

# WHAT'S THE BORDER GOT TO DO WITH IT? HOW IMMIGRATION REGIMES AFFECT FAMILIAL CARE PROVISION—A COMPARATIVE ANALYSIS

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## I. INTRODUCTION

The current wave of international migration is larger than ever before.<sup>1</sup> It is also “feminized”<sup>2</sup> both in that approximately half of the world’s migrants are now women and in that the work that many of them engage in is traditional “women’s work” such as cleaning; taking care of children, the elderly, and the disabled; and sex work.<sup>3</sup> The workers migrate to the “receiving” countries through formal (legal) as well as informal (illegal) routes, some temporarily and others with the hope of settling permanently. While these jobs do not necessarily have to be exploitative, unskilled migrant workers tend to be employed in low-wage secondary market jobs that are characterized by weak legal regulation and/or problems of enforcement, which often lead to high degrees of vulnerability and exploitation.<sup>4</sup>

“Outsourcing” care work,<sup>5</sup> that is, importing care from developing

1. See generally U.N. DEP’T OF ECON. & SOC. AFFAIRS, POPULATION DIVISION, TRENDS IN INTERNATIONAL MIGRANT STOCK: THE 2008 REVISION (2009), available at [http://www.un.org/esa/population/publications/migration/UN\\_MigStock\\_2008.pdf](http://www.un.org/esa/population/publications/migration/UN_MigStock_2008.pdf) (providing global statistical data regarding trends in migration over the past three decades that shows that female migrants make up slightly more than half of all migrants by region across the globe—a trend that has been on the rise in all geographic areas except North America).

2. See U.N. DEP’T OF ECON. & SOC. AFFAIRS: POPULATION DIVISION, INTERNATIONAL MIGRATION REPORT 2002, ¶ 11, U.N. Doc. ST/ESA/SER.A/220 (2002), available at <http://un.org/esa/population/publications/ittmig2002/2002ITTMIGTEXT22-11.pdf> (estimating that there are 175 million migrants throughout the world, comprising 3% of the world’s population, and pointing to a significant surge in the number of international migrants, that stood at 75 million in the 1960’s); see also INT’L LABOUR OFFICE, PREVENTING DISCRIMINATION, EXPLOITATION AND ABUSE OF WOMEN MIGRANT WORKERS: AN INFORMATION GUIDE 9 (2003), available at [http://www.ilo.org/employment/Whatwedo/Instructionmaterials/lang--en/docName--WCMS\\_116358/index.htm](http://www.ilo.org/employment/Whatwedo/Instructionmaterials/lang--en/docName--WCMS_116358/index.htm) [hereinafter PREVENTING DISCRIMINATION] (stating that over 120 million of these workers are migrant workers and women constitute 51% of all migrants in the developed world and 46% of all migrants in the developing countries).

3. Because of the informal character of most of the migration into markets of care, the exact numbers are uncertain. However, it is widely accepted that “female labour migration is strongly characterized by the concentration in a very limited number of female-dominated occupations, which are associated with traditional gender roles, such as domestic workers and ‘entertainment’ workers.” See PREVENTING DISCRIMINATION, *supra* note 2, at 11. For data in the U.S., see GEORGES VERNEZ, IMMIGRANT WOMEN IN THE U.S. WORKFORCE: WHO STRUGGLES? WHO SUCCEEDS? 78, 91 (1999) (suggesting that 30% of migrant workers work in private households).

4. PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS 165 (1971). Primary and secondary labor markets are terms taken from labor economics literature and theories about labor market segmentation. Primary market jobs “possess several of the following characteristics: high wages, good working conditions, employment stability, chances of advancement, equity, and due process in the administration of work rules.” *Id.* Secondary market jobs, on the other hand, “tend to have low wages and fringe benefits, poor working conditions, high labor turnover, little chances of advancement, and often arbitrary and capricious supervision.” *Id.* Much of in-home care work is part of the secondary labor market.

