INVISIBLE LABOR, INVISIBLE RIGHTS: AN INTERSECTIONAL ANALYSIS ON THE UNITED STATES' AU PAIR PROGRAM

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Abstract

Immigrant women of color have long formed the backbone of the American domestic workforce, and in the past few decades, they have been increasingly stepping in to fill the country's deepening childcare crisis. While scholars have examined the racialized, gendered, and classed dimensions of domestic labor and the transnational "global nanny chain," far less attention has been paid to immigrant women of color who enter the United States through legal, temporary guest worker programs. This Note focuses on the United States' au pair program—a J-1 Cultural Exchange initiative—to examine the intersectional vulnerabilities faced by au pairs from the Global South and other developing countries. It argues that these au pairs are uniquely exposed to exploitation not only because of the inherent precarity of live-in domestic labor but also due to their "liminal legality": a form of legal marginalization that simultaneously grants and withholds rights, creating a precarious state of in-betweenness. Drawing on recent litigation, demographic shifts in the program, and an intersectional framework, this Note highlights how these au pairs are often excluded from effective labor protections and struggle to assert their rights within both legal and social structures. It concludes by calling for robust anti-retaliation protections and expanded access to labor organizing as essential mechanisms for empowering minority au pairs and addressing the structural harms they face.

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INTRODUCTION

Immigrant women, especially women of color, have long served as the backbone of the American domestic work industry.[1] As the United States confronts an escalating childcare crisis, migrant women have stepped in to fill the critical gaps in care work, allowing local women to participate in the workforce and obtain affordable childcare.[2] In New York City, for instance, 94% of domestic workers are women, 78% were born outside the United States, and 83% are women of color.[3]

Scholars have extensively examined the racialized and gendered division of domestic workers,[4] exploitation of undocumented domestic workers,[5] and migrant women in the "global nanny chain."[6] Coined by sociologist Arlie Hochschild, the term "global nanny chain" refers to a transnational network of women who migrate from economically disadvantaged countries to wealthier nations to work as domestic workers, primarily as

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1 Domestic work refers to the reproductive labor performed in the private sphere, including cooking, cleaning, and caring for dependent family members. This Note focuses on childcare work conducted by au pairs, which typically involves taking care of children by cooking and cleaning for them, supervising and accompanying them, addressing their needs, and teaching them a foreign language. This Note uses the phrases "domestic work" and "childcare work" to refer to the work performed by au pairs.

2 *See* Hila Shamir, *What's the Border Got to Do with It? How Immigration Regimes Affect Familial Care Provision—A Comparative Analysis*, 19 AM. U. J. GENDER SOC. POL'Y & L. 601, 602–03 (2011).

3 NAT'L DOMESTIC WORKERS ALL., DOMESTIC WORK IN AN ENGINE OF NEW YORK CITY'S ECONOMY: NEW YORK CITY DOMESTIC WORK FACTSHEET, https://domesticworkers.org/membership/chapters/we-dream-in-black-new-york-chapter/nyc-care-campaign/new-york-city-domestic-work-factsheet/#:~:text=94%25%20of%20New%20York%20City [https://perma.cc/2AZV-BZJX]. The share of women of color in domestic work is disproportionately high, with 38% being Hispanic/Latinx, 27% Black (non-Hispanic), and 18% Asian. *Id.*

4 *See, e.g.*, Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, J. WOMEN CULTURE & SOC'Y 1, 1 (1992) (highlighting the racial and gendered division of paid domestic work); MARY ROMERO, MAID IN THE U.S.A. (1992) (noting the structural inequalities affecting Latinx domestic workers and the intersection of race, class, and gender); PIERRETTE HONDAGNEU-SOTELO, DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE (2007) (exploring the lived experiences of immigrant domestic workers with a focus on the marginalization and exploitation of domestic workers along the lines of race and class).

5 *See, e.g.*, ROMERO, *supra* note 4 (noting the extreme hardship undocumented Latinx women face in domestic work); HONDAGNEU-SOTELO, *supra* note 4.

6 *See, e.g.*, ARLIE RUSSELL HOCHSCHILD & BARBARA EHRENREICH, GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY (2000).

nannies or caregivers.[7] Unbalanced power dynamics in the household, social isolation, low wages, and fear of repatriation characterize their day-to-day lived experience.[8]

Scholars and commentators have widely documented how race, gender, class, and immigration status intersect to heighten the risks of exploitation for migrant domestic workers.[9] However, far less research has focused on immigrant women of color who enter the United States through guest worker programs with temporary legal status.[10] This Note examines the au pair program, a J-1 Cultural Exchange Program that recruits young foreign nationals, predominantly women, to live in American households and provide childcare in exchange for cultural exchange experiences. Applying an intersectional analysis to the experiences of au pairs from Latin America and other developing countries,[11] this Note argues that Latinx au pairs experience heightened vulnerabilities due to both the exploitative nature of live-in domestic work and their legally marginalized status through guest worker programs. In addition to race, gender, and national origin, this Note brings the concept of "liminal legality"[12]—a framework that captures the precarity, temporariness, and legal instability of noncitizens with limited rights—into the analysis to demonstrate how this legal status renders Latinx au pairs more susceptible to abuse while simultaneously restricting

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7 *Id.*

8 *See, e.g.*, Janet McLaughlin & Jenna Hennebry, *Pathways to Precarity: Structural Vulnerabilities and Lived Consequences for Migrant Farmworkers in Canada*, *in* PRODUCING AND NEGOTIATING NON-CITIZENSHIP 175, 175–95 (2013) (Luin Goldring & Patricia Landolt eds., 2013).

9 *See, e.g.*, Glenn, *supra* note 4; ROMERO, *supra* note 4.

10 *See, e.g.*, RHACEL SALAZAR PARREÑAS, UNFREE: MIGRANT DOMESTIC WORK IN ARAB STATES (2021) (examining an employment sponsorship system known as the *kafala* in the United Arab Emirates and arguing that the *kafala* renders migrant workers unfree because they are made subject to the arbitrary authority of their employers); LUIN GOLDRING & PATRICIA LANDOLT, PRODUCING AND NEGOTIATING NON-CITIZENSHIP (2013) (analyzing the complex dynamics through which individuals are excluded from citizenship rights and how they negotiate their precarious legal status through this exclusionary framework).

11 For convenience, this Note will use the term "minority au pairs" to refer to au pairs from the Global South and other developing countries.

12 *See, e.g.*, Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 709 (2015) (noting that "the notion of liminal legality is used to describe individuals moving in and out of, and living on the edges of, legal immigration status"); Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOCIO. 999 (2006) (noting that liminal legality subjects immigrants to a state of protracted legal uncertainty, restricting their access to rights and protections while exposing them to heightened vulnerabilities and emphasizing that this condition is not a temporary phase, but a long-term reality shaped by shifting immigration policies, bureaucratic inefficiencies, and structural barriers that prevent full integration).

their ability to seek legal redress. To enhance the legal mobilization of marginalized au pairs, this Note calls for the implementation of anti-retaliation protections and expanded access to labor-organizing efforts to safeguard the rights of Latinx au pairs.

Established in 1964, the U.S. au pair program remained largely absent from scholarly discourse until the 2010s. The practice of au pairing originated in post-World War II Western Europe, where young women traveled to foreign countries and resided in local households.[13] In its early years, the program mostly comprised participants from Western Europe.[14] Perhaps because of these origins, this program has long been considered a visa pathway associated with privilege and cultural exchange, rather than a traditional labor arrangement.[15]

Beginning in the 2010s, the program faced growing scrutiny. Professor Janie Chuang notably challenged the prevailing "cultural exchange" narrative, arguing that it functioned as a disguise for a government-facilitated domestic worker program designed to provide flexible, in-home childcare for upper-middle-class American families at below-market rates.[16] Since 2014, au pairs have brought three class actions against their recruiting agencies ("au pair agencies" or "sponsors"), challenging their status as "cultural exchange agents" and alleging violations of federal and state minimum wage and hour law.[17]

Federal courts across multiple jurisdictions have ruled in favor of au pairs, recognizing them as "employees" entitled to statutory labor protections.[18] In response to these legal challenges, the Department of State proposed revisions to the program, including a raise in au pairs' weekly salary to comply with state minimum wage laws and the introduction of

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13 *See* Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J.L. & GENDER 269, 275 (2013).

14 *See id.*

15 *See id.* at 271.

16 *See id.* at 272.

17 *See* Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066, 1079–80 (D. Colo. 2016); Morales Posada v. Cultural Care, Inc., 554 F. Supp. 3d 309, 322–23 (D. Mass. 2021), *aff'd on other grounds sub nom.* Posada v. Cultural Care, Inc., 66 F.4th 348 (1st Cir. 2023); Merante v. Am. Inst. for Foreign Study, Inc., No. 21-CV-03234-EMC, 2022 WL 2918896 (N.D. Cal. July 25, 2022).

18 *See, e.g.*, *Beltran*, 176 F. Supp. 3d at 1082; *Morales Posada*, 554 F. Supp. 3d at 322–23.

additional safeguards to protect them from exploitative host families, reflecting some of the key demands advocated by labor rights organizations.[19]

Although these developments address the pervasive issue of wage theft within the program, they fail to account for the unique challenges encountered by Latinx au pairs. Over the past decade, the program has undergone a significant demographic shift, with women from the Global South and developing countries replacing the previous Western European majority.[20] Countries such as Brazil, Mexico, Colombia, South Africa, and Argentina have emerged as leading sources of au pair participants, alongside traditional sending nations like Germany and France.[21]

This demographic transition has unfolded within the broader framework of the "international division of reproductive labor"—commonly referred to as the "global nanny chain"—wherein women from lower-income countries migrate to wealthier nations to perform domestic and caregiving labor.[22] In addition, domestic work itself is inherently shaped by the intersecting systems of gender, race, class, and immigration status,[23] making an intersectional approach essential to fully understanding the vulnerabilities faced by au pairs. Accordingly, this Note employs an intersectional framework to examine the experiences of Latinx au pairs, highlighting the compounded forms of marginalization they endure within the program.

While class action litigation has played a crucial role in securing wage protections for au pairs, its structural limitations have left minority au pairs' intersectional harms and grievances unaddressed, often a result of litigation strategy and cultural conditioning.[24] Au pairs exist in a gray area of legal protection—formerly covered by federal and state labor laws, yet practically constrained by their precarious legal status, limiting their access to collective bargaining protections and legal redress.[25] Consequently, even when class

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19 *See* Exchange Visitor Program–Au Pairs, 88 Fed. Reg. 74071, 74071–97 (proposed Oct. 30, 2023).

20 *See infra* note 81.

21 *See id.*

22 *See* RHACEL SALAZAR PARREÑAS, SERVANTS OF GLOBALIZATION: WOMEN, MIGRATION AND DOMESTIC WORK 28–52 (2d ed. 2015); HOCHSCHILD & EHRENREICH, *supra* note 6, at 28.

23 *See, e.g.*, ROMERO, *supra* note 4, at 27; Glenn, *supra* note 4, at 1–3.

24 *See infra* Part III.

25 *See infra* Part III.

actions secure financial settlements, systemic vulnerabilities faced by minority au pairs remain outside of legal protection.[26]

Part I of this Note provides an overview of domestic workers and guest worker programs in the United States, contextualizing the framework in which the Au Pair Program operates.[27] This section then examines the program's historical development and highlights a notable trend during the COVID-19 pandemic, wherein minority au pairs appeared more likely to remain in increasingly hostile work environments despite experiencing fewer cultural exchange opportunities.[28] Part II takes an intersectional lens to the au pair program, analyzing the mistreatment and problems faced by minority au pairs specifically.[29] This section argues that the program's classification as a guest worker program, combined with the preexisting vulnerabilities of women of color in domestic labor, exacerbates conditions of precarity, systemic exploitation, and deterrents to rights enforcement.[30] Part III focuses on the current legal landscape, noting that heightened invisibility and compounded vulnerabilities of minority au pairs diminish their ability to benefit from both top-down regulatory interventions and bottom-up grassroots advocacy.[31] Given these structural barriers, this Note contends that robust anti-retaliation protections are essential to enabling minority au pairs to engage in rights-claiming processes and participate in collective bargaining efforts, thereby fostering meaningful labor protections within the program.[32]

I. Background

A. Immigrant Domestic Workers in Context

Immigrant women from the Global South constitute a disproportionate share of the domestic workforce, a pattern deeply rooted in the gendered and racialized division of

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26 *See infra* Part III.

27 *See infra* Part I.

28 *See infra* Part I.C.

29 *See infra* Part II.

30 *See infra* Part II.

31 *See infra* Part III.

32 *See infra* Part IV.

reproductive labor.[33] Since the colonization of the Americas, domestic work has largely been relegated to poor, immigrant women of color, with a few exceptions.[34] In the nineteenth century, for instance, domestic work in the South was often associated with the stereotypical image of "black mammy."[35] In the Southwest and the West, domestic work was primarily performed by Mexican and Mexican American women, as well as Asian, African American, and Native American women, and, briefly, Asian men.[36]

Prior to the 1920s, most domestic workers lived in employers' homes, where employers enjoyed significant control over their dwellings, nutrition, privacy, and social relations.[37] Dependent upon their employers and isolated from social support, live-in domestic workers were subject to greater vulnerabilities, including sexual abuse, psychological manipulation, intrusive questioning, and demands for long hours of work.[38]

Society systematically undervalues domestic work by categorizing it as inherently "women's work."[39] Childcare, in particular, demands not only the fulfillment of children's physical needs but also the provision of emotional care—an essential yet intangible form of labor that remains difficult to quantify within traditional employment frameworks.[40]

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33 *See* Julia Wolfe et al., *Domestic Workers Chartbook*, ECON. POL'Y INST. (May 14, 2020), https://www.epi.org/publication/domestic-workers-chartbook-a-comprehensive-look-at-the-demographics-wages-benefits-and-poverty-rates-of-the-professionals-who-care-for-our-family-members-and-clean-our-homes/ [https://perma.cc/Y67K-GSG6]. "Reproductive labor" refers to the activities involved in sustaining and reproducing life within households and communities. *See* Glenn, *supra* note 4, at 3. This includes tasks such as caregiving, child-rearing, household chores, cooking, cleaning, and emotional support. *See id.* Reproductive labor is often unpaid or underpaid and has historically been associated with women's roles within the family and household. *See id.* It encompasses the physical, emotional, and mental work required to maintain daily life and support the well-being and development of individuals and families. *See id.*

34 *See* HONDAGNEU-SOTELO, *supra* note 4, at 14.

