The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange

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

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ABSTRACT

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, 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 to promoting decent working conditions for all domestic workers.

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INTRODUCTION

During a weekly playdate with my kids, Paola, 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 4-6 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 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 exploitation 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. Although 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, 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 subject to its oversight, they presumably have within their grasp – unlike other domestic workers\(^1\) – 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 backwages owed to her, I have learned that au pairs are not so different from – and 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.\(^2\) Of these, only one addresses the situation of au pairs in

\(^1\) 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.

the United States, 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 guestworker program designed to provide childcare for upper-middle-class families at below-market prices. But while the “cultural exchange” subterfuge 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. Anecdotal information from au pairs and industry insiders suggests that au pair exploitation is not uncommon, and is rarely addressed. The lack of ethnographic research and data prevents this Article from offering any empirical conclusions regarding the extent of au pair exploitation in the United States, however. Instead, this Article provides an in-depth analysis of how the program’s regulatory loopholes, implementation failures, and the harmful social norms promoted by the program render au pairs structurally vulnerable to exploitation and undermine their ability to access legal remedies. To illustrate how this is so, the Article recounts the experiences of “Paola,” an au pair whose exploitation and subsequent struggle to seek accountability I witnessed firsthand.

Paola’s story and the analysis of 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. Not only does affordable, flexible childcare remain in far greater demand than supply, but childcare providers increasingly are being asked to take on the added responsibility of caring for America’s rapidly growing elderly population. The resulting elder care crisis has presented an important opportunity for rights advocates to make dramatic progress in the movement for all domestic workers’ rights. This is

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3 Policy makers often employ subterfuges – or fictions to shield tough choices that offend deeply-held values. See Eleanor Marie Lawrence Brown, A Visa to “Snitch”: An Addendum to Cox and Posner, 87 Notre Dame L. Rev. 973 (2012); Visa as Property, Visa as Collateral, 64 Vand. L. Rev. 1047 (2011).

4 “Paola” is a pseudonym. Note that that the names and certain identifying features of those involved in Paola’s story have been changed to protect against possible negative repercussions against Paola for exposing the details of her experiences as an au pair.
reflected, for example, in the landmark adoption of an international treaty on domestic workers’ rights, and in the United States, the passage of the New York Bill of Rights for Domestic Workers, and ongoing efforts to secure similar domestic-worker-protective state and local legislation in California and Maryland. 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.

Part I traces the controversial history of the au pair program’s creation as a “cultural exchange” program under the State Department, thus avoiding the messy politics and costs of a formal guestworker program. Trenchant criticism from both within and outside the government ensued. But the program 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 the detriment of au pairs. Labeling the program a “cultural exchange” permits American families access to flexible, in-home childcare at artificially low prices; and 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. At the same time, 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

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6 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).
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childcare options. 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 –run program, these proposed reforms 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. 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. Concerned that moral decline would accompany this newfound independence, churches and other groups encouraged young women to live and work in families, through which they could also acquire household skills and improve their foreign language abilities. 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.”

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 3000 young Western Europeans to come live in the United States as au pairs on a two-year trial basis. Now in its 26th year, the U.S. au pair program has enabled

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7 At roughly 23,000 in the United States, the au pair population is approximately ten percent of the total population of child care workers employed in private households. See U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK 2010-2011.
10 GRIFFITH & LEGG, at 10.
hundreds of thousands of young (mostly female) people to come to the United States as “cultural exchange” participants in the U.S. State Department’s J-1 Exchange Visitor Program.

The U.S. au pair program permits an 18 to 26 year old person to live in the United States with a “host family” and provide childcare in exchange for room, board, and a weekly stipend\(^\text{13}\) for a period of one to two years\(^\text{14}\). Au pairs provide up to 45 hours of childcare per week, including on federal holidays, 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\(^\text{15}\). 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).\(^\text{16}\) 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.\(^\text{17}\)

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.\(^\text{18}\) 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.\(^\text{19}\) 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.

\(^\text{13}\) 22 C.F.R. § 62.31(a), (d).
\(^\text{14}\) 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(o).
\(^\text{15}\) 22 C.F.R. § 62.31(e)(5).
\(^\text{17}\) 22 C.F.R. § 62.31(k)(1).
\(^\text{19}\) According to IRS filings, for example revenues reported by au pair agencies in fiscal year 2010 included: Au Pair in America ($4,622,479), Cultural Homestay International ($9,919,591), EurAuPair ($4,617,950). See Guidestar entries, available at http://www.guidestar.org.
The program structure and regulations have scarcely changed since program inception, but the program has expanded significantly over the last quarter century. Now bringing upwards of 22,000 people from all over the world each year, 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.\(^{20}\) Between 1975 and 2008, the percentage of women in the workforce with preschool aged children rose from 39 percent to 63 percent; for those with children between six and seventeen, it increased from 55 percent to 75 percent.\(^{21}\) The typical American middle-income family is also working longer hours, putting in an average of 11 more hours of work per week in 2006 than in 1979\(^{22}\) -- substantially longer working hours than other wealth countries.\(^{23}\) 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 has created.\(^{24}\) 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.\(^{25}\)

Consequently, over 11 million children under age 5 spend an average of 35 hours per week in some form of non-parental child care, about one-third of whom are in multiple child care arrangements so that parents can meet the need for child care during traditional and nontraditional working hours.\(^{26}\) Middle and upper-middle class working parents tend to prefer in-home care (i.e., nannies and au pairs) over center-based care,\(^{27}\) in part due

\(^{20}\) MacDonalD, supra note 2, at 1.
\(^{21}\) Maxine Eichner, The Supportive State 6 (2010).
\(^{22}\) Joan C. Williams & Heather Boushey, The Three Faces of Work-Family Conflict 1 (2010).
\(^{23}\) 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 21, at 39.
\(^{24}\) Eichner, supra note 21, at 6.
\(^{25}\) Williams & Boushey, supra note 22, at 1.
\(^{26}\) Nat’l Ass’n of Child Care Res. & Referral Agencies, ChildCare: 2011 State Fact Sheets 3 (2011) [hereinafter NACCRA 2011 Fact Sheets]; Eichner, supra note 21, at 40.
\(^{27}\) MacDonalD, supra note 2, at 3, 13.
to criticism of day care settings as being largely unregulated and generally not developmentally enriching. But the preference for in-home care is also largely due to social pressures to engage in “intensive mothering” – i.e., the “child-centered, expert-guided, emotionally absorbing, labor intensive, financially expensive” approach that dominates childrearing in the United States today. 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. 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. As sociologist Cameron MacDonald explains, “caught 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 hired a wife.”

B. Women Migrating to Fill the Care Gap

Increasingly, American childcare demands are being met by immigrant women, domestic work being the single largest sector of the global economy that pulls women to migrate. 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. This reliance on migrant labor coincides with increasing privatization of care in wealthier

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28 For example, one study found that only roughly one in seven day-care facilities provides care that is deemed developmentally enriching. EICHNER supra note 21, at 39, citing SUZANNE HELBURN ET AL., COST, QUALITY, AND CHILD OUTCOMES IN CHILD CARE CENTERS: PUBLIC REPORT 319 (1995).

29 MacDonald, supra note 2, at 22.

30 Id. at 21, 24 (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.”).

31 Id. at 3.

32 Id. at 41.

33 RHACEL SALAZAR PARREÑAS, THE FORCE OF DOMESTICITY: FILIPINA MIGRANTS AND GLOBALIZATION 3 (2008). Many studies suggest that almost all nannies are immigrant women. 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”). MacDonald, supra note 2, at 45-46.

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.\textsuperscript{35} Migrant domestic workers have become “crucial agents” in “global survival circuits.”\textsuperscript{36} 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.\textsuperscript{37} These care chains and survival circuits are part and parcel of what commentators have come to refer to as “the new world domestic order.”\textsuperscript{38}

The United States actively participates in this international division of labor and perpetuates it through selective enforcement of the different legal regimes triggered by the migration. The U.S. government’s policy of relegating care work either to the family or to private markets has led to a concentration of migrant women in care work, replacing American women in their traditional care roles.\textsuperscript{39} On paper, the United States jealously guards its borders through restrictive immigration laws that, with few exceptions, prohibit entry of migrant domestic workers.\textsuperscript{40} In practice,


\textsuperscript{37} 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 Parrenas, The Care Crisis in the Philippines: Children and Transnational Families in the New Global Economy, in Global Women, supra note 36, at 39-54.


\textsuperscript{40} 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
however, domestic work remains a “softly regulated” sector, characterized by “a high tolerance for employment and immigration law violations.” Hiring undocumented domestic workers and failing to pay employer taxes (i.e., Social Security and Medicare contributions), for example, remain common practices, notwithstanding concerns over “nannygate” exposure. Enforcement problems aside, this worker population suffers from deficient baseline protections under labor law. Domestic workers are explicitly excluded from the protection of the right to organize and collectively bargain under the National Labor Relations Act, and the


42 Quick perusal of the nanny listings page on the DC Urban Moms and Dads website, popular among parents residing in the Washington DC 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. http://www.dcurbanmom.com/jforum/forums/show/9.page;jsessionid=B7DF32B4699352814BA093B57EBABD3B. The specter of “nannygate” problems arguably makes Washington DC-based professionals, a significant portion of which either work for or aspire to work for the U.S. government, more scrupulous regarding the hiring of documented domestic workers.

