to consume.¹¹⁹ Through these rules, host-family-employers can impose further obligations on an au pair (e.g., dishwashing, taking out the trash, cooking meals), but in her role as “family member” rather than worker.¹²⁰ Providing all of the benefits of an affordable, maximally flexible guestworker childcare program, but without any of the costs, the au pair program is a windfall for American families.

2. *Au Pairs*

When Paola first arrived, she was responsible for helping Mrs. Johnson, who was on maternity leave, care for the newborn Sofia and 3-year-old Isabella. But a few weeks after her arrival, in response to Mrs. Johnson’s repeated complaints about having to wake multiple times a night to feed Sofia, who suffered from colic, Paola offered to help Mrs. Johnson with the nighttime feedings. Immediately thereafter, Paola found herself responsible for waking four to six times per night to feed and soothe Sofia, while the Johnsons slept through the night, six nights per week.

Under the Fair Labor Standards Act, given the frequent interruptions to Paola’s sleep each night, Paola should have been compensated for the entire nighttime period for which she was “on call” (i.e., six to eight hours).¹²¹ But the Johnsons compensated her for only the minutes spent attending to Sofia (1-2 hours per night). Not only did they fail to compensate Paola for the bulk of her

¹¹⁷ Au pairs are entitled to 1.5 days off per week, one complete weekend per month, and two weeks of vacation per year. They are permitted to work up to 45 hours per week, at no more than 10 hours per day. 22 C.F.R. § 62.31(j) (2012).

¹¹⁸ 22 C.F.R. § 62.31 (2012).

¹¹⁹ See “Kitchen Rules,” appended to Email from Local Care Coordinator to Host Families (February 18, 2012) (on file with author) (listing rules—developed by one host family—that a local counselor for Cultural Care circulated to her cluster of host families including requirements that the au pair take out the trash, empty the dishwasher, and clean up other people’s spills).

¹²⁰ *Id.*; see also Cox & Narula, *supra* note 3, at 339–43 (describing families imposing rules about room use, house guests, and food consumption).

¹²¹ See discussion of on-call hours calculation under the Fair Labor Standards Act accompanying *infra* notes 315–16.

night hours, they also required her to work 50 to 75 hours during the day each week. Fully aware that these daytime hours were in excess of the 45 hour work limit, the Johnsons provided Paola extra compensation, but at only \$4 per extra hour, or slightly over half of the federal minimum wage rate. The Johnsons being senior lawyers at prominent firms, Paola never questioned their assurances that the hours and pay were proper.

For au pairs, taking care of children is rarely the central motivation behind the decision to participate in the program.¹²² For some, the au pair program stipend, while low by American standards, can itself provide financial incentive when compared to wages the au pair might otherwise earn at home.¹²³ For others, the program offers the promise of adventure and cultural exchange, an opportunity to meet new friends (even a spouse), and a chance to improve one's English and to experience life in a different country.¹²⁴ Some au pairs may come with an eye toward escaping family life back home rather than joining a new "host family,"¹²⁵ while others, being young and far from home, derive a sense of security from the promise of developing kinship ties. Overall, au pairing offers a seemingly simple, safe, and inexpensive option for an extended stay in a foreign country—particularly when compared to finding housing and jobs in a foreign country on one's own.¹²⁶

Though marketed to au pairs as a cultural exchange program, the au pair program offers little in the way of structured cultural exchange opportunities. The \$500 reimbursement host families are required to provide for the

¹²² A *Washington Post* reporter recounts witnessing an au pair program trainer's effort to poll recently-arrived au pairs as to their motivations for participating in the au pair program. Of the approximately 100 au pairs, all came to improve their English, most came seeking adventure, half came in hopes of finding a rich American husband, and one came to take care of American children. Tamara Jones, *Hello, Nanny: Recently Arrived Au Pairs Get a Crash Course on America's House Rules*, WASH. POST, Oct. 16, 2005, at D01. Note that an empirical study of au pair motivations has never been conducted in the United States. An in-depth examination of the motivations of Slovakian au pairs placed in England provides some insight into the range of reasons behind the decision to become an au pair. See BÚRIKOVÁ & MILLER, *supra* note 3, at 5–31 (recounting the backgrounds and motivations of four au pairs).

¹²³ See, e.g., ØIEN, *supra* note 94, at 72–73 (noting that Filipinos become au pairs as a livelihood strategy); BÚRIKOVÁ & MILLER, *supra* note 3, at 188 (noting that a new generation of au pairs coming from post-socialist countries of Central and Eastern Europe did so as an economic strategy to cope with post-socialist unemployment conditions); Hess & Puckhaber, *supra* note 3, at 66–67 (telling the story of a Slovakian woman's decision to pursue au pairing in Germany after her parents could not afford to send her to university).

¹²⁴ See e.g., BÚRIKOVÁ & MILLER, *supra* note 3, at 5–31; Cohen, *supra* note 81, at 19; Hess & Puckhaber, *supra* note 3, at 68, 71. Indeed, it is this very conception of au pairing as a cultural exchange adventure that au pair agencies historically emphasized to applicants as necessary to the survival of the program, because parents of potential au pairs would not permit their children to take part in the cultural exchange if the exchange was defined as work. Yodanis & Lauer, *supra* note 3, at 52.

¹²⁵ BÚRIKOVÁ & MILLER, *supra* note 3, at 5–31; ØIEN, *supra* note 94, at 51–52.

¹²⁶ BÚRIKOVÁ & MILLER, *supra* note 3, at 187.

mandated au pair coursework is a figure that has not changed since 1995,¹²⁷ and barely (if at all) covers the cost of the required courses.¹²⁸ Moreover, au pairs' opportunity to improve their English language skills may be compromised by host families' attempts to maximize their children's exposure to foreign language by restricting English language usage in the household. Most significantly, the complete discretion an employer has over an au pair's work schedule—whether through scheduling of irregular hours or not providing advance notice regarding the work schedule—can undercut an au pairs' access to “cultural exchange” by limiting the ability to make plans to experience American life outside the home. That au pairs can be placed with families in remote suburbs and given limited access to transportation severely limits their prospects for developing social ties outside the host family. It comes as little surprise, therefore, that ethnographic studies of au pairing underscore the tension between au pairs seeking cultural exchange and host parents/employers seeking a low-cost childcare worker.¹²⁹ Called upon at any hour to perform childcare duties, the reality for many au pairs is thus more akin to that of a live-in migrant domestic worker than a cultural exchange participant.¹³⁰

Au pairs assume the responsibilities of formal recognition of the employer-employee relationship, but receive none of its labor-protective benefits. Unlike their employers, au pairs do not receive tax breaks for participating in a “cultural exchange” program. Instead, they are required to pay income tax on the small stipends they receive.¹³¹ While au pairs undergo psychological testing to ensure their suitability as childcare employees,¹³² host families are not psychologically tested to determine their suitability as

¹²⁷ Exchange Visitor Program, 60 Fed. Reg. 8547, 8553 (Feb. 15, 1995) (to be codified at 22 C.F.R. pt. 514) (listing requirements of § 514.31(k)).

¹²⁸ Indeed, au pair blogs reveal frustration regarding the difficulty of fulfilling the course requirement with only a \$500 reimbursement. The response of au pair agencies and host families, however, has not been to suggest increasing the reimbursement fee, but to lobby the State Department to permit au pairs to fulfill the 6 hour credit requirement with community service hours. See *CC Survey About Classes*, CULTURAL CARE AU PAIR BLOG, http://community.culturalcare.com/culturalcare/topics/cc_survey_about_classes (last visited Mar 10, 2013); *The State Department Should Bring Back Community Service Hours to Count Towards the Educational Component*, CULTURAL CARE AU PAIR BLOG, http://community.culturalcare.com/culturalcare/topics/the_state_department_should_bring_back_community_service_hours_to_count_towards_the_educational_component (last visited Mar 10, 2013). The difficulty of fulfilling the educational requirement has created a niche market for “intensive programs” enabling au pairs to meet their required credit hours over the course of a couple of weekends, for approximately \$600. See, e.g., *Weekend Program*, AU PAIR WEEKEND, <http://www.aupairweekend.org/schedule> (last visited Mar 10, 2013) (cost of \$600 for program at Sojourner Douglass College); *Au Pair Weekend Program: Learning to Live Your American Dream*, REGONLINE, <http://www.regonline.com/Register/Checkin.aspx?EventID=966091> (last visited Mar. 10, 2013) (cost of \$570 for program at National Louis University).

¹²⁹ MACDONALD, *supra* note 3, at 52.

¹³⁰ Hess & Puckhaber, *supra* note 3, at 71–75.

¹³¹ E.g., AU PAIR IN AMERICA, 2012 GENERAL TAX INFORMATION FOR AU PAIRS (2012), http://www.aupairinamerica.com/pdf/tax_information_for_aupairs.pdf.

¹³² 22 C.F.R. § 62.31(d)(6) (2012).

employers and cultural exchange “hosts.”¹³³ Prospective au pairs are not even entitled to see the notes of the “home visit” an agency is supposed to conduct to assess the adequacy of living space and suitability of the prospective host family for the program.¹³⁴ Moreover, in contrast to the 32 hours of childcare training au pairs are required to undergo, host families are not required to attend trainings regarding their responsibilities as employers, even with respect to areas that have been specifically and repeatedly identified as problematic—e.g., training targeting sexual harassment and proper application of the Fair Labor Standards Act to work hours and payment.¹³⁵

Available ethnographies reveal—and author interviews confirm—that underpayment and overworking of au pairs are common practices.¹³⁶ But the framing of the au pair program as a cultural exchange rather than labor program offers only two options to an exploited au pair: placement with a different host family (referred to as “rematch”) or repatriation back to their home countries. Either option might provide relief from the harm, but neither provides actual redress for labor violations.

Hence, despite formal recognition of au pairs as both cultural exchange participants and employees, au pairs can easily find themselves deprived of the benefits of one or both components of the program. The complete discretion host-family-employers exercise over au pair working and living conditions renders an au pair’s access to “cultural exchange” entirely contingent on employer goodwill. At the same time, the failure to inform au pairs and host families of the labor protections attached to their employer-employee relationship facilitates (however inadvertently) exploitative working conditions. These dynamics render the au pair vulnerable to labor violations at the hands of her host-family-employers in the first instance and, moreover, allow the host-family-employers to continue to perpetrate such violations with impunity.

3. *The State Department*

The au pair program as a source of affordable, in-home childcare could not exist but for its strategic placement within the purview of the State Department. The State Department plays a crucial role in promoting the program’s status as a cultural exchange—not only by housing the program under its J-1 Visitor Exchange Program, but also through its normative man-

¹³³ See 22 C.F.R. § 62.31(h) (2012) (setting out the requirements for host family selection).

¹³⁴ See *id.*

¹³⁵ Note that host-family-employers are technically required to attend an agency-organized “family day conference”—which may or may not contain employer-relevant training—or else risk termination from the program 22 C.F.R. § 62.31(i)(3) (2012). But the au pair agencies are not required to monitor, much less ensure, actual attendance. Telephone Interview with Au Pair Industry Insider No. 1, *supra* note 12.

¹³⁶ See sources cited *supra* note 3.

agement of the program. Despite formal acknowledgment of au pairs as both cultural exchange participants and employees, the State Department does not incorporate labor standards or involve labor institutions in its program governance. The end result is a bureaucratic structure and operations that actively obscure the program's work component and possible avenues of recourse for labor violations.

To be clear, the fact that au pairs are "cultural exchange participants" does not, as a matter of law, deprive them of the few labor protections domestic workers have under federal and (some) state labor laws. In cases of minimum wage violations, for example, an au pair, like any other domestic worker, could seek back wages by filing an administrative complaint with the federal Department of Labor Wage & Hour Division,¹³⁷ and—where state labor laws apply to domestic workers—also to comparable state agencies.¹³⁸ An au pair could also file civil lawsuits under the FLSA¹³⁹ and relevant state labor laws,¹⁴⁰ and in cases of more extreme exploitation, pursue criminal prosecution and civil lawsuits for damages under the U.S. Trafficking Victims Protection Act.¹⁴¹

Yet, the only mention of labor standards in the au pair program materials is a passing reference embedded in the au pair regulations, noting that hours and wages are to be paid "in conformance with the requirements of the Fair Labor Standards Act as interpreted and implemented by the United States Department of Labor."¹⁴² The references to the FLSA and the Department of Labor were only added in 1997 as an explanatory response to host families' "voluminous comments" all objecting to having to increase au pair stipends to comply with minimum wage requirements.¹⁴³ Past and current au pair regulations are devoid of any discussion of the specific FLSA guidelines for calculating work hours for employees who reside in their place of em-

¹³⁷ *FairPay—Filing a Complaint for Back Wages Under the Fair Labor Standards Act*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/regs/compliance/fairpay/complaint.htm> (last visited Mar. 10, 2013) (describing the process for filing a complaint).

¹³⁸ *See, e.g., How to file a wage claim*, CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, <http://www.dir.ca.gov/dlse/HowToFileWageClaim.htm> (last visited Mar. 10, 2013) (describing the process for filing a complaint).

¹³⁹ Fair Labor Standards Act, 29 U.S.C. § 216(b) (2006) (permitting damages equal to double the back pay owed, reasonable attorney's fee and costs).

¹⁴⁰ *See, e.g., Maryland Wage Payment and Collection Law*, MD. CODE ANN. LAB. & EEMPL. § 3-507.2(b) (LexisNexis 2012) (permitting damages up to three times the back pay owed, as well as reasonable attorney's fees and costs).

¹⁴¹ 18 U.S.C. § 1595 (2012) (affording victims of trafficking the right to bring a civil action to recover damages and reasonable attorneys fees).

¹⁴² 22 C.F.R. § 62.31(j)(1) (2012).

¹⁴³ When compliance with minimum wage standards was first required, in the 1995 final rules, it resulted in a raise in au pair stipends from \$100 to \$155. Exchange Visitor Program, 60 Fed. Reg. 8547, 8551 (Feb. 15, 1995) (to be codified at 22 C.F.R. pt. 514). Non-compliance with the rule led the USIA to include explicit reference to FLSA and the Department of Labor in the 1997 regulations. Exchange Visitor Program, 62 Fed. Reg. 34,632, 34,633 (June 27, 1997) (to be codified at 22 C.F.R. pt. 514).

ployment.¹⁴⁴ For example, in establishing the 10-hour workday limit,¹⁴⁵ the au pair regulations provide no guidance as to how those hours are to be calculated.¹⁴⁶ As underscored by Paola's experience, recounted above, such omission—particularly regarding on-call hours—enables employers to readily exceed the federally-mandated au pair work hour limit. The materials the State Department provides to the au pairs and host families are similarly devoid of substantive guidance. The welcome letters the State Department sends to host-family employers and au pairs provide links to the State Department Au Pair Program website, but the “participants” (au pairs) and “host families” webpages make no mention of the FLSA or the Department of Labor.¹⁴⁷

Nor do the au pair program materials provide au pairs any substantive information regarding possible recourse in the event of rights violations—labor or otherwise. The State Department does not provide these young migrants with information, for example, concerning the potential role of the federal or state labor departments—or even the police—in providing redress and/or protection for rights violations.¹⁴⁸ The Trafficking Victims Protection Reauthorization Act of 2008 required the U.S. government to develop and distribute an information pamphlet detailing the legal rights and resources for aliens applying for employment- or education-based non-immigrant visas.¹⁴⁹ But that pamphlet is nowhere to be found on the State Department Au Pair Program website.¹⁵⁰ Instead, there is a “Guidance Directive” delegating to the J-1 sponsors/agencies the responsibility of providing the pamphlet to their program participants.¹⁵¹ In a similar vein, the State Department welcome letters direct au pairs and host families to contact their au pair agencies should any problems arise, and—only if the agency is unrespon-

¹⁴⁴ See Exchange Visitor Program, 62 Fed. Reg. at 32632–34; Exchange Visitor Program, 60 Fed. Reg. at 8547–53.

¹⁴⁵ Though not required by the FLSA, the au pair regulations were amended in 1997 to limit au pair daily working hours to 10 hours per day. See Exchange Visitor Program, 62 Fed. Reg. at 32633.

¹⁴⁶ See *id.* at 32632–34.

¹⁴⁷ U.S. Dept. of State, *Au Pair Program: Participants*, J-1 VISA EXCHANGE VISITOR PROGRAM, <http://j1visa.state.gov/programs/au-pair#participants> (last visited Mar. 10, 2013); U.S. Dept. of State, *Au Pair Program: Hosts/Employers*, J-1 VISA EXCHANGE VISITOR PROGRAM, <http://j1visa.state.gov/programs/au-pair#hostsemployers> (last visited Mar. 10, 2013). Only the “sponsor” (au pair agency) page mentions the FLSA or the Department of Labor. See U.S. Dept. of State, *Au Pair Program*, J-1 VISA EXCHANGE VISITOR PROGRAM, <http://j1visa.state.gov/programs/au-pair/#program-sponsors> (last visited Mar. 10, 2013).

¹⁴⁸ See *supra* text accompanying note 91.

¹⁴⁹ The 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, 122 Stat. 5044, 5055 (codified at 22 USC § 7101 (2012)). See also U.S. DEPT. OF STATE, *YOUR WORKPLACE RIGHTS IN THE UNITED STATES* (2009), <http://www.state.gov/documents/organization/126007.pdf>.

¹⁵⁰ See sources cited, *supra* note 147.

¹⁵¹ U.S. DEPT. OF STATE BUREAU OF EDUC. & CULTURAL AFFAIRS, *PRIVATE SECTOR EXCHANGE, GUIDANCE DIRECTIVE* (2009) (regarding William Wilberforce Trafficking Victims Protection Reauthorization Act) (on file with author).

sive—to then contact the State Department via a general email address for the J-1 program.¹⁵²

If contacted by an au pair or host family, however, State Department protocol ultimately redirects disputes back to the au pair agencies to resolve.¹⁵³ An au pair or host family can submit a complaint to the State Department detailing any allegations of program violations by au pair or host family, or of agency mishandling of complaints.¹⁵⁴ The information is then brought to the attention of the au pair agency for resolution by the agency.¹⁵⁵ Regardless of how egregious the violation, however, the State Department disclaims authority to dictate how an agency resolves individual complaints.¹⁵⁶ The State Department does not even track the outcomes of such disputes—e.g., for purposes of either collecting data regarding the quality of au pair program operations, or blacklisting noncompliant host families or au pairs to preclude repeat participation in the program.¹⁵⁷ Indeed, it was not until February 2011 that the State Department began logging complaints submitted to the ECA by either host families or au pairs.¹⁵⁸

Thus, decidedly removed from direct engagement with host families and au pairs, the State Department instead focuses its regulatory efforts on certifying au pair agencies as official State Department-designated au pair program “sponsors” and overseeing their compliance with the program regulations. The J-1 program regulations contemplate a range of sanctions for sponsor noncompliance.¹⁵⁹ For example, failure to monitor and enforce the stipend and hours requirements may result in agencies being suspended from the program, losing their designation as program sponsors, or facing a range of lesser sanctions including percentage reductions in the number of people they are permitted to recruit.¹⁶⁰ As the Department of State refuses to involve itself in au pair-host family relations,¹⁶¹ the only function the filing of

¹⁵² See State Department Welcome Letter to Host Families, *supra* note 91 (advising host families that “[t]he Department is unable to mediate disputes involving au pairs, host families and sponsoring organizations”).

¹⁵³ Email from State Department Official to Author (June 22, 2011) (on file with author).

¹⁵⁴ Email from State Department Official to Author (June 7, 2011) (on file with author).

¹⁵⁵ June 22, 2011 Email, *supra* note 153.