35 *See* CHANEQUA WALKER-BARNES, TOO HEAVY A YOKE: BLACK WOMEN AND THE BURDEN OF STRENGTH 85–88 (2014).

36 *See id.*

37 *See* Kristi L. Graunke, *"Just Like One of the Family": Domestic Violence Paradigms and Combating On-the-Job Violence Against Household Workers in the United States*, 9 MICH. J. GENDER & L. 131, 150 (2002).

38 *See id.*

39 *See id.* at 191.

40 *See* PARREÑAS, *supra* note 22, at 135. Emotional labor refers to the management of emotions as part of one's job responsibilities, often requiring workers to regulate their feelings and expressions to fulfill professional expectations. *See* ARLIE RUSSELL HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN

Employers may capitalize upon family-based ideals to obtain unpaid labor, including the emotional work of offering care and building bonds with their wards.[41] In addition, employers of childcare workers often resist seeing themselves as employers. Many refer to nannies or babysitters as "part of the family," rejecting the "master-servant" relation reminiscent of outdated feudal and slave systems.[42]

Since the latter half of the twentieth century, the demographics of U.S. domestic and childcare workers have drastically shifted from African American women to immigrant women.[43] From 1950 to the end of the 1980s, the share of African American women in the domestic work industry declined from 41% to 3.5%.[44] Beginning in the 1970s, immigrant women started to constitute a disproportionate share of domestic workers.[45] In the early twentieth century, Japanese and Mexican women were commonly associated with domestic work.[46] From the 1970s, Latinx and Caribbean immigrants increasingly filled domestic positions, commonly referred to by scholars as the "international division of reproductive labor" or "global care chain."[47] As women from Western, developed countries stepped out of the private sphere and undertook roles in the public, women from the Global South migrated to "rich nations" to take care of the household.[48] Many of these migrant women were college-educated and had worked as professionals in their home countries—and some

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FEELING 7 (2012) (defining emotional labor as "the management of feeling to create a publicly observable facial and bodily display"). Emotional labor is particularly significant in care work where workers are expected not only to perform physical tasks but also to cultivate emotional bonds and provide psychological support. *See* Nancy Folbre, *Valuing Care*, *in* FOR LOVE AND MONEY: CARE PROVISION IN THE UNITED STATES 92 (Nancy Folbre ed., 2012) (discussing the undervaluation of emotional labor in the care economy).

41 PARREÑAS, *supra* note 22, at 142.

42 *See id.*

43 *See* HONDAGNEU-SOTELO, *supra* note 4, at 16. For reasons behind the declining shares of African American women in domestic work, see Graunke, *supra* note 37, at 143–50 (noting that mass migration of African Americans to the northern states, labor-conscious reforms of the New Deal, and social and demographic change brought by the Civil Rights movement all contributed to this demographic change).

44 Graunke, *supra* note 37, at 150.

45 *See id.* at 150–51.

46 *See id.*

47 *See* PARREÑAS, *supra* note 10, at 202.

48 *See id.*

of them, while abroad, also hired less privileged women to take care of their own children back in their home country.[49]

While this influx of Latinx women is commonly explained by the "feminization of migration,"[50] scholars have noted that many employers choose them precisely because of explicit racial, ethnic, and gendered preferences.[51] For instance, employers perceive light-skinned Latinx women as submissive and caring, representing the "Old World" where women performed unpaid domestic work as an expression of love.[52] Due to language barriers, they are unlikely to gossip about family matters.[53] As African American women gradually separated work from life and chose to "live out" from their employers' premises, immigrant women often chose to "live in" for economic and immigrant status reasons; this provides their employers with more childcare flexibility, but it also exposes the workers to greater vulnerabilities.[54] In fact, some employers actively seek out non-citizens and undocumented immigrants because of their vulnerabilities.[55]

B. Guest Worker Programs in the United States

The origin of the U.S. temporary worker program can be traced back to the Bracero Program.[56] This program brought in millions of Mexican men to work on short-term, primarily agricultural-labor contracts from 1942 to 1964 to fill labor needs in the American

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49 *See* Shamir, *supra* note 2, at 604, 614–15 (noting that migrant workers are rarely the poorest of the poor in their home countries; instead, they are mostly those who possess enough social and financial capital to finance the trip (even if by borrowing)).

50 Llezlie Green Coleman, *Exploited at the Intersection: A Critical Race Feminist Analysis of Undocumented Latina Workers and the Role of the Private Attorney General*, 22 VA. J. SOC. POL'Y & L. 397, 400–02 (2015).

51 *See, e.g.*, HONDAGNEU-SOTELO, *supra* note 44, at 55–57; Graunke, *supra* note 37, at 153; Kathy A. Kaufman, *Outsourcing the Hearth: The Impact of Immigration on Labor Allocation in American Families, in* IMMIGRATION RESEARCH FOR A NEW CENTURY 347, 358–63 (Nancy Foner et al. eds., 2000).

52 *See* HONDAGNEU-SOTELO, *supra* note 4, at 55–57; Graunke, *supra* note 37, at 153.

53 *See* Graunke, *supra* note 37, at 9.

54 *See id.* at 143–44, 152.

55 *See* ROMERO, *supra* note 4, at 13 (noting that employers prefer noncitizen and undocumented workers because they "are available all the time, can accommodate the employer's schedule, and are willing to undertake the wide variety of tasks connected to childcare and maintaining a household").

56 *See* BRACERO: HISTORY ARCHIVE, CTR. HIST. & NEW MEDIA (2021), https://braceroarchive.org/about [https://perma.cc/K3CN-YDN5].

Southwest.[57] Once in the United States, braceros were required to stay on their employers' farms, and the braceros' legal statuses were tethered to their employment.[58] Many farms operated in the form of debt bondage, hiring more braceros than necessary and deducting room and board during off-periods from their current or future salaries.[59] Scholars have criticized that the program was deliberately designed to deny immigrant workers essential rights and labor protections, rendering them cheaper and more vulnerable to exploitation.[60] To preserve their vulnerable status, the government granted them continued temporary status but prevented them from becoming new citizens.[61]

Guest worker programs are generally seen as legacies of the Bracero Program.[62] Workers now enter the United States via some form of lettered nonimmigrant visa defined in § 101(a)(15) of the Immigration and Nationality Act (INA).[63] The most visible visa is perhaps the H category, which consists of the "skilled" visa category, H-1B, and the "unskilled" visa categories, H-2A (for agricultural labor) and H-2B (for non-agricultural labor).[64] This scholarly emphasis on the H-2A and H-2B visa categories could be attributed to their eligibility for legal assistance from federally funded legal services offices.[65] Domestic workers' visas are generally ineligible for these public benefits.[66]

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57 *See id.*

58 GRACE CHANG, DISPOSABLE DOMESTICS: IMMIGRANT WOMEN WORKERS IN THE GLOBAL ECONOMY 103 (2000).

59 *See id.*

60 *See id.* at 104.

61 *See id.* at 103–04 (citing KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE INS (1992)).

62 *See* CHANG, *supra* note 58, at 105.

63 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15).

64 The key distinction between the skilled and unskilled categories is that the skilled category permits guest workers to have an intent to immigrate, while most other nonimmigrant categories prohibit intent to immigrate to the United States. 8 U.S.C. § 1101(a)(15)(H). H-2A visa holders typically work in landscaping, forestry, hospitality, or as amusement park operators, while H2B visa holders typically work in food services and construction. *See* U.S. DEP'T OF LAB., INDUSTRIES WITH HIGH PREVALENCE OF H-2B WORKERS (2023), https://www.dol.gov/agencies/whd/data/charts/industries-h2b-workers [https://perma.cc/82PC-MHZJ].

65 *See* Briana Beltran, *The Hidden 'Benefits' of the Trafficking Victims Protection Act's Expanded Provisions for Temporary Foreign Workers*, 41 BERKELEY J. EMP. & LAB. L. 229, 235–36 (2020).

66 *See id.*

American families first attempted to bring in guest workers as domestic workers in 1953.[67] In El Paso, Texas, a group of Anglo housewives organized the Association of Legalized Domestics, proposing to hire Mexican women to work for them.[68] According to this proposal, employees were to earn a minimum wage of $15 a week. Though the Department of Justice rejected this effort to elicit cheap household help, domestic workers now come to the United States under a variety of nonimmigrant visas depending on their employers—including the A-3 visa for a diplomat, the G-5 visa for an employee of international organizations, and the B-1 visa for visitors to the United States.[69] These visa programs have received vehement criticism in the past decades. including instances where domestic workers were trafficked, misled about job conditions, forced to work excessive hours, confined to their employers' homes, underpaid, isolated from outside contact, and subjected to psychological, physical, or sexual abuse.[70]

C. The U.S. Au Pair Program and Its Recent Demographic Shift

The U.S. au pair program originates from Western European practices in which middle-class women would travel to another country, stay with a host family, and learn cultural, language, and housekeeping skills before marriage.[71] The term "au pair" in French means "on equal terms."[72] In 1969, the European Council established the first regulation on the

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67 *See* CHANG, *supra* note 58, at 100–02.

68 *See id.*

69 *See* Beltran, *supra* note 65, at 236.

70 *See* HUM. RTS. WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES (2001), https://www.hrw.org/report/2001/06/01/hidden-home/abuse-domestic-workers-special-visas-united-states [https://perma.cc/86EJ-FE7G] (remarking that "isolation is so extreme and the culture of fear created by their employers through explicit threats and/or psychological domination is so great that the workers believe they will suffer serious harm if they leave their jobs and have no choice but to remain in and continue laboring in abusive conditions").

71 *See* Rosie Cox, *Introduction*, *in* AU PAIRS' LIVES IN GLOBAL CONTEXT: SISTERS OR SERVANTS? 3 (Rosie Cox ed., 2015).

72 Tina Davis, *Au Pair Scheme: Cultural Exchange or a Pathway to Slavery?*, 1 SLAVERY TODAY J. 1, 2 (2014).

movement of young women traveling as au pairs.[73] The early agreements European nations adopted generally reflected the program's "cultural exchange" nature.[74]

Unlike the European program, the U.S. au pair program was established by a private company, the American Institute of Foreign Studies, in 1986.[75] The first pilot au pair program consisted of approximately 1,000 Western Europeans.[76] The United States Information Agency, an agency regulating foreign cultural exchanges as a product of the Cold War, administered the two-year pilot program.[77] The legislative history has faced criticism from advocates and scholars, particularly regarding whether the program truly fostered reciprocal cultural exchange or merely introduced inexpensive child care to American households.[78] Despite these criticisms, the program has persisted, fueled by demand from host families and lobbying efforts by au pair agencies, which profit substantially from both host families and au pairs.[79]

Since the early 2010s, a significant demographic shift has occurred in the United States' au pair population.[80] In the early 2010s, the au pair population shifted from being primarily Western European to a more diverse composition—while roughly half of au pairs remained Western European, the rest came from Latin America, Africa, Eastern Europe, and Asia.[81]

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73 *See id.*

74 *See, e.g.*, Davis, *supra* note 72, at 2; Cox, *supra* note 70, at 3; Rosie Cox, *The Au Pair Body: Sex Object, Sister or Student?*, 14 EUR. J. WOMEN'S STUD. 281, 282 (2007).

75 *See* Victoria Bejarano Hurst Muirhead, *"I'd Never Let My Sister Do It": Exploitation Within the U.S. Au Pair Program*, 26 LEWIS & CLARK L. REV. 241, 246 (2022).

76 *See* Glenn Collins, *Young Foreigners to be Brought to U.S. as Childcare Workers,* N.Y. TIMES (Feb. 19, 1986), https://www.nytimes.com/1986/02/19/garden/young-foreigners-to-be-brought-to-us-as-child-care-workers.html [https://perma.cc/P3Q4-5X5E].

77 Muirhead, *supra* note 75, at 246.

78 *See id.* at 246–49.

79 *See id.*

80 *See* KIM ENGLAND & GRACE REINKE, SENDING COUNTRIES OF AU PAIRS IN THE UNITED STATES: PATTERNS AND IMPLICATIONS (2020), https://www.reginfo.gov/public/do/eoDownloadDocument?pubId=&eodoc=true&documentID=6614 (on file with the *Columbia Journal of Gender and Law*) (noting a sizable increase of au pairs from Latin America from 2011 to 2019).