43 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 (2000); Ben Wildavsky, More Calls to IRS about Domestic Help Zoe Baird Case Has Raised Public Awareness, S.F. CHRON. (Jan. 23, 1993); Hugo Martin, Nannies Criticize Outcry over Zoe Baird Nomination, L.A. TIMES (Jan. 23, 1993).

44 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 Civil Rights Act of 1964, Title VII, 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).

45 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, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)), §152(3). 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

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, available at http://travel.state.gov/visa/.
application of workplace safety standards under the Occupational Safety and Health Act, and the overtime wage protections (at least for live-in domestic workers) of the Fair Labor Standards Act. Workers’ underreporting of violations, combined with the perceived challenges of addressing labor violations in the context of such intimate relationships undermine meaningful enforcement of the few labor protections that do apply to domestic work.

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. 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:

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.

The AIFS sold the au pair program as an opportunity for “middle income successor generation Europeans” to experience a homestay cultural exchange with middle-income American families. Moreover, because

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*Citizens, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 319, 343-44 (Michael Grossberg & Christopher Tomlins eds., 2008).

46 29 U.S.C. §§ 651-678 (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).


American host families would pay all of the program fees, the program would cost the U.S. government virtually nothing.

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 reiterated\(^\text{49}\) – that a program requiring up to 45 hours of childcare per week possesses all the indications of a fulltime employment program and should not be continued under the J-visa.\(^\text{50}\)

Confronted, therefore, with a USIA demand that the work hours be reduced to 30 hours per week,\(^\text{51}\) 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.\(^\text{52}\) Indeed, bolstered with letters from Members of Congress,\(^\text{53}\) 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.\(^\text{54}\)

Despite acknowledging that the au pair program served an unmet need for childcare services, however, AIFS resisted the notion that au pairs are workers: “au pairs are not laborers; they are members of their host family….child care hours are not at the expense of the extensive educational and cultural activities [integral to the program].”\(^\text{55}\)

Regulating the program as a labor program would “strangle the special relationship between the host

\(^{49}\) GAO Report, *supra* note 50, at 19-20 (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).


\(^{51}\) Epstein, *supra* note 12, at CRS-3.


\(^{54}\) 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, 384.

\(^{55}\) *Id.*, at 388.
family and the au pair and damage [their] mission of educational and
cultural exchange.”

Moreover, Department of Labor oversight – which would require labor certification of the au pairs to ensure that noncitizens do not displace Americans in employment opportunities – 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 had returned to their home countries and benefited from the cultural exchange aspects of the program.

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, and expanded the program, giving the USIA oversight of an additional six au pair agencies. The USIA continued to view the au pair program as inimical to cultural exchange goals of the J-1 program and questioned its statutory authority to oversee what it believed to be a childcare program. 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

57 See GAO Report, supra note 50, at 29.
58 Kahn, Prepared Statement, supra note 53, at 397-98 (appended letter jointly signed by Senators Dodd, Helms, Pell, Moynihan, and Trible). 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 have 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 (Jan. 1, 2010), available at: http://wikileaks.org/cable/2010/01/10LAPAZ144.html; Cable from U.S. Embassy Sarajevo (Bosnia), 09SARAJEVO464: Half of Bosnian Au-pairs remain in America (Apr. 14, 2009).
62 See, e.g., Wilgoren & Shear, supra note 88 (quoting the then-USIA director Jim 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.”); 60 Fed. Reg. 8550 (Feb. 15, 1995) (noting criticism that 45 hours exceeds the 40 hour American work week, and “leaves the au pair insufficient time to meet the educational exchange requirement or truly pursue a cultural experience”).
minimum wage protections under the Fair Labor Standards Act.  

It was not until 1994, after an infant was shaken to death by a 19-year-old au pair, that Congress granted the USIA the authority to regulate (as opposed to oversee) the program, which by then had grown to 10,000 participants. 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. It did not go so far as to create a complaints mechanism or any other recourse for addressing exploitation allegations. Yet, the pressure exerted by host families to “save” the au pair program from regulations (e.g., by orchestrating a letter-writing campaign that flooded Congress with 3,500 letters) and by registered lobbyists retained by the au pair agencies during the 30-day comment period resulted in a watered down version of the proposed regulations.

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 subject to minimum wage requirements under the Fair Labor Standards Act. As the USIA explained, “employees are those who as a matter of economic reality are dependent upon the business to which they render service” and where the employer exercises “pervasive control” over the work performed. In exchanging

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65 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 $100/week to $155/week; to increase families’ tuition costs from $300 to $500. 22 C.F.R. Part 514, Exchange Visitor Program (Interim rule with request for comment), 59 Fed. Reg. 64296-301 (Dec 14, 1994).
69 For example, the USIA dropped its proposal that au pairs be at least 21 before being permitted to care for infants, and required au pairs receive eight instead of 16 hours of child safety training. 60 Fed. Reg. 8551 (Feb. 15, 1995).
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. 73  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. 74  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. 75

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 employee and a guest” in the host family’s home, and reminds host families that they are “employer[s] of the young person.” 76  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, overseen by Private Sector Exchange office of the State Department Bureau of Educational and Cultural Affairs (ECA). 77

Housed in the State Department, the au pair program not only offers rare access to affordable, flexible in-home childcare, but it affords American families this benefit minus 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 – as they were at program inception.

366 U.S. 28 (1961)).
73 Id., at 8550-51.
74 Id., at 8551.
75 Id.
76 Letter from Stanley S. Colvin, Deputy Assistant Secretary for Private Sector Exchange, U.S. Department of State, Bureau of Educational and Cultural Affairs, to Au Pair Program Participant (Dec. 2010) (emphasis added) [hereinafter State Department Au Pair Program Welcome Letter].
77 The J-1 program brings 350,000 foreign nationals to the United States each year “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 physicians. U.S. Department of State, J-1 Visa Exchange Visitor Program, available at http://http://j1visa.state.gov/programs.
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 earns just barely enough money to experience the American life she or he envisioned. The notion of the au pair and host family being “on par” tends to be more an ideal than reality. The au pair’s experience—whether more weighted towards cultural exchange or towards childcare provision—is entirely contingent upon the demands of host families.

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, classifying 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 au pair program’s “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 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 exploitation is not only unnecessary but inappropriate. The “cultural exchange” label not only frees this childcare program from regulation, but it

78 See references cited at supra note 2.
79 Id.
avoids messy guestworker program politics and evades difficult questions regarding the nature and role of migrant domestic work in sustaining American 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.\textsuperscript{81} 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.\textsuperscript{82} This reaction in turn is often looked upon with surprise, if not disdain, by host family-employers, who have been primed by program marketing to expect trained and qualified childcare providers.\textsuperscript{83}

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, 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 brings benefits American families, who gain access to flexible, full-time, in-home childcare at bargain basement prices. But it is the au pair agencies who stand the most to gain from the mislabeling. 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, exploitation of au pairs by their host families. This dynamic leaves au pairs extremely vulnerable to abuse, and with little access to legal remedies.

1. Employers

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

\textsuperscript{81} See sources cited in supra note 2.
\textsuperscript{82} Hess and Puckhaber, supra note 2, at 71-75.
\textsuperscript{83} Id.
Senior lawyers in major national law firms, Alice and Robert Johnson found dropping off and picking up their son 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 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 Johnson’s second child, Sofía 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. For some, the pseudo-kinship role au pairs are to assume can alleviate parents’ concern over handing the care of their children to a stranger. The prospect of exposing their children to a different language and cultural traditions is also appealing. 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 childcare option for working families.

In Washington DC, for example, legally hiring the services of a full-time nanny costs upwards of $45,000 per year. Hiring an au pair to

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85 There may even be specific resistance to the notion of incorporating the au pair as family member. BURIKOVÁ & MILLER, supra note 2, at 34; Cox & Narula, supra note 2, at 335-36.

86 This is linked to commodification anxiety, discussed at infra text accompanying notes 165-166.

87 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.

88 Debbi Wilgoren & Michael D. Shear, Regulation of Au Pairs Out of Step with Reality, WASHINGTON POST (August 14, 1994). See also sources cited in supra note 2.

89 International Nanny Association, 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) even regardless of whether their nannies are documented.
provide in-home care costs less than $20,000 per year – consisting of approximately $7000 in au pair agency fees, $195.75 per week au pair stipend (as of 2012), and a $500 reimbursement for the au pair’s required coursework. As compared to daycare options, which are generally less expensive than in-home care, 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.

The au pair program is designed to prioritize host families’ need for flexible, affordable childcare over au pairs’ interest in cultural exchange. The only cultural/educational exchange requirement of the program is the requirement to attend courses equivalent to six hours of academic credit. 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 host family with interview notes from its interviews of au pair applicants 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.” Au pairs are required to undergo 32 hours of child safety and child development training, and only those with 200 hours of documented infant childcare experience are permitted to provide infant care. In an effort to guarantee satisfaction, if an au pair fails to meet host family expectations, the host family can request that the agency replace the au pair.

Despite host families’ functioning as employers, the program’s putative “cultural exchange” component frees host families from standard employer

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90 Based on the 2012 au pair stipend rate ($195.75), which includes a 40% deduction for room and board, an au pair’s annual gross income is $10,179. Host families also pay fees to the au pair agency of an average of $7000.