¹⁵⁶ *Id.*

¹⁵⁷ Reasons for why this is so, based on speculation from State Department officials and au pair agency representatives, center on concerns over confidentiality of the program participants, and the potential disputes over allegedly wrongful inclusion in the blacklist. *Id.* Telephone Interview with Au Pair Industry Insider No. 2 (Nov. 29, 2011).

¹⁵⁸ Interview with State Department, Bureau of Educational and Cultural Affairs, Private Sector Exchange, Wash., D.C., (initial interview on June 1, 2012 with subsequent follow-up and clarification) [hereinafter Interview with State Department ECA].

¹⁵⁹ 22 C.F.R. § 62.50(n) (2012) (listing potential sanctions for sponsor non-compliance); 22 C.F.R. § 62.31(n) (2012) (listing situations in which the Department of State may undertake “immediate program revocation” against a sponsor).

¹⁶⁰ 22 C.F.R. § 62.50(n) (2012); 22 C.F.R. § 62.31(n) (2012).

¹⁶¹ See State Department Welcome Letter to Host Families, *supra* note 91.

a complaint with the State Department serves is to possibly trigger sanctions against an au pair agency for noncompliance with the regulations.

As a practical matter, however, there is objectively little risk of sanctions, given the structural incapacity of the State Department to exert meaningful oversight over sponsor practices. Currently, there are fourteen State Department-certified au pair program sponsors,¹⁶² responsible for the approximately 22,000 au pairs currently residing in the United States.¹⁶³ Though one of the largest, the au pair program is but one of fourteen different exchange programs under the J-1 Visitor Exchange Program—the other programs involving sponsors numbering in the thousands.¹⁶⁴ As of early 2012, a total of thirteen ECA officers oversee compliance by approximately 3,400 J-1 program sponsors, which together bring to the United States over 350,000 foreign “cultural exchange” participants each year.¹⁶⁵ Given their exceedingly low numbers compared to the J-1 sponsors, the ECA compliance officers do not conduct site visits or other forms of direct monitoring. Instead, they base their compliance determinations on self-reports submitted by the sponsors themselves.¹⁶⁶ While the State Department does require au pair agencies’ self-reports to be independently audited,¹⁶⁷ unlike the self-reports of other J-1 program sponsors,¹⁶⁸ the State Department does not provide specific guidance regarding audit procedures. Moreover, anecdotal information from industry insiders suggests that the auditing procedures, at least in practice, permit identification and correction of problem files in advance of the audit.¹⁶⁹ Indeed, as recently found by the State Department Inspector General, even when sanctioning of J-1 sponsors is undertaken, it requires a “multistep exercise that rarely results in meaningful [or swift]

¹⁶² U.S. Dep’t of State, *Designated Sponsor Organizations*, J-1 VISA EXCHANGE VISITOR PROGRAM, <http://j1visa.state.gov/participants/how-to-apply/sponsor-search/?program=Au%20Pair> (last visited Mar. 10, 2013).

¹⁶³ Telephone Interview with Au Pair Industry Insider No. 1, *supra* note 12.

¹⁶⁴ The fourteen programs include au pair, camp counselor, college and university student, government visitor, intern, international visitor, physician, professor and research scholar, secondary school student, short-term scholar, specialist, summer work travel, teacher, and trainee. See U.S. Dep’t of State, *Programs*, J-1 VISA EXCHANGE VISITOR PROGRAM, <http://j1visa.state.gov/programs> (last visited Mar. 10, 2013). The total number of sponsors across the fourteen programs has been estimated to be 3,416. COSTA, *supra* note 26, at 7 (aggregating from data found on U.S. Dep’t of State, *J-1 Visa Exchange Visitor Program, Facts and Figures*, J-1 VISA EXCHANGE VISITOR PROGRAM (May 27, 2011) <http://j1visa.state.gov/basics/facts-and-figures/>).

¹⁶⁵ COSTA, *supra* note 26, at 1–2, 7.

¹⁶⁶ Interview with State Department ECA, *supra* note 158.

¹⁶⁷ 22 C.F.R. § 62.31(m)(4) (2012).

¹⁶⁸ COSTA, *supra* note 26, at 16 (noting that annual reports submitted by the sponsors are not independently audited).

¹⁶⁹ Auditing procedures require auditors to assess au pair agency compliance with the federal regulations through close review of a random sample of participant files. In practice, however, the auditing procedure permits disclosure of *which* files will be reviewed well in advance of the audit, such that agencies have an opportunity to supplement or revise files as necessary. Telephone Interview with Au Pair Industry Insider No. 1, *supra* note 12; Telephone Interview with Au Pair Industry Insider No. 2, *supra* note 157.

consequences for a delinquent sponsors.”¹⁷⁰ That it took over a year, for example, for the State Department Bureau of Cultural Affairs (“ECA”) to finally terminate a sponsor in its high school exchange program that had been placing students for years with a convicted murderer¹⁷¹ is telling of the ECA’s utter incapacity to effectively monitor, identify, and sanction noncompliant J-1 sponsors.

The State Department management of the au pair program has, in effect, placed the fox in charge of guarding the henhouse. The State Department’s almost exclusive reliance on agency self-reports for its compliance determinations perhaps explains why no au pair agency has ever been terminated or suspended from the program—despite what appears to be widespread violation of the hours requirement.¹⁷² In addition to enjoying broad discretion under a weak compliance mechanism, au pair agencies and their lobbyists have arguably undue influence even over the crafting of the very regulations that govern their activities. The State Department holds “stakeholder consultations” for the purpose of receiving feedback regarding proposed regulatory changes—but the only “stakeholders” invited to these consultations are the agencies and their lobbyists.¹⁷³ While the agencies might be viewed as also representing the interests of the host families, there is little incentive to represent the interests of au pairs. As discussed below, the State Department’s lax monitoring practices, combined with the market dynamics of the au pair industry, empower and incentivize agencies to ig-

¹⁷⁰ 2012 INSPECTION REPORT, *supra* note 8, at 23.

¹⁷¹ *Id.* at 24.

¹⁷² Telephone Interview with Au Pair Industry Insider No. 1, *supra* note 12.

¹⁷³ Interview with State Department ECA, *supra* note 158. Following meetings author had with ECA staff in June 2012, including a meeting with the newly appointed Deputy Assistant Secretary for Private Sector Exchanges, Robin Lerner, State Department Officials expressed interest in broadening “stakeholder” participation in the “public” meetings the ECA holds to receive feedback on proposed changes to the regulations governing the J-1 program. Email from State Department to Author (June 5, 2012) (on file with author). Note that State Department officials requested—and the author provided—a set of proposed reforms for the Au Pair Program regulations and the names of possible “stakeholders” who could represent the au pair perspective. Email from Author to State Department officials (June 27, 2012) (on file with author), attaching *Recommendations for J-1 Au Pair Program Reform*. State Department officials subsequently attended a “listening session” hosted by workers’ rights organizations to inform the State Department of widespread labor abuses across the J-1 program and to begin a dialogue regarding possible reforms. *Listening Session Regarding the J-1 Program*, Economic Policy Institute, Washington DC (August 16, 2012). None of these organizations were invited, however, to attend the stakeholder “public” meetings the State Department held with sponsors and their lobbyists, in October 2012, to discuss proposed changes to the Summer Work Travel Program and the Au Pair Program. Interview with State Department ECA, *supra* note 158. The State Department has informed the author of its plan to release a set of revised au pair regulations for notice and comment in Spring 2013. To the best of the author’s knowledge, none of the organizations the author recommended that the State Department include in its “stakeholder” meetings have ever been consulted regarding the proposed new au pair regulations. Nor is it clear whether and to what extent the author’s proposed recommendations have factored into the development of the revised regulations. Emails from State Department to author (March 12, 2013) (on file with author).

nore—if not conceal—any labor violations experienced by these “cultural exchange” participants.

4. *Au Pair Agencies*

“The IAPA’s Work: Lobby governments to treat au pair programmes as cultural exchange programmes.”—International Au Pair Association website¹⁷⁴

After eighteen months of working for the Johnsons, exhausted and emotionally distraught, Paola informed them of her desire to change employers. When the Johnsons asked Paola what reason she would give the au pair agency for wanting to leave, Paola offered to tell her “local care coordinator,” Randy, that she had not had enough of an opportunity to practice her English—instead of disclosing her excessive work hours. But later concerned that her silence on the matter might enable the Johnsons to subject another au pair to excessive work hours, Paola ultimately decided to inform Randy of the Johnsons’ excessive work requirements.

To Paola’s dismay, Randy responded that she had “wondered” about Paola’s obvious fatigue at the monthly meetings. But Randy rebuffed Paola’s efforts to discuss her hours, encouraging Paola to focus on trying to “re-match” with a new host family. Randy’s supervisor, Doreen, later noted that Paola’s nighttime hours sounded “cruel,” but deemed the nighttime hours calculation irrelevant because the Johnsons had already broken the 45-hour rule by having Paola work 50–75 daytime hours. When asked about how to calculate the additional nighttime hours, Doreen conceded ignorance of the Fair Labor Standards Act requirements. All that mattered, Doreen explained, was that the 45-hour work limit had been broken— by how many hours and how much backpay was owed under the FLSA was simply beyond the scope of the au pair agency’s concern.

Notwithstanding the violation, Doreen concluded that the Johnsons should be permitted to hire another au pair again from Venezuela, despite Paola’s explicit recommendation to the contrary. As Doreen explained to Paola, if the agency were to remove the Johnsons from the program, it would also have to send Paola home to Venezuela for having “agreed” to the excessive work hours—and thus also knowingly violating the au pair regulations. Doreen further cautioned that if Paola reported her situation to

¹⁷⁴ About IAPA, INTERNATIONAL AU PAIR ASSOCIATION, <http://www.iapa.org/about/> (last visited Mar. 10, 2013).

the State Department, the agency would be deprived of its discretion to allow Paola to remain in the program (notwithstanding her wrongdoing) and would be required to send her home.

In fact, when presented with the details of Paola's situation with no names given, the State Department Bureau of Education and Cultural Affairs (ECA) au pair program administrator explained that Paola would be considered a victim of exploitation. In light of Doreen's misrepresentations otherwise, the ECA official suggested that Paola file a formal complaint with the ECA to initiate an investigation of the agency's handling of the situation. The ECA conceded, however, that it would have neither the authority to require the agency to remove the Johnsons from the program, nor the power to prevent the agency from having Paola deported in retaliation. At best, a complaint by Paola would be noted in the ECA's files on the au pair agency and perhaps eventually provide a basis for possible sanctions against the agency.

Three months after Paola left the Johnsons' employ, the au pair agency placed a new au pair from Venezuela in the Johnson home.

While the "cultural exchange" label enables host families to have rare access to affordable, flexible childcare, the au pair agencies stand the most to gain from the misnomer. Lacking the necessary expertise and resources to meaningfully monitor labor programs, State Department oversight affords au pair agencies far greater control over their program operations than if the agencies were within the purview of the Labor Department.¹⁷⁵ Consequently, whether a noncompliant host family (or au pair, for that matter) is held accountable for misconduct is entirely at the discretion of individual au pair agencies. A closer look at industry practice reveals two dynamics that undercut prospects for accountability. First, au pair agencies' role as administrators of "cultural exchange" narrows the parameters of their competence such that developing expertise in and implementing labor standards are subsidiary—if not entirely irrelevant—concerns. Second, regardless of the substantive norms to be enforced, the State Department's lax monitoring of au pair agency practice enables other incentives, such as profit-making, to dominate agency decision-making.

Contributing to the lax monitoring and enforcement of the au pair program regulations is the fact that a significant portion of an au pair agency's functions—recruitment of au pairs—is conducted by foreign entities beyond the reach of U.S. law. While some au pair agencies use American-trained staff in their foreign operations, au pair agencies typically partner with local affiliates with access to potential applicant pools (e.g., university officials,

¹⁷⁵ See Wilgoren & Shear, *supra* note 75, at B1. (The former director of the USIA stated, "[w]e don't have the authority or the staffing to be in [the childcare] business.")

travel agencies, labor recruiters) to recruit prospective au pairs.¹⁷⁶ The foreign-based staff conducts the background checks and administers the psychometric test required by the au pair regulations. The State Department does not oversee the activities of the foreign recruiters—rather, it relies on the U.S.-based au pair agency to monitor the activities of their staff and affiliates abroad. The State Department does not regulate, for example, the apparently common practice among foreign recruiters of charging prospective au pairs recruitment fees that can amount to several thousands of dollars.¹⁷⁷ As recognized by the State Department Office to Monitor and Combat Trafficking, high recruitment fees can pressure workers to withstand poor or abusive working conditions, and even facilitate forced labor and human trafficking.¹⁷⁸ That risk notwithstanding, the ECA considers fee-charging abroad an au pair sponsor's internal business practice, hence beyond the scope of State Department scrutiny.¹⁷⁹ Additionally, in the instances where the ECA has sought to prohibit au pair agencies from engaging in other similarly coercive practices, it has met with limited success. For example, although in 1995, the State Department banned au pair agencies from requiring au pairs to pay a "performance bond" to ensure their completion of the program, continued noncompliance led the ECA to issue, in 2011, a Guidance Directive reminding agencies of the prohibition.¹⁸⁰

Au pair agencies enjoy relatively unfettered discretion even with respect to their U.S.-based operations. On the U.S. side, the agencies' staff recruit and vet prospective host families as well as facilitate the "match" of au pair to host family, usually via login-required websites displaying applicant (au pair and host family) profiles.¹⁸¹ After matching applicants, the au pair agency handles travel logistics and child safety/development training of au pairs upon arrival in the United States. Once the au pair is placed in the home, the au pair agency is responsible for monitoring the host family-au pair relationship for compliance with the au pair regulations. To this end, the regulations mandate that agencies hire local and regional coordinators—typically referred to as "counselors"—who maintain monthly and quarterly,

¹⁷⁶ Telephone Interview with Au Pair Industry Insider No. 1, *supra* note 12.

¹⁷⁷ Anecdotal information from au pairs and State Department officials interviewed by the author revealed examples ranging from \$500 to \$5000. Au pairs from Latin America and Africa routinely pay higher local recruitment fees than au pairs from Western Europe, for example. Interview with State Department ECA *supra* note 158; Interview with Au Pair No. 1 (Mexico), Au Pair No. 2 (Colombia), and Au Pair No. 3 (Colombia) in Wash., D.C. (July 22, 2012) [hereinafter Group Au Pair Interview].

¹⁷⁸ U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 24, 40 (2012).

¹⁷⁹ Interview with State Department ECA, *supra* note 158.

¹⁸⁰ BUREAU OF EDUC. & CULTURAL AFFAIRS, U.S. DEP'T OF STATE, PRIVATE SECTOR EXCHANGE, GUIDANCE DIRECTIVE 2011-02, EXCHANGE VISITOR PROGRAM: STATUTORY CONSIDERATIONS OF CONTINUED COLLECTION OF "PERFORMANCE BONDS" (2011) (explaining that the practice constituted a minimum wage violation).

¹⁸¹ See, e.g., *Au Pairs Available Now: Second Year Au Pairs*, AU PAIR IN AMERICA http://www.aupairinamerica.com/aupairs/available_featured.asp (last visited Mar. 10, 2013) (displaying profiles of au pairs currently available for immediate placement).

respectively, contact with au pairs and host families.¹⁸² These staff are to report “unusual or serious situations or incidents,” and to report directly to the State Department any incidents involving “the crime of moral turpitude or violence.”¹⁸³ Whether the (apparently common) violation of excessive work hours is sufficiently “serious” to report remains entirely within the discretion of au pair agencies.¹⁸⁴

Ultimately, au pair agencies exercise full and absolute discretion over whether an au pair is repatriated or permitted to stay, and whether host families who violate the rules are permitted to remain in the program.¹⁸⁵ As Paola’s situation underscored, the agencies can use even their power to deport au pairs to chill complaints to the State Department concerning program operations. Indeed, not only does an au pair agency control an au pair’s immigration status while a participant in the Au Pair Program, but an au pair agency also has the power to control an au pair’s *future* ability to obtain a visa (J-1 or otherwise) to *return* to the United States. Upon an au pair’s completion of the program, the au pair agency has discretion to designate—via data entry into the Department of Homeland Security’s Student Exchange Visitor Information System electronic database—the au pair’s immigration status as either “inactive” or “terminated.”¹⁸⁶ “Inactive” status indicates successful completion of the program, whereas “terminated” signals an au pair’s failure to comply with the federal regulations, which according to ECA officials, “may prevent a participant from receiving a future U.S. visa.”¹⁸⁷ The State Department does not monitor the accuracy of these designations, however; review is triggered only in the rare circumstance that an au pair files a formal complaint with the State Department alleging au pair agency misconduct.¹⁸⁸

Similarly, au pair agencies exercise complete discretion over a host family’s ability to remain in the program, even when a complaint has been

¹⁸² 22 C.F.R. § 62.31(l) (2012).

¹⁸³ *Id.*

¹⁸⁴ Telephone Interview with Au Pair Industry Insider No. 1, *supra* note 12.

¹⁸⁵ Email from State Department Official to Author, *supra* note 153; Telephone Interview with Au Pair Industry Insider No. 1, *supra* note 12.

¹⁸⁶ Email from State Department to Author (Dec. 27, 2012) (on file with author) (mentioning the distinction between “terminated” and “inactive” status in the SEVIS system); Email from Author to State Department (Jan. 7, 2013) (on file with author) (inquiring into the effect of being rendered “terminated” in the SEVIS system); Email from State Department to Author (Feb. 5, 2013) (on file with author) (explaining the consequences of “terminated” status). These email exchanges were precipitated by allegations of abuse by an au pair whose situation was brought to the author’s attention by a friend of the au pair, who had obtained and read a draft of this Article in the course of undertaking internet research into possible avenues of recourse for au pair abuse. With the consent of the au pair, the Author brought the case to the attention of the State Department, which encouraged the au pair to file a formal complaint so that the State Department could review the au pair’s file in the SEVIS system. In this case, the au pair agency had rendered the au pair “terminated” in the SEVIS system, a status which the au pair agency undertook measures to correct following State Department intervention.

¹⁸⁷ Email from State Department to Author (Feb. 5, 2013), *supra* note 186.

¹⁸⁸ Email from State Department to Author (Dec. 27, 2012), *supra* note 186.

filed with the State Department alleging host family violation of the federal regulations.¹⁸⁹ Not only does weak monitoring by the State Department provide au pair agencies little incentive to sanction noncompliant host families (and au pairs), but market forces also favor keeping them in the program notwithstanding their violations. Au pair agencies participate in a highly competitive market that places a premium on recruiting and retaining as many host families (and au pairs) as possible. Agencies actively compete for business, wooing new host families with claims of better prices and services than other agencies.¹⁹⁰ Tellingly, employment advertisements for local coordinator positions routinely prioritize recruitment of new and repeat host families over other “counselor” responsibilities.¹⁹¹ Industry juggernaut Cultural Care Au Pair, for example, offers its “Local Care Counselors” “unlimited” earning potential through bonuses for recruiting new and repeat host families, and rewards counselors who meet certain sales goals with eligibility to attend special meetings. These rewards include “travel opportunities domestically and internationally”¹⁹² described, until recently, as “decadent escape[s] to a different country each year.”¹⁹³ Such financial incentives create a fundamental conflict of interest for the agency staff responsible for responding to allegations of host family misconduct.

¹⁸⁹ Email from Author to State Department Officials (Feb. 5, 2013) (inquiring into the impact of the au pair’s complaint on her host family’s ability to remain in the Au Pair Program); Email from State Department to Author (Feb. 19, 2013) (responding that “[w]ith regards to the [host family], that the State Department is in the process of compiling a Notice of Proposed [R]ule Making addressing work hours and duties in addition to other modifications to the CFRs”).