81 In 2016, Western European au pairs made up most of the au pair population (45%), with the rest primarily composed of Latin American au pairs (32.9%). ENGLAND & REINKE, *supra* note **Error! Bookmark not defined.**. There was also a sizable South African au pair population (5%). *Id.* In 2019, Latin American au pairs rose to

Scholars have argued that this demographic shift indicates that minority au pairs come in to fill the caregiving gap as part of the "global care chain."[82]

Demographic data during the COVID-19 pandemic further lends support to this theory, revealing that minority au pairs are more likely than their Western European peers to remain in the program despite a worsening work environment.[83] On June 22, 2020, the Trump administration suspended the issuance of new work visas, except for host families with medical professionals and special needs children.[84] Most au pairs who had not yet arrived were banned from entering the United States.[85] This ban left many families who relied on them for childcare scrambling to find replacements. Additionally, amid COVID-19 "stay-at-home" orders, au pairs often faced extended work hours with their host children and increased isolation.[86] Prior to the pandemic, well-intentioned families emphasized the cultural exchange component of the program, but the pandemic relegated this program to its pure childcare function.[87] Consequently, many au pairs found the challenging work environment untenable, while others resisted being reduced to mere childcare providers.[88]

The travel ban had a profound psychological impact on minority au pairs, many of whom associated it with the Trump Administration's anti-immigrant policies.[89] However,

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46.5% of the au pair population (21,551). *Id.* The percentage of Western Europeans declined to 32.7%. *Id.* Since 2020, Latin American au pairs have constituted most of the program (53.6%, 65.2%, and 52.1% in 2020, 2021, and 2022, respectively). *Id.* In contrast, the number of au pairs from Western Europe has dropped to 25.3%, 21.6%, and 31.9% over the past three years. *Id.*

82 *See* Chuang, *supra* note 16, at 278–79.

83 *See infra* notes 90–95.

84 *See* Jordan Salama, *The Great Au Pair Rush*, N.Y. TIMES (July 25, 2020), https://www.nytimes.com/2020/07/25/business/the-great-au-pair-rush.html [https://perma.cc/8C54-MQX8].

85 *See id.*

86 *See* Alyson Krueger, *This Is Not the America These Au Pairs Were Expecting*, N.Y. TIMES (July 17, 2020), https://www.nytimes.com/2020/07/17/style/au-pairs.html [https://perma.cc/AA9T-2AAX].

87 *See id.*

88 *See id.*

89 *See* Nathaly Carolina Hernández García, *Experiences of Latin American Au Pairs in El Paso, Texas*: *Perceptions and Challenges in a Border Context* 25–27 (Dec. 1, 2021) (M.A. thesis, University of Texas at El Paso) (on file with ProQuest Dissertations & Theses, University of Texas at El Paso) (describing the Trump administration's immigration policy as "a desperate desire to . . . defend the country from the brown-skinned invaders").

statistics indicate that minority au pairs were more likely to remain in the program and fill the childcare deficit.[90] In 2020, amidst a sharp decline in total au pair numbers to 7,101 (down from the usual 15,000 to 20,000),[91] au pairs from Brazil, Colombia, Mexico, and Argentina accounted for roughly half of the au pairs (3,516). Including au pairs from South Africa, the number rises to 4,313, making up approximately 60% of the total au pair population.[92] Meanwhile, au pairs from Germany, Italy, and France, typically the top three European sending countries, dwindled to 1,224 (from 5,202 in 2019).[93] This declining trend persisted into 2021, with the proportion of non-Western-European au pairs reaching a historic high of 65.2%, while the proportion of Western European au pairs decreased to approximately 21%.[94] Following the lifting of the travel ban, however, the share of Western European au pairs rebounded to 31.9% in 2022.[95]

In an email to host families, Nancy Sterling, a spokeswoman for Au Pair in America, stated that "some au pairs, mainly from Europe, have chosen to return home due to concerns from their nuclear families or just wanting to be in their home countries during the pandemic."[96] However, she emphasized that this was not the predominant trend among all au pairs. Her statement aligns with statistical trends, indicating that while European au pairs left the program more readily, au pairs from non-European countries remained despite the reduced cultural exchange experience.

Multiple factors likely contribute to minority au pairs' reluctance to leave the program, despite the diminishing "cultural exchange" component. Subsection II.C examines these reasons. The increasing representation of minority au pairs, along with their demonstrated

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90 *See* FACTS AND FIGURES, BRIDGEUSA, https://j1visa.state.gov/basics/facts-and-figures/ [https://perma.cc/C5SB-4TWC].

91 *Id.*; *see also* Alyson Krueger, *supra* note 86 (noting that every year there are approximately 18,000 au pairs in the United States).

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 Gina Cherelus, *Au Pairs Caught Between Work and a Pandemic*, N.Y. TIMES (Apr. 1, 2020), https://www.nytimes.com/2020/04/01/well/au-pairs-caught-between-work-and-a-pandemic.html [https://perma.cc/L8XB-LG6X].

willingness to endure challenging environments, underscores the need for an intersectional analysis that centers on their lived experiences.[97]

II. An Intersectional Analysis of the Au Pair Program

> *The ceiling was very high, and the walls went all the way up to the ceiling, enclosing the room like a box in which cargo traveling a long way should be shipped. But I was not cargo. I was only an unhappy young woman living in a maid's room, and I was not even a maid. I was the young girl who watched over the children and went to school at night. How nice everyone was to me, though, saying that I should regard them as my family and make myself at home.*[98]

Through the voice of Lucy, an au pair from the West Indies, Jamaica Kincaid's autobiographical novel *Lucy* intricately captures the lived experience of a young Black woman working as an au pair.[99] The narrative reflects a sense of confusion, mirroring the self-contradictory nature of minority au pairs' experiences.[100] They are labeled as cultural exchange agents but are treated as cheap childcare laborers. They see the program as a path to professional growth but become ensnared in colonial legacies as maids.[101] They pursue the American Dream but find themselves denied equal rights and protections.

Scholars and advocates have extensively criticized the au pair program, including the widespread wage theft, lack of supervision, isolation, and the devaluation of childcare work.[102] This Section contributes to this discourse by focusing on minority au pairs,

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97 Intersectionality is a theoretical framework that acknowledges how various social identities intersect and influence each other, shaping individuals' experiences of privilege and oppression. It highlights the interconnected nature of systems of power related to race, gender, class, sexuality, and ability as a lens for understanding complex social phenomena. *See generally* KIMBERLÉ CRENSHAW, ON INTERSECTIONALITY: ESSENTIAL WRITINGS (2017).

98 JAMAICA KINCAID, LUCY 7 (1990).

99 *Id.*

100 *See* Mirza Aguilar Pérez, *The Cosmopolitan Dilemma: Fantasy, Work, and the Experiences of Mexican Au Pairs in the USA*, *in* AU PAIRS' LIVES IN GLOBAL CONTEXT: SISTERS OR SERVANTS? 203, 204 (Rosie Cox ed., 2015).

101 *See* Sondra Cuban, *"Any Sacrifice is Worthwhile Doing": Latina Au Pairs Migrating to the United States for Opportunities*, 16 J. IMMIGRANT & REFUGEE STUD. 235, 238 (2017).

102 *See generally* Chuang, *supra* note 16; Muirhead, *supra* note 75.

highlighting the precarity they face at the intersection of domestic work and guest worker identity. Part II.A and Part II.B highlight how common vulnerabilities among immigrant women of color in domestic work render minority au pairs particularly susceptible to exploitation—a situation exacerbated by the "part of the family" rhetoric toward them.

Part II.C and Part II.D employ the framework of "liminal legal" or precarious status, concepts increasingly used in studies on temporary guest worker programs. Some minority au pairs are deceived into the program, while others face indebtedness due to agency and administrative fees.[103] This concept of "liminal legal status" becomes particularly pertinent for au pairs seeking to pursue career advancement or immigrate to the United States, often sold the American Dream by au pair agencies.[104] Disproportionately hailing from the Global South,[105] au pairs frequently find themselves trapped in cycles of precarious positions, with the uncertainty of their legal status haunting their daily lives.

A. Racialized and Gendered Images Perpetuated in the Au Pair Selection Process

While the domestic work industry has long been characterized by racial and ethnic divisions, au pair agencies have perpetuated those divisions through their selection and matching processes.[106] Agencies assign generalized features to au pairs from different nations—Mexicans are praised for being helpful, Brazilians for their endless energy and joy, Colombians for their model manners, and Venezuelans for being extroverted and smiley.[107] Through this process, minority au pairs are "produced as subjects through stereotypes," which in turn reduces a complex, heterogeneous function into a repetitive, simplistic, and homogeneous function that dehumanizes minority au pairs.[108]

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103 *See infra* Part III.C.2.

104 *See infra* Part III.C.

105 *See supra* Part I.C.2.

106 *See* Aguilar Pérez, *supra* note 100, at 209–10. This generalization is found in au pair programs across the globe. In France, for instance, host families often speak of attributes of au pairs based on their national origins—Germans are "cold" or even "depressive," while Latin Americans are "fun," "warm," and "hardworking." *See* Séverine Durin, *Ethnicity and the Au Pair Experience: Latin American Au Pairs in Marseille, France*, *in* AU PAIRS' LIVES IN GLOBAL CONTEXT: SISTERS OR SERVANTS? 155, 161–62 (Rosie Cox ed., 2015).

107 *See* Aguilar Pérez, *supra* note 100, at 203.

108 *Id.* at 209–10.

Minority au pairs are often cast as embodiments of the "Old World," where traditional notions of "family-oriented" women prevailed.[109] Host families, influenced by these perceived characteristics, seek out au pairs who fit these stereotypes.[110] Consequently, individual minority au pairs must contend with the racial and cultural stereotypes imposed upon them.[111] A Mexican au pair recounted her anger, frustration, and disbelief when her host family demanded that she cook for the family: "Not all Mexican women know how to cook."[112] Cooking is a task beyond the scope of au pairs' primary childcare responsibilities.[113]

B. Minority Au Pairs as the Racial and Cultural "Other"

The concept of "cultural exchange" within the au pair program, operating as a nonimmigrant initiative, inherently involves a process of rationalization and "othering."[114] Indeed, throughout American history, immigration regulation has often been marked by exclusionary practices based on factors such as race, nationality, and the perceived cultural differences of immigrants.[115] Scholars have criticized the concept of "cultural exchange" within the au pair program as perpetuating a process of "othering," justifying a "tendency to view the employer-domestic worker relationship in paternalistic terms."[116] In contrast to the original au pairing principles, host families often perceive themselves

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109 *See id.*

110 *See id.*

111 *See id.*

112 Mirza Aguilar-Pérez, *Child Care and Labor Deregulation Through the J1 Visa in the USA: Cultural Experiences and Temporary Work of Qualified Young Mexican People*, 21 J. INT'L MIGRATION & INTEGRATION 453, 463 (2020).

113 *See id.*

114 Caterina Rohde-Abuba, *"The Good Girl from Russia Can Do It All": Au Pairs' Perspective on Morality and Immorality in the Au Pair Relation*, 6 NORDIC J. MIGRATION RSCH. 215, 215–16 (2016).

115 In *Chae Chan Ping* and *Fong Yue Ting*—the two Supreme Court cases on the restrictive Chinese exclusion legislation targeting migrant Chinese workers—the Court upheld this legislation based on the "otherness" of the Chinese racial identity. Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889) ("[T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living."); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

116 Chuang, *supra* note 16, at 313.

as benefactors of minority au pairs.[117] They see their generosity as enabling au pairs from impoverished developing countries to come to the United States.[118]

There are multiple reports of exploitative host families and au pair sponsors using language with racialized, anti-immigrant undertones to command and coerce minority au pairs, including through overt threats of deportation.[119] For example, Sandra, an au pair from Colombia, stated that her host family commented in front of other people that she "[did] not know anything" and told her that "nobody [was] going to want an Au Pair who [didn't] speak proper English."[120] Caterina Rohde-Abuba's article "The Good Girl from Russia Can Do It All" highlights how host families often assigned extra work to au pairs from economically disadvantaged countries, assuming they would do anything to remain in the program.[121] In fact, to prevent au pairs from changing families, some au pair agencies even warned au pairs that they would be deported from the United States if they could not find a new family within two weeks.[122]

When faced with the possibility of increasing au pairs' weekly stipends, some host families react by threatening to leave the program.[123] Rather than acknowledging the

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117 *See* Rohde-Abuba, *supra* note 114, at 220 (noting host families' paternalistic attitudes as well as host families' misconceptions that earning income and accommodation in a middle-class home are the major benefits for au pairs, who are actually looking for language-learning opportunities and formal certificates).

118 *See id.*

119 *See* Zack Kopplin, *"They Think We Are Slaves": The U.S. Au Pair Program Is Riddled with Problems—and New Documents Show that the State Department Might Know More than It's Letting On*, POLITICO MAG. (Mar. 27, 2017), https://www.politico.com/magazine/story/2017/03/au-pair-program-abuse-state-department-214956/ [https://perma.cc/B9NY-MMS3] (noting that an anonymous au pair complained to the State Department that her host mother used threats of deportation to hold her in the house against her will, illegally forcing her to work long hours uncompensated).

120 *See* Hernández García, *supra* note 89, at 134–36.

121 Rohde-Abuba, *supra* note 114, at 220.

122 *See* INT'L HUM. RTS. L. CLINIC ET AL., SHORTCHANGED: THE BIG BUSINESS BEHIND THE LOW WAGE J-1 AU PAIR PROGRAM 19 (2018), https://cdmigrante.org/wp-content/uploads/2018/08/Shortchanged.pdf [https://perma.cc/UX2K-KVGD] ("Any au pair who leaves her host family is allowed only two weeks to arrange a 'rematch' with a new host family . . . When an au pair fails to rematch, she must return to the home country. . . .").