91 Washington, DC is the most expensive area in the United States for daycare. Full-time day care for an infant costs an average of $20,178 while full-time daycare for a four-year-old costs and average of $15,437 per year. 2012 Child Care in the State of: District of Columbia, NACCRRA, 1, 2 (June 2012), http://www.naccrra.org/sites/default/files/default_site_pages/2012/dc_060612-3.pdf.

92 22 C.F.R. 62.31(k). 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. 60 Fed. Reg. 8548.

93 22 C.F.R. § 62.31(d)(6).

94 22 C.F.R. § 62.31(g) (“au pair training”).

95 22 C.F.R. §62.31(e)(3).

96 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 AuPairCare website, Rematching done right, available at http: http://www.aupaircare.com/blog/tags/rematch.
responsibilities. Unlike other employers of immigrant workers, host family-employers do not have to obtain Department of Labor certification 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.\footnote{22 C.F.R. §62.31. For information regarding the U.S. Department of Labor foreign labor certification process, see U.S. Department of Labor, Employment & Training Administration, About Foreign Labor Certification, available at: http://www.foreignlaborcert.doleta.gov/about.cfm. Regarding prevailing wage rate determination process, see U.S. Department of Labor, Employment & Training Administration, Information and resources, Online Wage Library, available at: http://www.foreignlaborcert.doleta.gov/wages.cfm.} Host family-employers do not have to pay au pairs according to the “prevailing wage” standard required even of some other employers in the J-1 program.\footnote{The interim regulations for the Summer Work Travel (SWT) Program recently proposed by the State Department suggests that SWT participants be compensated with “pay and benefits commensurate with those offered to their similarly situated U.S. counterparts.” Department of State, 22 C.F.R. Part 62, Exchange Visitor Program – Summer Work Travel, \textit{Interim final rule with request for comment}, 77 Fed. Reg. 27610 (May 11, 2012).} Nor do they have to pay the employer contributions to Medicare and Social Security, workers’ compensation, or unemployment insurance.\footnote{22 C.F.R. §62.31.} In addition to reprise from these financial obligations, host family-employers can even claim a child-care tax credit based on the cost of employing an au pair.\footnote{Internal Revenue Service, \textit{Ten things to know about child and dependent care credit} (website), available at http://www.irs.gov/newsroom/article/0,,id=10618900.html. \textit{See also Host Family Taxes Information}, EURAUPAIR, http://www.euraupair.com/taxes.html; Tax Information for Host Families, AU PAIR CARE, http://www.aupaircare.com/current-host-families/tax-information.}

Moreover, aside from the program requirements regarding days off and maximum work hour limits,\footnote{22 C.F.R. § 62.31(j).} host-family employers retain complete discretion over au pair working hours and living conditions. Au pairs are not entitled to federal holidays, and can be required to work irregular, sporadic hours with no advanced notice.\footnote{See generally 22 C.F.R. § 62.31(j).} Not only are host-family-employers subject to few regulations regarding au pair work schedules, but 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.\footnote{For example, a set of “Kitchen Rules” (developed by one host family) that a local}
obligations on an au pair (e.g., dishwashing, taking out the trash, cooking meals), but in her role as “family member” rather than worker. 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 2-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 night-time feedings. Immediately thereafter, Paola found herself responsible for waking 4-6 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 and the resulting excessive sleep deprivation, Paola should have been compensated for the entire night-time period for which she was “on call” (i.e., 6-7 hours). 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 hours, they required her to work an additional 50-75 hours during the daytime 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 Johnsons’ 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. For some, the au pair counselor for Cultural Care circulated to her cluster of host families included requirements that the au pair take out the trash, empty the dishwasher, and clean up other people’s spills. See “Kitchen Rules,” appended to Email from Local Care Coordinator to Host Families, dated February 18, 2012 (on file with author). See also Cox & Narula, supra note 2, at 339-43 (describing families imposing rules about room use, house guests, and food consumption).

104 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, WASHINGTON POST (2005). Note that an
program stipend, while low by American standards, can itself provide financial incentive compared to wages the au pair might otherwise earn at home. 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. Some au pairs may come with an eye to escaping family life back home rather than joining a new “host family,” 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 compared to finding housing and jobs in a foreign country on one’s own.

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 mandated au pair coursework is a figure that has not changed since 1995, and barely (if at all) covers the cost of the required courses. Moreover, au pairs’ opportunity to improve their English

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 Burišková & Miller, supra note 2, at 5-31 (recounting the backgrounds and motivations of four au pairs).

See e.g., Øien, supra note 80, at 72-73 (noting that Filipinos become au pairs as a livelihood strategy); Burišková & Miller, supra note 2, 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 2, at 66-67; Burišková & Miller, supra note 2, at 5-31; Cohen, supra note 68. Indeed, it is this very expectation that au pair agencies historically emphasized 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, supra note 2, at 52.

Burišková & Miller, supra note 2, at 5-31; Øien, supra note 80, at 51-52.

Burišková & Miller, supra note 2, at 187.


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 Cultural Care Au Pair blog, available at http://community.culturalcare.com/culturalcare/topics/cc_survey_about_classes, and http://community.culturalcare.com/culturalcare/topics/the_state_department_should Bring back community service hours to count towards the educational component. 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., Sojourner Douglass College Weekend
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 may already severely limit 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.\textsuperscript{111} 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.\textsuperscript{112}

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 required to pay income tax on the small stipends they receive.\textsuperscript{113} Moreover, the au pair regulations do not require the same vetting and training of host families to become employers that au pairs receive to become employees. Unlike prospective au pairs, host family applicants are not psychologically tested to determine their suitability as exchange program hosts. While the agency conducts a “home visit” to assess adequacy of living space and to interview the families to assess suitability for the program, prospective au pairs are not entitled to the notes of the visit.\textsuperscript{114} Moreover, in contrast to the 32 hours of training au pairs are required to undergo, host families are not required to attend trainings to ensure their suitability 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.\textsuperscript{115}

\begin{thebibliography}{11}
\bibitem{111} MacDonald, supra note 2, at 52.
\bibitem{112} Hess & Puckhaber, supra note 2, at 71-74.
\bibitem{113} See, e.g., \textit{2011 General Tax Information for Au Pairs}, \textit{Au Pair in America}, \url{http://www.aupairinamerica.com/pdf/tax_information_for_aupairs.pdf}.
\bibitem{114} See 22 C.F.R. § 62.31(h).
\bibitem{115} Note that host-family-employers are technically required to attend an agency-
What is most striking about the structure of the au pair program, however, is how it obscures the program’s heavy work component and the relevance of labor law to the host family-au pair relationship. The welcome letters the State Department sends to host family-employers and au pairs provide links to State Department websites regarding the au pair program, but none of these webpages discuss au pairs’ rights as employees or host families’ responsibilities as employers beyond abiding by the program’s work hour limits. Tellingly, the website does include a State Department “Guidance Directive” advising J-1 sponsors to provide participants with a pamphlet detailing their legal rights against worker exploitation and information regarding toll-free worker exploitation hotlines. But this pamphlet is nowhere to be found on the State Department’s own Au Pair Program website. Instead, the State Department welcome letters direct au pairs and host families who encounter problems to contact their au pair agencies, and if the agency is unresponsive, to then contact the State Department via a general email address for the J-1 program. There is no information concerning the potential role of the federal or state labor departments in addressing problems arising out of the host family-au pair employment relationship.

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.” The references to the FLSA and the Department of Labor were only added in 1997 in response to host families’ organized “family day conference” – which may or may not contain employer-relevant training – or else risk termination from the program. But the au pair agencies are not required to monitor, much less, ensure actual attendance. 22 C.F.R. § 62.31(i)(3); Author Interview with Au Pair Industry Insider No. 1 (Nov. 28, 2011).

116 The only exception to this is a passing reference – embedded in the au pair regulations – to FLSA minimum wage requirements, but this is framed only as an explanatory justification for the weekly stipend. See 22 C.F.R. 62.31(j)(1). Note also that the link to the regulations page is not readily apparent on the State Department au pair program website. See http://j1visa.state.gov/programs/au-pair/.


119 See State Department Au Pair Program Welcome Letter, supra note 76 (instructing au pairs and host families to “contact the Department of State directly at jvisas@state.gov.”)

120 See supra note accompanying 76.

121 See 22 C.F.R. § 62.31(j)(1).
“voluminous comment” all objecting to having to pay higher au pair stipends to comply with minimum wage requirements. 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 employment. The 10-hour workday limit includes no guidance as to how those hours are to be calculated. The Johnsons’ failure to properly calculate Paola’s on-call night hours underscores the dire consequences of this omission, feeding the Johnsons’ belief that they were justified in having Paola work double the federally-mandated limit.

Available ethnographies – and author interviews confirm – that underpayment and overworking of au pairs are common practices. 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 exploitation. The obscuring of the program work component masks the possibility of recourse under labor law.