5. By care work, I refer to the traditional work of the housewife: cooking,

countries, is a common solution for the current combination of a “care deficit” due to retrenching by welfare states, an increase in female labor market participation in many developed countries, and an aging population.<sup>6</sup> Migrant care workers supply a cheap solution to the care deficit by allowing local women to both participate in the primary labor market and to afford paid, individualized care for dependent family members, whether children, disabled, or elderly. The effect in the receiving countries is to liberate women who can afford to pay for care work from the burdens of domesticity, as well as to enable single parents to work and ‘coupled’ households to enjoy a dual-income.<sup>7</sup>

While the demand for affordable care work in receiving countries might serve as the “pull” factor of migrant workers towards care markets in the developed world, the migration of care workers is also the result of the “push” factor of economic restructuring (known as structural adjustment programs, or “SAPs”) in the developing world that renders the economy dependent on remittances.<sup>8</sup>

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cleaning, and taking care of dependent family members, when the work is paid for in a “market” setting or unpaid for in a “family” setting. Care work bundles together various occupations that, when commodified, are usually categorized as part of the secondary labor market. These are low wage, unskilled, precarious jobs that are done mostly by minority and immigrant women. There is a growing body of literature that conceptualizes care work as a category of occupations. *See generally* CARE WORK: THE QUEST FOR SECURITY (Mary E. Daly ed., 2001); CARE WORK: GENDER, CLASS, AND THE WELFARE STATE (Madonna Harrington Meyer ed., 2000); GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2002) [hereinafter GLOBAL WOMAN]; JANET BODDY ET AL., CARE WORK: PRESENT AND FUTURE (2005). Another organizing thread that runs through all these occupations is their categorization as a sub-category of “Body Work.” *See* CAROL WOLKOWITZ, BODIES AT WORK (2006). An additional element of a housewife’s traditional roles is related to sex. Although in my general conceptualization sex work is an integral part of care work, for the purpose of this article sex work is framed out of the discussion.

6. *See* Helma Lutz, *Introduction: Migrant Domestic Workers in Europe*, in *MIGRATION AND DOMESTIC WORK* 2-3 (Helma Lutz ed., 2008) [hereinafter Lutz, *Introduction*].

7. Special Rapporteur, *Special Groups and Individuals: Migrant Workers*, ¶ 2, U.N. Doc. E/CN.4/2004/76 (Jan. 12, 2004), available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/0032d58d2667f0b9c1256e700050f77f/\\$FILE/G0410237.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/0032d58d2667f0b9c1256e700050f77f/$FILE/G0410237.pdf) (observing that “in developed countries migrant domestic workers are becoming indispensable to enable women to advance in employment and society”).

8. *See* Cynthia Enloe, “*Just Like One of the Family*”: *Domestic Servants in World Politics*, in *GLOBAL DIMENSIONS OF GENDER AND CARE WORK* 118, 118-20 (Mary K. Zimmerman et al., eds., 2006); *see also* GRACE CHANG, *DISPOSABLE DOMESTICS: IMMIGRANT WOMEN WORKERS IN THE GLOBAL ECONOMY* 125-30 (2000) (recounting testimony of women living under SAPs); Carlota Ramírez et al., *Crossing Borders: Remittance, Gender and Development* 13-14 (U.N. INSTRAW, Working Paper, 2005) (outlining the concept of remittances); Robert Burgess & Vikram Haksar, *Migration and Foreign Remittances in the Philippines* 4 (IMF, Working Paper No. 05/111, 2005), available at <http://www.imf.org/external/pubs/ft/wp/2005/wp05111.pdf> (explaining that the Philippines is an economy in which “remittances are by some margin the largest source of foreign exchange”).