123 *See, e.g.*, Comment Letter on DOS-2023-0025-0001 Proposed Rule to Exchange Visitor Program: Au Pairs (Oct. 30, 2023), https://www.regulations.gov/comment/DOS-2023-0025-0064 [https://perma.cc/25KS-6LKX].

hardship they would face without the au pair's assistance, one family suggested they would give the job opportunity to an undocumented immigrant instead.[124] This attitude pervades globally. In a study on Latinx au pairs in France, Colombian au pair Ximena, whose brother lives in Sweden, noted that her French family sees her as "people who have nothing and come to France and open her eyes."[125]

C. Precarious Legal Status Embedded in a Guest Worker Program

Most legal scholarship examining the lives of migrant domestic workers has focused on undocumented women.[126] In recent years, scholars have paid increasing attention to immigrants in the gray areas between full citizenship and undocumented status by employing "liminal legality" and "precarity" as theoretical frameworks.[127]

The term "liminal legality" captures the institutional production of multiple categories of "less-than-full-status" non-citizenship, including authorized and unauthorized forms.[128] It is often characterized by lingering temporariness and ambiguity of a person's present or future legal status due to their lack of citizenship.[129] This legally imposed uncertainty has shaped immigrant workers' experiences of partial belonging, insecurity, and instability, and workers with "liminal" status often experience less security, fewer opportunities for mobility, and a diminished sense of independence over their day-to-day work.[130]

This Part argues that the au pair program, though not defined as a guest worker program, *de facto* functions as one by subjecting au pairs to precarious legal status. When liminal legality collides with workers' pre-existing vulnerabilities along the lines of race, gender, class, and national origin, workers are often more likely to encounter coercive

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124 *See id.*

125 Durin, *supra* note 106, at 163–64.

126 *See, e.g.*, Diana Vellos, *Immigrant Latina Domestic Workers and Sexual Harassment*, 5 AM. U. J. GENDER & L. 407 (1997); Annie Flanagan, Note, *Reaction to: Domestic Work in the United States: Gender, Immigration, and Personhood*, 10 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 89 (2018).

127 *See generally* GOLDRING & LANDOLT, *supra* note 10; Menjívar, *supra* note 12.

128 GOLDRING & LANDOLT, *supra* note 10, at 14–20; *see* Chacón, *supra* note 12, at 713–18.

129 *See* Chacón, *supra* note 12, at 713–18.

130 *See generally* Shannon Gleeson & Kati L. Griffith, *Employers as Subjects of the Immigration State: How the State Foments Employment Insecurity for Temporary Immigrant Workers*, 46 LAW & SOC. INQUIRY 92 (2020).

mistreatment and exploitative environments. Chilled by the consequence of losing their legal status, these workers are also less likely to assert their rights.

First, for some minority au pairs, the program operates as a form of debt bondage, like the Bracero Program. The out-of-pocket enrollment fee for an au pair typically hovers between $1,000 to $2,000.[131] However, the total administrative cost can unexpectedly soar, at times exceeding $4,000 due to visa fees, embassy review fees, immigration documentation, and travel expenses.[132] Some au pairs from countries with weaker currencies resort to borrowing money to participate in this program with the intention of repaying the debt using remittances in U.S. dollars.[133] In some cases, unscrupulous sponsors pressure au pairs' family members to sign documents vouching for them, which may contain loan agreements claiming that the au pairs have borrowed from the sponsors.[134] The Southern Poverty Law Center's report on J-1 programs notes that one loan agreement claimed that the au pairs had borrowed $7,000 from the agency and required the au pairs' family members to put up their homes as collateral in the event that they failed to return.[135]

The current structure of the au pair program binds au pairs through two layers of dependency. First, au pairs' legal statuses are sponsored by and dependent upon their au pair agencies, who restrict au pairs' mobilities to rematch with new families.[136] On paper, the rematch process should function as a safety net for when an au pair wishes to change their host families. In reality, au pairs' rights to seek a new placement or "rematch" are contingent upon their receipt of a positive recommendation from their host families.[137] In other words, host families can limit au pairs' mobilities through threats of negative reviews and verbal abuse.

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131 Salama, *supra* note 84.

132 *See id.*

133 *See* MEREDITH B. STEWART, S. POVERTY L. CTR., CULTURAL SHOCK: THE EXPLOITATION OF J-1 CULTURAL EXCHANGE WORKERS 3–4 (Booth Gunter et al. eds., 2014), https://www.splcenter.org/wp-content/uploads/files/d6_legacy_files/downloads/publication/j-1_report_v2_web.pdf [https://perma.cc/DH2D-HPA9].

134 *See id.* at 18.

135 *See id.*

136 *See* Muirhead, *supra* note 75, at 15; Chuang, *supra* note 16, at 306.

137 *See id.*

Au pairs lack equal bargaining power within the program. In her lawsuit against her former host family, Colombian au pair Tatiana Cuenca-Vidarte contended that her family limited her mobility through the "veiled threat of deportation."[138] Aware of their control over Cuenca-Vidarte's replacement, the host family threatened her with a negative reference if she refused to "comply with their every demand, including their demands that she work in excess of the weekly 45-hours set by the contract."[139] After the host family "blocked her access to the internet and gave her negative references," three potential host families who initially expressed interest in hiring Cuenca-Vidarte later declined.[140] Cuenca-Vidarte's co-plaintiff, former au pair Sandra Peters, had a similar experience.[141] Peters stated that her host family restricted her free time, demanded she return to the house hours prior to the start of her shift, and threatened to call the program to have Peters deported.[142] Cuenca-Vidarte and Peters' lawsuit is just one example of how host families can use verbal abuse to belittle and degrade au pairs to prevent them from entering into the rematch procedure. Au pair agencies, viewing host families as repeat customers, often prioritize host family interests over those of the au pairs.[143] According to a complaint in the State Department's Freedom of Information Law library, one au pair told her agency that her host family threatened to deport her unless she did what they demanded.[144] The local coordinator assigned to the au pair refused to interfere because the au pair had "signed a contract."[145] "3,505 complaints were received by sponsors," yet no sponsors or families were ever held accountable.[146]

Au pairs experience an additional level of dependency on au pair agencies—centered around their ability to immigrate to the United States in the future. Agencies have the power to control whether an au pair can obtain a future visa.[147] Professor Chuang notes that

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138 Tatiana Cuenca-Vidarte v. Samuel, No. GJH-20-1885, 2022 U.S. Dist. LEXIS 179633, at *8–10 (D. Md. Sept. 30, 2022) (citations omitted).

139 *Id.*

140 *Id.*

141 *See id.*

142 *See id.*

143 *See* Kopplin, *supra* note 119.

144 *Id.*

145 *Id.*

146 *Id.*

147 *See* Chuang, *supra* note 16, at 302.

when au pairs report to leave abusive families, an au pair agency may exercise its discretion to either repatriate them or to facilitate a rematch.[148] If an agency repatriates an au pair, they can designate the au pair's program status as either "inactive" or "terminated."[149] An "inactive status indicates successful completion of the program, whereas terminated signals an au pair's failure to comply with the federal regulations, which according to ECA officials, may prevent a participant from receiving a future U.S. visa."[150] It is only on the limited occasions that there is a formally filed complaint from an au pair that the State Department will actually review an agency for misconduct and potentially intervene.[151] As of 2017, no au pair agency has been penalized for misconduct.[152]

This imbalance of power and dependency can have more severe consequences for minority au pairs. Because they are often more motivated by long-term educational or migratory goals, the threat of deportation or program termination carries greater weight.[153] In contrast, most German and Austrian au pairs characterize their program as a "gap year" or "time-out."[154] Viewing the au pair program as a carefree time abroad, many German and Austria au pairs express their motivations for participating in the au pair program as stemming from a desire to extend adolescence while still embracing an identity of an independent world explorer or "global nomad[]."[155] As a result, for these au pairs, leaving the program because of poor working conditions or threats of termination is merely a disappointing inconvenience, not a derailment of long-term aspirations.

Au pair agencies' marketing campaigns partially contribute to minority au pairs' aspirational perspectives, often leading them to remain in the program at all costs.[156] They conduct marketing campaigns in Latin American universities, promising that au pairs will gain qualifications through cultural exchange programming under the J-1 Exchange Visitor

148 *See id.* at 305–06.

149 *See id.*

150 *Id.*

151 *See id.*

152 *See* Kopplin, *supra* note 119.

153 *See* Christine Geserick, *'I Always Wanted to Go Abroad. And I Like Children': Motivations of Young People to Become Au Pairs in the USA*, 20 YOUNG 49, 61–64 (2012); Cuban, *supra* note 101, at 236–37.

154 Geserick, *supra* note 153, at 51–52.

155 *Id.* at 63.

156 *See* Cuban, *supra* note 101, at 246–47.

visa category.[157] Taking advantage of the notion of the "American Dream," or "El Sueño Americano," they paint a rosy picture that au pairs will be able to study in the United States.[158] Some university colleagues promote the program to potential au pairs, lending it more credibility.[159] Joanna Beltran, the plaintiff in the first class action against au pair agencies, told the *Washington Post* that she was sold the "American Dream."[160] Sandra Peters claimed that she incurred substantial debt to participate in the program.[161] Sondra Cuban noted that one of her au pair interviewees expressed a desire to pursue higher education, saying she "really want [sic] to study, graduate master's [sic], study something else to complement [her] bachelors [sic] or work in school."[162] For minority au pairs who are more invested in the program's ability to connect them with their education goals, their aspirational perspectives can make them more susceptible to exploitation.

Liminal legality imposes a significant psychological burden on minority au pairs. Immigrants living with uncertain legal status often shape their lives around this imposed uncertainty.[163] Viewing the au pair program as a pathway to academic advancement or as a necessary sacrifice, minority au pairs are thus more willing to endure unreasonable exploitation.[164] This may elucidate why many au pairs chose to remain in the au pair program during the pandemic, even as the program's primary function inappropriately shifted to childcare.[165] Despite their challenging circumstances, the prospect of maintaining their legal status likely outweighed the difficulties these minority au pairs faced, ultimately compelling them to stay and endure their unideal situations.

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157 *See id.*

158 *See* Hernández García, *supra* note 89, at 20–22.

159 *See* Cuban, *supra* note 101, at 246.

160 Lydia DePillis, *Au Pairs Provide Cheap Childcare. Maybe Illegally Cheap.*, WASH. POST (Mar. 20, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/20/au-pairs-provide-cheap-childcare-maybe-illegally-cheap/ [https://perma.cc/W9Q9-2YSU].

161 *See id.*

162 *See* Cuban, *supra* note 101, at 247.

163 *See* SHANNON SCHUMACHER ET AL., UNDERSTANDING THE U.S. IMMIGRANT EXPERIENCE: THE 2023 KFF/LA TIMES SURVEY OF IMMIGRANTS (2023) ("Among likely undocumented immigrants . . . four in ten say they have avoided things such as talking to the police, applying for a job, or traveling because they didn't want to draw attention to their or a family member's immigration status.").

164 *See supra* notes 138–147.

165 *See supra* Part I.C.

D. Cycles of Liminal Legality—the Precarious Path After the Program

For many minority au pairs considering the program's educational prospects, the au pair program actually transforms into their pathway to further precarity.[166] Au pair agencies advertise two stages of educational advancement. First, they advertise the chance for au pairs to take classes and learn English while they are in the program. Second, they advertise that au pairs can also apply to American universities; if admitted, the university will be their new visa sponsor, and they can switch their visas to F-1 visas.[167] These two stages are interrelated. Au pairs who do not achieve their educational goals in the first stage are incentivized to still pursue the second stage because they do not want these two years to be sunk costs.

Scholars have noted that it can be difficult to successfully attain the educational goals as advertised by au pair agencies.[168] The program itself does not offer accredited degrees, certifications, or credited courses.[169] Au pairs usually take classes ranging from Zumba to ESL (English as a second language classes) that hardly provide them with the qualifications or professional capacities they envision.[170] In addition, host families may thwart their au pair's education, believing that her coursework deviates her attention from childcare.[171]

The United States immigration regime provides few viable means for au pairs to remain in the country legally after their program ends, despite the idealized vision of the American Dream au pair agencies promote. The J-1 visa is strictly time-limited, expiring immediately after the two-year participation period with few transition options for continued legal residency.[172] Most alternative visa categories tie an immigrant's legal status to employer sponsorship, which might provide even fewer labor protections than the au pair program

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166 *See* McLaughlin & Hennebry, *supra* note 8, at 186–87 (noting that the farmworkers hoping to immigrate to Canada in temporary guest worker programs are subject to a "vicious cycle of precarity" because of the lack of legal pathways).

167 *See* Cuban, *supra* note 101, at 241.

168 *See id.* at 247.

169 *See id.*

170 *See id.*

171 *See id*. at 244 ("However the family stalled her progress in the program due to the hours they insisted she work for them. The beginning of every quarter was a complex power negotiation between herself and her employers about which courses she could take and when and which books she really needed.").

172 Immigration and Nationality Act, 8 U.S.C. § 1182(e).

itself.[173] Some au pairs choose to apply for an F-1 student visa by applying to and enrolling in American universities, but this path has several potential hurdles.[174] Minority au pairs often underestimate the high tuition costs in the United States, having come from countries that offer tuition-free higher education.[175] Moreover, as international students, former au pairs are not eligible for federal funding or loans.[176] This issue is compounded by the fact that many au pairs already have bachelor's degrees, so many au pairs feel more inclined to attend expensive research universities instead of cheaper alternatives like community colleges. Some Ph.D. programs also deny stipends for international students or limit their enrollment altogether.