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, au pairs like any other domestic worker could seek backwages by filing an administrative complaint with the federal Department of Labor Wage & Hour Division, and – where state labor laws apply to domestic workers – also to comparable state agencies. Au pairs could also file civil suits under the FLSA and relevant state labor laws, and in cases of more extreme exploitation, pursue criminal prosecution and civil suits for damages under the U.S. Trafficking Victims Protection Act. Nothing in the au pair program regulations or industry practice, however, informs au pairs – much less encourages pursuit – of their rights under labor law.

Hence, despite formal recognition of au pairs as both cultural exchange participants and employees, au pairs 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

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122 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. 60 Fed. Reg. 8551 (1997). Non-compliance with the rule led the USIA to include explicit reference to FLSA and DoL in the 1997 regulations. 62 Fed. Reg. 34633 (1997).

123 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.


125 See references cited in supra note 2.
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. This creates vulnerability to exploitation in the first instance, and, moreover, enables exploitation to occur with impunity. The “cultural exchange” overlay justifies placement of the au pair program under the auspices of the State Department, which has exhibited neither the willingness nor the capacity to engage in substantive monitoring of agency, host family, or au pair compliance with the au pair regulations. The end result is outsourcing of what is functionally a government-sponsored labor program to private entities who, as discussed below, are empowered to ignore if not hide labor exploitation of these “cultural exchange” participants.

3. Au Pair Agencies

“Lobby governments to treat au pair programmes as cultural exchange programmes.” – “IAPA’s Work,” International Au Pair Association website

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 the fact of her excessive work hours. But Paola ultimately decided to inform Randy of the Johnsons’ excessive work requirements out of concern that the Johnsons would be permitted to hire another au pair and subject her to the same hours. To Paola’s dismay, Randy noted that she had “wondered” about Paola’s obvious fatigue at the monthly meetings, but otherwise rebuffed Paola’s efforts to discuss her hours, encouraging Paola to focus on the “rematch” process. Randy’s supervisor, Doreen, later noted that Paola’s night-hours sounded “cruel,” but deemed the night hours calculation irrelevant because the Johnsons had already broken the 45-hour rule by having Paola work 60-75 daytime hours. When asked about how to calculate the night hours, Doreen conceded ignorance of the Fair Labor Standards Act requirements. All that mattered, Doreen explained, was that the 45 work hour 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, they 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 the State Department, the agency would be deprived of their discretion to allow Paola to remain in the program (notwithstanding her wrongdoing) and required to send her home.

In fact, when presented with facts of Paola’s situation on a no-names basis, 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. When asked about the possible consequences, however, the ECA representative conceded that the ECA 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. The ECA further conceded that even if the Johnsons were removed from the au pair agency’s program, there was no central State Department blacklist to prevent the Johnsons from signing with a different au pair agency. 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.

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

While the “cultural exchange” label has enabled host families rare access to affordable, flexible childcare, it is the au pair agencies that stand the most to gain. Oversight by the Department of State rather than Labor affords au pair agencies greater control over their program operations since the State Department lacks the expertise and resources to meaningfully monitor labor programs.\(^{127}\) Accordingly, whether a non-compliant 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, however. First, au pair agencies’ role as administrators of

\(^{127}\) As the former director of the USIA stated, “[w]e do not have the authority or the staffing to be in [the child care] business.” Wilgoren & Shear, supra note 88.
“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 inability to meaningfully monitor au pair agency practice allows for other incentives, such as profit-making, to dominate decision-making. This situation in effect places the fox in charge of guarding the henhouse.

There are currently 14 State Department-designated au pair agencies, otherwise known in J-1 program parlance as au pair program “sponsors.” These agencies either use homegrown staff sent abroad or local affiliates with access to potential applicant pools (e.g., university officials, travel agencies, labor recruiters) to recruit prospective au pairs. The foreign-based staff conduct the requisite background checks and administer the psychometric test. Meanwhile, the U.S.-based entity recruits and vets prospective host families and facilitates the “match” of au pair to host family, usually via login-required internet sites displaying applicant (au pair and host family) profiles. After matching applicants, the au pair agency handles travel logistics and child safety/developing 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 month and quarterly, respectively, contact with au pairs and host families. These staff are to report “unusual or serious situations or incidents,” and report directly to the State Department any incidents involving “the crime of moral turpitude or violence.” Whether the (apparently common) violation of excessive work hours is sufficiently “serious” to report remains entirely in the discretion of au pair agencies, and thus unlikely.

Indeed, au pair agencies have strong incentives to hide violations of the regulations. Failure to monitor and enforce the stipend and hours requirements, may result in agencies being suspended from the program, losing their designation as a program sponsor, and facing a range of lesser

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128 See text accompanying supra note 97.
130 Interview with Au Pair Industry Insider No. 1, supra note 115.
132 22 C.F.R. § 62.31(l) (“monitoring”).
133 Interview with Au Pair Industry Insider No. 1, supra note 115.
sanctions including percentage reductions in the number of people they are permitted to recruit. The absence of meaningful State Department monitoring of the agencies enables reporting omissions to go unchecked. A staff of eight (as of early 2012) officers at the ECA oversees compliance not only by the 14 designated au pair agencies, but also the hundreds of sponsors of the other 14 J-1 exchange programs, which altogether involve over 350,000 foreign participants. Given staff shortages, these officers do not conduct site visits or other forms of direct monitoring, but rather base the compliance determinations on reports submitted by the sponsors themselves. While unlike the other J-1 programs, au pair agencies’ self-reports are supposedly independently audited, anecdotal information from industry insiders suggest opportunity within the auditing procedures to permit identification and correction of files in advance of the audit.

Not surprisingly, the State Department exercises no authority over individual host-family-au-pair relationships. Instead, the 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. The State Department does not maintain a central database that identifies participants – host families or au pairs – who violate the regulations. While, technically, host family or au pair non-compliance is grounds for removing the agency from the program, the ease with which agencies can avoid triggering State Department scrutiny – e.g., omission from or veiled inclusion in the agency self-report – renders this an unlikely threat. Moreover, even when made aware of a specific case of egregious violations, the State Department disclaims authority to dictate the outcome of individual cases, resting instead on the

134 22 C.F.R. § 62.31(n) (“sanctions”); 22 C.F.R. § 62.50.
135 ECONOMIC POLICY INSTITUTE, GUESTWORKER DIPLOMACY 1, 7 (2011) [hereinafter GUESTWORKER DIPLOMACY].
136 Id. at 27; 22 C.F.R. § 62.31(m)(4).
137 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. Interview with Au Pair Industry Insider No. 1, supra note 115; Interview with Au Pair Industry Insider No. 2 (Nov. 29, 2011).
138 Email from State Department Official to Author, June 22, 2011 (on file with author); Interview with Au Pair Industry Insider No. 1, supra note 115.
139 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. Email from State Department Official to Author, supra note 138; Interview with Au Pair Industry No. 2, supra note 137.
140 Email from State Department Official to Author, supra note 138.
(flimsy) threat of sanctions to compel compliance with the regulations. This perhaps explains why no au pair agency has ever been terminated or had its right to participate in the program revoked despite what appears to be widespread violation of the hours requirement.\footnote{Interview with Au Pair Industry Insider No. 1, \textit{supra} note 115.}

Program operations reveal that, not only does the weak monitoring system provide au pair agencies little incentive to sanction non-compliant host families (and au pairs), but market forces favor keeping even non-compliant participants in the program. 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.\footnote{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. Cultural Care Au Pair – flexible childcare for every budget, \url{http://pages.culturalcare.com/aupair-affordability?wspapp=11855877915&gclid=CMvyM2Tmq8CFQjd4AodzHgKZw} (chart comparing cost of Cultural Care au pair to cost of other au pairs, daycare centers, and nannies).} Tellingly, employment advertisements for local coordinator positions routinely prioritize recruitment of new and repeat host families among “counselor” responsibilities.\footnote{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, including “a de»lasabellat escape to a different country each year.”\footnote{Cultural Care, Income potential and rewards, \url{http://coordinator.culturalcare.com/income-potential--rewards.html}.} Such financial incentives create a fundamental conflict of interest for the agency staff responsible for responding to allegations of host family misconduct.

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
The 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,\textsuperscript{145} au pairs ultimately are a limited source of revenues.\textsuperscript{146} Au pairs have limited ability to re-enroll in the program,\textsuperscript{147} hence they are rarely a source of repeat business. Host families, on the other hand, can – and apparently often do – re-enroll multiple times.\textsuperscript{148} And because the au pair regulations do not bar non-compliant host families from the program, for an agency to terminate a non-compliant host family from its program makes no economic sense, as that family could simply take its business to a competitor agency.\textsuperscript{149}

Against this backdrop of cursory monitoring and recruitment-focused agency practices, host families can overwork and/or underpay an au pair with little risk of being caught. Not only is there strong, personal monetary incentive for a local counselor to overlook non-compliance for the sake of host family retention, but 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 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 families and au pair – i.e., the very questions and concerns that labor law is often intended to address – even

\textsuperscript{145} Although the practice was outlawed in 1995, some agencies apparently have continued to require au pairs to pay a “performance bond” to ensure au pairs’ completion of the program. U.S. Department of State, Bureau of Educational and Cultural Affairs, Private Sector Exchange, Guidance Directive 2011-02, Exchange Visitor Program: Statutory Considerations of Continued Collection of “Performance Bonds” (June 3, 2011) (explaining that the practice constituted a minimum wage violation).

\textsuperscript{146} 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.