¹⁹⁰ The homepage of the largest au pair agency, Cultural Care, for example, boasts its services as costing less than other au pair agencies (\$350 compared to \$425). *An Au Pair is More Affordable Than Nannies*, CULTURAL CARE, <http://info.culturalcare.com/blog-au-pair-cost> (last visited Mar. 10, 2013) (displaying chart comparing cost of Cultural Care au pair to cost of other au pairs, daycare centers, and nannies).

¹⁹¹ *Community Counselor Job Profile*, AU PAIR IN AMERICA, http://www.aupairinamerica.com/careers_profile.asp (last visited Mar. 10, 2013) (listing “recruiting potential host families” at the top of the list of responsibilities for community counselors); *Local Childcare Coordinator Responsibilities*, CULTURAL CARE, <http://coordinator.culturalcare.com/lcc-responsibilities.html> (last visited Mar. 10, 2013) (defining the duties of a local childcare consultant, including “market[ing] to new families in your community and nationwide through grassroots marketing efforts, networking through local events,” etc); *Who are Local Area Representatives?*, GOAUPAIR, <http://www.goaupair.com/Partners/Local-Area-Representatives/Who-are-Local-Area-Representatives.aspx> (last visited Mar. 10, 2013) (listing responsibilities of a Local Area Representative as “continuously execut[ing] marketing initiatives handed down by headquarters” and “be[ing] sales driven and professional at all times”); *Local Coordinator Recruitment*, AU PAIR USA, <http://www.interexchange.org/au-pair-usa/child-care-agency/local-coordinator-recruitment> (last visited Mar. 10, 2013) (listing the qualifications of a local coordinator, with “self-driven, organized and resourceful with an aptitude for sales and community marketing” at the top of the list).

¹⁹² *Commission Potential and Rewards*, CULTURAL CARE AU PAIR, <http://coordinator.culturalcare.com/commission-potential—rewards.html> (last visited Mar. 10, 2013).

¹⁹³ *Income Potential and Rewards*, CULTURAL CARE AU PAIR, <http://coordinator.culturalcare.com/income-potential—rewards.html> (last visited Apr. 5, 2012) (on file with author).

The profit incentive also gives the au pair agencies a reason to favor the interests of host families over those of the au pairs, as agencies' main revenue stream derives from the fees families pay for each year of an au pair placement. Although au pair agencies have an interest in ensuring that their au pairs remain in the program as long as possible because of the investment sponsors make in recruiting, vetting, and placing the au pairs,¹⁹⁴ au pairs ultimately are a limited source of revenues.¹⁹⁵ Because au pairs have limited ability to re-enroll in the program,¹⁹⁶ they are rarely a source of repeat business. Host families, on the other hand, can—and apparently often do—re-enroll multiple times.¹⁹⁷ And because the au pair regulations do not bar noncompliant host families from the program, an agency has little economic incentive to terminate a noncompliant host family from its program, as that family could simply take its business to a competitor agency.¹⁹⁸

Against this backdrop of lax monitoring and recruitment-focused agency practices, host families can overwork and/or underpay an au pair with little risk of being caught. Not only are there strong, personal monetary incentives for a local coordinator to overlook noncompliance for the sake of host family retention, but also the “cultural exchange” rubric can foster an inability even to recognize labor exploitation when it occurs. The “cultural exchange” label creates a binary system—participants are in or out based on compliance with the program rules. As reflected in Paola's experience, the only operative question from the au pair agency's perspective is whether the au pair exceeded the 45-hour limit—whether or how much an au pair was compensated for the extra hours and why is irrelevant. Nor do differences in bargaining power between host family and au pair—i.e., the very questions and concerns that labor law is often intended to address—even begin to factor into the analysis.¹⁹⁹

¹⁹⁴ See discussion of performance bonds *supra* text accompanying note 180.

¹⁹⁵ Anecdotal information from au pairs consulted for this Article suggests that au pair agencies and/or their affiliates and agents abroad charge au pairs recruitment fees. Paola, for example, was charged \$3000 by a professor at her university—presumably working with the U.S.-headquartered au pair agency—to participate in the program. Nothing in the au pair regulations prohibits agencies or their affiliates in the countries of origin from charging fees to the au pair. See 22 C.F.R. § 62.31 (2012).

¹⁹⁶ 22 C.F.R. § 62.31(p) (2012).

¹⁹⁷ Host families have submitted testimonials regarding their decision to become repeat customers on various au pair agency websites. See, e.g., *Host Family and Au Pair Testimonials*, GO AU PAIR, <http://www.goaupair.com/Host-Families/Choose-Go-Au-Pair/Reviews.aspx> (last visited Mar. 10, 2013); *Family and AuPair Testimonials*, EXPERT AU PAIR, <http://www.expertaupair.com/testimonials.html> (last visited Mar. 10, 2013); *Au Pair in America Testimonials*, AU PAIR IN AMERICA, <http://www.aupairinamerica.com/testimonials.asp> (last visited Mar. 10, 2013).

¹⁹⁸ Although the Department of State can undertake agency revocation procedures if the agency does not enforce and monitor host families' compliance with stipend and hours requirements, there is nothing to keep noncompliant families from going to an agency's competitor. 22 C.F.R. § 62.31(n) (2012). This incentivizes the agency to disregard noncompliance.

¹⁹⁹ In Paola's case, for example, all that mattered to the regional director was that she “knowingly” violated the 45-hour limit. The fact that Paola was paid \$4 an hour for the

The host family-au pair employment relationship thus operates in a vacuum, conceptually and operationally segregated from applicable labor standards and institutions. Au pairs and host families are left unaware of whether or how certain working conditions constitute violations under labor law, while the au pair agencies remain unaccountable for these situations, distanced in their role as administrators of “cultural exchange.” Absent meaningful government scrutiny of agency practices, recruitment-driven decision-making then takes precedence, so that host family (and even au pair) non-compliance is tolerated, and au pair exploitation is perpetrated with impunity.

B. Barriers to Accountability

Paola’s decision to leave the Johnson household was a difficult one, given the deep emotional attachment she had developed with the Johnson children during her eighteen months living and working in their household. Paola preferred to remain in the U.S. to improve her English skills rather than return to Venezuela, but entering the agency’s “re-match” process was a gamble, as it would be difficult to find a family willing to take her on for the mere six months Paola had remaining on her visa. Luckily, through her own contacts, Paola was able to find such a family and leave the Johnson household shortly thereafter.

After settling into her new household, Paola considered her legal options. She wanted the Johnsons to understand that what they did to her was wrong and to be prevented from mistreating any future au pairs. But Paola feared possible retaliation by her local recruiter in Venezuela if she were to accept the U.S. State Department’s invitation to file a complaint with their J-1 compliance office. Because the recruiter had close ties to Paola’s university, Paola worried the recruiter might interfere with Paola’s ability to complete her degree upon return to Venezuela. Paola decided instead to pursue a private lawsuit against the Johnsons,

excess hours, that only one to two of her eight nightly on-call hours were compensated, and that she felt she had to “volunteer” to work these hours in order to prove herself “part of the family” in response to Mrs. Johnson’s persistent complaints of post-birth fatigue were of no consequence. And even though the ECA representative viewed Paola as a victim of exploitation, the ECA had no institutional capacity or competence to offer recourse for recouping the over \$10,000 in back-wages owed to Paola. Having outsourced monitoring of the relationship between the host families and au pairs to the agencies themselves, the ECA disclaimed authority to dictate the agency’s handling of Paola’s or any other individual case, no matter how egregious the violation. Telephone Interviews with Paola’s Au Pair Agency (June 2011); E-mail from Au Pair Agency to Author (June 15, 2011, 16:03 EST) (on file with author); E-mail from Author to Au Pair Agency, (June 15, 2011) (on file with author); E-mail from Author to Au Pair Agency (June 14, 2011) (on file with author); E-mail from State Department to Author (June 22, 2011) (on file with author).

pursuant to the Fair Labor Standards Act ("FLSA"), to recover the over \$10,000 in back wages they owed her for the unpaid and undercompensated hours. Finding a lawyer to pursue her claim proved challenging, however. The lawyers in private law firms who typically handle such cases on a pro bono basis were unwilling to sue senior lawyers in other major law firms. Paola ultimately retained a lawyer who agreed to handle the case on contingency, for one-third of Paola's damages recovery.

That Paola was even able to pursue legal action against her employers took a remarkable stroke of luck. Au pair program structure and industry practice permits au pair exploitation to be ignored if not affirmatively swept under the rug through the standard au pair agency prescription for the breakdown of any host family-au pair relationship: au pair reassignment or repatriation back home. In the vacuum of "cultural exchange," any conflict is deemed personal: an unsuccessful "match" regrettably lacking in personal chemistry. But while it is true that personal chemistry significantly affects the outcome of the relationship between host family and au pair,²⁰⁰ it ought not obscure problems of excessive hours and underpayment of wages, and sexual harassment and exploitation, among other rights violation au pairs experience in the program.

Indeed, existing case law suggests that agencies may be motivated more by financial interests than the interests of au pairs and/or host families in pursuing rematches. Suspected, and perhaps even known, violators of au pair program regulations have been permitted to "rematch" and continue participating in the program.²⁰¹ Host families have (unsuccessfully) brought lawsuits against au pair agencies for alleged fraudulent misrepresentation in placing in their homes au pairs who had been removed from other homes after allegations of misconduct.²⁰² Conversely, au pair actions alleging sexual misconduct by their host families have also involved claims of prior host family misconduct against their former au pairs. In a recently settled lawsuit, for example, a German au pair alleging sexual molestation sued her sponsoring agency, US Au Pair Inc., for negligence and fraud after discovering that two previous au pairs for this family had reported sexual advances by the host father.²⁰³ Similarly, a 2009 investigation of sexual assault charges a

²⁰⁰ See sources cited *supra* note 3.

²⁰¹ MACDONALD, *supra* note 3, at 51 (noting that "even when mistreatment is brought to the attention of agency staff, offending host families often continue their relationship with the agency for years, committing the same kind of abuses with each new au pair placed in their homes.").

²⁰² See e.g., *Doe v. Cultural Care Inc.*, No. 10-11426-DJC, 2011 WL 1048624 (D. Mass. Oct. 7, 2011).

²⁰³ Though US Au Pair denied knowledge of past abuses by the host father, investigation by the local sheriff revealed notes in US Au Pair's files detailing allegations of abuse of at least one former au pair. Investigators were able to speak with the other au pairs, who also confirmed having experienced sexual advances by the host father. Shae Healey, *In Unsafe Hands*, WILLAMETTE WEEK, Oct. 26, 2011, <http://www.wweek.com/portland/>

Slovak au pair brought against her host father revealed that she was the seventh au pair placed with this host family in four years, and that at least four previous au pairs had also suffered sexual advances.²⁰⁴

These are only the reported cases, however, and as such, likely underrepresent the extent to which rematch or repatriation has been used to mask non-sexual labor exploitation. The ready identification of sexual exploitation as a *crime* renders the institutions one turns to for redress easier to identify and access—i.e. to the criminal justice system—than the typically underfunded and understaffed state and federal administrative agencies responsible for resolving labor disputes. Moreover, the (arguable) prevalence of overwork and underpayment of wages in the au pair sector and the background social norms that tolerate such abuses in the domestic work sector writ large—explored below in Part II.A.4.C of this Article—further obfuscate the “wrong” of labor exploitation. Already relegated to the realm of personal (rather than professional) conflict by the cultural exchange rubric, the wrong thus becomes barely—if at all—cognizable as labor exploitation deserving of redress.

Given these background dynamics, few au pairs are able to pursue legal remedies when exploitation occurs. An au pair agency wields ultimate control over whether an au pair gains access to redress. While au pairs can opt to leave abusive families, an au pair agency may exercise its discretion to simply send an au pair home rather than facilitate a rematch with a new host family. Indeed, anecdotal information suggests that in cases of severe exploitation, agencies prefer to repatriate an au pair in order to avoid bad publicity and possible legal culpability.²⁰⁵ Moreover, even if rematch is permitted, agency control of the terms and conditions of the rematch process—e.g., the typical requirement that an au pair accept another placement within two weeks or else face repatriation—operates to discourage pursuit of rematch. Depending on the level of exploitation, and of the au pair’s level of financial or emotional investment in “the au pair experience,” pursuing rematch might not be worth the risk of being sent home early.²⁰⁶

article-18136-in_unsafe_hands.html; Nick McCann, *Au Pair Sues Agency for \$1 Million*, COURTHOUSE NEWS SERVICE, Oct. 7, 2011, <http://www.courthousenews.com/2011/10/07/40401.htm>.

²⁰⁴ The host father had subjected the Slovak au pair to “vaginal tests” before a family outing to a local swimming pool, and one of the previous au pairs had discovered (and police confirmed) a hidden camera in her bathroom. Tracy Kennedy, *Nanny accuses man of sexual assault*, THE REGISTER CITIZEN, Jan. 24, 2009, <http://www.registercitizen.com/articles/2009/01/24/news/doc497abc21bb9d1428657573.txt>. For the agency’s response, see *Cultural Care Senior Vice President’s Rebuttal on Cover-up by Agency*, AU PAIR CLEARINGHOUSE, <http://aupairclearinghouse.com/node/83> (last visited Mar. 10, 2013).

²⁰⁵ This was allegedly the fate that befell the sexually assaulted Slovak au pair described in the sources cited, *supra* note 204 and accompanying text. The agency allegedly encouraged the au pair to return home to recover from the ordeal, and that, in her absence, the agency would pursue prosecution of her abuser and perhaps even a lawsuit for monetary damages on her behalf. Following the au pair’s return home, no such actions were pursued. Telephone Interview with Au Pair Industry Insider No. 1, *supra* note 12.

²⁰⁶ Group Au Pair Interview, *supra* note 177.

Not only does an au pair agency control whether an au pair is repatriated or rematched, but it also indirectly controls the au pair's ability to pursue remedies under labor law through its power over the au pair's immigration status. As an initial matter, an au pair agency and/or a regional/local coordinator is unlikely to help an au pair pursue an administrative complaint or civil suit against a host-family-employer. Doing so is potentially costly for agencies and staff—i.e., resulting in the agency's loss of a fee-paying host family-client, and/or the coordinator's recruitment/retention bonus.²⁰⁷ But while an au pair might, with outside legal assistance, be able to identify her possible options for redress, actually pursuing an administrative complaint or a civil (or criminal) lawsuit to its conclusion requires being able to maintain her legal immigration status. Unless the au pair agency agreed to extend her J-1 visa, an au pair would have to switch to a different visa (e.g., an F-1 student visa) to gain additional time, which could be difficult to accomplish without outside legal assistance.²⁰⁸

C. *Re-Entrenching Tropes*

The barriers to justice for labor exploitation are not only structural. They also issue from deeply inscribed social norms that resist awareness and identification of the “wrong” of domestic worker exploitation. The au pair program reifies these norms, to the detriment of efforts to ensure decent working conditions for au pairs and other migrant domestic workers.

Despite their crucial contributions to society and the global economy, migrant domestic workers are among the most exploited in the world.²⁰⁹ At the heart of the problem is entrenched societal resistance to treating domestic workers as deserving of labor protections. Treated as unskilled labor, domestic workers are typically one of the lowest paid worker populations.²¹⁰ Moreover, labor rights considered normal in the formal sector (e.g., minimum wage, vacation and sick leave, fixed working hours) are considered unneces-

²⁰⁷ The Louise Woodward case, described *infra* note 240, presented the converse scenario. In that case, the au pair agency paid for a high-profile legal team to defend Woodward, an au pair, against murder charges. Woodward's defense team undertook a high stakes strategy of requesting the court to rule out the lesser charge of manslaughter and require the jury to either find Woodward guilty of first or second-degree murder, or let her free. Some commentators speculated that the au pair agency, EF Au Pair (post-Woodward case, renamed “Cultural Care Au Pair”), had a vested interest in this strategy, as a manslaughter finding could support a finding of negligence by EF Au Pair should a wrongful death lawsuit later be pursued against the agency. In contrast, a finding of murder would place the blame for the child's death squarely on Woodward. Debra Rosenberg & Evan Thomas, ‘*I Didn't Do Anything*,’ NEWSWEEK, Nov. 9, 1997, <http://www.the-dailybeast.com/newsweek/1997/11/09/i-didn-t-do-anything.html>.

²⁰⁸ The regulations permit an au pair to apply (with agency approval) to extend her participation in the program by up to one year. 22 C.F.R. § 62.31(p).

²⁰⁹ See SWEPT UNDER THE RUG, *supra* note 45, at 1.

²¹⁰ See *infra* text accompanying notes 250–58 (in-home work often carries wage penalties).

sary—even inappropriate—in the context of a private household.²¹¹ The roots of resistance to treating domestic workers as workers are many—centered around both the nature and site of the work and the identity of those providing it. In-home care workers typically have a weak bargaining position because they have little to no formal training, are mostly of minority groups (sometimes as undocumented migrants), and have few market alternatives.²¹² Their placement at the bottom of class, gender, and race hierarchies, combined with deep societal resistance to allowing public scrutiny of the inner workings of private households²¹³—particularly upper-middle-class households, and even of formal employment relationships therein—exacerbates these workers’ exposure to potential abuse.

These factors combine to create conditions of extreme vulnerability for in-home caregivers. It is important to recognize, however, that these norms are not inherent to the occupation. Rather, they are formed, strengthened, and made vital by the design and implementation of legal regimes. As Hila Shamir has demonstrated, for example, employment and immigration laws play a crucial (if indirect) role in constructing markets for care by excluding domestic workers from protective employment legislation and limiting legal routes for migration.²¹⁴ But through the au pair program, the State engages in explicit and *direct* construction of a market—“au pair” as a category would not exist but for the State. Through its rhetoric and structure, the au pair program regulations reify and legitimate certain tropes and assumptions that maintain the social devaluing of domestic workers and domestic work. These tropes have the apparent benefit of ameliorating “commodification anxiety,” or the fear that turning care work into a market commodity (i.e., waged labor) could transform the caregiving relationship from one motivated by love or altruism to one driven by self-interest.²¹⁵ Recasting the host family-au pair relationship as kinship or an expression of American largesse

²¹¹ ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES* 31 (2009), <http://labor.ucla.edu/publications/reports/brokenlaws.pdf> (listing child care as the occupation in which the highest percentage (66%) of minimum wage violations occurs).

²¹² Hila Shamir, *Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care*, 30 *BERKELEY J. EMP. & LAB. L.* 404, 448–49 (2009) (noting “the patchy application of protective employment law to care work and the difficulty of enforcing what little protections apply in the private setting of the home”) [hereinafter Shamir, *Between Work and Home*]; MARTHA NUSSBAUM, *SEX AND SOCIAL JUSTICE* 282 (1999) (noting that domestic service industry is colored by race and gender).

²¹³ Peggy R. Smith, *Work Like Any Other, Work Like No Other: Establishing Decent Work for Domestic Workers*, 15 *EMP. RTS. & EMP. POL’Y J.* 159, 160–61, 164–66 (2011).

²¹⁴ Shamir, *Between Work and Home*, *supra* note 212, at 449; Shamir, *What’s the Border Got to Do With It?* *supra* note 49, at 629–30; *see also* sources cited *supra* note 49 and 51.