For former au pairs, getting into a degree program in the first place can be an uphill battle; affording the program without working in the shadow economy would seem practically impossible. In a study of twenty former au pairs from Latin America, only seven transitioned their visa to F-1.[177] All seven of them continued to work as nannies under the table, perhaps because the F-1 student visa forbids any form of off-campus employment and limits the hours of on-campus jobs except in rare cases of extreme hardship.[178] Working in the shadow economy, these au pairs are subject to vulnerabilities comparable to those of undocumented domestic workers. One former au pair lost her legal status because she could

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173 Some host families would apply for an EB-3 visa (Employment-Based Third Preference) for au pairs. The EB-3 visa requires employer sponsorship in almost all cases. Unlike some other employment-based Green Card categories (such as the EB-1A for extraordinary ability or EB-2 National Interest Waiver), the EB-3 does not allow self-petitioning and must be sponsored by a United States employer. Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3).

174 *See* Cuban, *supra* note 101, at 241.

175 Major sending countries such as Brazil, Colombia, and Mexico offer free tuition; tuition in many other large sending countries such as Mexico only amounts to approximately $1,000 per year, a stark difference from the American education system. *See, e.g.*, TOP UNIVS., STUDY IN MEXICO, https://www.topuniversities.com/where-to-study/latin-america/mexico/guide [https://perma.cc/9H8R-98YV]; TIMES HIGHER EDUC., THE COST OF STUDYING AT A UNIVERSITY IN BRAZIL (Aug. 23, 2015), https://www.timeshighereducation.com/student/advice/cost-studying-university-brazil [https://perma.cc/2LDJ-S2FQ]; COLOM. EDUC. INFO, COST OF STUDY AND LIVING IN COLOMBIA, https://www.colombiaeducation.info/international-students/studying-and-living.html [https://perma.cc/4FE6-MLGZ].

176 *See* U.S. DEP'T OF EDUC., FEDERAL STUDENT AID, ELIGIBILITY FOR NON-U.S. CITIZENS, https://studentaid.gov/understand-aid/eligibility/requirements/non-us-citizens [https://perma.cc/3C9Q-KP5G].

177 *See* Cuban, *supra* note 101, at 241.

178 *See id.*

no longer afford her tuition.[179] She lived with her boyfriend and worked as a nanny after overstaying her visa and becoming undocumented.[180] In this way, the U.S. immigration regime creates a cycle of precarious status.

The feelings of uncertainty surrounding one's legal status may persist for years or even decades until one obtains permanent legal residence. To avoid this uncertainty, some au pairs resort to marriage for a pathway to legal status, but marriage may lead to its own dependency issues and still trap au pairs in domestic work.[181] An au pair's ability to obtain citizenship would remain contingent on her husband's goodwill for at least five years pursuant to the family-based immigration rules; this dependent status may subject her to the risk of domestic abuse and violence.[182] The racialized and sexualized image of au pairs as exotic, domestic, and caring heightens the risk of abuse within marriage.[183] Moreover, economic independence may be difficult to obtain, as even immigrant women who have high educational attainments are often bound to domestic work in their arrival countries.[184]

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179 *See id.* at 248–49.

180 *See id.*

181 *See* Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401 (1993) (discussing how immigrant women whose legal immigration status depends on their spouses are vulnerable to domestic violence and abuses); Carin M. Bowes, *"Male" Order Brides and International Marriage Brokers: The Costly Industry That Facilitates Sex Trafficking, Prostitution, and Involuntary Servitude*, 18 CARDOZO J.L. & GENDER 1 (2011).

182 *See* Anderson, *supra* note 181.

183 Scholars have noted factors such as immigration status to citizenship, language barriers, financial dependence, and intersectionality (race, ethnicity, class, etc.) fueled domestic violence in cross-border marriages. *See generally* Muhamad Helmi Bin Md Said & Grace Emmanuel Kaka, *Domestic Violence in Cross-Border Marriages: A Systematic Review*, 24 TRAUMA VIOLENCE & ABUSE 1 (2023). Regarding the relationship between sexualized bodies and violence, scholars have noted that gendered racialization of Asian women portrays them as hypersexual and disposable bodies for white male use. *See, e.g.*, Maria Cecilia Hwang & Rhacel Salazar Parreñas, *The Gendered Racialization of Asian Women as Villainous Temptresses*, 35 GENDER & SOC'Y 567, 567–76 (2021). Regarding the sexualization of au pairs, see Cox, supra note 74, at 285.

184 *See* PEI-CHIA LAN, GLOBAL CINDERELLAS: MIGRANT DOMESTICS AND NEWLY RICH EMPLOYERS IN TAIWAN 10 (2006). ("Filipina women have dominated the global domestic labor market because of their English-language skills and relatively high levels of education. It is not unusual to find middle-class, college-educated Filipinas working overseas as maids and caretakers.").

III. Marginalization of Minority Au Pairs, Class Actions, and the Current Legal Landscape

Despite the persistent exploitation of au pairs, enforcement mechanisms remain largely ineffective.[185] This Part first explores how au pairs have increasingly turned to class action litigation as a primary means of redress.[186] This Part then explores how these lawsuits have prompted regulatory action, such as the State Department proposing new rules and a revised compensation structure.[187]

However, while these legal developments represent a step toward recognizing au pairs as local workers instead of "cultural workers" outside of the law,[188] this Note argues that they fail to address the distinct vulnerabilities of minority au pairs in two critical ways. First, by focusing primarily on wage theft, both class action lawsuits and regulatory reforms target only a symptom of the broader structural inequalities that minority au pairs face along the lines of gender, race, class, and national origin.[189] Other forms of mistreatment—ranging from debt bondage and racialized recruitment by au pair agencies to fear of retaliation by host families—often remain unaddressed.[190] Second, minority au pairs are less likely to participate in litigation due to their precarious legal standing, limited legal awareness, and the uncertainty imposed by "liminal legality." Uncertainty surrounding an au pair's legal status not only obscures her rights but also fosters hesitation in pursuing legal action. The fear of retaliation from her host family or au pair agency—heightened by weak anti-retaliation safeguards and restricted access to legal support—further deters her from coming forward.[191] Addressing these issues requires expanding au pairs' access to labor organizations and collective advocacy efforts. Existing legal frameworks governing

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185 Scholars and advocates have extensively criticized the Department of State's failure to adequately oversee the au pair program and protect au pairs from exploitation, pointing to insufficient resources, understaffing, untransparent reporting channels, and the complete delegation of adjudicative authorities to au pair agencies. *See generally* Muirhead, *supra* note 75; Kopplin, *supra* note 119; Coleman, *supra* note 50. The *Politico Magazine* report, in particular, highlights that no host families or agencies have been held accountable for their wrongdoings or failure to interfere. *See* Kopplin, *supra* note 119.

186 *See infra* Part III.A.

187 *See* Exchange Visitor Program–Au Pairs, 88 Fed. Reg. 74071, 74071–97 (proposed Oct. 30, 2023).

188 *See* Shayak Sarkar, *The New Legal World of Domestic Work*, 32 YALE J.L. & FEMINISM 1, 34 (2020).

189 *See infra* Part III.A.

190 *See infra* Part III.A.

191 *See infra* Part IV.

collective bargaining and workplace protections largely exclude domestic workers.[192] As the structural gaps in labor law intersect with the chilling effect of "liminal legality" on legal mobilization, many minority au pairs' grievances are left completely unresolved.

A. Federal and State Minimum Wage Law Litigation

While the au pair program defines au pairs as "cultural exchange" agents playing the roles of ambassadors, au pairs have successfully vindicated their rights as workers entitled to minimum wage standards and overtime pay in the past decade.[193] This success can be attributed to two "bottom-up" developments: (1) states' enactment of a Domestic Workers' Bill of Rights, championed by the National Domestic Workers Alliance, and (2) federal class action lawsuits filed by au pairs.[194] These class actions have allowed a group of named plaintiffs to act as private attorneys general representing a larger number of similarly situated au pairs.[195] Au pairs falling within the scope of the class action—typically those who worked in a specific state within a certain time period—can join the case by opting in.[196]

1. Au Pairs Acting as Private Attorneys General in Class Action Litigation

In 2014, Joanna Paola Beltran, a former Colombian au pair, filed a class action lawsuit in the District Court of Colorado on behalf of eleven au pairs, alleging federal and state wage violations against au pair agencies.[197] Beltran argued that the au pairs were

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192 *See infra* Part III.

193 *See* Coleman, *supra* note 50, at 431.

194 *See infra* Part III.B.

195 *See infra* Part III.B.

196 *See* Coleman, *supra* note 50, at 431. After opting in, an individual au pair will become a class member and agree to be bound by the outcome of the case. *See id.* They can benefit from the outcome without pursuing their own individual lawsuits, but they also give up their right to sue the defendant(s) separately for the same claims covered by the class action. *See id.*

197 Complaint, Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066 (D. Colo. 2016) (No. 983). Claims brought by the *Beltran* plaintiffs included, *inter alia*, breach of fiduciary duty and negligent misrepresentation. *Id.* Though the *Beltran* court determined that the plaintiffs had sufficiently alleged these claims at the motion to dismiss stage, *id.*, the claim regarding violations of federal and state minimum wage law—specifically, violations of the Fair Labor Standards Act (FLSA) and Massachusetts state and hour law—had the most influence in subsequent litigations. As a result, this Subsection focuses on the state and federal minimum wage law claims.

employees of the au pair agencies—who were "joint employers" liable for minimum wage law violations.[198] The au pair sponsors attempted to defend themselves by emphasizing the "cultural exchange" nature of the program and characterized themselves as merely visa sponsors.[199] Noting evidence of an employment relationship, the court ruled that the au pairs had sufficiently alleged a joint-employer relationship to survive a motion to dismiss.[200]

The court additionally found that the FLSA applied to the au pairs, citing the statute's explicit requirement that au pairs be paid "in conformance with" the FLSA's requirements "as interpreted and implemented by the Department of Labor."[201] The more complex issue was whether the preemption doctrine would bar the application of state minimum wage and overtime laws.[202]

The au pair sponsors then tried to argue that the obstacle preemption doctrine[203] barred the application of state minimum wage and overtime laws—specifically that the program's

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198 *See* Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066, 1079 (D. Colo. 2016).

199 *Id.*

200 *See id.* at 1079–80 (noting that au pair agencies recruit the au pairs, effectively dictate their wages, are statutorily obligated to ensure timely payment, exert control over their work conditions, and have the power to terminate au pairs without the consent of the host family and cause their removal from the United States).

201 *Id.* at 1080–82.

202 *See id.*

203 The preemption doctrine refers to the idea that a higher authority of law will displace the law of a lower authority of law when the two authorities come into conflict. When state law and federal law conflict, federal law preempts state law due to the Supremacy Clause of the Constitution. U.S. Const. art. VI, § 2. *See also, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992). Express preemption occurs when federal laws contain express preemption clauses. There are two types of implied preemption—field preemption and conflict preemption. Field preemption occurs when the court finds that Congress intended the federal law to occupy the entire "field" of an issue. *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (explaining that field preemption occurs where a federal statutory scheme is "so pervasive as to make reasonable the inference that Congress left no room for States to supplement it," or where federal law concerns "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"); Arizona v. United States, 567 U.S. 387 (2012); De Canas v. Bica 424 U.S. 351 (1976). Conflict preemption is broken down into two categories: impossibility preemption—when it is impossible to comply with both state and federal law—and obstacle preemption—when a state law interferes with Congress' full purpose of the law. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (noting state law can interfere with federal goals by frustrating Congress' intent to adopt a uniform federal regulatory framework, conflicting with Congress' goal of setting a regulatory "ceiling" for specific products or activities, or by hindering the vindication of a federal right); Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 875 (2000); Felder v. Casey, 487 U.S. 131, 153 (1988).

"regulatory framework" mandated uniform wage compensation and applying state law would disrupt this uniformity and present an obstacle to the program's goals.[204] However, the court disagreed, offering two reasons why state laws are not preempted.[205] First, even though the regulation expressly provides that the au pair program conforms with the FLSA without exception, the FLSA only provides a wage floor, not a ceiling.[206] That is, if a state sets a higher minimum wage than the FLSA mandates, employers within that state must comply with the higher state standard.[207] Second, the Court noted that the rules governing the au pair program allowed host families to deduct room and board based on actual costs rather than a uniform deduction.[208] This practice means that au pairs do not receive uniform wages.[209] Therefore, the Court found the sponsors' argument unpersuasive and allowed the case to proceed.[210]

While *Beltran v. InterExchange, Inc.* was pending, there was also a surge in movements advocating for the protection of domestic laborers, a group whose protections have historically been contested.[211] When enacted during the New Deal Era, the FLSA and the National Labor Relations Act (NLRA) both excluded live-in domestic workers from labor protections.[212] The FLSA now recognizes live-in domestic service workers as employees for the purpose of the federal minimum wage, but it still excludes them from overtime pay.[213] During the 2010s, the National Domestic Workers Alliance—an organization representing nannies, house cleaners, and home care workers—campaigned for the passage of the Domestic Workers Bill of Rights ("DWBOR").[214] As of February 2025, twelve states,

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204 *See Beltran*, 176 F. Supp. 3d at 1083–84.

205 *See id.* at 1084.

206 *See id.*

207 *See id.*

208 *See id.*

209 *See id.*

210 *See id.*

211 *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 96 (2011).

212 *See id.* at 131.

213 *See* 29 C.F.R. § 552.3 (2025).