\textsuperscript{147} 22 C.F.R. § 62.31(p).


\textsuperscript{149} 22 C.F.R. §62.31.
begin to factor into the analysis.\footnote{In Sofìa’s case, for example, all that mattered to the regional director was that she “knowingly” violated the 45-hour limit. The fact that Sofìa was paid $4 an hour for the excess hours, that only 1-2 of her 8 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 the Mrs. Barrett’s persistent complaints of post-birth fatigue – were of no consequence. And even though the ECA representative viewed Sofìa 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 Sofìa. Having outsourced host-family-au-pair-relationship monitoring 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. Phone conversations between Author and Paola’s au pair agency, June 2011; Email from Au Pair Agency to Author, June 15, 2011, 4:03 p.m. EST; Email from Author to Au Pair Agency, June 15, 2011, 3:24 pm EST; Email from Author to Au Pair Agency, June 14, 2011, 9:15 pm (EST); Email from State Department Official to Author, supra note 138.}

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 labor exploitation under the 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, host family (and even au pair) non-compliance tolerated, and au pair exploitation perpetrated with impunity.

4. 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 18 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 only the 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, pursuant to the Fair Labor Standards Act (FLSA), to recover the over $10,000 in backwages 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 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,\(^\text{151}\) it ought not obscure problems of excessive hours and underpayment of wages, and sexual harassment and exploitation, among others.

Indeed, a search of caselaw suggests how agencies may be motivated more by financial interests than the interests of au pairs and/or host families in pursuing rematches. Suspected, if not known, violators of au pair program regulations have been permitted to “rematch” and continue participating in the program.\(^\text{152}\) 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.\(^\text{153}\) Conversely, au pair actions alleging sexual misconduct by their host families have also involved claims of prior misconduct against other 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

\(^{151}\) See references cited in supra note 2.

\(^{152}\) MACDONALD, supra note 2, 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).

\(^{153}\) See e.g., Doe v. Cultural Care, Civil Action No. 10-11426-DJC (D. Ma 2011).
advances by the host father. Similarly, a 2009 investigation of sexual assault charges a 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.

These are only the reported cases, however, and as such, probably under-represent the extent to which rematch or repatriation has been used to mask labor exploitation. The ready identification of sexual exploitation as a crime renders identifying and accessing 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 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 exploitative 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. Moreover, even if

154 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. Shaw Healey, In Unsafe Hands, WILLAMETTE NEWS (Oct. 26, 2011); Nick McCann, Au Pair Sues Agency for $1 Million, COURTHOUSE NEWS SERVICE (Oct. 7, 2011).

155 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). For the agency’s response, see Cultural Care Senior Vice President’s Rebuttal on Cover-up by Agency, Au Pair ClearingHouse, available at http://aupaireclearinghouse.com/node/83.

156 This was allegedly the fate that befell the sexually assaulted Slovak au pair described in supra note 155 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 pairs return home, no such actions were pursued. Interview with Au Pair Industry Insider No. 1, supra note 115.
rematch is permitted, agency control of the terms and conditions of the
terms 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 financial or emotional investment in “the au pair experience,” pursuing rematch might not be worth the risk of being sent home early.\textsuperscript{157}

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 — i.e., resulting in the agency’s loss of a fee-paying host family-client, and the coordinator’s recruitment/retention bonus. But while an au pair might, with outside 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. As such, an au pair has to either switch to a different visa (e.g., an F-1 student visa) to gain additional time — which itself requires outside and likely legal assistance — or seek an au pair agency’s approval to extend her visa.\textsuperscript{158}

\begin{itemize}
  \item B. Re-Entrenching Tropes
\end{itemize}

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.\textsuperscript{159} 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.\textsuperscript{160} Moreover, labor rights considered normal in the formal

\textsuperscript{157} Interview with Au Pair No. 1 (Mexico), Au Pair No. 2 (Colombia), and Au Pair No. 3 (Colombia), July 22, 2012 [hereinafter Group Au Pair Interview].

\textsuperscript{158} The regulations permit an au pair to apply (with agency approval) to extend her participation in the program by up to one year.

\textsuperscript{159} See SWEEP UNDER THE RUG, supra note 35.

\textsuperscript{160} ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS:
sector (e.g., minimum wage, vacation and sick leave, fixed working hours) are considered unnecessary – even inappropriate – in the context of a private household. 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. 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 households – particularly upper-middle-class households, and even of formal employment relationships therein – exacerbates these workers’ vulnerabilities to 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. 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. Recasting the host-family-au pair relationship as kinship or an expression of American


161 See infra discussion accompanying notes 195-200.


164 See references cited in supra notes 39 and 41.

165 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 (2000).
largesse helps police the boundary between family and market, warding against “money [extinguishing] love.”

However mollifying, these tropes have the negative effect of perpetuating the problematic gender, race, and class stereotypes that enable exploitation of domestic workers. 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


It took 10 months before Paola first spoke out about her working conditions. She was reluctant to switch host families because she believed they 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.

Paola left the Johnson home six months later, when after boarding the return flight from a family vacation in Los Angeles, she 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 LA area, Paola was devastated when the Johnsons decided to continue on home, instructing Paola to find a taxi to the nearest

166 Deborah Stone, For Love nor Money: The Commodification of Care, in RETHINKING COMMODIFICATION 271, 274-76 (Martha M. Ertman & Joan Williams, eds, 2005)
emergency room, and then board the next flight home to Washington DC. 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 Sophia 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.”

Hence, the reoccurring 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. Given that au pairs can be as old as 26, 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-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 home, and specifically, commodifying care work. The


169 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://www.culturalcare.com/become-host-family/role-as-host-family.aspx.

170 COX & NARULA, supra note 2, at 335.
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.\(^{171}\) 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.”\(^{172}\) In the au pair context, specifically, employers can use their role as “host parent” to literally treat their au pair as a child, and not necessarily as a way of integrating the au pair into the family but rather to distance the au pair. 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.\(^{173}\)

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 or consider the compensation to be too low.\(^{174}\) 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.”\(^{175}\) Instead of the rational, monetized contractual relationship underlying paid labour, domestic work is typically viewed as a “‘mutual moral contract’ embedded in the dense social and gendered relations of the family.”\(^{176}\) 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.\(^{177}\) This “discourse of the moral economy” thus enables employers to demand longer hours and greater flexibility from the au pairs; to the au pairs, by contrast, it means exchanging their labor for gratitude and kindness. Many au pairs wait in vain, however, for such compensation – more commonly, they are treated as second-class family members in their daily interactions with the host families.\(^{178}\) 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.

\(^{172}\) Id. at 186.
\(^{173}\) Cox & Narula, supra note 2, at 339-43.
\(^{174}\) Bridget Anderson, supra note 2, at 256.
\(^{175}\) Hess & Puckhaber, supra note 2, at 69.
\(^{176}\) Id.
\(^{177}\) Id.
\(^{178}\) Id.
to request special consideration or time off, for example.179

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.180 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.181 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.’”182 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.183

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 national helps employers imagine the work as an opportunity rather than drudgery and themselves as benefactors as well as employers.184 The “otherness” of the domestic worker that class, race, 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.185

Contributing to this dynamic in the au pair context, specifically, is the apparent demographic shift in the U.S. au pair population from primarily consisting of Western Europeans to being dominated by Eastern Europeans, South Americans, and Africans.186 The Louise Woodward trial in 1998 and

179 *Id.* at 74; Bůrika & Miller, *supra* note 2, at 38-39.
180 Hess & Puckhaber, *supra* note 2, at 73.
181 *Id.*
185 *Id.* at 255.
186 Macdonald, *supra* note 2, at 50. The author filed a request under the Freedom of
the grisly murder of a Swedish au pair in Boston 1996\(^{187}\) shifted Western European and Scandinavian attitudes regarding the desirability of working in the United States. This dynamic combined with the establishment of the European Union, which broIsabellaeed prospective au pairs’ options for finding and changing employment within Europe, stemmed the tide of au pairs coming from Western Europe to the United States.\(^{188}\) 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.\(^{189}\)

While some women do pursue au pairing as a livelihood strategy, there is a tendency among employers to equate non-Western European origins with poverty.\(^{190}\) Employment as an au pair is thus seen as “a golden opportunity when it is undertaken by a hard-pressed migrant with limited opportunities.”\(^{191}\) The power the host parents/employers wield thus gets “clothed in the language of obligation, support, and responsibility, rather than power and exploitation.”\(^{192}\) While perhaps irrelevant to some relationships, the (real or perceived) power differential enables some

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\(^{187}\) 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.” WCVBTV Boston, \textit{14 Years Later, Case of Dismembered Nanny Still Mystery}, (June 22, 2010), \textit{available at} http://www.thebostonchannel.com/r/23982341/detail.html.

\(^{188}\) 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. \textsc{MacDonald, supra} note 2, at 50-51.

\(^{189}\) \textit{Id.} This dynamic is also seen in Europe. \textit{See Bůrková & Miller, supra} note 2, 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”).

\(^{190}\) \textit{See generally MacDonald, supra} note 2, at 66-82 (discussing “ethnic logics” used by employers in hiring childcare providers); \textit{Anderson, A Very Private Business, supra} note 2, at 253-54 (regarding British employers of au pairs).