²¹⁵ The term “commodification anxiety” was coined by Joan Williams in her seminal work, JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 31–32 (2000).

helps police the boundary between family and market, warding against “money [extinguishing] love.”²¹⁶

However mollifying, these tropes have the negative effect of perpetuating the problematic gender, race, and class stereotypes that enable exploitation of domestic workers.²¹⁷ By treating host family-au pair disputes as personal disputes to be mediated by the agency’s local staff, and resisting the possible framing of such disputes as potential worker exploitation for which labor law and institutions have a role, the U.S. au pair program furthermore affirms/bolsters the public versus private divide that shields exploitation of domestic workers from scrutiny and prevents meaningful redress.

1. *Not Work*

“Fair Labor Standards Act? Why should I know anything about the Fair Labor Standards Act?” – Mrs. Johnson.

For more than ten months, Paola did not complain about her working conditions. She was reluctant to switch host families because she believed the children would be worse off without her there to care for them. As a long-time friend of the Johnsons, I offered to speak with Mrs. Johnson on Paola’s behalf, to clarify what I hoped was an inadvertent misunderstanding of the FLSA regulations regarding work hour calculations.

My broaching the issue was immediately rebuffed with claims that I was violating the Johnsons’ privacy. I was admonished to keep my background as a researcher and advocate for domestic workers’ rights separate from my home life. The Johnsons argued that Paola was “not a worker,” but “part of the family” who was earning more than she could possibly dream of earning in Venezuela.

Indeed, the notion that she was “part of the family” enabled Paola to excuse her mistreatment for an additional six months. Paola finally decided to leave the Johnsons when, after boarding the return flight from a family vacation in Los Angeles during which she provided over-fulltime care for the children, Paola suddenly became so ill that the flight attendants removed her from the airplane and prohibited her from boarding another flight without written doctor approval. With no friends or family in the L.A. area,

²¹⁶ Deborah Stone, *For Love nor Money: The Commodification of Care*, in RETHINKING COMMODIFICATION 271, 274–76 (Martha M. Ertman & Joan C. Williams, eds., 2005).

²¹⁷ For a provocative discussion of the drawbacks of a society dependent on immigrant women caregivers, see Mary Romero, *Nanny Diaries and Other Stories: Imagining Immigrant Women’s Labor in the Social Reproduction of American Families*, 52 DEPAUL L. REV. 809 (2003).

Paola was devastated when the Johnsons decided to continue on home, instructing Paola to find a taxi to the nearest emergency room, and then board the next flight home to Washington, D.C. The emergency room doctor deemed Paola's illness likely brought on by extreme fatigue, and instructed Paola to rest or else suffer serious long-term medical problems. As Paola later recounted to me, these events led her to realize that far from being "like family," she was "just cheap labor."

Paola's experience is emblematic of the deeply entrenched social barriers to recognition of domestic work as work. As sociologists Julia O'Connell Davidson and Bridget Anderson explain, "[t]he home is imagined as governed by mutual dependence and affective relations, its values are in opposition to those of the market, [which is] driven by self-interest and instrumentalism, where individualism rather than conforming to pre-existing social roles is the rule."²¹⁸ Hence, the recurring tropes that au pairs are "part of the family" and that host families are giving au pairs the privilege of experiencing American life help manage the discomfort of bringing the employment relationship into the home. But they do so in a way that resists the role and relevance of labor law, as discussed below.

a. False Kinship

At the crux of the au pair program is the notion that an au pair will become part of the "host family." Standard au pair practice uses the rhetoric of kinship in describing the respective roles of host family and au pair. Employers are referred to as "host parents," "host mom," or "host dad," and au pairs as a "daughter" to the host parents or a "big sister" to the children.²¹⁹ Given that au pairs can be as old as 26,²²⁰ the parent/child overlay on the host parent-au pair relationship is an odd fit. But, however inaccurate, false kinship notions in the domestic work context—particularly the parent-child variant—play an important role in both masking and preserving the power differences between employer and employee.

Sociologists have found that false kinship notions appear to be important in many domestic worker situations. For many employers, the mother/child idiom is far more comfortable than employer/employee because it enables one to avoid the discomfort over introducing market relations into the

²¹⁸ BRIDGET ANDERSON & JULIA O'CONNELL DAVIDSON, IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN? A MULTI-COUNTRY PILOT STUDY 33 (2003).

²¹⁹ For example, Cultural Care Au Pair instructs host families that "an au pair should not be considered an employee, but rather an extension of your family Think about how you would want someone to treat your child living in a host family abroad and treat your au pair accordingly." See *Role As A Host Family*, CULTURAL CARE AU PAIR, <http://culturalcareaupair.com/becoming-a-host-family/role-as-a-host-family/> (last visited Mar. 11, 2013).

²²⁰ 22 C.F.R. 62.31(d)(1) (2012).

home, and specifically, commodifying care work.²²¹ The mother/child construct can have problematic gender, race, and class implications, however. Sociologist Judith Rollins has coined the term “maternalism” in the domestic work context as denoting a friendly relationship between women that works to confirm the employer’s kindness and the worker’s childlike inferiority.²²² To wit, the maternal employer who displays motherliness, protectiveness, and generosity is, according to Rollins, “expressing in a distinctly feminine way her lack of respect for the domestic worker as an autonomous, adult employee.”²²³

In the au pair context specifically, employers can use their role as “host parent” to literally treat their au pair as a child—but in an effort to distance the au pair rather than to integrate her into the family. This is evident in the “house rules” that the “host parents” sometimes impose on the au pairs, for example, restrictions on eating habits, personal hygiene, sexuality, and social lives.²²⁴ Just as the mother/child idiom can be used to mark kinship, it can be used for inclusive effect to extract additional labor that the au pair would otherwise refuse as beyond her required duties.²²⁵ Ethnographic studies of the au pair context reveal that the imagery of the “big sister” and the notion of “helping” the family play on what sociologists have described as the “moral economy of domestic work.”²²⁶ Instead of the rational, monetized contractual relationship underlying paid labor, domestic work is typically viewed as a “‘mutual moral contract’ embedded in the dense social and gendered relations of the family.”²²⁷ Rather than payment in monetary terms, the reward for helping with the work of the home is “first and foremost in the ‘moral currency’ of appreciation, caring and familial integration.”²²⁸ This “discourse of the moral economy” thus enables employers to “demand longer hours and greater flexibility from the au pairs”;²²⁹ in contrast, to the au pairs it means “exchanging their labor for gratitude and kindness.”²³⁰ Many au pairs wait in vain, however, for such compensation—more commonly, they are treated as second-class family members in their daily inter-

²²¹ Cox & Narula, *supra* note 3, at 335.

²²² JUDITH ROLLINS, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS* 173–203 (1985).

²²³ *Id.* at 186.

²²⁴ See e.g., Hess & Puckhaber, *supra* note 3, at 74–75 (describing host families restricting au pairs’ social interactions, limiting their food consumption to smaller amounts and of lesser quality than that consumed by the children, and restricting personal hygiene and laundry washing on the basis of supposed environmental awareness); Cox & Narula, *supra* note 3, at 339–43 (describing au pairs being limited to eating leftovers or even already-expired food, prohibited from having boyfriends and/or receiving any guests in the home).

²²⁵ Anderson, *supra* note 3, at 256.

²²⁶ Hess & Puckhaber, *supra* note 3, at 69.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 74.

²³⁰ *Id.*

actions with the host families.²³¹ The use of kinship notions to demand flexibility tends to cut only one way, with far less receptiveness on the part of host families when appealed to by au pairs for special consideration or time off.²³²

At the same time, au pairs' embrace of the kinship idiom can deter them from complaining about their living and working conditions. "[T]he discourse of the moral economy emphasizing cooperation and mutual responsibility" can make it difficult for au pairs to express their dissatisfaction.²³³ Moreover, particularly for au pairs responsible for small children, genuine emotional bonds with the children—who tend to unconditionally accept au pairs as family members—can cause au pairs to feel guilty for demanding shorter work hours.²³⁴ Researchers have also found that au pairs may cling to the kinship idiom to "eas[e] misgivings about becoming an au pair and calm[] fears of being treated as a 'servant.'"²³⁵ As has been demonstrated with respect to other domestic worker populations, describing oneself as a member of the family can be a strategic use of intimacy to de-emphasize the servitude one is experiencing, as well as to negotiate better working conditions.²³⁶

b. American Largesse

By marketing the au pair program as an *opportunity* for young foreign nationals to experience American culture, the au pair program rhetoric implicitly justifies a tendency to view the employer-domestic worker relationship in paternalistic terms. Sociologists have found that a domestic worker's "otherness" as a migrant can play a significant role in alleviating the discomfort of bringing market relations into the home. The notion of "hosting" a migrant rather than "employing" a foreign national "helps employers imagine the work as an opportunity rather than drudgery and themselves as benefactors as well as employers."²³⁷ The "otherness" of the domestic worker that class, race, and ethnic difference(s) can bring enables employers to recast the employment relationship as one of mutual dependence—the domestic worker needs money and work, and the employer needs a "flexible" worker.²³⁸

Contributing to this dynamic in the au pair context, specifically, is the apparent demographic shift in the U.S. au pair population from exclusively Western European to roughly half of the au pair population, with the other

²³¹ *Id.*

²³² BŮRIKOVÁ & MILLER, *supra* note 3, at 38–39.

²³³ Hess & Puckhaber, *supra* note 3, at 73–74.

²³⁴ *Id.*

²³⁵ *Id.* at 69.

²³⁶ RHACEL SALAZAR PARREÑAS, *SERVANTS OF GLOBALIZATION* 179 (2001).

²³⁷ Anderson, *supra* note 3, at 261–62.

²³⁸ *Id.* at 255.

half primarily from Central and South America, Eastern Europe, and Asia.²³⁹ The Louise Woodward trial in 1998²⁴⁰ and the grisly murder of a Swedish au pair in Boston in 1996²⁴¹ shifted Western European and Scandinavian attitudes regarding the desirability of working in the United States.²⁴² This dynamic combined with the establishment of the European Union, which broadened prospective European au pairs' options for finding and changing employment within Europe, stemmed the tide of au pairs coming from Western Europe to the United States.²⁴³ These demographic changes have thus increased the apparent "otherness" of the au pair population through increased racial and cultural differences, and, if not the reality then at least the perception of, class disparities between host family and au pair.²⁴⁴

While some women do pursue au pairing as a livelihood strategy, there is a tendency among employers of nannies and au pairs to equate non-West-

²³⁹ MACDONALD, *supra* note 3, at 50. The author filed a request under the Freedom of Information Act seeking specific demographic information—e.g., countries of origin, gender, age of the au pair population—from the State Department Education and Cultural Affairs Bureau. The State Department responded that after a "thorough search" of the record systems of the Bureau of Educational and Cultural Affairs and the Office of Visa Affairs, "no records responsive to [the] request were located." See Letter from Author to Office of Information Programs and Services, (October 4, 2011) (on file with author); Letter from Sheryl L. Walter, Director, Office of Information Programs and Services, U.S. Department of State to Author, (April 16, 2012) (on file with author). In a subsequent conversation, an ECA official confirmed that the J-1 office does not have demographic information regarding its program participants, but that such data might be obtained from the U.S. Department of Homeland Security. The author subsequently received this data, which indicates that au pairs of Western European origins now account for roughly half of the au pairs entering the program in 2011. Brazil, Colombia, and Mexico accounted for three of the top five countries of origin for these au pairs. See SEVIS, Chart of Au Pairs by Country and State for 2011 (on file with author).

²⁴⁰ Louise Woodward was a young English au pair who, at age 19, was convicted in 1997 of involuntary manslaughter of eight-month-old Matthew Eappen who was in Woodward's care at his home in Newton, Massachusetts. The death was attributed to "shaken baby syndrome" or the violent shaking of a baby, causing fatal neurological damage. The jury had returned a verdict of second-degree murder, but the trial judge reduced the conviction to involuntary manslaughter, finding that allowing Woodward to remain convicted of second-degree murder "would be a miscarriage of justice." *Commonwealth v. Woodward*, 7 Mass.L.Rptr. 449, (Mass.Super. 1997). As discussed previously, the high stakes defense strategy undertaken by Woodward's lawyers led to the removal of manslaughter verdict as an option available to the jurors. Rosenberg & Thomas, *supra* note 207.

²⁴¹ Karina Holmer, a 20-year-old Swedish au pair, was strangled and her upper body severed. The murder has never been solved and remains Boston's most notorious "cold case." O'Ryan Johnson, *Cold Case Squad Making Comeback*, BOSTON HERALD (Mar. 15, 2008).

²⁴² MACDONALD, *supra* note 3, at 50.

²⁴³ As EU citizens, au pairs can readily seek other employment in an EU-member-country of destination if the au pair placement becomes problematic. Another advantage of au pairing in Europe is that au pair hours are lower and more strictly regulated there than in the United States. *Id.*

²⁴⁴ *Id.* at 55–57. This dynamic is also seen in Europe. See BÚRIKOVÁ & MILLER, *supra* note 3, at 176 (noting a "new trend towards greater inequality" as "the image of the generic au pair migrates from that of a Scandinavian to that of an Eastern European").

ern European origins with poverty.²⁴⁵ Employment as an au pair is thus seen as “a golden opportunity when it is undertaken by a hard-pressed migrant with limited opportunities.”²⁴⁶ The power the host parents/employers wield thus gets “clothed in the language of obligation, support, and responsibility, rather than power and exploitation.”²⁴⁷ While perhaps irrelevant to some relationships, the (real or perceived) power differential enables some employers to dress up an exploitative relationship as one of paternalism/maternalism towards the impoverished “other.”²⁴⁸ This is particularly so where the migrant worker is young, as au pairs by law are required to be.²⁴⁹

c. “Anyone Can Do it” and For Very Little Money

Considered unskilled laborers properly relegated to the informal sector, domestic workers typically face a “wage penalty”—i.e., they earn less than expected based on their job characteristics and qualifications.²⁵⁰ This wage penalty is largely attributable to deep societal resistance to putting a price tag on care. Even when care is purchased on the market, “family” approaches to care are preferred and maintained.²⁵¹ Parents want caregivers who love the children as if they are their own, an expectation caregivers often fulfill.²⁵² But because caring is associated with mothering, or doing for others altruistically, those who provide care are perceived as “giving” their care, not “working.” Exchanging money for care thus can be viewed as devaluing the care that is given.²⁵³ Also contributing to the wage penalty is the fact that many contemporary employers still think of domestic work as an expression of workers’ female nature, rather than skilled work for which women should be appropriately compensated.²⁵⁴

The au pair program feeds these preconceptions. By pegging the au pair “stipend” to minimum wage,²⁵⁵ the State implicitly endorses the notion that domestic work is deserving of the lowest level of compensation legally permitted. That it took a decade before the U.S. government officially recog-

²⁴⁵ See generally MACDONALD, *supra* note 3, at 66–82 (discussing “ethnic logics” used by employers in hiring childcare providers); Anderson, *supra* note 3, at 253–54 (discussing a similar dynamic among British employers of au pairs).

²⁴⁶ Anderson, *supra* note 3, at 255.

²⁴⁷ *Id.*

²⁴⁸ ANDERSON & O’CONNELL DAVIDSON, *supra* note 218, at 32.

²⁴⁹ 22 C.F.R. 62.31(d)(1) (2012) (requiring that all au pairs be between the ages of 18 and 26).

²⁵⁰ Kristin Smith & Reagan Baughman, *Low Wages Prevalent in Direct Care and Child Care Workforce*, CARSEY INST. POL’Y BRIEF NO. 7, Summer 2007, at 1. Yodanis & Lauer report that “[w]hen considering different types of care work [in the United States], childcare has by far the highest wage penalty for women, at 41 percent.” Yodanis, & Lauer *supra* note 3, at 44.

²⁵¹ Yodanis & Lauer, *supra* note 3, at 45.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 46.

²⁵⁵ 22 C.F.R. 62.31(j) (2012).

nized the host family-au pair relationship as an employment relationship and, accordingly, raised au pair stipends—significantly—to meet *minimum* wage requirements aptly illustrates this perception.²⁵⁶ The au pair program also feeds the “anyone can do it” ethos regarding childcare through its presumption that 18-to-26-year-olds²⁵⁷ with no prior childcare experience are equipped to provide “quality” full-time childcare. That it took a decade and the tragic death of an infant before the U.S. government established any (post-arrival) training requirements—and failed, in the face of opposition from families and agencies, to raise the age requirement for au pairs caring for infants from 18 to 21—suggests the low expectations we hold as a society regarding the skill required to provide effective childcare.²⁵⁸ By thus entrenching the devaluing of domestic work, the au pair program promotes the devaluing of domestic work and domestic workers.

2. *A Private Matter*

That the U.S. government makes the au pair program available to American families might signal the government’s acknowledgment that childcare is at least partly a State responsibility. But au pair program structure and function signals that everything having to do with childcare—its provision, its nature, its treatment—is inexorably private. Moreover, that which is “private” ultimately creates and sustains a global underclass of migrant domestic workers who provide over-full-time childcare to upper middle-class American families, for artificially depressed wages, and removed from labor standards and labor scrutiny.

In establishing the au pair program, the U.S. government appears to implicitly acknowledge that the government has a role in the provision of affordable, flexible childcare to American families. This would be a dramatic departure from a long history of U.S. government policies treating childcare as an individual responsibility to be addressed by private markets, rather than a government responsibility to care for its dependent citizenry.²⁵⁹ Closer examination of au pair program practice reveals, however, that the au pair program does not actually displace the private market. Rather, the program flourishes because of the usual market mechanisms—it just disguises this dynamic with the façade of cultural exchange.

Instead of providing, for example, a governmental mechanism to meaningfully prevent, much less address any exploitation or abuse suffered by program participants, the program delegates its power—and responsibility—to regulate this state-created employment relationship to private entities. These private entities then strategically use the concept of “private” to ex-

²⁵⁶ See *supra* discussion accompanying notes 85–90.

²⁵⁷ 22 C.F.R. 62.31(d)(1) (2012).

²⁵⁸ See *supra* discussion accompanying notes 77–84.

²⁵⁹ Yodanis & Lauer, *supra* note 3, at 41–44.

clude this employment relationship from the application of labor law standards and the scrutiny of labor institutions, and instead implement the au pair program according to the rules and priorities (e.g., profit incentive) of the private market.

This dynamic reifies the central paradox of domestic work—namely, that the care a domestic worker/au pair provides is born of a private, intimate relationship, and as such is invaluable and cannot be commodified; yet when care is purchased on the market, it is available at artificially low prices.²⁶⁰ By framing au pair compensation as a “stipend” and setting it at minimum wage—i.e., substantially *less* than the prevailing wage in the private domestic work market—the au pair program undermines the notion that domestic work is “work,” and signals that domestic work is rightfully excepted from labor standards. That the site of domestic work is a private household is further reason to exclude labor scrutiny because the household is private domain that should be free of public government intrusion. Government regulation and institutions have no place in this “private” site and this “private” relationship.²⁶¹ Such exclusions apply in the au pair context even notwithstanding its identity as a State-created and State-run program.

This should not be the case. Having brought the market directly into the family—albeit disguised as “cultural exchange”—the State now has an obligation to exert meaningful oversight over the au pair program. Using the lure of an American cultural experience, the State created this worker population, and has an obligation to bring that population fully into the protection of applicable U.S. labor laws. Disputes involving the rights of this State-created worker population should not be relegated to private actors to resolve as private (as in personality conflicts) disputes. As with any other rights abuses, au pair exploitation is matter of public import, rightly subject to scrutiny of government labor institutions.

²⁶⁰ See Manuela Tomei, *Decent Work for Domestic Workers: Reflections on Recent Approaches to Tackle Informality*, 23 CAN. J. WOMEN L. 185, 186–88 (2011). Some scholars argue that labor with a caring component pays less than similarly skilled jobs because employers believe that keeping wages low limits the labor pool to those with truly altruistic motives. See MACDONALD, *supra* note 3, at 8 (citing Julie A. Nelson, *Of Markets and Martyrs: Is it Ok to Pay Well for Care?*, 5 FEMINIST ECONOMICS 43 (1999)).