214 *See Domestic Worker Bill of Rights*, NAT'L DOMESTIC WORKER ALL., https://www.domesticworkers.org/programs-and-campaigns/developing-policy-solutions/domestic-workers-bill-of-rights/ [https://perma.

the District of Columbia, and two major cities have now enacted different versions of the model bill.[215]

In 2014, Massachusetts passed the Massachusetts DWBOR Act, which set forth workplace protections for domestic workers.[216] Considering au pairs as "domestic workers" and their host families as "employers" within the meaning of the DWBOR Act, the Massachusetts state attorney general issued regulations requiring host families to adhere to Massachusetts wage and hour laws, which require higher hourly wages and more onerous recordkeeping requirements than the FLSA.[217] In response to these heightened labor protections, the au pair agency Cultural Care filed suit against the Massachusetts attorney general in *Capron v. Office of the Attorney General of Massachusetts* as a collateral attack on *Beltran*.[218] Notably, in *Capron*, both parties stipulated the existence of an employment relationship between the host families and the au pairs, thus acknowledging au pairs' entitlement to labor protections as employees.[219]

Similar to the *Beltran* case, the central issue in *Capron* revolved around whether the au pair program, administered by the federal State Department, preempted Massachusetts state law.[220] Cultural Care argued for preemption based on both field preemption and obstacle preemption.[221] Under the field preemption doctrine, they contended that the federal government's comprehensive regulatory framework for the program, coupled with its interest in immigration and foreign relations, demonstrated an intent to exclusively regulate au pairs.[222] Under the obstacle preemption doctrine, they argued that adhering to state law would obstruct the federal objective of establishing a uniform standard for compensation and administrative requirements within the au pair program.[223] The State

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215 *See* NAT'L DOMESTIC WORKER ALL., *supra* note 214.

216 MASS. GEN. LAWS ch. 149, § 190 (2015).

217 940 MASS. CODE REGS. 32.00–.06.

218 *See* Capron v. Off. of the Att'y Gen. of Mass., 944 F.3d 9, 18–19 (1st Cir. 2019).

219 *See id.* at 19.

220 *See id.* at 20.

221 *See id.*

222 *See id.* at 22.

223 *See id.* at 27.

Department supported Cultural Care's position through an amicus brief, stating that any changes to the au pair program should be made "not through litigation but through rulemaking by the State Department" because Congress had vested regulatory oversight of exchange programs in the State Department, not in individual states.[224]

The First Circuit rejected both of Cultural Care's arguments. First, the court found insufficient evidence of federal intent to preempt an entire field of state employment law—a realm traditionally under local jurisdiction. The court stated, "It is hardly evident that a federal foreign affairs interest in creating a 'friendly' and 'cooperative' spirit with other nations is advanced by a program of cultural exchange that, by design, would authorize foreign nationals to be paid less than Americans performing the same work."[225] The court did not find the foreign affairs argument dispositive, nor did it see a clear federal interest in allowing au pairs to be paid less than workers in the states they resided in. Second, the First Circuit found no evidence to support the argument that following state law would disrupt the program's goals.[226] Rather, the court found that the State Department's regulations were intended to accommodate the Department of Labor's determination that au pairs are employees entitled to wage and hour protections under state employment law.[227] In response to the State Department's amicus brief, the court conceded the degree of deference it owed to the agency's interpretation but nonetheless found the regulatory history invoked by the State Department unpersuasive.[228]

After *Capron*, au pair litigation largely shifted toward state minimum wage and overtime claims—and it was successful.[229] In 2018, the *Beltran* parties reached a $65.5 million settlement.[230] Later in 2021, the First Circuit affirmed the employment relationship

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224 Brief for the United States as Amicus Curiae Supporting Petitioners at 26, Capron v. Off. of the Att'y Gen. of Mass., 944 F.3d 9 (1st Cir. 2019) (No. 17-2140) 2018 WL 4740081.

225 *Capron*, 994 F.3d at 26.

226 *See id.* at 32.

227 *See id.* at 32–33.

228 *See id.* at 42.

229 *See, e.g.*, Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066, 1079–80 (D. Colo. 2016); Morales Posada v. Cultural Care, Inc., 554 F. Supp. 3d 309, 322 (D. Mass. 2021), *aff'd on other grounds sub nom.* Posada v. Cultural Care, Inc., 66 F.4th 348 (1st Cir. 2023).

230 *See* Beltran v. InterExchange, Inc., No. 14-CV-03074-CMA-KMT, 2019 U.S. Dist. LEXIS 128676, at *4–14 (D. Colo. Aug. 1, 2019).

between au pairs and sponsoring agencies in a putative class action brought by au pairs.[231] And in 2022, another au pair class action in California resulted in a $1 million settlement for the au pairs.[232] Scholars have emphasized these lawsuits' significance in strengthening worker protections, despite legal challenges posed by foreign affairs and preemption doctrines.[233]

2. The Weaknesses and Limitations of Au Pair Class Action Litigation

Although the series of au pair class action litigation was largely successful, relying on litigation is insufficient to fully protect au pair interests, especially the interests of minority au pairs. While class actions allow immigrant workers to *de facto* act as private attorneys general, the procedural complexities of litigation demand significant time, resources, and emotional investment.[234] The "opt-in" mechanism allows less-resourced au pairs to participate in lawsuits without active involvement, but structural barriers—including isolation, atomization, cultural conditioning, and minority au pairs' precarious status—may prevent au pairs from actually recognizing or pursuing these claim-making opportunities. Marginalized groups facing legal, social, or political discrimination often require affirming experiences with the legal system before they can fully perceive themselves as rights-bearing individuals with legally cognizable grievances.[235]

Cultural factors may further discourage claim-making. Latinx immigrants, for instance, might be dissuaded from asserting their rights due to cultural narratives—to "bear their burdens in solitude"—that emphasize individual endurance over collective action.[236] Denoted as a form of "self-abnegation," this narrative can lead individuals to internalize suffering rather than challenge unjust conditions.[237] For example, in a study conducted by

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231 *See* Morales Posada v. Cultural Care, Inc., 554 F. Supp. 3d 309, 322 (D. Mass. 2021), *aff'd on other grounds sub nom.* Posada v. Cultural Care, Inc., 66 F.4th 348 (1st Cir. 2023).

232 *See* Merante v. Am. Inst. for Foreign Study, Inc., No. 21-CV-03234-EMC, 2022 WL 291889, at *1 (N.D. Cal. July 25, 2022).

233 *See* Sarkar, *supra* note 188, at 38.

234 *See* Coleman, *supra* note 50, at 420.

235 *See* Grace Reinke, *"We Come Here to Work:" US Au Pairs and Rights Claiming During a Case Crisis*, 44 NEW POL. SCI. 565, 580 (2022).

236 Laura M. Padilla, *Re/Forming and Influencing Public Policy, Law and Religion: Missing from the Table*, 78 DENV. U. L. REV. 1211, 1215 (2001).

237 Coleman, *supra* note 50, at 410–11.

Mirza Aguilar-Pérez, Mexican au pairs frequently attributed their hardship to bad luck or the absence of divine intervention rather than systemic inequities.[238] These factors may contribute to the reluctance of some minority au pairs to engage in claim-making processes and seek legal recourse for their grievances.

More critically, fear of retaliation may discourage minority au pairs from asserting their rights, as their employers hold significant power over their immigration status.[239] Although no specific studies have been conducted on au pairs, similar patterns are evident in other guest worker programs.[240] For example, Mayee Crispin, an organizer for H-1 nurses at St. Bernard's Hospital in Chicago, has noted that 80% of the nurses there are single Filipina women, and many refrain from union organizing out of fear that their employer will withdraw visa sponsorship.[241] Similar to minority au pairs, these women have compelling reasons to remain in the United States, such as supporting their families back home or repaying debts incurred to enter the country.[242]

Storytelling is an expressive value of class actions, but procedural and other lawyering processes may sometimes downplay the racial and intersectional dimensions of minority au pairs' experiences.[243] Professor Llezlie Coleman has noted that, in a class action, lawyers may selectively extract parts of the narrative that conform to existing legal frameworks rather than weaving the law around the client's whole story.[244] Legal frameworks, including evidentiary and procedural rules, can further restrict storytelling by filtering out certain aspects of a worker's experience as irrelevant or inadmissible.[245] For instance, a court might exclude evidence of sexual harassment in a wage-theft case, even though the worker perceives both as interconnected forms of workplace exploitation.[246]

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238 *See* Aguilar-Pérez, *supra* note 100, at 465.

239 *See supra* Part II.D.

240 *See* CHANG, *supra* note 58, at 102.

241 *Id.* at 94, 107.

242 *See id.* at 123 (noting that most of these women live in a situation much like debt bondage for at least two years).

243 *See* Coleman, *supra* note 50, at 428–29.

244 *See id*.

245 *See id.* at 429.

246 *See id.*

A closer examination of the *Beltran* class action suggests that this phenomenon played out in that case. The initial *Beltran* complaint provides extensive details on the work experiences and hardships of au pairs, highlighting the "extreme suffering" they endured when sponsoring agencies failed in their obligations to protect vulnerable host families.[247] The complaint underscored the significant barriers au pairs face in asserting their rights, stating that they are "often tucked away in homes in scattered communities . . . with limited language skills."[248]

Indeed, the primary motivation behind the lawsuit does not appear to have been wage recovery. The complaint provided a detailed account of Beltran's experience: in addition to her childcare responsibilities, she was required to perform a wide range of household tasks unrelated to childcare, such as cleaning for the entire family (two adults and two children), cooking dinner nearly every night, doing the family's laundry, making the family's beds, packing and unpacking luggage for trips, cleaning her host mother's car daily, unloading groceries, and even tending to the family's garden and approximately eight chickens by feeding, watering, and cleaning the coop.[249] Despite preparing dinner for the family almost every night, Beltran was not allowed to eat with them.[250] While she was occasionally permitted to eat leftovers, there were times when no food was saved for her, forcing Beltran to prepare her own meals separately.[251] In her interview with the *Washington Post*, Beltran emphasized her motivation for the class action, stating that the sponsor agency had sold her the idea of "learning about a new culture."[252] Instead, her host family "treated her like a maid."[253]

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247 *See* Complaint at 5, Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066 (D. Colo. 2016) (No. 983).

248 *Id.* at 5.

249 *See id.* at 77–81.

250 *See id.* at 80.

251 *See id.* at 80.

252 DePillis, *supra* note 160.

253 *Id.* In addition to Beltran's experience, the complaint outlines exploitation experienced by other minority au pairs as well. *See* Complaint at 81–96, Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066 (D. Colo. 2016) (No. 983).
For instance, originally from Bogotá, Colombia, Ivette Gonzalez joined the program through an agency called Intercambio E Tourismo LTDA, paying approximately $1,600 in fees—$1,000 as an administrative charge and $600 as a refundable deposit contingent on completing the program and returning to Colombia. *Id.* at 86. Upon arriving in the United States, she was placed with a host family that severely restricted her autonomy. *Id.* at 86–88. The family imposed a strict curfew requiring her to be home seven hours before her childcare duties began, even though she was required to start caring for the infant at four a.m. each weekday after the parents

However, as the litigation progressed, the focus narrowed to wage theft—a universal concern for all au pairs. Following the success of the *Beltran* case on its FLSA claims, subsequent class actions focused exclusively on minimum wage and overtime violations, sidelining other forms of exploitation.[254] This narrowed focus obscures what many former au pairs and advocates identify as the more pressing issues for minority au pairs—such as racial discrimination, coercion, and workplace mistreatment.

Moreover, these class action lawsuits solely target au pair agencies, leaving exploitative host families untouched.[255] In *Capron*, where host families were not directly involved as defendants, au pairs submitted an amicus brief detailing severe mistreatment, including excessive workloads beyond childcare, invasion of privacy, restricted internet access, emotional abuse, harassment, food deprivation, and even confinement.[256] Despite these egregious abuses, host families have largely escaped scrutiny because the class action lawsuits have remained focused on wage recovery rather than the direct experiences of au pairs in their host households.

B. Abuse and Human Trafficking Litigation

In 2019, the State Department noted several incidents of abuses under the au pair program—some concerning wage theft, but twenty-five incidents involving physical and verbal abuse and the withholding of identity and immigration documents.[257] A Polaris report on human trafficking identified nineteen incidents of human trafficking in domestic

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left early for work. *Id.* at 87. Living in the suburbs without access to a car, Gonzalez felt isolated and alone. *Id.* at 87. In January 2015, after a heated argument with the host mother about the curfew, Gonzalez was abruptly expelled from the home the following morning, and the host mother ordered her not to return. *Id.* at 87–88. Gonzalez remained completely unpaid for two weeks of work. *Id.* at 88. While GoAuPair, her sponsor agency, initially agreed to help her find a new family, they refused to provide food or temporary housing. *Id.* at 88. Forced to rely on friends for shelter, Gonzalez spent weeks searching for a new placement, but GoAuPair was ultimately unable to find her a host family. *Id.* at 88. With no support system, she had to borrow money from a friend to purchase a flight back to Colombia. *Id.* at 88.

254 *See* Morales Posada v. Cultural Care, Inc., 554 F. Supp. 3d 309 (D. Mass. 2021), *aff'd on other grounds sub nom.* Posada v. Cultural Care, Inc., 66 F.4th 348 (1st Cir. 2023); Merante v. Am. Inst. for Foreign Study, Inc., No. 21-CV-03234-EMC, 2022 WL 291889 (N.D. Cal. July 25, 2022).

255 *See* Brief of Amici Curiae Worker Organizations in Support of Defendant-Appellees and Affirmance, Capron v. Off. of Att'y Gen. of Mass., 994 F.3d 9 (1st Cir. 2019) (No. 17-2140) 2018 WL 2016232, at *18–20.

256 *Id.* at *8–12.