\(^{191}\) \textit{Id.}

\(^{192}\) \textit{Id.}
employers to dress up an exploitative relationship as one of paternalism/maternalism towards the impoverished “other.” This is particularly so where the migrant worker is young, as au pairs by law are required to be.

c. “anyone can do it” and for very little money

Considered unskilled laborers properly relegated to the informal sector, domestic workers face a “wage penalty” – i.e., they earn less than expected based on their job characteristics and qualifications. 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. Parents want caregivers who love the children as if they are their own, an expectation caregivers often fulfill. But because caring is associated with mothering, 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. 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, not skilled work for which women should be compensated.

The au pair program feeds these preconceptions. By pegging the au pair “stipend” to minimum wage, the State implicitly sanctions 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 recognized 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. The au pair program also feeds the “anyone can do it” ethos regarding childcare through its presumption that 18-26 year olds with no prior childcare

194 22 C.F.R. 62.31(d)(1) (requiring au pairs to be between the ages of 18 and 26).
195 Kristin Smith & Reagan Baughman, Low Wages Prevalent in Direct Care and Child Care Workforce, Carsey Institute Policy Brief No. 7 (Summer 2007), at 1. Yodanis reports 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, supra note 2, at 44.
196 Yodanis, supra note 2, at 45.
197 Id. at 45.
198 Id. at 46.
199 See supra discussion accompanying notes 70-75.
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.\footnote{See supra discussion accompanying notes 64-69.}

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

Although government sponsorship/regulation of the program would suggest public responsibility for childcare, au pair program structure and function signals that everything having to do with childcare – its provision, its nature, its treatment – is inexorably private. The au pair program appears to displace the private market for childcare to which parents would otherwise turn in the United States due to the background norm of childcare being an individual, not a State, responsibility. Closer examination reveals, however, that the au pair program does not displace the private market, but rather actually flourishes because of the usual market mechanisms, and disguises this dynamic with the façade of cultural exchange. That which is “private” ultimately creates a global underclass of migrant domestic workers who provide over-fulltime childcare to upper middle-class American families, for artificially depressed wages, and removed from labor standards and labor scrutiny.

In creating the au pair program, the U.S. government implicitly acknowledges that the government has a role in the provision of affordable, flexible childcare to American families. This is 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. But what is particularly striking about this novel move is the stark absence of a governmental mechanism to meaningfully address any exploitation or abuse suffered by program participants. Instead, the program delegates its power – and responsibility – to regulate the state-created host family/employer-au pair/employee to private entities that operate according to the rules and priorities (e.g., profit incentive) of the private market.

Moreover, the government and private au pair agency administrators of the au pair program strategically use the concept of “private” to exclude this
employment relationship from the application of labor law standards and the scrutiny of labor institutions. The au pair program 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.\textsuperscript{201} By framing au pair compensation as a “stipend” and setting it at minimum wage – i.e., substantially less than the prevailing wage in private domestic work market– the au pair program undermines the notion that domestic work is “work,” thus 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.\textsuperscript{202} Such exclusions apply in the au pair context 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 regulate. 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 U.S. labor laws. Moreover, 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.

\textsuperscript{201} See Manuela Tomei, Decent Work for Domestic Workers: Reflections on Recent Approaches to Tackle Informality, 23 CANN. J. WOMEN LAW 185 (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 2, at 8, 59-60.

\textsuperscript{202} 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, WASHINGTON POST (Feb 15, 1995); Cheryl Wetzstein, Families organize to fight new USIA au pair rules, WASHINGTON TIMES (Jan 8, 1995). 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 out 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) (October 23, 1997).
Thankfully, as discussed below, 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, 11 April 1967

That the U.S. au pair program has managed to evade scrutiny in the 20 years since the early 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. The history of global au pair practice shows other governments also being confronted with the problem of au pair exploitation, but nonetheless allowing the problematic practices to continue unabated for pragmatic reasons. Recognition of growing au pair exploitation during the 1950s to 1970s, for example, actually led au pairing to be coined “the pink slave trade.” Organizations like the British Vigilance Association lobbied for recognition and protection of au pairs and regulation of the sometimes “unscrupulous” recruitment agencies. 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. 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

203 Robert C. Toth, The end is coming for Britain’s ‘Pink Slave’ trade, STRAITS TIMES (April 11, 1967).
204 Id.
of inspectors to see carried out.” In 1997, 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 traveling abroad to become au pairs. 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. Despite the admittedly “inevitable” risk of exploitation, 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 elder-care deficit, the Irish and Danish governments have expanded the scope of their au pair programs to permit au pairs to be used for elder care. Compared to the at least €900 per month it would cost to hire in-home elder care in these countries, there is predictably great demand for elder care au pairs at half the cost. 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, Switzerland, and Denmark, but in 2012 lifted the ban for all of Europe. The Philippines government justified its 2010 action based on these destination countries’ specific efforts to increase au pair protections. But in its 2012

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207 HC Debate, Feb 15, 1971, supra note 205.
208 Statistics from the Danish Ministry of Refugee, Immigration and Integration Affairs showed that in 2009, despite the ban, 1,510 out of the 2,207 au pair permits officially provided by the Danish government were given to Filipino women. Tessi Cruz-Larsen, Filipino au pairs go for ‘black work,’ PHIL. DAILY INQUIRER, Jan. 7, 2009, http://globalnation.inquirer.net/diaspora/diaspora/view/20090107-181950/Filipino-au-pairs-go-for-black-work.
209 HC Debate, Feb 15, 1971, supra note 205.
210 In Denmark, for example, retired 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. Au pairs weigh in on controversial proposal, COPENHAGEN POST (June 2, 2011). The Irish system has au pairs providing the same services, but along four levels of care, ranging from “demi-aupairs” 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. Au Pair Study Agency (website), available at http://www.aupairagency.ie/i-need-an-au-pair/i-need-an-aupair-for-senior.
211 Philippine Overseas Employment Administration, Governing Board Resolutions, Series of 2010, No. 2 (lifting the ban on deployment of au pairs to Switzerland), No. 4 (same regarding Norway), No. 7 (same regarding Denmark).
213 See resolutions cited supra note 211. These “safety nets” include provision of
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 ministry and streamlining the documentation requirements for Filipino au pair departure.\footnote{214} These au pair program expansions have elicited deep criticism. Some Philippines-based advocates have characterize 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.\footnote{215} Meanwhile, the European Parliament has gone so far as to release a report calling upon European governments to consider substantial reforms to – if not outright abolition of – their au pair programs due to widespread abuse.\footnote{216}

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 changes to the J-1 program to reduce participants’ vulnerability to exploitation.\footnote{217} This opportunity coincides with a recent spate of advocacy

\footnote{214} See Embassy of the Philippines (for Norway, Denmark, Iceland) (website), Au Pair Ban Lifted for Norway (June 9, 2010).


\footnote{216} 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.” Council of Europe, Explanatory Report on the European Agreement on “au pair” Placement (ETS No. 68), available at http://conventions.coe.int/treaty/en/Reports/Html/068.htm.

\footnote{217} US. STATE DEP’T, OFFICE OF THE INSPECTOR GENERAL, INSPECTION OF THE BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS (2012). 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 becoming “visa mills” that enjoyed minimal State Department oversight. JERRY KAMMER, CHEAP LABOR AS CULTURAL EXCHANGE: THE $100 MILLION SUMMER WORK TRAVEL INDUSTRY 20 (Center for Immigration Studies) (December 2011), available at: 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 young charges that they became ‘mere purveyors of J-1 visas.’” Id. Colvin was allegedly quietly pushed out of his job. Id. at 2.
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 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. The NDWA’s advocacy efforts have targeted one of the key contributors to domestic worker abuse – the absence of laws protecting their rights – by successfully advocating for recognition of domestic workers’ rights in state, federal, and even international laws and regulations. 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. A similar bill recently gained approval

\[\text{See Who We Are, Nat’l Domestic Workers Alliance http://www.domesticworkers.org/who-we-are.}\]

\[\text{Scholars and activists have long focused the critique and advocacy on the state, believing that the state has perpetuated domestic worker abuse through the absence or inapplicability of labor protections for domestic workers. See generally CAN. J. WOMEN & LAW (special issue on Regulating Decent Work for Domestic Workers) (Adelle Blackett, ed.) (2011); Grace Chang, Disposable Domestics: Immigrant Women Workers in the Global Economy (2000); Pierrette Hondagneu-Sotelo, Doméstica: Immigrant Workers Cleaning and Caring in the Shadows of Affluence (2001); Barbara Ehrenreich and Arlie Hochschild, Global Women (2002).}\]


\[\text{See supra note 6.}\]
of the California Assembly and awaits state Senate approval. 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. 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.

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.

222 See supra note 220.
223 Department of Labor, Wage and Hour Division, Application of the Fair Labor Standards Act to Domestic Services, 29 C.F.R. pt. 552, 76 Fed. Reg. 81190 (Dec 27, 2011). Current FLSA regulations allow employers 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). 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. Id.
224 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 relatively dismal record of ratifying international human rights and labor rights treaties. 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 163.
225 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. International Labour Office, Decent work for domestic workers, Report IV(1), at ¶117, Box III.2 (“[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” babysitters than as “regular” workers warranted exclusion from treaty coverage. See, e.g., ILO Report IV(1), at ¶ 62 (Netherlands), ¶ 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, infra note 241. Trade unions, however, argued in favor of inclusions. See id., at 70 (Norwegian Confederation of Trade Unions): ILO Report IV(2A), at 21 (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 Labour Affairs Bureau, Washington DC,
is 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. Moreover, recent successes in migrant workers’ rights advocacy regarding another J-1 program – the Summer Work Travel Program – present a political opportunity to draw attention to au pairs as a domestic worker population.