²⁶¹ This dynamic is evident in the stunted development of the au pair program regulations, with the idea that “parents are better judges of who can best take care of their children” as the hallmark of resistance to increased training and age requirements. Sandra Evans, *Final Rules for Au Pairs Not as Tough as Planned; Parents’ Outcry Sways Agency’s Decision*, WASH. POST, Feb. 15, 1995, at B03; Wetzstein, *supra* note 83. When asked whether the federal government had a role in regulating the au pair program, then-Secretary of Health & Human Services Donna Shalala responded that, “Congress will decide whether we ought to be regulating a national au pair program or whether those are parental decisions, local decisions, or whether the states ought to do that.” But in response to the specific question of whether there should be “restrictions regarding age and the clientele,” Shalala commented, “I believe that every parent is the best regulator and protector of their children’s future” Pat Etheridge & Martin Savidge, *White House to Hold a Conference Today Focusing on Child Care*, CNN EARLY EDITION (transcript) (Oct. 23, 1997).

Thankfully, the opportunity and means for fixing the au pair program are within grasp. As discussed below, tremendous strides made in recent years on behalf of domestic workers' rights hold the promise of creating meaningful change towards norms that better value domestic work and domestic workers. By signaling government commitment to changing social norms, au pair program reform would make a crucial contribution to this reconstruction project.

III. THE FUTURE OF THE AU PAIR PROGRAM AND ITS IMPLICATIONS FOR MIGRANT DOMESTIC WORK

*Midnight has begun to toll for British housewives who have been living high off the "pink slave trade," otherwise known as au pair girls, for two decades. —The Straits Times, April 11, 1967.*²⁶²

That the U.S. au pair program has managed to evade scrutiny notwithstanding calls for reform is a testament to its entrenched position in the American childcare landscape. The United States is not alone in deliberately avoiding the problems with its au pair program. Other governments confronted with the problem of au pair exploitation have also, for pragmatic reasons, allowed the problematic practices to continue unabated. Recognition of growing au pair exploitation during the period from the 1950s to 1970s in the United Kingdom, for example, actually led au pairing to be coined "the pink slave trade."²⁶³ Organizations like the British Vigilance Association lobbied for recognition and protection of au pairs and regulation of the recruitment agencies.²⁶⁴ Recognizing that "these girls are extremely valuable to the economy of [Great Britain] by helping to release many women for other work," advocates sought regulation rather than abolition.²⁶⁵ But even regulation proved unattainable, opponents arguing that, "converting au pair into ordinary employment" would "virtually abolish the au pair as such," and, in any event, would "require a vast army of inspectors to see carried out."²⁶⁶ In 1998, widespread reports of unfair treatment, excessive working hours, discrimination, and sexual assault of Filipino au pairs led the Philippines, a country of origin, to officially ban its nationals from

²⁶² Robert C. Toth, *The end is coming for Britain's 'Pink Slave' trade*, STRAITS TIMES, Apr. 11, 1967, at 7.

²⁶³ *Id.*

²⁶⁴ 811 PARL. DEB., H.C. (5th ser.) (1971) 1499–510 (U.K.), available at http://hansard.millbanksystems.com/commons/1971/feb/15/au-pair-girls#S5CV0811P0_19710215_HOC_578 [hereinafter HC Debate, Feb. 15, 1971]; see also 595 PARL. DEB., H.C. (5th ser.) (1958) 1330–1494 (U.K.), available at http://hansard.millbanksystems.com/commons/1958/nov/20/schedule#S5CV0595P0_19581120_HOC_384 (expressing concern over the "unscrupulous" recruitment agencies).

²⁶⁵ 695 PARL. DEB., H.C. (5th ser.) (1964) 798–819 (U.K.), available at <http://hansard.millbanksystems.com/commons/1964/may/15/au-pair-girls>.

²⁶⁶ HC Debate, Feb. 15, 1971, *supra* note 264.

traveling abroad to become au pairs.²⁶⁷ But Filipino nationals continued to participate in the au pair market without government censure, and even with the explicit permission of some destination countries fully aware of the ban.²⁶⁸ Despite the admittedly “inevitabl[e]” risk of exploitation,²⁶⁹ destination governments’ interests in preserving an affordable childcare alternative and origin governments’ interest in reaping revenues from the au pair remittances prevailed time and time again.

Whether to expand or contract au pair programs is now again on government agendas. Faced with an eldercare deficit, the Irish and Danish governments have expanded the scope of their au pair programs to permit au pairs to be used for eldercare.²⁷⁰ Given that hiring an eldercare au pair in these countries costs a fraction of what a nursing home or in-home care provider would charge, there is predictably great demand for eldercare au pairs.²⁷¹ Meanwhile, in what arguably is a response to the weak global economy, the Philippines in 2010 lifted its au pair ban only as to Norway, Swit-

²⁶⁷ Interview with Luzviminda Padilla, Labor Attache, Embassy of the Philippines, Washington DC (Sept. 15, 2011) (explaining the reasons behind the Philippines government’s decision to ban Filipinos from becoming au pairs); Email from Luzviminda Padilla to Author (Oct. 20, 2011) (on file with author) (confirming that “the ban on the deployment of [] workers under [the] au pair program [was] banned for all destinations, except [sic] for the 3 European countries where the ban was lifted recently upon the recommendation of the Philippine Embassies in those countries.”).

²⁶⁸ Statistics from the Danish Ministry of Refugee, Immigration and Integration Affairs showed that in 2009, despite the ban, 1510 out of the 2207 au pair permits officially provided by the Danish government were given to Filipino women. Tessi Cruz-Larsen, *Filipino au pairs go for ‘black work,’* GLOBAL NATION (Jan. 7, 2009 2:32 PM), <http://globalnation.inquirer.net/diaspora/diaspora/view/20090107-181950/Filipino-au-pairs-go-for-black-work>.

²⁶⁹ HC Debate, Feb. 15, 1971, *supra* note 264.

²⁷⁰ *Au Pairs Weigh in on Controversial Proposal*, COPENHAGEN POST, June 2, 2011; Isabel Conway, *Friends in deed for older people*, IRISH TIMES, August 16, 2011, at 13 (noting that the eldercare au pair program was a pilot programme under assessment); *How it Works*, AU PAIR STUDY AGENCY, <http://www.aupairagency.ie/i-need-an-au-pair/i-need-an-aupair-for-senior> (last visited Mar. 10, 2013).

²⁷¹ AU PAIR STUDY AGENCY, <http://www.aupairagency.ie/i-need-an-au-pair/i-need-an-aupair-for-senior> (last visited Feb. 2, 2013). In Ireland, for example, the cost of a nursing home averages € 1000 per week, while in-home care costs approximately € 350–€ 500 per week. Ursula Barry & Ciara Conlon, *Elderly Care in Ireland—Provisions and Providers* 7, 11 (University College Dublin School of Social Justice Working Papers Series, Number 10(1): 1-34, 2010) <http://researchrepository.ucd.ie/bitstream/handle/10197/2083/Barry-EGGEIrelandeldercare-2010.pdf?sequence=3>. In Denmark, the monthly cost of these alternatives can run upwards of € 900 per month. *Au Pairs Weigh in on a Controversial Proposal*, *supra* note 270. This presents a stark contrast to the costs of hiring an eldercare au pair. For example, retired Danish couples who do not need special nursing care can hire eldercare au pairs to do 18–30 hours of cleaning, cooking and shopping in exchange for room and board and a minimum of € 409 per month. *Id.* The Irish system has au pairs providing the same services, but along four levels of care, ranging from “demi-au pairs” who provide 15–25 hours plus 1–2 nights of care for € 70–80 per week, to “au pair plus” who provide 40 hours plus 1 night of care for € 130 per week. *How it Works*, *supra* note 270.

zerland, and Denmark,²⁷² and in 2012 lifted the ban for all of Europe.²⁷³ The Philippines government justified its 2010 action based on these destination countries' specific efforts to increase au pair protections.²⁷⁴ But in its 2012 lifting of the ban, the Philippines government embraced the cultural exchange rubric, shifting oversight of its au pairs from its overseas labor administration to its foreign affairs department and streamlining the documentation requirements for Filipino au pair departure.²⁷⁵

These au pair program expansions have elicited deep criticism. Some Filipino workers' rights advocates have characterized these changes as the Philippines government's attempt to reap the financial benefits (i.e., remittances) of its nationals' *official* participation in the booming global au pair market.²⁷⁶ Meanwhile, the European Parliament has gone so far as to release a report calling upon European governments to consider substantial reforms to their au pair programs due to widespread abuse.²⁷⁷

The United States is primed to consider reforms of its own au pair program, if not by virtue of other governments' efforts to do so, then by domestic pressures from within and outside of the government. Recent review of the J-1 program by the U.S. State Department Office of Inspector General and key personnel changes and have raised hopes for long-overdue reforms

²⁷² PHILIPPINE OVERSEAS EMPLOYMENT ADMINISTRATION, GOVERNING BOARD RESOLUTIONS, SERIES OF 2010, NOS. 2, 4, 6 (lifting the ban on deployment of au pairs to Switzerland, Norway, and Denmark respectively).

²⁷³ *Ban on Au Pairs Bound for Europe Lifted*, PHILIPPINES DEP'T OF FOREIGN AFFAIRS (Feb. 22, 2012), <http://www.philembassy.no/news-item/ban-on-au-pairs-bound-for-europe-lifted>.

²⁷⁴ See resolutions cited *supra* note 272. These "safety nets" include provision of health insurance and coverage of repatriation costs in case of death, terminal illness, and other similar reasons. See *Au Pair Ban Lifted for Norway*, EMBASSY OF PHILIPPINES (June 9, 2010) (on file with author).

²⁷⁵ *Compare Ban on Au Pairs Bound for Europe Lifted*, *supra* note 273 (stating that the Department of Foreign Affairs "will act as the lead agency in formulating policies on the au pair scheme") with resolutions cited *supra* note 272 (setting out requirements for the new au pair programs in Switzerland, Norway, and Denmark through the Overseas Employment Administration).

²⁷⁶ Filipino workers' rights advocates offered this hypothesis during a series of interviews author conducted with the Mission for Migrant Workers, Hong Kong, in May 2012. Note that the Philippine Vice President has proposed to exempt au pairs from travel taxes "in recognition of their contribution to the inward foreign exchange remittances." *VP Binay Proposes Travel Tax Exemption for Au Pairs*, GMA NEWS (June 10, 2012), <http://www.gmanetwork.com/news/story/261356/pinoyabroad/news/vp-binay-proposes-travel-tax-exemption-for-au-pairs>.

²⁷⁷ DIRECTORATE-GENERAL FOR INTERNAL POLICIES, POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRES, EUROPEAN PARLIAMENT, ABUSED DOMESTIC WORKERS IN EUROPE: THE CASE OF AU PAIRS (2011), <http://www.europarl.europa.eu/document/activities/cont/201110/20111020ATT29946/20111020ATT29946EN.pdf> [hereinafter EUROPEAN PARLIAMENT AU PAIR REPORT]. Though the 1969 European Au Pair Treaty mandates certain protections for au pairs, including the use of written agreements, it preserves States' ambivalence over how best to categorize au pairs, stating that they are neither students nor workers, but rather "a special category that has features of both." EUROPEAN AGREEMENT ON AU PAIR PLACEMENT, *supra* note 14.

to the J-1 program to reduce participants' vulnerability to exploitation.²⁷⁸ This opportunity coincides with a recent spate of grassroots advocacy successes on behalf of other J-1 program participants and, separately, the broader domestic worker population. The potential convergence of these advocacy movements over the au pair program presents a unique opportunity not only to consider substantive au pair program reforms, but also to explore how best to address America's ever-growing care deficit and to protect the workers who provide the care. Targeting the au pair program as a government-run program carries broad potential for effecting social norm change by taking the government to task for its own role in perpetuating a situation in which domestic worker exploitation is overlooked and unaddressed.

A. *Inevitable Scrutiny*

The convergence of two highly successful advocacy movements promises to shine a spotlight on the au pair program in the near future: (1) domestic workers' rights advocacy achieving passage of laws and regulations to recognize and protect domestic workers' rights, and (2) migrant workers' rights advocacy exposing the ways that migrant laborers have been relied upon—and exploited—in a wide range of informal and formal sectors of the economy.

At the forefront of domestic worker advocacy in the United States is the National Domestic Workers Alliance (NDWA), a national membership-based organization of over 10,000 nannies, housekeepers, and caregivers for the elderly.²⁷⁹ The NDWA's advocacy efforts have targeted one of the key contributors to domestic worker abuse—the absence of laws protecting their rights²⁸⁰—by successfully advocating for recognition of domestic workers'

²⁷⁸ 2012 INSPECTION REPORT, *supra* note 8. The former Deputy Assistant Secretary of State in charge of the Private Sector Exchange program, Stanley Colvin, who was involved in the management of the J-1 program since the early 1990s, was criticized for having had a “cavalier attitude” towards J-1 sponsors, allowing them to become “visa mills” that enjoyed minimal State Department oversight. JERRY KAMMER, CHEAP LABOR AS CULTURAL EXCHANGE: THE \$100 MILLION SUMMER WORK TRAVEL INDUSTRY 20 (2011), <http://cis.org/sites/default/files/SWT-Report.pdf>. The State Department acknowledged the problem in 2011, noting that some sponsors “were so detached from their [au pairs] that they became ‘mere purveyors of J-1 visas.’” *Id.* Colvin was allegedly quietly pushed out of his job. *Id.* at 2.

²⁷⁹ See *Who We Are*, NAT'L DOMESTIC WORKERS ALLIANCE, <http://www.domesticworkers.org/who-we-are> (last visited Mar. 12, 2013).

²⁸⁰ Scholars and activists have long focused the critique and advocacy on the state, believing that the state has perpetuated domestic worker abuse through the absence or inapplicability of labor protections for domestic workers. See generally GRACE CHANG, DISPOSABLE DOMESTICS: IMMIGRANT WOMEN WORKERS IN THE GLOBAL ECONOMY (2000) (arguing that the United States and other First World countries “routinely make deliberate economic interventions to facilitate their continued extraction of Third World resources, especially people”); GLOBAL WOMAN, *supra* note 44 (discussing through a series of essays the migration of Third World women to do “women’s work in affluent countries”); HONDAGNEU-SOTELO, *supra* note 48 (examining the employment relationships of Mexican and Central American immigrant women working in domestic service

rights in state, federal, and even international laws and regulations.²⁸¹ The NDWA was instrumental in securing passage of the 2010 New York Domestic Workers' Bill of Rights—the first state law to recognize domestic workers as a worker population.²⁸² NDWA advocacy also prompted the Department of Labor's recently proposed rule to better ensure that all hours actually worked by domestic workers are recorded and paid under the FLSA minimum wage rules.²⁸³ At the international level, the NDWA successfully partnered with domestic workers' rights advocates worldwide to achieve adoption of the 2011 ILO Convention on Decent Work for Domestic Workers, establishing international standards for the protection of domestic workers' rights.²⁸⁴

The NDWA and other domestic workers' rights advocates have not, however, traditionally included au pairs in their advocacy efforts. This is attributable to a variety of factors, including, among others, the sense of separation from other domestic workers—by au pairs and advocates alike—by virtue of their participation in an official government program.²⁸⁵ There is

in Los Angeles and their employers); 23 CAN. J. WOMEN & LAW (special issue on Regulating Decent Work for Domestic Workers) (Adelle Blackett, ed.) (2011) (examining in a series of articles the potential of labor regulation for domestic workers).

²⁸¹ See *Campaigns*, NAT'L DOMESTIC WORKERS ALLIANCE, <http://www.domesticworkers.org/campaigns> (last visited Mar. 12, 2013).

²⁸² See Shah & Seville, *supra* note 11, at 414. Though ultimately vetoed by the California governor, a similar bill gained approval of the California Assembly and Senate in 2012. Hannah Dreier, *Domestic Workers Bill Of Rights In California, AB889, Vetoed By Gov. Jerry Brown*, HUFFINGTON POST, Oct. 1, 2012, http://www.huffingtonpost.com/2012/10/01/domestic-workers-bill-of-rights-veto_n_1928001.html.

²⁸³ Application of the Fair Labor Standards Act to Domestic Services, 77 Fed. Reg. 14688, 14688 (March 13, 2012) (to be codified at 29.C.F.R. pt. 552). Current FLSA regulations allow employers to use an agreement entered into between employer and employee establishing the employee's hours of work in lieu of maintaining precise records of the hours actually worked. 29 C.F.R. § 552.102(b) (2012). Responding to concerns that all hours actually worked by domestic workers have not been captured by such agreements and paid—thus resulting in minimum wage violations—the proposed rule requires employers of domestic workers to keep accurate records of—and to pay for—all hours actually worked. Application of the Fair Labor Standards Act to Domestic Services, *supra*.

²⁸⁴ The fact that the U.S. government was unlikely to ratify such a treaty did not preclude the U.S. government from positioning itself as the champion of domestic workers' rights during the treaty negotiations. Indeed, the U.S. government is oft-criticized for its relatively dismal record of ratifying international human rights and labor rights treaties. See Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667 (2003) (defending against such criticisms). For an excellent discussion of the ILO Convention and how it might be applied in the U.S. context if ever ratified, see Smith, *supra* note 213, at 177–94.

²⁸⁵ Indeed, during negotiations over the ILO Domestic Workers Convention, the question of au pair coverage was a matter of heated debate. The ILO Secretariat suggested that the treaty drafters consider including au pairs within the scope of the treaty. INT'L LABOUR ORG., REPORT IV(1): DECENT WORK FOR DOMESTIC WORKERS 117, BOX III.2 (2010) [hereinafter ILO REPORT IV(1)] (“[g]iven the abuses that can occur against young people working “au pair”, the ILO’s constituents may wish to consider “au pairs” as both workers and young people on a cultural exchange, and to regulate their working conditions appropriately”). Some European governments argued that the cultural exchange purpose and the (presumed) fact that au pairs function more as “occasional”

also the perception that au pairs' temporary residency in the United States limits their ability to meaningfully contribute to a broader worker movement. Yet, that au pairs function as participants in the domestic work sector is a reality that NDWA accepts as within the scope of their concern.²⁸⁶ Indeed, recent successes in migrant workers' rights advocacy regarding another J-1 program—the Summer Work Travel Program—now present a prime political opportunity to draw attention to au pairs, and consequently to the broader domestic worker population.²⁸⁷

In August 2011, 300 foreign students walked off their jobs at a Hershey's chocolates packaging warehouse, setting off a firestorm of harsh publicity²⁸⁸ and criticism²⁸⁹ of the Summer Work Travel Program (SWT).²⁹⁰ These students had each paid \$3,000–\$6,000 to participate in the program, expecting to work for a few months in “Charlie's chocolate factory” and then travel through the United States.²⁹¹ Instead, they found themselves lifting heavy boxes on a fast-moving production line, often during a night shift, for which, after paycheck deductions for program fees and rent, they were paid \$1 to \$3 per hour.²⁹² Grievances students lodged with the recruiter were

babysitters than as “regular” workers warranted exclusion from treaty coverage. *See, e.g., id.*, at ¶ 62 (Netherlands), *id.* at ¶ 66 (Italy). The International Domestic Workers Network also argued against inclusion on grounds that au pairs, as cultural exchange participants, should not “work.” *See* EUROPEAN PARLIAMENT AU PAIR REPORT, *supra* note 277, at 32. Trade unions, however, argued in favor of inclusions. *See* ILO REPORT IV(1), at 70 (Norwegian Confederation of Trade Unions); INT'L LABOUR ORG. REPORT IV(2A) 21 (2010) (Irish Congress of Trade Unions). The United States government held to its interpretation of the definition of domestic worker as including au pairs, consistent with U.S. recognition of au pairs as employees under federal regulations. Interview with Bob Shepard, U.S. Department of Labor, International Labor Affairs Bureau, in Wash. D.C. (Dec. 2012).