257 U.S. DEP'T OF STATE, 2019 TRAFFICKING IN PERSONS REPORT 490 (2019), https://www.state.gov/wp-content/uploads/2019/06/2019-TIP-Report-Narratives-T-ZSpecial-Case.pdf [https://perma.cc/L5BM-CRFS].

work (though some of them may be under the Summer Work Travel program).[258] Yet, prior to the first class action brought by Beltran, few au pairs had filed any complaints against exploitative host families.[259] Instead, most cases involving au pairs only concerned issues such as child custody or assaults by third parties.[260] In other words, patterns of abuse and trafficking of au pairs persisted for around three decades without a single case filed in court. After *Beltran*, more au pairs began to bring lawsuits against their employers, largely due to the efforts of labor organizations.[261] On the one hand, these recent developments underscore how community organizing has improved marginalized workers' access to justice.[262] On the other hand, the stark contrast between the previous lack of litigation and the influx of accusations highlights the challenges involved in law enforcement and legal mobilization.[263]

1. Absence of Public Prosecution

The under-prosecution of abuse and trafficking of au pairs may be attributed to two main causes. First, scholars and advocates have identified a clear failure to prosecute labor trafficking.[264] The myth that all human trafficking is sex trafficking has led to the widespread under-prosecution of labor trafficking, which in turn reinforces this misconception.[265] Second, common barriers to investigation identified by scholars are aggravated in the

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258 *See* LILLIAN AGBEYEGBE ET AL., POLARIS, HUMAN TRAFFICKING AT HOME: LABOR TRAFFICKING OF DOMESTIC WORKERS 43 (Caren Benjamin ed., 2019), https://polarisproject.org/wp-content/uploads/2019/09/Human_Trafficking_at_Home_Labor_Trafficking_of_Domestic_Workers.pdf [https://perma.cc/4L7M-PU2V].

259 A search on Westlaw shows that prior to 2014, only labor trafficking outside the program as well as cases related to sexual assaults and sex trafficking were filed in court. The search term used is "au pair." There are 126 cases in total on Westlaw. Most cases were filed by host families against au pairs for negligent or abusive behavior.

260 *See e.g.*, McKenna v. Am. Inst. for Foreign Study Scholarship Found., No. 94-671-B, 1995 U.S. Dist. LEXIS 16609 (D.N.H. Nov. 3, 1995) (a sexual assault case); Metzer v. Metzer, 4 Pa. D. & C.5th 417 (Bucks Cnty. Ct. Cm. Pl. 2008) (a child support case).

261 *See infra* Part III.C.2.

262 *See infra* Part III.C.2.

263 *See infra* Part III.C.2.

264 *See, e.g.*, Annie Smith, *The Underprosecution of Labor Trafficking*, 72 S.C. L. REV. 477, 492–93 (2020) (noting the fact "[t]hat labor trafficking is underprosecuted is uncontroversial" and "increasing the number of prosecutions of labor trafficking has been among the top recommendations for the United States").

265 *See id.* at 479.

au pair context.[266] Au pairing takes place in private households that are typically beyond law enforcement's reach.[267] The myth of human trafficking as sex trafficking or physical constraints makes both law enforcement and au pairs unaware that what they experience amounts to labor trafficking.[268] Exploited au pairs are often isolated in private households with limited access to support networks and language barriers.[269]

The Trump administration's anti-immigrant rhetoric and harsh policies also work to deter au pairs from reaching out for help.[270] Additionally, law enforcement often expresses skepticism towards foreign nationals' reports of trafficking, and some even view the au pair program as an unethical springboard to immigration.[271]

2. Private Civil Lawsuits Holding Families Accountable

The Trafficking Victims Prevention and Reauthorization Act (TVPRA) permits both public and private causes of action.[272] With the help of the migrant rights organization Centro de los Derechos del Migrante, former au pairs Tatiana Cuenca-Vidarte and Sandra Peters initiated a lawsuit against their sponsoring agency and host parents in 2020.[273] Upon their arrival in the United States, they were inundated with substantial program fees.[274]

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266 *See id.* at 498–524 (noting workplace exceptionalism, pervasive myths, isolation of victims, fear and distrust of law enforcement, ongoing and credible coercion, skepticism of foreign national victims, insufficient training, maladaptive law enforcement strategies, and insufficient resources as the main sources of the difficulty in prosecuting labor trafficking).

267 *See id.* at 498–502. This Note uses the term "workplace exceptionalism" to describe the phenomenon where unlawful employer conduct has been normalized. Workers rarely benefit from the protection of the criminal justice system because regulating employers and conduct associated with the workplace may seem like a purely civil matter not appropriate for law enforcement intervention.

268 *See id.* at 498–504.

269 *See id.* at 505–06.

270 *See id.*

271 *See id.* at 511.

272 *See* 18 U.S.C. § 1595(a).

273 SANDRA AND TATIANA, TWO MARYLAND AU PAIRS SUE THEIR EMPLOYERS FOR TRAFFICKING, FORCED LABOR AND UNPAID WAGES, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., https://cdmigrante.org/sandra-and-tatiana-two-maryland-au-pairs-sue-their-employers/ [https://perma.cc/Y3BM-ZRGR].

274 Tatiana Cuenca-Vidarte v. Samuel, No. GJH-20-1885, 2022 U.S. Dist. LEXIS 179633, at *3–4 (D. Md. Sept. 30, 2022).

Working for the Samuel family at different times in 2016 and 2018, Cuenca-Vidarte and Peters reported similar negative working conditions. On top of compelling them to exceed agreed-upon work hours and duties, the host parents restricted their access to food, restricted their movement, issued deportation threats, and constantly monitored them through a network of surveillance cameras.[275]

During the course of their litigation, however, an issue arose regarding whether the *Beltran* settlement barred their lawsuit.[276] In January 2022, the defendants sought to dismiss their complaint, arguing that the *Beltran* settlement released Peters and Cuenca-Vidarte's claims because the claims arose out of the same au pair employment.[277] A Maryland federal judge agreed, holding that the defendants were covered by the settlement.[278]

Cuenca-Vidarte and Peters then turned to the Colorado courts for help.[279] Even though the host families were not parties to the *Beltran* litigation, the Colorado district court found them within the meaning of the settlement agreement.[280] Nonetheless, the Colorado court found the two claims distinct.[281] While the *Beltran* settlement agreement barred the *Beltran* class members from bringing state, FLSA, and TVPRA claims against au pair agencies, the Colorado court permitted Cuenca-Vidarte and Peters' TVPRA claims against their *host families* to move forward.[282] *Beltran* concerned minimum wage and overtime violations, but Cuenca-Vidarte and Peters' human trafficking claims arose from the host families illegally obtaining labor through force, abuse, threats, or serious harm.[283] The court emphasized that the *Beltran* settlement agreement did not prevent *Beltran* class members from filing labor

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275 *See id.* at *4–18.

276 *See id.* at *34–39.

277 *Id.*

278 *See id.*

279 *See* Beltran v. InterExchange, Inc., No. 14-CV-03074-CMA, 2023 U.S. Dist. LEXIS 30376 (D. Colo. Feb. 23, 2023).

280 *See id.* at *21.

281 *Id.* at *47.

282 *See id.*

283 *See id.* at *41–43.

trafficking claims against their host families, and thus the plaintiffs were not precluded from their TVPRA claims.[284]

Although this case is still pending, this part of the Colorado court's ruling holds promising implications for au pairs broadly. Any former au pairs who joined one of the existing three class actions would not be prevented from pursuing additional labor trafficking claims against their host families (although au pair agencies remain released from liability). Consequently, this development offers an additional avenue for au pairs to seek justice and assert their rights in federal court.

This case also underscores the crucial role played by migrant and labor rights organizations to help au pairs realize their legal rights. Unlike claims under the FLSA, it is unlikely that au pairs will bring class action lawsuits under the TVPRA because certification of a class action requires numerosity and uniformity.[285] Au pairs are unlikely to satisfy the numerosity requirement against a single host family, given that host families typically host fewer than three au pairs per year.[286] Moreover, meeting the commonality requirement against multiple host families would be challenging, as each au pair experiences varying degrees and types of abuse from different host families.[287] Consequently, pursuing a

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284 *See id.* at *43–44.

285 *See* Coleman, *supra* note 50, at 466.

286 For an example of where a class of plaintiffs failed to meet the numerosity requirement, see *Anderson v. Weinert Enterprises, Inc.*, 986 F.3d 773 (7th Cir. 2021) (holding that a proposed class of thirty-seven employees failed to meet the numerosity requirement; the court emphasized that geographic concentration of class members and the ability to recover attorneys' fees made joinder more practical). While there is no bright-line number, courts generally consider a class of forty or more to be sufficient. *See* Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986) ("[L]ess than 21 is inadequate, more than 40 adequate, with numbers between varying according to other factors.").

287 In *Wal-Mart Stores, Inc. v. Dukes*, the Court held that commonality means that the class members "have suffered the same injury," not just that all have suffered a violation of the same provision of law. 564 U.S. 338, 350 (2011). Moreover, the common contention must be of such a nature that it is capable of class-wide resolution, "which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id. See also* Ellis v. Costco Wholesale Corp., 657 F.3d 970, 981 (9th Cir. 2011) (vacating and remanding trial court's determination that plaintiffs met Rule 23's commonality requirement because the court failed to engage in a "rigorous analysis" on this point; relying on *Dukes* and noting that "Plaintiffs must have a common question that will connect many individual promotional decisions to their claim for class relief."); Jimenez v. Allstate Ins. Co., 765 F.3d 1161, 1165 (9th Cir. 2014) ("As *Dukes* and all of our subsequent caselaw have made clear, a class meets Rule 23(a)(2)'s commonality requirement when the common questions it has raised are 'apt to drive the resolution of the litigation,' no matter their number.").

TVPRA claim would likely entail significant costs for individual au pairs because they would be required to bring individual cases rather than join an existing class action lawsuit. Nonetheless, individualized TVPRA claims offer certain advantages. Unlike FLSA class actions, which demand uniformity, plaintiffs can tailor their cases to best suit their specific circumstances and shape their storytelling in an individualized manner.

IV. Other Mechanisms to Protect Au Pairs

In response to recent FLSA class action litigation, the State Department unveiled a proposal to amend the current au pair program on October 30, 2023.[288] Among the significant changes that would benefit au pairs was a new compensation system that aligns with state or local minimum wage levels, accompanied by a proposal to preempt various areas of law related to employment, wages, taxes, and other matters.[289] Additionally, the proposal introduced several measures aimed at enhancing the au pair program, including the implementation of host-family agreements to enhance transparency and align expectations between au pairs and host families, safety-oriented reporting requirements for sponsors regarding displaced au pairs in the rematching process, and host-family orientations to clarify that host families cannot restrict au pairs' access to identification documents and cell phones.[290]

However, while the State Department's attempt to initiate au pair program reform represents positive progress, it ultimately fails to adequately address many issues unique to minority au pairs. These proposed changes have yet to be formalized into rules, so this Article treats the proposals as initial steps toward crafting concrete solutions. This Section highlights shortcomings in the State Department's proposed solutions and proffers alternative options, such as defining au pairs as employees, increasing au pairs' access to justice, and formulating anti-retaliation laws and mechanisms.

A. Defining Au Pairs as Employees

The State Department's 2023 regulation proposals reaffirmed the program's identity as a "cultural exchange"[291]—rather than an employment relationship between au pairs and host

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288 *See* Exchange Visitor Program–Au Pairs, 88 Fed. Reg. 74071, 74071–97 (proposed Oct. 30, 2023).

289 *Id.* at 74077–82.

290 *Id.* at 74073–80.

291 *Id.* at 74072.

families, as recognized by district courts. In conventional terms, "employment" denotes a relationship between an employer and an employee where the employee provides labor or services to the employer in exchange for compensation with built-in legal protections.[292] A "cultural exchange," on the other hand, necessarily diverges from employment law protections as it implies reciprocity characterized by expressions of love and gratitude, blurring the boundary between work and personal life.[293]

It is often employers who characterize the au pair-host family relationship as familial.[294] Judith Rollins has observed that white employers often play the role of "benevolent mothers" as a way of confirming the inferior status of their domestic workers.[295] Similarly, Hondagneu-Sotelo has noted that maternalistic acts are prevalent among employers, reinforcing a "familial" dynamic.[296] While some au pairs may expect this, others may prefer a more professional relationship dynamic.[297] The au pair program's rhetoric of au pairs being "part of the family" only reinforces this existing practice.

This Article proposes that the government define au pairs as employees, rather than just participants in a cultural exchange. Under an employee status, minority au pairs would be able to utilize labor protections in both their home countries and the United States. Consequently, au pairs may be more likely to ask that their program grievances be addressed through employment negotiations that acknowledge their rights or possibilities for legal recourse. This shift in language creates the potential for a more equitable and empowered position for au pairs in advocating for their rights within the program.

B. Increasing Au Pairs' Access to Justice

The State Department's proposed rules attempted to reform family and au pair orientations, which include "know-your-rights" sessions.[298] These orientations are essential for informing both host families and au pairs about their rights and responsibilities. However,

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292 *See* Chuang, *supra* note 13, at 316–17.

293 *See id.* at 308–13.

294 *See infra* notes 315–318.

295 *See* JUDITH ROLLINS, BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS 156–70 (1985).

296 *See* HONDAGNEU-SOTELO, *supra* 4, at 182–88.

297 *See id.* at 217–21.

298 *See* Exchange Visitor Program–Au Pairs, 88 Fed. Reg. 74071, 74075 (proposed Oct. 30, 2023).