In August 2011, 300 foreign students walked off their jobs at a Hershey’s chocolates packaging warehouse, setting off a firestorm of harsh publicity and criticism of the Summer Work Travel Program (SWT). These students had each paid $3000-$6000 to participate in the program, expecting to work for a few months in “Charlie’s chocolate factory” and then travel through the United States. 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. Grievances students lodged with the recruiter were either ignored or met with threats of deportation. Such complaints about the SWT program were neither new nor few, but it

December 2012.

226 Interview with Ai-jen Poo, Executive Director of the National Domestic Workers Alliance, March 13, 2012.

227 Id.; Interview with Jennifer Rosenbaum, Legal Director, National Guestworker Alliance, June 13, 2012.


231 Preston, Foreign Students, supra note 228.

232 Id.; Preston, Not the America They Expected, supra note 228.

233 Preston, Pleas Unheeded, supra note 228.

234 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
was not until a migrant workers’ rights organization, the National Guestworker Alliance (NGA)\(^ {236}\) 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.\(^ {237}\) Drawing scrutiny from the Department of Labor, international human rights advocates, workers’ rights organizations, and anti-trafficking advocates, the Hersheys incident destabilized the notion that SWT was simply a cultural exchange program, rightly confined to the purview of the State Department.

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.\(^ {238}\) 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.\(^ {239}\)

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238 Both organizations are considering the possibility of such a collaboration. Poo Interview, supra note 226; Rosenbaum Interview, supra note 227.

239 See Cass Sunstein, On the Expressive Function of Law, 144 U. Penn. L. R. 2021
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 its functioning as a cheap childcare program. Some European governments argued against coverage of au pairs under the ILO Domestic Workers Convention, yet European Parliament’s recent report debunks the myth of cultural exchange and recommends that governments:

separate the current au pair program into two: (1) one of cultural and educational exchange with less than eight hours domestic help per week in exchange for food and lodging; and (2) one of domestic and care work on conditions meeting decent working conditions.

But mindful 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, but undertake more robust application of labor standards to au pair working conditions, while also undertaking efforts to establish formal migrant domestic worker programs to meet care demands and thereby avoid abuse of the au pair program.

There is no principled justification for the U.S. au pair program’s continued existence of a program that provides 45 hours of over-full-time childcare as a “cultural exchange” under the auspices of the U.S. State Department. But any effort to transform the U.S. au pair program into a legitimate cultural exchange or into a formal domestic worker guestworker program would undoubtedly elicit the same air of resignation as in Europe.

(1996); see also Lawrence Lessig, Social Meaning and Social Norms, 144 U. PENN L. R. 2181 (1996).

240 See discussion of ILO Convention debates in supra note 225.


242 Id at 118.
While either change would remove the lie of the cultural exchange” masquerade, neither is politically feasible. 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 in favor of a broader domestic worker guestworker program, given the increased administrative and financial costs of hiring a guestworker. 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, 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.

The au pair program will thus have to continue as an avowedly hybrid cultural exchange and labor program. But, unlike Europe, where au pairing is largely unregulated, the U.S. program creates an infrastructure that, with reform, could be utilized to ensure decent working conditions. Closer State Department monitoring and more stringent sanctions for regulatory non-compliance could incentivize au pair agencies to more closely monitor host families and prioritize the best interests of the au pairs. A few modifications of the program structure and rules would not only improve the experience of au pairs, but also provide crucial foundation for a system that would promote decent working conditions for all domestic workers. In addition to carrying the imprimatur of the State, 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 would significantly advance the broader project of reconstructing legal and social norms to better value domestic work and preserve the dignity and rights of all domestic workers.

243 See supra discussion accompanying footnotes 53-75.
244 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: Oppose new tax on au pairs and American host families, available at http://capwiz.com/alliance-exchange/issues/alert/?alertid=60980916 (copy on file with author).
245 See generally EUROPEAN PARLIAMENT AU PAIR REPORT, supra note 241.
246 See references cited in supra note 239.
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 go a long way to addressing areas of particular vulnerability to exploitation: (1) inadequate compensation for hours worked, and (2) limits on the ability to change employers.

a. Work Hours

Calculating and properly compensating work hours has long been one the most challenging aspects of regulating domestic work. For 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. That, consequently, au pairs often feel the need to leave the home after hours to create a physical barrier against further help/work demands reflects difficulty of maintaining work vs. non-work-life boundaries where work takes place in the home. As exemplified by Paola’s situation and not uncommon among other live-in domestic workers, even night-time 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 encourage the 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, based on mistaken assumptions regarding the feasibility of maintaining work vs. non-work-life boundaries after hours.

\[\text{Footnotes:} 247 \text{ Fair Labor Standards Act, } \S 13(b)(21). \]
\[248 \text{ Commentators attribute this to the fact that as live-in workers, domestic workers were often assumed to be part of the employer’s family, and therefore likely permitted freedom to pursue their own interests after hours – a questionable assumption as a matter of historical fact. See Smith, supra note 163, text accompanying footnotes 157-58.}\]
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 actually worked – thus failing to capture actual hours worked and permitting widespread minimum wage violations.\(^{249}\) Nor do the FLSA regulations designed to compensate 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.\(^{250}\) But 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 sleep deprivation experienced by domestic workers who are on-call during the night.\(^{251}\)

To ensure that all work is properly compensated, the au pair rules should include specific guidelines to ensure proper accounting of all on-call hours, especially sleep-time – e.g., by requiring a specified number of consecutive hours of rest time per night, or that all au pair work hours be confined to a 15-hour period to ensure a meaningful block of rest time. Such a rule and practice in the au pair context could then serve as the basis for a future revised FLSA rule that applies to all domestic workers.

b. Freedom to change employers and agencies

The intimate bonds formed in the course of a domestic worker-employer relationship can make it difficult to leave the job, however challenging the work conditions. But for migrant domestic workers, what can make leaving an exploitative relationship structurally impossible is the risk of deportation/repatriation. Undocumented workers are most vulnerable, but the deportation threat applies even to documented migrant workers whose immigration status may be tied to specific employers (e.g., domestic workers of diplomats posted to the United States),\(^{252}\) because leaving the

\(^{249}\) Supra note 223, at 76 Fed. Reg. 81190, 81198 (discussion at “D. Live-in Domestic Service Employees”).

\(^{250}\) 22 C.F.R. § 783.22(b).

\(^{251}\) 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 \((15 \times 7) = 105\) minutes of work, having accrued \((45 \times 7) = 5.25\) hours of sleep that night.

\(^{252}\) For a discussion of the problems faced by A-3/G-5 workers, see CAROL PIER, HIDDEN IN THE HOME (Human Rights Watch, 2001); Janie A. Chuang, Achieving Accountability for Migrant Domestic Worker Abuse, 88 N.C.L. REV. 1627 (2010).
employer renders them deportable as (suddenly) undocumented workers.\textsuperscript{253} Alternative immigration relief is typically unavailable, reserved for workers who can demonstrate extreme abuse (e.g. trafficking), and in any event entrusts protection of these workers to anti-trafficking systems that tend to prioritize criminal justice over victim protection.\textsuperscript{254} Tying immigration status to specific employers thus facilitates conditions tantamount to “the new bonded labor,” the threat of illegality a powerful tool of control for employers.\textsuperscript{255}

Against this backdrop, the U.S. au pair program practice exemplifies how permitting employer switching is both administratively possible and not a threat to our restrictive immigration system. The au pair program permits au pairs to change employers when an au pair is dissatisfied with her placement.\textsuperscript{256} Not only are such “rematches” not uncommon, but agencies have established procedures for facilitating them, if for no other reason than to increase the pool of prospective au pairs for fee-paying host families.\textsuperscript{257}

Stronger measures to limit recruitment agency discretion in this process are necessary, however, for an au pair to fully enjoy the freedom to change employers. Under the current system, whether an agency pursues a rematch for an au pair is entirely at the agency’s discretion rather than a matter of right. While 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

\textsuperscript{253} 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, \textit{New visa rules for domestic workers 'will turn the clock back 15 years,'} \textit{GUARDIAN}, Feb. 29, 2012; Aidan McQuade, \textit{Slavery is real—we must protect its victims}, \textit{GUARDIAN}, Feb. 2, 2012.

\textsuperscript{254} In the United States, for example, a domestic worker subjected to trafficking can apply for a “T-visa,” which permits a temporary stay of [3] 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.” \textit{Trafficking Victims Protection Act of 2000} (TVPA), Pub. L. No. 106-386, div. A, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.), at 107(e).


\textsuperscript{256} Interview with Au Pair Industry Insider No. 1, \textit{supra} note 115.