²⁸⁶ Interview with Ai-jen Poo, Executive Director of the National Domestic Workers Alliance (New York City, Mar. 13, 2012).

²⁸⁷ *Id.*; Telephone Interview with Jennifer Rosenbaum, Legal Director, National Guestworker Alliance (June 13, 2012).

²⁸⁸ Julia Preston, *Foreign Students in Work Visa Program Stage Walkout at Plant*, N.Y. TIMES, Aug. 17, 2011, at A11; Editorial, *Not the America They Expected*, N.Y. TIMES, Aug. 18, 2011, at A22, available at <http://www.nytimes.com/2011/08/19/opinion/not-the-america-they-expected.html>; Julia Preston, *Companies Point Fingers as Students Protest Conditions at Chocolate Plant*, N.Y. TIMES, Aug. 18, 2011, at A12, available at <http://www.nytimes.com/2011/08/19/us/19students.html>; Julia Preston, *Pleas Unheeded as Students' U.S. Jobs Sour*, N.Y. TIMES, Oct. 16, 2011, at A1, available at <http://www.nytimes.com/2011/10/17/us/hershey-foreign-exchange-students-pleas-were-ignored.html>.

²⁸⁹ Criticism of the program has issued from organizations with widely divergent perspectives on immigrant work. *See e.g.,* REPORT OF THE AUGUST 2011 HUMAN RIGHTS DELEGATION TO HERSHEY, PENNSYLVANIA (2011), <http://www.guestworkeralliance.org/wp-content/uploads/2011/09/Human-Rights-Delegation-Report-on-Hersheys-J-1-Workers.pdf> (criticizing violations of workers' rights); CENTER FOR IMMIGRATION STUDIES, CHEAP LABOR AS CULTURAL EXCHANGE: THE \$100 MILLION SUMMER WORK TRAVEL INDUSTRY (2011), available at <http://cis.org/cheap-labor-as-cultural-exchange-contents> (criticizing SWT for its negative impact on American employment).

²⁹⁰ U.S. Dep't of State, *Summer Work Travel Program*, J-1 VISA EXCHANGE VISITOR PROGRAM, <http://j1visa.state.gov/programs/summer-work-travel> (last visited Mar. 12, 2013).

²⁹¹ Preston, *Foreign Students*, *supra* note 288, at A11.

²⁹² *Id.*; Editorial, *Not the America They Expected*, *supra* note 288, at A22.

either ignored or met with threats of deportation.²⁹³ Such complaints about the SWT program were neither new²⁹⁴ nor few,²⁹⁵ but it was not until a migrant workers' rights organization, the National Guestworker Alliance (NGA)²⁹⁶ helped stage the walkout of the Hershey student workers—joined by major unions the AFL-CIO and the Service Employees International Union—that the State Department finally responded to these concerns.²⁹⁷ Drawing scrutiny from the Department of Labor, international human rights advocates, workers' rights organizations, and anti-trafficking advocates, the Hershey's incident destabilized the notion that SWT was simply a cultural exchange program, rightly confined to the purview of the State Department.

Indeed, a subsequent review of the J-1 Program by the State Department Inspector General ("IG") echoed many of the rights advocates' concerns, with the IG "question[ing] the appropriateness of using J visas in work programs"—specifically including the au pair program—and recommending either elimination or transfer of these programs to the Department

²⁹³ Preston, *Pleas Unheeded*, *supra* note 288, at A1.

²⁹⁴ The Hershey walkout came on the heels of an Associated Press investigation of other J-1 visa abuses, with students cleaning hotel rooms and waiting tables for little to no pay, or finding themselves with no jobs at all, forced to beg, and some even trafficked into forced stripping. See Holbrook Mohr, Mitch Weiss, & Mike Baker, *Investigation: U.S. Fails to Tackle Student Visa Abuse*, ASSOCIATED PRESS, Dec. 5, 2010, <http://www.deseretnews.com/article/700088733/Investigation-US-fails-to-tackle-student-visa-abuses.html>; Holbrook Mohr & Mitch Weiss, *Student Visa Program: New Rules, Same Problems*, ASSOCIATED PRESS, June 26, 2011, http://www.huffingtonpost.com/2011/06/20/student-visa-program-new_n_880202.html; Holbrook Mohr, *US Curbs Work Program for Foreign College Students*, ASSOCIATED PRESS, Nov. 7, 2011, http://www.boston.com/news/education/higher/articles/2011/11/07/ap_newsbreak_us_limits_troubled_visa_program/; Holbrook Mohr, *Clinton Orders Review of Visa Program: Students Have Been Victims of Brokers, Mafia*, ASSOCIATED PRESS, Dec. 5, 2011, http://www.boston.com/news/education/higher/articles/2011/12/05/apnewsbreak_clinton_orders_review_of_visa_program/.

²⁹⁵ Criticisms of the Summer Work Travel program have issued from government and civil society. See GENERAL ACCOUNTING OFFICE, U.S. INFORMATION AGENCY: INAPPROPRIATE USES OF EDUCATIONAL AND CULTURAL EXCHANGE VISAS (1990); OFFICE OF THE INSPECTOR GENERAL, THE EXCHANGE VISITOR PROGRAM NEEDS IMPROVED MANAGEMENT AND OVERSIGHT, AUDIT REPORT 00-CI-028 (2000); U.S. GOV'T ACCOUNTABILITY OFFICE, STRONGER ACTION NEEDED TO IMPROVE OVERSIGHT AND ASSESS RISKS OF THE SUMMER WORK TRAVEL AND TRAINEE CATEGORIES OF THE EXCHANGE VISITOR PROGRAM (2005); Holbrook Mohr, Mitch Weiss, and Mike Baker, *U.S. Fails to Tackle Student Visa Abuses*, *supra* note 294.

²⁹⁶ National Guestworker Alliance, a membership organization of guestworkers, has been instrumental in exposing labor trafficking in the United States. *About NGA*, NAT'L GUESTWORKER ALLIANCE, <http://www.guestworkeralliance.org/about-nga/> (last visited Mar. 12, 2013).

²⁹⁷ Julia Preston, *Work Program for Foreign Students Will Not Expand During Review*, N.Y. TIMES, Nov. 8, 2011, at A14; Julia Preston, *Company Banned in Effort to Protect Foreign Students from Exploitation*, N.Y. TIMES, Feb. 1, 2012, at A12; Editorial, *Closing the Student Sweatshop*, N.Y. TIMES, Feb. 2, 2012, at A24; Julia Preston, *State Department Revises Foreign Student Job Program After Abuse Complaints*, N.Y. TIMES, May 4, 2012, at A13; Holbrook Mohr, *Clinton Orders Review of Visa Program*, *supra* note 294.

of Labor.²⁹⁸ While these criticisms have been voiced in the past by government oversight offices, accompanying grassroots advocacy in pursuit of J-1 program reforms has never been so organized or broad-based as it is now.

Having successfully drawn public attention and government scrutiny to the SWT, NGA is considering targeting other J-1 programs for reform, including the au pair program and in possible partnership with NDWA.²⁹⁹ Such collaboration is timely, as the State Department ECA is currently in the process of revising the au pair regulations.³⁰⁰ Developing a labor framework that secures au pairs' rights and creates infrastructure to support meaningful exercise of those rights could provide the foundation for a broader reconstructionist project that benefits all domestic workers, particularly migrants. Reforming a state-run program carries particular expressive value and the power to redefine social norms to value domestic work as work like any other.³⁰¹

Imagining what reforms to the au pair program should entail raises a host of complicated and fraught questions, however. Could the au pair program be transformed into a legitimate vehicle for cultural exchange, or should it be shifted to the Labor Department and treated as domestic worker guestworker program? In the alternative, what reforms could be made to make a hybrid cultural exchange and labor program less exploitative and lopsided? What transformative potential might au pair programs have for the broader domestic worker population? The following discussion examines these questions and suggests possible reforms.

B. Reform Agenda

The United States is not alone in experiencing dissonance between the billing of its au pair program as cultural exchange and functioning of it as a cheap childcare program. Some European governments argued against coverage of au pairs under the ILO Domestic Workers Convention on grounds that au pairs are not "workers."³⁰² But mere months after the treaty's adoption, the European Parliament's Directorate General for Internal Policy issued a report debunking the myth of cultural exchange and equating au pairing with domestic work.³⁰³ After surveying au pair practice in a cross-section of European countries, where au pair working hours were typically

²⁹⁸ 2012 INSPECTION REPORT, *supra* note 8 (questioning the use of J visas for the alien physician, teacher, au pair, intern, and trainee work programs).

²⁹⁹ Both organizations are considering the possibility of such a collaboration. Telephone interview with Ai-jen Poo, *supra* note 286; Telephone Interview with Jennifer Rosenbaum, *supra* note 287.

³⁰⁰ Interview with State Department ECA, *supra* note 158.

³⁰¹ See Cass Sunstein, *On the Expressive Function of Law*, 144 U. PENN. L. R. 2021, 2043 (1996); see also Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PENN. L. R. 2181, 2186–87 (1996).

³⁰² See ILO REPORT IV(1), *supra* note 285.

³⁰³ EUROPEAN PARLIAMENT AU PAIR REPORT, *supra* note 277, at 98.

capped at 30 hours per week, the European Parliament report concluded that European governments should “separate the current au pair program into two programmes: one of cultural and educational exchange with less than eight hours domestic help per week in exchange for food and lodging; and one of domestic and care work on conditions meeting decent working conditions.”³⁰⁴ Mindful, however, that option (1) is unlikely to come to pass given the pressing need for affordable and flexible care, the European Parliament report settles for a politically feasible compromise. Namely, it recommends that governments retain their au pair programs as hybrid cultural exchange and labor programs, but undertake more robust application of labor standards to au pair working conditions, while also establishing formal migrant domestic worker programs to meet care demands and avoid abuse of the au pair program.³⁰⁵

When compared to its European counterparts—particularly given that the 45-hour cap on weekly U.S. au pair working hours is 50 percent higher than the European cap—it is all the more difficult to discern a principled justification for maintaining the U.S. au pair program as a State Department “cultural exchange.” Even if the program could be re-fashioned to ensure enforcement of the few labor rights au pairs (as domestic workers) are afforded under U.S. law, it remains difficult to justify the low stipends/wages afforded to au pairs. While one might argue that the au pair program is a laudable (and singular) effort by the U.S. government to lessen the heavy burden of childcare expenses born by American families, it only does so by shifting the costs to the au pairs. With wages set at minimum wage (\$7.25 per hour)—even *before* the 40 percent room and board deduction—au pairs are earning far less than the prevailing wage for documented nannies with comparable experience (upwards of \$13 per hour).³⁰⁶

Given these concerns, the principled response would be—as initially proposed in the European context—to replace the program with (1) a legitimate cultural exchange program (i.e., with drastically reduced work hours and increased cultural exchange opportunities), and/or (2) a rights-protective domestic worker program. But pursuing such reforms would undoubtedly elicit the same air of resignation as permeates the European Parliament recommendations. A legitimate cultural exchange program would require such a dramatic reduction of hours that parents would likely object that the burden of hosting an au pair outweighs the benefits of such limited childcare coverage. Even less likely is the prospect of abolishing the au pair program

³⁰⁴ *Id.*, at 11.

³⁰⁵ *Id.* at 118–22.

³⁰⁶ INT’L NANNY ASS’N, 2012 INTERNATIONAL NANNY ASSOCIATION SALARY AND BENEFITS SURVEY 8 (2012), available at <http://www.nanny.org/document.doc?id=80>. According to this survey, the national average gross weekly salary for full-time live-in nannies is \$652 (\$16.30/hour). *Id.* More specifically, the national gross weekly salary for full-time nannies with less than one year of nanny experience is \$521 per week (\$13.05/hour). *Id.*

in favor of a broader domestic worker guestworker program, given the increased administrative and financial costs of hiring a guestworker (especially at prevailing wage rates).³⁰⁷ Indeed, in the year since the 2012 State Department Inspector General's J-1 program inspection, no action has been taken to follow up on the IG's recommendation that the ECA undertake to consider the viability of moving the au pair program to the Department of Labor.³⁰⁸ Given the history of the au pair program, this was hardly an unpredictable result. In the decades since American families vehemently opposed the 30-hour work week reform proposal as impossibly low for American childcare needs, and objected to bringing au pair stipends up to minimum wage,³⁰⁹ American families' reliance on au pairs for childcare—particularly for infant care—has only become more deeply entrenched, and the U.S. au pair lobby more effective at shielding the program from scrutiny and reform.³¹⁰

Accepting, for practical purposes, these unfortunate limitations, the following discussion proposes how the au pair program might continue as an avowedly hybrid cultural exchange and labor program. To be sure, one would have to suspend disbelief regarding the appropriateness of the “cultural exchange” label for an over-full-time childcare program, and accept on faith that whatever cultural enrichment an au pair gains somehow justifies the au pair being paid below-market wages compared to other migrant domestic workers providing comparable services. Setting aside those (serious) concerns, the program nonetheless could be significantly improved within its existing structure, and possibly even to the benefit of the broader migrant domestic worker population. After all, not only does the imprimatur of the State arguably provide added expressive value to au pair program reforms,³¹¹ but the au pair program's elaborate regulatory structure offers a valuable testing ground for innovative approaches to regulating domestic work and a visible context within which to develop a practice of domestic worker protection. Such a practice could significantly advance the broader project of

³⁰⁷ See discussion in main text *supra* accompanying notes 113–15.

³⁰⁸ 2012 INSPECTION REPORT, *supra* note 8, at 25.

³⁰⁹ See discussion accompanying *supra* notes 62–90.

³¹⁰ For example, the Alliance for International Educational and Cultural Exchange, a lobbying organization that represents the largest au pair agencies, along with sponsors for other J-1 cultural exchange programs, successfully brought a nationwide letter-writing campaign to defeat a legislative proposal to impose employment taxes on host families and au pairs (e.g., Social Security, Medicare). ALLIANCE FOR INTERNATIONAL EDUCATIONAL AND CULTURAL EXCHANGE, ACTION ALERT: OPOSE NEW TAX ON AU PAIRS AND AMERICAN HOST FAMILIES (on file with author). According to the Alliance, the 2012 Membership Meeting of the Alliance, held in Washington DC, on October 23, 2012, involved “unparalleled level of engagement with the State Department.” Assistant Secretary of State for Educational and Cultural Affairs Ann Stock provided luncheon remarks; four ECA Deputy Assistant Secretaries participated in a panel discussion; and there were nine programmatic task force sessions “facilitating substantive and engaged discussions between ECA representatives and Alliance members.” See *Annual Membership Meeting*, ALLIANCE FOR INTERNATIONAL EDUCATIONAL AND CULTURAL EXCHANGE, <http://www.alliance-exchange.org/annual-membership-meeting> (last visited March 30, 2013).

³¹¹ See sources cited *supra* note 301.

reconstructing legal and social norms to better value domestic work and preserve the dignity and rights of all domestic workers.

The reforms proposed below are not intended to be comprehensive in scope, but rather are intended as targeted strikes at a few longstanding issues faced by au pairs and domestic workers alike. Although some of these reforms are contingent on the existence of a regulatory structure like that undergirding the U.S. au pair program, these proposed reforms are nonetheless instructive with respect to the broader (currently unregulated) domestic worker population. After all, increasing demands for in-home care for our rapidly increasing elderly population could prompt government efforts to create a formal domestic worker program—efforts that could benefit from the insights gained from au pair program practice. Even structural differences aside, the proposed reforms undertaken in the au pair program context could provide a crucial foundation for broader norm creation and development. For example, establishing routine labor inspections in the au pair context could begin to chip away at the social norms—e.g., the concept of the impenetrable private sphere of the household and notions that domestic work is “not work”—that have long shielded domestic work from labor scrutiny.

1. *Working Conditions*

The following proposed reforms of the au pair program would significantly improve au pair working conditions. Moreover, if more broadly applied to all domestic workers, these improvements would significantly reduce vulnerability to exploitation in two key respects: (1) inadequate compensation for hours worked, and (2) limits on the ability to change employers and agencies.

a. *Work Hours*

Calculating and properly compensating work hours has long been one of the most challenging aspects of regulating domestic work. For au pairs and other live-in domestic workers, in particular, when the workday ends and begins is obscured by the worker’s continued physical presence in the household, especially for those living in close quarters, sharing common living spaces. For example, a nanny or au pair relaxing in the shared living room who agrees to watch the baby while the employer takes a quick late-night phone call might easily be construed as “helping” rather than “working.” The false kinship overlay of the au pair relationship tips the balance towards “helping” by creating heightened expectations that the au pair function as any family member would—e.g., “help” prepare dinner and wash the dishes, watch the baby while the host parents run quick errands.³¹² Consequently, au pairs often feel the need to leave the home after hours to create a

³¹² See discussion in main text accompanying *supra* notes 120, 224–234.

physical barrier against further help/work demands, reflecting the difficulty of maintaining work vs. non-work-life boundaries in situations where work takes place in the home. As exemplified by Paola's situation and many other live-in domestic workers, even nighttime sleep hours may be unprotected from work incursions.

Reforms to the au pair regulations present a valuable opportunity to identify—and fill—the gaps in worker protection that issue from the unique nature of domestic work. Closer scrutiny of the legal rules relating to domestic work reveals how, for example, these rules have permitted the systematic discounting of domestic worker work hours. Unlike other workers, live-in domestic workers are explicitly excluded from the overtime pay under the Fair Labor Standards Act.³¹³ Moreover, employers until very recently have been permitted to rely on the hours listed in a domestic worker employment agreement as the basis for establishing hours worked—thus failing to capture *actual* hours worked and permitting widespread minimum wage violations.³¹⁴ Nor do the FLSA regulations requiring compensation for on-call work during sleeping periods adequately protect domestic workers, like Paola, called upon to care for infants throughout the night. The FLSA regulations require that if a worker's sleeping period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (i.e., five hours sleep), the entire period must be counted.³¹⁵ But although this calculus might ensure decent working conditions for workers subject to infrequent interruptions, without requiring five *consecutive* hours of sleep, the rule falls short with respect to compensating for the frequent sleep disruptions experienced by domestic workers who are on-call during the night.³¹⁶

To ensure that all work is properly compensated, the au pair rules should include specific guidelines to ensure more stringent enforcement of au pair work hour limits through proper accounting of all hours actually worked. This includes clear prohibitions on interruptions of au pair rest periods and specific guidance regarding how to calculate “on-call hours” during periods when an au pair is expected to be available to work, particularly during night-time sleep periods. The au pair regulations could, for example, improve upon the current FLSA guidance by specifying a set number of consecutive hours of sleep time per night, or in the alternative, that all au

³¹³ Fair Labor Standards Act, 29 U.S.C. § 213(b)(21) (2012). Commentators attribute the exclusion to the fact that as live-in workers, domestic workers were often assumed to be part of the employer's family, and therefore likely permitted freedom to pursue their own interests after hours—a questionable assumption as a matter of historical fact. See Smith, *supra* note 213 at 183–84, and text accompanying notes 157–58.

³¹⁴ Application of the Fair Labor Standards Act to Domestic Services, 77 Fed. Reg. 14688, 14688 (March 13, 2012) (to be codified at 29 C.F.R. pt. 552).