Professor Jennifer Gordon has observed that know-your-rights sessions led by attorneys often have limited effectiveness, particularly for immigrant workers.[299] Moreover, some au pairs have reported difficulty understanding their orientation due to language barriers.[300] Storytelling spaces and interactive communication methods, which create opportunities for dialogue and sharing personal experiences, may be more effective in facilitating and enhancing immigrant workers' understanding and ability to assert their rights.[301]

Unlike more clear-cut issues like wage theft, abuse and exploitation within the private home can manifest in subtler but nonetheless debilitating ways for au pairs. For example, an au pair who faces microaggressions such as discriminatory attitudes, assumed incompetence, and forced isolation—all commonly experienced by immigrant domestic workers—may not actually have any legally cognizable claims to redress these harms.

Ai-Jen Poo, the president of the National Domestic Workers Alliance, has called for reforms related to au pairs' "rights, respect, and recognition."[302] Even in situations where immigrant women are unable to pursue legal action or assert specific legal rights, they still have the power to demand dignity and respect from their employers.[303] It is important to move beyond a narrow scope of legal "rights" because advocacy could come in the form of raising cultural consciousness through meaningful interpersonal conversations.[304]

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299 *See* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 116 (2005).

300 *See* Tatiana Cuenca-Vidarte v. Samuel, No. GJH-20-1885, 2022 U.S. Dist. LEXIS 179633, at *11–12 (D. Md. Sept. 30, 2022).

301 *See* GORDON, *supra* note 299, at 112–22.

302 *See* Shirley Lin, *'And Ain't I a Woman?': Feminism, Immigrant Caregivers, and New Frontiers for Equality*, 39 HARV J.L. & GENDER 67, 109 (2016) (citing Ai-Jen Poo, *Dying to Work*, VILLAGE VOICE (Mar. 19, 2002), http://www.villagevoice.com/2002-03-19/specials/letters [http://perma.cc/9QW2-8TGL] (regarding domestic workers in New York City: "It's about time that we give this workforce the rights, respect, and recognition it deserves.")); Press Release, AFL-CIO, National Domestic Workers' Alliance, National Guestworkers' Alliance Announce Partnership Agreements (May 10, 2011), http://www.aflcio.org/Press-Room/Press-Releases/AFL-CIO-National-Domestic-Workers-Alliance-Nati [http://perma.cc/J2JC-7D77] ("We are proud to fight together with our union brothers and sisters to defend and expand the right to organize, win justice for immigrants, and ensure that one day the workers that makes [sic] all other work possible—cleaning and caring for children and seniors—will have rights, respect, and recognition." (quoting Barbara Young, a nanny and National Organizer with the National Domestic Workers Alliance)).

303 *See* Lin, *supra* note 302, at 110.

304 *See id.* at 110–11.

One key barrier to collective action among domestic workers is atomization. Au pairs are often placed in remote areas, although they can still communicate through platforms like Facebook.[305] Simple strategies to disperse resources among au pairs can enhance their access to justice. For instance, the State Department could include a list of organizations that offer assistance to au pairs in their orientation materials. Labor organizations can share their contact information with au pairs on Facebook and host virtual information sessions to reach au pairs in remote locations. Scholars have pointed out that when undocumented workers have fewer protections than authorized workers, it undermines working conditions for everyone in the state.[306] Similarly, when authorized workers are subjected to "liminal legality"—a state of uncertainty and potential repatriation—it jeopardizes working conditions for all categories of domestic workers, regardless of their immigration status.

C. Increasing Anti-Retaliation Protections

Improving access to justice for au pairs cannot be achieved without anti-retaliation safeguards and improving au pairs' understanding of anti-retaliation laws. Au pairs who fear retaliation, even if the possibility of it happening is only slight, may hesitate to participate in collective action. The State Department's changes sought preemption in various areas, such as employment tax and au pair placement.[307] Currently, the State Department explicitly excludes sexual harassment and retaliation laws from preemption.[308]

However, au pairs who provide live-in childcare are not protected by anti-retaliation laws.[309] Under the NLRA, the National Labor Relations Board (NLRB) generally protects the rights of workers to engage in collective bargaining and to be reinstated in cases of unfair labor practices.[310] The extent of protection varies depending on a worker's specific immigration status and occupation. For instance, the Supreme Court has held that while

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305 *See* Salama, *supra* note 84.

306 *See* Kati L. Griffith, *The Power of a Presumption: California as a Laboratory for Unauthorized Immigrant Workers' Rights*, 50 U.C. DAVIS L. REV. 1279, 1296 (2017).

307 Exchange Visitor Program–Au Pairs, 88 Fed. Reg. 74071, 74082 (proposed Oct. 30, 2023).

308 *Id.* at 74097.

309 *See* 29 U.S.C. § 152(3) (noting the exclusion of domestic workers in family homes from the definition of "employee").

310 *See generally* 29 U.S.C. § 151 ("[P]rotecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection").

undocumented workers are "employees" within the definition of the NLRA, usual remedies of reinstatement and back pay do not apply when employers retaliate against undocumented immigrants for their support of unions.[311] In contrast, the NLRB protects H-1 guest workers' work authorization from being revoked during strikes.[312] However, the NLRA has categorically excluded several occupations from labor protection, such as agricultural workers and domestic workers, many of whom came to the United States through guest worker programs.[313]

State legislatures can enact statutes that protect immigrant workers, as California has done.[314] For instance, California's Division of Labor Standards Enforcement has the power to suspend or revoke business licenses if the business is found engaging in unfair immigration-related practices.[315] While the Domestic Worker Bill of Rights takes significant steps in protecting workers by expanding rights to minimum wage, implementing maximum hours and paid leave, and laying out protection against harassment, it still does not include provisions for establishing domestic workers' collective bargaining rights.[316]

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311 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (holding that the Immigration Reform and Control Act prohibits the NLRB from awarding post-termination back pay to an undocumented worker who uses false documentation to establish work authorization without the employer's knowledge).

312 *See* WJA Realty Ltd. P'ship v. Nelson, 708 F. Supp. 1268 (S.D. Fla. 1989) (holding that an immigration regulation permitting the revocation of work authorization of employed non-immigrant workers when a strike occurs was invalid because the regulation squarely conflicted with the NLRA's grant of "employee" status to non-immigrant workers).

313 *See* 29 U.S.C. § 152(3).

314 *See* CAL. PENAL CODE § 519 (West) (prohibiting extortion by reporting an individual's immigration status).

315 *See* CAL. LAB. CODE § 1019 (West).

316 *See, e.g.*, N.Y. EXEC. LAW § 296-b; N.Y.S. DEP'T OF LAB., ABOUT THE DOMESTIC WORKERS BILL OF RIGHTS LAW, https://dol.ny.gov/system/files/documents/2021/03/about-domestic-workers-law.pdf [https://perma.cc/WQ2T-M6GV] (noting that the law directed the Commissioner of Labor to study the practicality of extending collective bargaining rights to domestic workers in New York, which means that collective bargaining rights have not yet been granted). While the original Bill of Rights did not explicitly include protections against employer retaliation, subsequent amendments to the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL) have extended such protections to domestic workers. Effective December 31, 2021, amendments to the NYSHRL provided domestic workers with protections against discrimination and harassment. Similarly, starting March 12, 2022, the NYCHRL extended its protections to domestic workers, explicitly prohibiting retaliation against workers who exercise their rights.

To fully safeguard the rights of au pairs and immigrant workers to participate in labor organizations, the next stage of the campaign should prioritize advocating for foreign domestic workers' rights to collective bargaining. Reinstatement relief is perhaps one of the most crucial aspects of this reform, particularly for minority au pairs. In *WJA Realty Ltd. Partnership v. Nelson*, a Florida court recognized nonimmigrant workers as eligible to be reinstated to their nonimmigrant visa program.[317] Other courts could do the same. However, one issue scholars have noted regarding reinstatement is that reinstating a live-in domestic worker to the previous employer's home is likely undesirable to both parties and may raise issues concerning the employer's right to privacy.[318] However, the reinstatement problem does not necessarily exist in the au pair context because au pairs could be reinstated into the *program* and enter the rematch procedure more broadly. Another option is that states could allow domestic workers and employers to choose whether to reinstate the worker, with employees entitled to back pay in both scenarios.[319]

D. Alternative Solutions

Despite the State Department's proposal for changes to host family agreements, the State Department has yet to provide any enforcement mechanisms.[320] The State Department currently relies on au pair agencies to resolve disputes when conflicts arise.[321] No matter how comprehensive a host family agreement is, the lack of enforcement has a major effect on the actual deterrence of exploitative families or agencies from abusive conduct. Scholars have instead advocated for increased scrutiny and investigation of agencies and host families by the State Department.[322] This Note echoes Victoria Bejarano Muirhead's proposal urging the State Department to impose sanctions on au pair agencies, conduct independent investigations, and make public aggregated data regarding complaints.[323] The above mechanisms will most effectively hold host families and agencies accountable. Nonetheless, this Note recognizes that thorough internal investigations and oversight may

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317 *See WJA Realty*, 708 F. Supp. at 1268.

318 *See* Terry Buck, *The Constitutional Path to Domestic Worker Organizing and Collective Bargaining Rights Under New York State Private Sector Labor Law*, 46 N.Y.U. REV. L. & SOC. CHANGE 271, 303 (2022).

319 *See id.* at 304–05.

320 *See* Exchange Visitor Program–Au Pairs, 88 Fed. Reg. 74071 (proposed Oct. 30, 2023).

321 *See* Kopplin, *supra* note 119.

322 *See* Chuang, *supra* note 13, at 332–37.

323 *See generally* Muirhead, *supra* note 75.

pose administrative or financial burdens. As an alternative, this Note proposes measures aimed at shifting the oversight function to the public, other au pairs, and labor organizations.

1. Transparency Reforms

One of the major vulnerabilities faced by au pairs is their lack of information about their host families, which creates a structural information imbalance and limits au pairs' mobility. Knowing that au pairs are unlikely to stay in the United States for long and that there are very few accountability mechanisms, host families can abuse their au pairs without any oversight; this lack of accountability, in turn, gives them more incentive to obstruct the au pairs' goals to advance their studies and careers in the United States. Some au pairs post about their experiences with their host families on social media, such as Facebook.[324] Unfortunately, because these posts can be scattered across various social media platforms in different languages, they may not reach a wide audience, and marginalized au pairs are less likely to access this information. If the information were centralized, however, au pairs could make more informed decisions about their host families.

One way to improve transparency and empower au pairs could be to gather anonymous comments through a centralized feedback form and share it with incoming au pairs and those in the rematch process. This approach is common among international students seeking jobs, especially when companies have different policies regarding noncompete clauses, immigration visas, and relocation benefits. Given that there are 20,000 au pairs each year, the feedback form could be designed with word limits, short answer options, or ratings to streamline the administrative process.

This solution may run into issues with bad-faith comments or invasions of host families' privacy. To enhance reliability and secure host families' personal information, State Department personnel could review and filter au pairs' feedback before it gets shared more widely. The State Department could also limit information access to au pairs alone. As au pairs already share information about their host families on various social media platforms,[325] a centralized, streamlined system that prohibits the sharing of private matters would actually provide better protections for host families' privacy than what currently exists. The attrition between host families and au pairs often stems from the difference

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324 *See, e.g.*, Catalina Duque Dazkevich, FACEBOOK (Jan. 19, 2025), (on file with the *Columbia Journal of Gender & Law*); Inès Along, FACEBOOK (Jan. 16, 2025), (on file with the *Columbia Journal of Gender & Law*).

325 *See* Dazkevich, *supra* note 324; Along, *supra* note 324.

in their expectations,[326] so providing more information to au pairs will likely better align expectations, better facilitate the transition period, and even reduce the administrative costs that arise when dissatisfied au pairs choose to rematch with other families.

2. Educational Reforms

Another area where au pairs would benefit from increased information sharing is in their educational pursuits. The current program does not provide sufficient assistance for au pairs to continue their studies in the United States and places them in precarious situations where they may easily lose their student status.[327] Although host families bear a small amount of an au pair's educational expenses, tuition costs in most programs significantly exceed this budget.[328] The State Department or au pair agencies should facilitate information sharing from au pairs who have successfully completed degree programs in the United States. This would create more realistic expectations for au pairs seeking to immigrate to the United States.

In addition, the State Department could consider establishing a program that allows au pairs who have completed two years of the program to enroll in public schools at an in-state rate in states where they have worked and resided for twelve months.

CONCLUSION

Minority au pairs represent a small demographic of non-citizen workers, but an intersectional analysis unveils their heightened vulnerability to exploitation due to factors such as race, gender, national origin, and liminal legality. The intersection of domestic work with its racialized and gendered nature adds layers of barriers for them to properly assert their rights. The lack of legal safeguards in both the U.S. immigration regime and labor law landscape perpetuates a cycle of uncertainty and instability. Proper reform for au pairs' rights necessitates a cultural and legal shift that challenges the deep-seated biases that render domestic work "unskilled" and its workers disposable.[329] Looking forward, policymakers, advocates, and scholars should continue to push for systemic reforms that dismantle the racialized and gendered devaluation of domestic labor. Strengthening

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326 *See generally* Hernández García, *supra* note 89; Chuang, *supra* note 13; Davis, *supra* note 72.

327 *See supra* Part II.

328 *See supra* Part II.

329 *See generally* CHANG, *supra* note 58 (noting that the United States treats domestic workers as disposable).

labor protections, redefining the legal status of au pairs, and elevating domestic work as a recognized and respected profession are critical steps in ensuring that minority au pairs, and all domestic workers, are no longer seen as temporary, exploitable labor but as individuals deserving of dignity, stability, and rights.