\textsuperscript{257} \textit{Id.}
eliminate agency exposure (either legal or public relations-wise) for prior employer abuse. 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. Moreover, if the agency is unwilling or unable to find a suitable rematch, the regulations should permit an au pair to change au pair agencies. 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 switching 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 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 are meaningless, however, without 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, providing meaningful access to remedies in the event of exploitation would provide 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 inures to the benefit of all domestic workers by promoting long-overdue recognition of domestic workers’ entitlement to rights protection.

a. Monitoring Employers and Recruitment Agencies

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258 See discussion accompanying supra note 156.
259 Israel, for example, permits employer and agency switching. Adriana Kemp, Reforming Policies on Foreign Workers in Israel, OECD Social, Employment and Migration Working Papers No. 103, at ¶ 76 (2010).
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 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 program – are exceedingly rare. The U.S. Department of Labor, for example, has rarely exercised its authority to investigate allegations of domestic worker abuse. Why 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, or because of labor officials’ reluctance to pursue investigations of domestic worker complaints for the reasons stated 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.” 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. But the regulations do not specify the purpose or substance of the required periodic meetings. Indeed, anecdotal information suggests vast differences between and within au pair agencies with regard to actual implementation of these regulations.

The regulations do, however, hold agencies liable for employer

260 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. Inspections find abuses of domestic workers, THE IRISH TIMES (July 7, 2011) (reporting that by mid-2011, NERA had undertaken 20 inspections of private homes).

261 Interview with U.S. Department of Labor official, Wage & Hour Division (February 9, 2012).

262 Id.

263 22 C.F.R. § 62.31(1)(1)-(2).

264 22 C.F.R. § 62.31(1)(3)-(4).

265 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. Interview with Au Pair Industry Insider No. 1, supra note 115.
violations of the stipend and work hour requirements by virtue of the threat of decertification of agencies for failure to monitor employer compliance. Given this, it would be reasonable to revise the regulations to better utilize the local/regional coordinator infrastructure for monitoring employer compliance. Specifically, the regulations should mandate that local/regional coordinators hold individualized periodic 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. Matching supply and 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 are exceedingly rare. Moreover, tremendous reliance on remittance revenues – and, at times, government kickbacks from labor recruiters – are strong disincentives against close monitoring of recruitment practices in countries of origin. Even for countries of destination concerned about the drawbacks of unfettered recruitment agency action, questions of jurisdictional reach over acts committed in countries of origin, and the costs of creating systems to effectively monitor recruitment practices are commonly cited as obstacles to effective response.

266 22 C.F.R. § 62.31(n)(3).
269 For a discussion of the “jurisdictional conundrum,” see Fudge, supra note 36.
270 For example, language targeting exploitative labor recruitment practices in recently-proposed U.S. anti-trafficking legislation was stripped from the bill due to costs and concerns that implementation would over-burden the already over-extended and under-funded U.S. Department of Labor. See Alliance to End Slavery & Trafficking, Recommendations for the Reauthorization of the Trafficking Victims Protection Act of
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, should the need arise. Indeed, current au pair program practice provides important insights into what not to do. As a preliminary matter, having agencies submit “independently-audited” reports detailing their compliance with federal regulations is a poor substitute for actual government oversight. The absence of substantive audit guidelines from the State Department has resulted in agencies being provided advance notice of the files to be pulled in the auditor’s “random” sampling, thus affording agencies opportunity fix problem files. Unsurprisingly, therefore, no au pair agency has ever had its sponsorship revoked despite the apparently common complaints of employer wage and hour violations. 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. Scrutiny of agency practices should be extended to cover agency staff and subcontractors located abroad, which currently are unregulated and engage in harmful practices. Such scrutiny could, 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. Broader scrutiny could also address the highly problematic practice of prospective au pairs’ payment of recruitment fees to the local recruiters. Paola, for example, paid $3000 to participate in the program. Such fees 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 one’s earnings.

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271 22 C.F.R. § 62.31(m).
272 Interview with Au Pair Industry Insider No. 1, supra note 115; Interview with Au Pair Industry Insider No. 2, supra note 137.
273 See supra note 141.
274 Interview with Au Pair Industry Insider No. 1, supra note 115; Interview with Au Pair Industry Insider No. 2, supra note 137.
275 Au pairs consulted for this article had the impression that the recruitment fees differed according to continents of origin, with for example, Latin Americans charged higher fees than Europeans.
276 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, Center for Comparative and Public Law, Faculty of Law, The University of Hong
b. Increasing access to justice

Access to justice for those exploited in private households 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. 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. Despite having an active life outside the Johnson household, 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.

Kong, Occasional Paper No. 16 (May 2006).


278 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
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., 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.\(^{279}\)

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 factor into possible sanctions against an au pair agency 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.\(^{280}\)

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

\(^{279}\) See supra note 117.

\(^{280}\) 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. 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 – e.g., a Rule 68 offer 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.
remain in the United States for “time sufficient to fully and effectively participate in” any civil action brought against their employers for violating the terms and conditions of their employment.\footnote{William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, sec. 203(c).}

C. Food for Thought

The au pair program has helped enabled 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, 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.\footnote{People with long-term care needs are projected to grow from 13 million in 2000 to 27 million in 2050. The current long-term care workforce is comprised of approximately 3 million workers. \textit{Who will care for the baby boomers? As generation nears retirement, concern mounts over elderly care}, \textit{Associated Press} (June 14, 2007); \textit{Caring Across Generations} \textit{Press Packet}, available at \url{http://www.caringacrossgenerations.org/sites/default/files/full-press-packet.pdf}.} 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.\footnote{Poo Interview, \textit{supra} note 226.} Because the elder care crisis is of increasing concern to policy makers,\footnote{The target population also conveniently a voting population, eldercare provides a political hook previously not available in domestic workers’ rights advocacy in the childcare context. Concern over the eldercare deficit led Senators Tom Harkin and Jay Rockefeller to introduce 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.” \textit{S. Res. 453}, \textit{Cong. Rec. S3087} (2012).} 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 “elder care au pairs.”\footnote{\textit{Copenhagen Post}, \textit{supra} note 210; Isabel Conway, \textit{Friends in deed for older people}, \textit{Irish Times} (August 16, 2011) (noting a long waiting list of recipient families); \textit{I}}
government has yet to contemplate such an expansion, but au pair agencies have expressed interest in tapping into the lucrative eldercare market, and American families have offered support for it. 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. 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, the opposite result is equally possible – e.g., if the au pair were living alone with a senior with deteriorating mental health. Indeed, that au pairs might assume, as in the Irish system, the burden of providing night-time care in addition to daytime care, further limits the prospects of an 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 regulate 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 Isabella with a host of deeply-contested normative and challenging practical

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.

286 Interview with State Department Official, May 22, 2012.


288 See, e.g., criticism of the Danish program reported in Conway, supra note 285.

289 See sources at supra note 285.

290 Indeed, this example was provided by the CEO of Expert Au Pair, Mark Gaulter, 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 Au Pair ClearingHouse website, available at http://www.aupairclearinghouse.com/node/669.

291 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 (requiring work during the night).
considerations.\textsuperscript{292} The problems with existing U.S. guestworker programs are well-documented, however, and apparently growing.\textsuperscript{293} 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.\textsuperscript{294} 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.\textsuperscript{295} Advocates and scholars are currently in the process of indentifying and assessing alternatives to recruitment agencies – e.g., creation of a direct hire system to cut out middlemen altogether,\textsuperscript{296} enabling international institutions like the International Organization for Migration to act as recruiter,\textsuperscript{297} or allowing worker collectives to manage recruitment of their own workers.\textsuperscript{298}

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 elder care 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 elder care while also providing program participants

\textsuperscript{292}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, NEW YORK TIMES (September 2011).


\textsuperscript{294}See supra note 217.


\textsuperscript{296}Gordon, Restructuring Labor Migration, supra note 295, at 15.

\textsuperscript{297}See Kemp, supra note 259, at ¶ 43.

\textsuperscript{298}Gordon, Restructuring Labor Migration, supra note 295, at 27-41.
with a path to citizenship. 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 and become U.S. citizens. This is a critical point of departure from the domestic worker guestworker programs adopted in other countries, which typically permit 2-5 year (possibly renewable) work periods but without the prospect of permanent residency or citizenship.

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. 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, and the possibility of 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.

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. 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

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299 Caring Across Generations Press Kit, supra note 282.

300 For a sampling of analyses of domestic worker guestworker programs around the world, see e.g., Kemp, supra note 297 (Israel); Fudge, supra note 36 (Canada); Pei-Cha Lan, Legal Servitude, Free Illegality: Migrant “Guest” Workers in Taiwan (Taiwan) (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).


302 Research on this issue is currently being undertaken. Poo Interview, supra note 226.

303 Id.

304 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.
rendering proposed domestic worker reforms – e.g., providing a path to
citizenship for migrant domestic workers – politically more palatable.\textsuperscript{305}
Challenging these assumptions is substantively important given that many
migrant domestic workers have endured downward class mobility in
becoming domestic workers in the 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/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.\textsuperscript{306}

The problem, however, is that the structure and rhetoric of the au pair
program does little to prevent, 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

\textsuperscript{305} Thanks to Daniela Kraiem for this important insight.

\textsuperscript{306} 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.
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 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, and have rightly spawned many a law review critique from different theoretical orientations. 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.

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307 See Fudge, supra note 36, at 242.