³¹⁵ 29 C.F.R. § 785.22(b) (2006).

³¹⁶ Under the current rule, for example, if Paola were awakened every hour of a seven-hour period for fifteen minutes at a time, she would technically be entitled to compensation for only (15 x 7) 105 minutes of work, having accrued (45 x 7) 5.25 hours of sleep that night.

pair work hours be confined to within a 15-hour window to ensure a meaningful block of sleep time. Such a rule and practice in the au pair context could then serve as the basis for a future revised FLSA rule, hence applicable to all domestic workers.

b. Freedom to Change Employers and Agencies

The intimate bonds au pairs and other domestic workers form with their charges can make leaving a job with poor working conditions difficult. But the potential immigration consequences can make quitting virtually impossible. While undocumented workers are most vulnerable, documented temporary migrant domestic workers are not immune to the coercive effects of the threat of deportation. For au pairs and other (documented) temporary migrant domestic workers (e.g. A-3/G-5-visa-holders who perform domestic work for diplomats posted to the United States³¹⁷), immigration status is tied to specific recruitment agencies or employers such that leaving the agency or employer renders the worker immediately deportable as (suddenly) undocumented workers.³¹⁸ The threat of illegality is a powerful tool of control for employers and agencies; the tying of immigration status to specific agencies and employers can create and sustain conditions tantamount to servitude, or “the new bonded labor.”³¹⁹ Alternative immigration relief for workers is typically unavailable,³²⁰ limited to workers who can demonstrate extreme abuse such as trafficking.³²¹

³¹⁷ For a discussion of the problems faced by A-3/G-5 workers, see CAROL PIER, HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES (2001), <http://www.hrw.org/reports/2001/usadom/usadom0501.pdf>; Janie A. Chuang, *Achieving Accountability for Migrant Domestic Worker Abuse*, 88 N.C. L. REV. 1627, 1643–54 (2010).

³¹⁸ Until very recently, the United Kingdom boasted a migrant domestic worker program that afforded workers independent immigration status, enabling them to renew their visas so long as they were in full-time employment. But concerns over the possibility of migrant domestic workers remaining permanently (via visa renewals) led the U.K. government to issue new visa rules preventing migrant domestic workers from switching employers—a move that rights advocates criticize as “turn[ing] back the clock 15 years” and creating a system that would now mirror the “kafala” system across the Middle East where a change of employer amounts to a loss of residency. Alan Travis, *New visa rules for domestic workers ‘will turn the clock back 15 years,’* GUARDIAN, Feb. 29, 2012, <http://www.guardian.co.uk/uk/2012/feb/29/new-visa-rules-domestic-workers>; Aidan McQuade, *Slavery is real—we must protect its victims,* GUARDIAN, Feb. 29, 2012, <http://www.guardian.co.uk/commentisfree/2012/feb/02/rethink-attitudes-to-slavery-trafficking>.

³¹⁹ See VANINA WITTENBURG ET AL., OXFAM & KALAYAAN, THE NEW BONDED LABOUR: THE IMPACT OF PROPOSED CHANGES TO THE UK IMMIGRATION SYSTEM ON MIGRANT DOMESTIC WORKERS, 17 (2008).

³²⁰ Domestic workers who come to the United States on A-3 or G-5 visas to work for diplomats are, however, entitled to a stay of removal in order to bring a civil action against their employers for labor violations. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, sec. 203(c) (codified at 21 U.S.C. § 7101); see also *infra* discussion accompanying note 353.

³²¹ Note that pursuing such relief entrusts protection of these workers to anti-trafficking systems that tend to prioritize criminal justice over victim protection. In the United States, for example, a domestic worker subjected to trafficking can apply for a “T-visa,”

Against this backdrop, the U.S. au pair program provides a prime testing ground to explore the possibility of delinking immigration status from one's employer or agency. As a matter of practice, dissatisfied au pairs may be able to switch employers through an au pair agency's "rematch" process.³²² Agencies typically have established procedures for facilitating rematches, as rematch possibilities increase the pool of prospective au pairs for fee-paying host families.³²³ But whether and with whom an au pair is permitted to rematch is entirely within the discretion of the au pair agency—au pairs are not entitled to access the rematch process under the au pair regulations.³²⁴ Within its broad discretion, an au pair agency may decide rematch is simply not feasible, and offer the au pair the option of either remaining with the exploitative host family or returning to one's home country.³²⁵ Indeed, anecdotal information from au pairs, industry insiders, and State Department officials suggests that the more severe the exploitation an au pair has suffered, the lower the likelihood of a rematch—while in some cases, an au pair might prefer to simply return home, in others, an agency's expeditious repatriation may be motivated by an desire to wash its hands of "problem" cases.³²⁶

The au pair program regulations should therefore be revised to limit au pair agency discretion over whether to pursue rematch for an au pair. Although agencies should be permitted discretion to refuse to pursue rematches for au pairs whose dissatisfaction with former employers appears unreasonable, they should be prohibited from refusing to rematch an au pair when there are legitimate allegations of host family violations. This would prevent agencies from pursuing involuntary repatriation of an au pair to eliminate agency exposure (either legal or public relations-wise) for prior employer abuse.³²⁷ That Paola's au pair agency threatened to forgo rematch and simply repatriate her to Venezuela if Paola were to lodge a complaint with the State Department is testament to the coercive potential of agency discretion in this context. Preventing an agency from *refusing* to pursue rematch would remove the specter of repatriation/deportation that can prevent au pairs from leaving or reporting abusive situations.

To fully protect au pairs from employers and agencies wielding the threat of repatriation to perpetrate or cover up rights violations, the au pair

which permits a temporary stay of three years, with the possibility of permanent residency status. To qualify for a T-visa, the worker must "[comply] with any reasonable request for assistance in the investigation or prosecution of acts of trafficking." Trafficking Victims Protection Act, 18 U.S.C. § 1595 (2012)

³²² Telephone Interview with Au Pair Industry Insider No. 1, *supra* note 12.

³²³ *Id.*

³²⁴ See 22 CFR § 62.31 (2012).

³²⁵ Group Au Pair Interview, *supra* note 177; Telephone Interview with Au Pair Industry Insider No. 1, *supra* note 12; Interview with State Department ECA, *supra* note 158.

³²⁶ Telephone Interview with Au Pair Industry Insider No. 1, *supra* note 12; Interview with State Department ECA, *supra* note 158.

³²⁷ See discussion accompanying *supra* note 205.

regulations must also provide au pairs with the option of switching au pair agencies in limited circumstances. Au pairs currently are not entitled to change agencies under the terms of the contracts they enter with the au pair agencies. But the regulations should require agencies to permit au pairs—with legitimate complaints of host family violations of the au pair regulations or other laws—to change au pair agencies if the agency is unwilling or unable to find a suitable rematch. This would create a market incentive for au pair agencies to undertake more rigorous efforts to ensure decent working conditions for their au pairs.

Establishing a practice and norm of permitting employer- and agency-switching³²⁸ in the au pair context would demonstrate the feasibility of affording the broader domestic worker population this crucial protection against servitude. Such a norm could then be applied to other domestic workers tied to specific employers (e.g., A-3/G-5 workers) and later incorporated into a comprehensive domestic worker program should the United States ever choose to develop one.

2. *Monitoring and Access to Justice*

The above-proposed reforms have limited potential for improving the situation of au pairs and other migrant domestic workers, however, without an effective infrastructure and mechanisms to ensure their implementation in practice. Implementation is distinctly challenging in the domestic worker context because of the difficulty of monitoring employment relationships in private households—whether due to privacy notions or pragmatic concerns over efficient allocation of limited labor inspection resources. The au pair program is instructive regarding what can and ought to be done to ensure effective monitoring of those with the power to exploit. Moreover, enabling meaningful access to remedies in the event of exploitation would serve as an additional check on agencies and employers and, more significantly, provide redress for abuse. Establishing a practice of holding employers and agencies accountable for abuse benefits all domestic workers by promoting long-overdue recognition of domestic workers' entitlement to rights protection.

a. *Monitoring Employers and Recruitment Agencies*

Perhaps the single most challenging aspect of achieving decent working conditions for domestic workers is monitoring employer compliance with labor standards. That the employment takes place in a private household and typically involves a single or handful of employee(s) creates at least the

³²⁸ Israel, for example, permits employer-and-agency-switching in its eldercare program. Adriana Kemp, *Reforming Policies on Foreign Workers in Israel* 30 (OECD Social, Employment and Migration Working Papers No. 103, 2010), [http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&cote=delsa/elsa/wd/sem\(2010\)](http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&cote=delsa/elsa/wd/sem(2010)).

perception that labor inspections in this context are impracticable and inefficient—particularly given the limited resources of state and federal labor agencies. Indeed, examples of countries that affirmatively engage in labor inspections in private households—such as a much-touted Irish pilot inspection program³²⁹—are exceedingly rare. The U.S. Department of Labor, for example, has scarcely exercised its authority to investigate allegations of domestic worker abuse.³³⁰ Why this is so is a matter of some dispute between labor department officials and workers’ rights advocates—whether due to lack of opportunity given the paucity of registered complaints,³³¹ or because of labor officials’ reluctance to pursue investigations of domestic worker complaints for the efficiency and practicality concerns discussed above. Indeed, domestic workers are rarely informed of their legal options, and even when they are, emotional bonds and/or fear of deportation may weigh against pursuing remedies for abuse.

The infrastructure created by the au pair program carries the potential for effective monitoring in the au pair context, however. The regulations require monthly contact between a “local coordinator” and their assigned au pairs and host families, and quarterly contact with a “regional coordinator.”³³² These coordinators are required to report any “unusual or serious situations or incidents” to the agency, and any incidents “involving or alleging a crime of moral turpitude or violence” to the State Department.³³³ But the regulations do not specify the purpose or substance of the required periodic meetings.³³⁴ Indeed, anecdotal information suggests vast differences between and within au pair agencies with regard to actual implementation of these regulations.³³⁵

The regulations do, however, hold agencies liable for employer violations of the stipend and work hour requirements by virtue of the threat of decertification of agencies for failure to monitor employer compliance.³³⁶ Given this regulation, it would be reasonable to revise the regulations to

³²⁹ In 2010, the Irish government’s National Employment Rights Authority (NERA) began a targeted campaign to inspect private homes and monitor working conditions of domestic workers. *Focusing on Domestic Workers*, 3 NERA QUARTERLY UPDATE (Nat’l Emp’t Rights Auth., Carlow, Ireland), 2010. <http://www.employmentrights.ie/en/media/NERA%20Quarterly%20Update%20September%202010.pdf> (announcing that in the coming months, NERA inspections would be focusing on domestic workers); Jamie Smyth, *Inspections find abuses of domestic workers*, IRISH TIMES, July 6, 2011, at 3 (reporting that by mid-2011, NERA had undertaken twenty inspections of private homes).

³³⁰ Interview with U.S. Department of Labor official, Wage & Hour Division, in Wash., D.C. (February 9, 2012).

³³¹ *Id.*

³³² 22 C.F.R. § 62.31(1)(1)–(2) (2012).

³³³ 22 C.F.R. § 62.31(1)(3)–(4) (2012).

³³⁴ 22 C.F.R. § 62.31(1)(1)–(4) (2012).

³³⁵ Some local counselors, for example, rarely contact their host families and, at most, hold monthly group meetings of their au pairs that are pitched more as an opportunity to socialize than to provide feedback on their placements. Telephone Interview with Au Pair Industry Insider No. 1, *supra* note 12.

³³⁶ 22 C.F.R. § 62.31(n)(3) (2012).

better utilize the local/regional coordinator infrastructure for monitoring employer compliance. Specifically, the regulations should mandate that local/regional coordinators hold periodic individualized meetings with au pairs and host families and use these meetings to engage in close review of stipend payments and work hours. Admittedly, the replicability of this specific monitoring structure outside the au pair context is perhaps limited, given that relatively few non-au pair domestic workers use recruitment agencies. But establishing a government-mandated *practice* of monitoring would benefit all domestic workers by destabilizing societal resistance to monitoring employment relationships within the home.

Moreover, recruitment agencies' relative absence from the domestic work sector would surely change if the United States were to adopt a domestic worker guestworker program.³³⁷ In matching supply with demand, recruitment agencies are key actors and drivers of global labor migration. They are notoriously difficult to regulate, however. Legal frameworks that effectively identify, punish, and redress exploitative labor recruitment practices have yet to be developed.³³⁸ Moreover, tremendous reliance on remittance revenues³³⁹—and, at times, government kickbacks from labor recruiters—are strong disincentives against close monitoring of recruitment practices in countries of origin.³⁴⁰ Even for countries of destination concerned about the drawbacks of unfettered recruitment agency action, questions of jurisdictional reach over acts committed in countries of origin³⁴¹ and the costs of creating systems to effectively monitor recruitment practices are commonly cited as obstacles to effective response.³⁴²

³³⁷ By “domestic worker guestworker program,” I am referring to a guestworker program designed to bring in migrant domestic workers to provide carework for American families.

³³⁸ INT'L LABOUR ORG., *MERCHANTS OF LABOUR* 175–83 (Christiane Kuptsch ed., 2006) [hereinafter *MERCHANTS OF LABOUR*]; Fudge, *supra* note 46, at 237; Sassen, *Women's Burden*, *supra* note 45, at 257. Innovative scholarship offering new approaches to addressing third party liability for labor violations might provide a useful analog for addressing recruitment agency practices that enable or directly perpetrate labor violations. See, e.g., Brishen Rogers, *Toward Third Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1 (2010) (proposing a new legal regime for handling wage theft in which firms would be held to a duty of reasonable care to prevent wage and hour violations within their domestic supply chains, regardless of whether they enjoy a contractual relationship with the primary wrongdoer).

³³⁹ For insightful critique of the reliance on remittances as a development tool, see Ezra Rosser, *Immigrant Remittances*, 41 CONN. L. REV. 1 (2008).

³⁴⁰ See Philip Martin, *Int'l Inst. for Labour Studies Discussion Paper*, in *MERCHANTS OF LABOUR*, *supra* note 338, at: 13–14.

³⁴¹ For a discussion of the “jurisdictional conundrum,” see Fudge, *supra* note 46, at 242–44.

³⁴² For example, language targeting exploitative labor recruitment practices in recently-proposed U.S. anti-trafficking legislation was stripped from the bill due to cost concerns. See ALLIANCE TO END SLAVERY & TRAFFICKING, *RECOMMENDATIONS FOR THE REAUTHORIZATION OF THE TRAFFICKING VICTIMS PROTECTION ACT OF 2000* (2012); Telephone Interview with Labor Rights Advocate (March 23, 2013).

As the only regulations that address domestic worker recruitment agencies in the United States, the au pair regulations provide a useful starting place for considering what more effective regulation of domestic worker recruitment agencies might entail. Indeed, current au pair program practice provides important insights into what *not* to do. As demonstrated above, having agencies submit “independently-audited” reports detailing their compliance with federal regulations is a poor substitute for actual government oversight, particularly without stringent audit guidelines establishing a random sampling procedure that denies agencies an opportunity to correct “problem” files in advance.³⁴³ In addition to more stringent audit guidelines, more proactive monitoring of agency practices by the State Department compliance office is crucial—e.g., on-site visits to verify agency compliance and perhaps even confidential interviews with an undisclosed sampling of au pairs to assess agency practices.

Most critically, scrutiny of agency practices should be extended to cover agency staff and subcontractors located abroad, which currently are unregulated and engage in practices that are potentially harmful to au pairs and host families alike. Such scrutiny should, for example, target the apparently common practice of having the psychological exams of prospective au pairs be administered (or re-administered after initial failure, with coaching) by untrained staff.³⁴⁴ Scrutiny of agency practices abroad must also address, in particular, the highly problematic practice of prospective au pairs’ payment of recruitment fees to the local recruiters. The State Department currently neither tracks nor prohibits local recruitment fees on grounds that whether and how much an au pair agency’s local recruiter charges are the “internal business decisions” of the au pair agencies.³⁴⁵ But local recruiter fees—for example, the \$3,000 Paola paid to an official at her university to gain access to the au pair program³⁴⁶—can cause au pairs, like other migrant domestic workers, to remain in exploitative or abusive placements in order to recoup the costs of the placement through their earnings.³⁴⁷ Hence, absent targeted State Department scrutiny of an au pair agency’s foreign affiliates’ activities, au pair agencies can readily circumvent the au pair regulations. More significantly, the State Department loses critical perspective on how actual program operations on the ground can transform a potential “cultural

³⁴³ See discussion in main text accompanying *supra* notes 168–169.

³⁴⁴ Telephone Interview with Au Pair Industry Insider No. 1, *supra* note 12; Telephone Interview with Au Pair Industry Insider No. 2, *supra* note 157.

³⁴⁵ Interview with State Department ECA, *supra* note 158.

³⁴⁶ Au pairs consulted for this Article had the impression that the recruitment fees differed according to continents of origin. For example, Latin Americans were typically charged higher fees than Europeans. Group Au Pair Interview, *supra* note 177.

³⁴⁷ The problem of high recruitment fees compelling workers to remain in even abusive employment relationships is the focus of domestic work advocacy efforts in Hong Kong, for example. See, e.g., Peggy W.Y. Lee & Carole J. Petersen, *Forced Labour and Debt Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers* (Occasional Paper No. 16 of the Centre for Comparative and Public Law, 2006).

exchange opportunity” into a harsh lesson in migrant worker exploitation in the United States.

b. Increasing Access to Justice

For those who are exploited in private households, access to justice can be extremely difficult to achieve given the substantial control employers can exert over domestic workers. This is particularly so for live-in workers, who must rely on their employers for basic subsistence needs (e.g., food and housing), and whose mobility and exposure to the outside world is contingent on employer work demands.³⁴⁸ Though arguably less isolated than other live-in domestic workers due to the class attendance requirement and possible opportunities to socialize with other au pairs, this additional outside exposure does little to offset the tremendous influence au pair agencies and employers wield over an au pair’s understanding of her situation and her options for redress. That Paola, for example, even became aware that her mistreatment entitled her to legal remedies was pure happenstance—the unlikely coincidence of frequent contact with a law professor with relevant expertise.

For au pairs and other domestic workers, therefore, knowledge really is a necessary condition for exercising power. Accessing justice requires that these workers not only be informed of their rights but also empowered to pursue redress when those rights have been compromised. Minor reforms to the au pair program could go a long way to ensuring that all program participants are aware of the rights and responsibilities that attach to the au pair-host family employment relationship. Explicit mention—for example, in all au pair program materials—of the applicability of federal and state labor laws, and of the authority of government agencies (e.g., the J-1 compliance office, the Department of Labor Wage & Hour division) to resolve disputes would be a crucial reminder to host families that their employment relationship with the au pair is subject to outside scrutiny.³⁴⁹ Mandated training of agency staff, au pairs, and host families would also ensure understanding by all parties of the substantive content of those worker protections—e.g.,

³⁴⁸ Not surprisingly, media coverage of domestic work is peppered with stories of live-in domestic workers confined to the home for years at a time, forced to work without pay. See, e.g., *Bay Area Woman Sentenced to Five Years in Domestic Worker Forced Labor Case*, U.S. FED. NEWS, Apr. 16, 2010, <http://www.ice.gov/news/releases/1004/100415oakland.htm>; Elissa Strauss, *The Invisible Workers*, AM. PROSPECT, May 22, 2009, at 24; Patrice O’Shaughnessy, *L.I. Case Turns on Hundreds Trapped As Slaves*, N.Y. DAILY NEWS, June 28, 2008, at 16; Dan Morse, *Housekeeper Sues Montgomery Family*, WASH. POST, Aug. 10, 2010, <http://voices.washingtonpost.com/crime-scene/montgomery/a-55-year-old-domestic-worker.html>; Shivani Vora, *Is the ‘\$1.5 Million Maid’ an Isolated Case?*, N.Y. TIMES, Mar. 28, 2012, <http://india.blogs.nytimes.com/2012/03/28/is-the-1-5-million-maid-an-isolated-case/>.

³⁴⁹ This information could be stated, for example, in the State Department welcome letters to au pairs and host families, posted on the State Department J-1 website, and included in au pair agency materials.

FLSA wage and hour requirements—and the remedies available in the event of violation. Required dissemination to all prospective au pairs of the U.S. anti-trafficking pamphlet (distributed by U.S. consular officials to all U.S.-bound non-immigrant workers) would provide them with critical information on how to access the U.S. worker exploitation hotline and legal services.³⁵⁰

Ensuring meaningful access to justice also requires that pursuit of legal redress is practicable. There must be actual remedies and procedures in place that enable au pairs to pursue them without fear of retaliation or deportation. As underscored in Paola's case, the current system for filing a complaint with the J-1 compliance office—in addition to being unpublicized—offers neither a remedy for individual exploitation cases nor, apparently, any means of preventing agency retaliation against a complainant. The notion that whatever information is gained from a complaint *might* lead to possible sanctions against an au pair agency³⁵¹ offers little incentive for au pairs to assume the risk of reporting. The au pair regulations should be amended to require the J-1 compliance office to ensure access to individual redress for violations. If the J-1 program is unwilling or unable to investigate an allegation of abuse and impose a specific remedy, it should develop a procedure by which such allegations are directed to appropriate mechanisms in the relevant state and federal labor departments (e.g., Wage and Hour Division's complaints procedure). Access to an administrative remedy is particularly important given the difficulty and cost of finding a private attorney to handle a civil lawsuit.³⁵²

Moreover, regardless of the specific remedy pursued, ensuring meaningful access to these remedies requires that au pairs be permitted to extend their visas for the time necessary to bring legal claims against their employers and/or agencies. Such protection could be modeled on that now afforded, for example, to A-3/G-5 visa holders (i.e. domestic workers working for diplomats posted in the United States), who have the right to remain in the United States for "time sufficient to fully and effectively participate in" any

³⁵⁰ See sources cited *supra* note 149.

³⁵¹ Email from State Department Official to Author, *supra* note 153.

³⁵² Private counsel could be hired to bring civil lawsuits under, for example, the Fair Labor Standards Act (e.g., for backpay) and in situations involving forced labor or trafficking, criminal and civil actions under the Trafficking Victims Protection Act. See Fair Labor Standards Act, 29 U.S.C. §216(b) (2006) (permitting damages equal to double the back pay owed, reasonable attorney's fee and costs); Trafficking Victims Protection Act, 18 U.S.C. § 1595 (2012) (affording victims of trafficking the right to bring a civil action to recover damages and reasonable attorneys fees). The cost of bringing a lawsuit tends to exceed the expected recovery, however. Although recovery of attorneys' fees, which often eclipse the substantive damages claims, can provide financial incentive to take on these cases, clever defense strategy—such as making an offer of judgment on the eve of trial—could limit the recovery of those fees. That risk combined with the difficulty of winning these cases on such limited evidentiary records can make these cases less compelling to private counsel and public interest attorneys alike.

civil action brought against their employers for violating the terms and conditions of their employment.³⁵³

C. *Broader Implications*

The au pair program has helped enable us to avoid difficult questions as to whether and how the United States might pursue a comprehensive fix to our growing care deficit, at least in the childcare context. But just as recent scrutiny of the Summer Work Travel program promises to shine a spotlight on the au pair program's deficiencies,³⁵⁴ major demographic changes in the United States are forcing the issue of broader domestic work reform. The increase in our nation's elderly population and their projected care needs drastically outpaces the available care workforce.³⁵⁵ Domestic workers providing childcare—including au pairs—are being pulled into the care gap to care for aging family members, despite lacking the necessary healthcare training to provide quality care.³⁵⁶ Because the eldercare crisis is of increasing concern to policy makers,³⁵⁷ it presents a valuable opportunity to substantively consider how the United States might construct a system that both ensures decent working conditions and provides quality care. The challenges of constructing such a system—or systems—are great, and raise a host of vexing questions that are beyond the scope of this Article to answer. But lessons from au pair programs and practice offer a few insights worth noting here.

The first is to caution against following Denmark and Ireland's lead in expanding the au pair program to provide "eldercare au pairs."³⁵⁸ The U.S. government has yet to contemplate such an expansion,³⁵⁹ but au pair agen-

³⁵³ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, sec. 203(c) (codified at 21 U.S.C. § 7101).

³⁵⁴ See accompanying text *supra* note 114.

³⁵⁵ People with long-term care needs are projected to grow from 13 million in 2000 to 27 million in 2050. *Press Packet*, CARING ACROSS GENERATIONS (2011), <http://www.caringacrossgenerations.org/sites/default/files/full-press-packet.pdf>. The current long-term care workforce is comprised of approximately 3 million workers. *Who Will Care for the Baby Boomers?: As generation nears retirement, concern mounts over elderly care*, ASSOCIATED PRESS, June 14, 2007, <http://www.nbcnews.com/id/19234042/#.USKPAKWsiSo>.

³⁵⁶ Interview with Ai-jen Poo, *supra* note 286.

³⁵⁷ As the target population is also conveniently a voting population, eldercare provides a political hook previously not available in domestic workers' rights advocacy in the childcare context. Politicians have also shown concern over eldercare policy. Senator Tom Harkin introduced a resolution expressing the sense of the Senate that "a comprehensive approach to expanding and supporting a home care workforce and making long-term services . . . is necessary to uphold the right of seniors . . . to a dignified quality of life." CONG. REC. S3087 (158 daily ed. May 10, 2012).

³⁵⁸ *Au Pairs Weigh In On Controversial Proposal*, *supra* note 270; Conway, *supra* note 270, at 13 (noting a waiting list of recipient families); *I need an au pair for senior*, AU PAIR STUDY AGENCY (IRELAND), <http://www.aupairagency.ie/i-need-an-au-pair/i-need-an-aupair-for-senior> (last visited Mar. 12, 2013).

³⁵⁹ Telephone Interview with State Department Official (May 22, 2012).

cies have expressed interest in tapping into the lucrative eldercare market, and American families have offered support for it.³⁶⁰ Whatever “quick fix” the au pair program appears to offer to address our care deficits cannot justify expanding or creating yet another “underclass of underpaid domestic workers.”³⁶¹ Expanding the U.S. au pair program to provide eldercare would only exacerbate and further complicate the problems detailed in this Article. While it is perhaps conceivable that spending time with an elderly person might afford greater opportunities for cultural exchange through adult conversation and companionship on social outings,³⁶² the opposite result is equally possible—e.g., if the au pair were living alone with a senior with deteriorating mental health.³⁶³ Indeed, as in the Irish system,³⁶⁴ au pairs might assume the burden of providing nighttime care in addition to daytime care, which further limits the au pair’s access to exchange opportunities. Moreover, unlike childcare au pairing where the child’s parents also reside in the household, primary responsibility for the health and well being of a senior could fall to the au pair, who might lack not only the skill but also the psychological mindset to assume such a burden. And even if the system were carefully regulated to limit eldercare au pairing to reasonably healthy and independent seniors, the risk of sudden and serious illness among this population is ever present and impossible to prevent.

Taking au pairing off the table as a possible response to the eldercare crisis then leaves the difficult question of whether the United States should follow the lead of other countries and establish a domestic worker guestworker program, and if so, how. These questions are laden with a host of deeply-contested normative and challenging practical considerations.³⁶⁵ The problems with existing U.S. guestworker programs are well-docu-

³⁶⁰ John Crudele, *How one immigration law cheats the elderly*, N.Y. Post, Dec. 29, 2009, at 30 (arguing that “Washington [is] treating families with young children better than it [is] treating old people. . .” in not permitting au pairs to provide eldercare); *Why Not Au Pairs for the Elderly*, AU PAIR CLEARINGHOUSE, <http://www.aupairclearinghouse.com/node/669> (last visited Mar. 12, 2013).

³⁶¹ Conway, *supra* note 270, at 13 (describing criticisms of the Danish system).

³⁶² See sources cited *supra* note 358.

³⁶³ Indeed, this example was provided by the CEO of Expert Au Pair, Mark Gaultier, who noted that they could not unequivocally support the idea of a senior-care program in light of concerns over how to ensure meaningful cultural exchange in the elder care context. See Mark Gaultier, *CEO of Expert Au Pair Supports the Idea of Senior-Care Program*, Comment to *Why Not Au Pairs for the Elderly?*, AU PAIR CLEARINGHOUSE (Dec. 30, 2009), <http://www.aupairclearinghouse.com/node/669#comment-1158>.

³⁶⁴ See *I need an au pair for senior*, *supra* note 358 (explaining that the program provides 24/7 live-in care).

³⁶⁵ Whether to afford migrant domestic workers permanent residency is currently a matter of active national debate in Hong Kong, for example. See Kevin Drew, *Court Rules on Side of Maids’ Rights to Residency*, N.Y. TIMES, Sept. 30, 2011, <http://travel.nytimes.com/2011/10/01/world/asia/court-rules-on-side-of-maids-rights-to-residency.html> (discussing a court in Hong Kong’s decision holding that a law that bars foreign domestic workers from seeking permanent residency in Hong Kong is unconstitutional).

mented, however, and apparently growing.³⁶⁶ Many of these problems stem from the political and economic power of recruitment agencies, which have enabled their interests to capture the regulatory agendas of the relevant agencies, effectively empowering them to exploit with impunity.³⁶⁷ Lessons from the au pair program caution wariness and further inquiry before risking creating a market for recruitment agencies through domestic worker guestworker program development. While the suggestions offered above regarding au pair agency compliance are important to implement for effective regulation of recruiters, they are far from comprehensive.³⁶⁸ Advocates and scholars are currently in the process of identifying and assessing alternatives to recruitment agencies—e.g., creation of a direct hire system to cut out middlemen altogether,³⁶⁹ enabling international institutions like the International Organization for Migration to act as recruiter,³⁷⁰ or allowing worker collectives to manage recruitment of their own workers.³⁷¹

In light of these concerns it is worth seriously considering the alternative to domestic worker guestworker programs currently being proposed by domestic workers' rights advocates. Though developed in the eldercare context, the proposal's elements readily translate to the childcare context. In 2011, the NDWA launched its Caring Across Generations (CAG) campaign, to promote reforms that would create care jobs, establish stronger labor standards, and provide job training and certification programs to raise the quality of eldercare while also providing program participants with a path to citizenship.³⁷² Rather than relying on circular migration of foreign workers to provide the care, the CAG proposal enables the many migrant domestic workers already living and caregiving in the United States to regularize their status

³⁶⁶ See generally, ASHWINI SUKTHANKAR, VISAS, INC.: CORPORATE CONTROL AND POLICY INCOHERENCE IN THE U.S. TEMPORARY FOREIGN LABOR SYSTEM (2012) (assessing how the structure of the U.S. temporary foreign labor system renders workers vulnerable to abuse); AM. UNIV. WASHINGTON COLL. OF LAW, INT'L HUMAN RIGHTS LAW CLINIC & CENTRO DE LOS DERECHOS DEL MIGRANTE, PICKED APART: THE HIDDEN STRUGGLES OF MIGRANT WORKER WOMEN IN THE MARYLAND CRAB INDUSTRY (2011) (exposing abuses suffered by migrant women who came to the United States under H-2B visas to work in the Maryland crab industry); NAT'L GUESTWORKERS ALLIANCE & PENNSYLVANIA STATE UNIVERSITY, DICKINSON SCHOOL OF LAW'S CENTER FOR IMMIGRANTS' RIGHTS, LEVELING THE PLAYING FIELD: REFORMING THE H-2B PROGRAM TO PROTECT GUESTWORKERS AND U.S. WORKERS (2012) (documenting widespread abuses in the H-2B visa program).

³⁶⁷ See sources cited *supra* note 278.

³⁶⁸ For an insightful discussion of alternatives to reliance on recruitment agencies, see generally JENNIFER GORDON, TOWARDS TRANSNATIONAL LABOR CITIZENSHIP: RESTRUCTURING LABOR MIGRATION TO REINFORCE WORKERS' RIGHTS: A PRELIMINARY REPORT ON EMERGING EXPERIMENTS (2009), http://www.law.berkeley.edu/files/Gordon_Transnatl_Labor_Final.pdf [hereinafter Gordon, RESTRUCTURING LABOR MIGRATION]. See also Verena Schmidt, *Temporary Migrant Workers: Organizing And Protection Strategies by Trade Unions in* MERCHANTS OF LABOUR, *supra* note 338, at 191–206.

³⁶⁹ Gordon, RESTRUCTURING LABOR MIGRATION, *supra* note 368, at 15.

³⁷⁰ See KEMP, *supra* note 328, at 19.

³⁷¹ Gordon, RESTRUCTURING LABOR MIGRATION, *supra* note 368, at 27–41.

³⁷² *Press Packet*, *supra* note 355.

and become U.S. citizens.³⁷³ This is a critical point of departure from the domestic worker guestworker programs adopted in other countries, which typically permit two to five year (possibly renewable) work periods but without the prospect of permanent residency or citizenship.³⁷⁴ The U.S. immigration system and American public sentiment have similarly been deeply resistant to affording migrant workers a path to citizenship. But there is a sense in which the nature of domestic work—i.e., as involving intimate, emotional bonds with American families, and making “all other work possible”—might perhaps give domestic workers greater claim in public perceptions to “belonging” than other migrant worker populations.³⁷⁵ There are also strong pragmatic arguments favoring permitting a path to citizenship based on, for example, the importance of continuity of care to the emotional and physical well-being of the care recipients;³⁷⁶ and the possibility that regularizing the undocumented migrants already here might carry lower financial and administrative burdens than constructing a system to facilitate circular migration of new migrants.³⁷⁷

Developing a domestic worker program that both ensures decent working conditions and affords quality care is a long process involving not just thinking through complex law and policy issues, but also—perhaps more critically—bringing the public along through better social awareness of and appreciation for domestic work. In this latter respect, presenting a united front with au pairs offers a politically shrewd antidote to the traditional “other-ing” of domestic workers along race, class, gender, and education lines.³⁷⁸ The perception, if not the reality, of au pairs’ class, educational, and race privilege could help transform the (literal) face of domestic work to look a bit more like the American voting public, perhaps rendering proposed domestic worker reforms—e.g., providing a path to citizenship for migrant domestic workers—politically more palatable.³⁷⁹ Challenging these assumptions is substantively important given that many migrant domestic workers have endured downward class mobility in becoming domestic workers in the

³⁷³ *Id.*

³⁷⁴ For a sampling of analyses of domestic worker guestworker programs around the world, see generally, KEMP, *supra* note 328 (Israel); Fudge, *supra* note 46 (Canada); Pei-Cha Lan, *Legal Servitude, Free Illegality: Migrant Guest Workers in Taiwan* (powerpoint presentation) (on file with author); Nicole Constable, *Migrant Workers and the Many States of Protest in Hong Kong*, 41 CRITICAL ASIAN STUD. 143 (2009) (Hong Kong).

³⁷⁵ For insightful discussion of the relationship between work and citizenship, see Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161 (2008); Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CA. L. REV. 503 (2007).

³⁷⁶ Research on this issue is currently being undertaken. Interview with Ai-jen Poo, *supra* note 286.

³⁷⁷ *Id.*

³⁷⁸ Indeed, one could (optimistically) view aspects of the au pair program as helpful in challenging some of these underlying prejudices—e.g. the increasing numbers of male au pairs might unsettle gendered assumptions of who is capable of performing domestic work.

³⁷⁹ Thanks to Daniela Kraiem for this important insight.

United States. Hence, the assumptions of privilege that have traditionally separated au pairs from other low wage domestic workers might prove key to bringing the American public closer to accepting domestic workers as deserving of rights protections.

CONCLUSION

For middle and upper-middle class working parents, finding and funding childcare (particularly for preschoolers) under the glare of intensive-mothering norms and absent state-provided financial assistance is an endeavor fraught with contradiction and compromise. Given that legally hiring a domestic worker and at a fair wage can exceed a year's worth of private college tuition, hiring an au pair is an immensely rational option. This article thus does not mean to criticize those who pursue this option. Many families treat their au pairs well—some, such as Paola's subsequent employer, even continue to provide emotional and financial support to their au pairs well beyond the duration of the placement.³⁸⁰

The problem, however, is that the structure and rhetoric of the au pair program does little to guard against, much less address, exploitation of au pairs, leaving their treatment entirely contingent on the goodwill of their host-family-employers. Regrettably, for some families, treating those who care for one's children well is *not* necessarily intuitive. While au pairs offer an affordable childcare option, affordability is often subjective—for those who simply do not value domestic workers or domestic work, it can never be cheap enough. For others, lesser treatment derives less from disrespect than from unconscious adherence to gender, race, and class stereotypes that shape this most intimate of employment relationships. Trying to consciously navigate this fraught terrain without the benefit of external rules designed to resist these presumptions requires vigilance. It is unpleasant enough to face the reality that those of us who hire migrant domestic workers are complicit in perpetuating the global care chain, a development strategy that comes with oft-hidden human costs. And at the level of interpersonal interaction, the very real bonds of intimacy that we develop with our domestic workers can make it disturbingly easy to take them for granted. Hence, the ways in which the au pair program enables—even encourages—the personal relationship to obscure the professional one are important to identify and rectify.

But as much as the au pair program obscures the host family-au pair employment relationship, it also holds the potential—with reform—of prompting a change in how we as a society value domestic workers and

³⁸⁰ Indeed, a strong commitment to social justice might even lead one to hire an au pair over a migrant domestic worker on grounds that, at least with au pairs, the inequality inherent to the employer-domestic worker relationship is a temporary one, as opposed to an endured social class difference many migrant domestic workers experience. Thanks to Corey Schmadaiah for this insight.

domestic work. That au pairs are participants in a government-sponsored program gives them added visibility and instant legitimacy, notwithstanding their small numbers relative to other migrant domestic workers. Unlike au pairs, other migrant domestic workers largely remain in the shadows, participants in a grey market marked by pervasive illegality. In this sense, the au pair population's legitimated presence in public understanding of the range of available childcare options perhaps renders them better-situated than other migrant domestic workers to transform how society views and values carework.

Greater acceptance of au pairs and other migrant domestic workers as protected workers might even yield greater traction for efforts to gain greater social acknowledgment of domestic work as valuable work. Feminists have long struggled to overcome the many barriers to fully valuing domestic work, particularly in the context of unpaid caregiving by mothers/wives/daughters. Commodification anxiety, the alleged incommensurability of domestic work, and the resulting private/public, home/market barriers are deeply inscribed in contemporary legal doctrines, discourses, and institutions;³⁸¹ and have rightly spawned many a law review critique from different theoretical orientations.³⁸² But efforts to address these concerns have scarcely made it off the page and into appreciable progress on the ground. Pursuit of domestic worker-targeted reforms carries that transformative potential, however, fostering greater appreciation for caring work by fully dignifying caring work as labor deserving of labor protections.

³⁸¹ See Fudge, *supra* note 46, at 242.

³⁸² See generally RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams, eds., 2005) (providing an interdisciplinary analysis of commodification); WILLIAMS, *supra* note 215 (offering a "reconstructive" feminist approach to mitigating the stresses of the work/family dilemma); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (exploring how the market/family dichotomy has undermined reform strategies intended to improve women's lives); Vicki Shultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000) (offering a vision of social justice grounded in the redistribution and restructuring of paid work).