An important factor leading to individual migration choice is economic: immigrants stand an opportunity to earn an income that significantly exceeds the income levels available in their countries of origin and, thus, ensure their own economic future and/or that of their families. Yet, migrant workers are rarely the poorest of the poor in their home countries. Instead, migrant workers are mostly those who possess enough social and financial capital to finance the trip (even if by borrowing) and that have the much needed connections to those who can facilitate migration.<sup>9</sup> For example, a study in Europe showed that a significant number of migrant care workers are from middle-class backgrounds.<sup>10</sup> Furthermore, while economic conditions are an important push-factor, they are not the only ones. The reasons for migration are varied and may include structural, individual (personal background and inclinations),<sup>11</sup> cultural, and social reasons. For example, the International Labor Organization's (ILO) information guide for women's migration suggests that for many women, "migration is not only a means of economic empowerment, but also, and importantly, a way to escape constraining socio-cultural norms and subordinate gender roles and to achieve independence or emancipation."<sup>12</sup>

Indeed, some care workers find financial benefit and personal satisfaction and empowerment in their migratory experience.<sup>13</sup> However, many migrant workers (both documented and undocumented), specifically those working in private households in which the boundaries between private and public spheres are unclear and effective supervision and enforcement of legal protections are low,<sup>14</sup> often find themselves in weak

9. See SEBASTIAN LĂZĂROIU & MONICA ALEXANDRA, WHO IS THE NEXT VICTIM? VULNERABILITY OF YOUNG ROMANIAN WOMEN TO TRAFFICKING IN HUMAN BEINGS 34-35 (2003), available at [http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published\\_docs/books/who\\_next.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/who_next.pdf) (pointing out that that migration is often induced by an improvement in one's economic situation).

10. See Lutz, *Introduction*, *supra* note 6, at 3.

11. See Laura Agustin, *Challenging "Place": Leaving Home for Sex*, 45 DEVELOPMENT 110 (2002). Agustin suggests that migrants are:

exposed to media images that depict world travel as essential to both education and pleasure, potential migrants learn that first-world countries are highly comfortable and sophisticated places in which to live. They are excited at the prospect of meeting people from other countries. All poor people do not decide to migrate; many that do are people interested in and capable of taking the risks involved in uprooting in order to 'find a place in the world.

*Id.*

12. PREVENTING DISCRIMINATION, *supra* note 2, at 9.

13. See RHACEL PARREÑAS, SERVANTS OF GLOBALIZATION: WOMEN, MIGRATION, AND DOMESTIC WORK 150-53 (2001) [hereinafter PARREÑAS 2001] (discussing care workers' "contradictory class mobility," through which the workers experience decline in their status in the receiving country in order to improve their status upon return to the country of origin).

14. BRIDGET ANDERSON, DOING THE DIRTY WORK? THE GLOBAL POLITICS OF DOMESTIC LABOR 2, 4-5 (2000); Taunya Lovell Banks, *Toward a Global Critical*

bargaining positions with employers and thus vulnerable to exploitation. The vulnerabilities and weak bargaining position of migrant workers are shaped, to a large extent, by immigration law in the receiving country.

This Article examines the role of immigration law in shaping the bargaining positions and market options of migrant in-home care workers as well as the care solutions that are available to families, as consumers of care services. Care work is a sector that is particularly attractive for migrant workers because it requires little to no formal professional skills, expertise, language skills, or equipment. Accordingly, immigration law and policy are central in determining the supply of care workers in many countries.

Migration into the in-home care sector shapes and transforms women's labor market participation and labor market composition in the receiving country. Furthermore, this migration impacts household structures, familial relationships, power dynamics, and expectations in both sending and receiving countries. Migration, therefore, plays a role, not only in the economic development of sending countries, but also in the economic development of receiving countries.

This Article tracks the distributive effects of migratory care work in three receiving countries—United States, Israel, and Australia—with some reference to the effect on migrant workers families in sending countries. This Article is, therefore, a comparative study of family relations and care provision from *outside* traditional Family Law. Family Law traditionally focuses on regulating relations between family members<sup>15</sup> and defines the boundaries of the family as a legal concept. However, many other fields of private and public law include family-targeted provisions that influence and regulate the family at different levels. This Article suggests that public spheres of regulation, and, in this case, migration regimes, establish legal rules that significantly influence and shape the family, and are therefore crucially important to understanding family relations. This Article shows how immigration policies and their derivative legal rules—which are often proclaimed as measures of national security, such as in the United States or of national integrity, such as in Israel (whatever they may achieve under those rubrics)—also result in a redistribution of care work related obligations and costs within households along ethnic, national, gender, and class lines. Additionally, this Article points to the important role that

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*Feminist Vision: Domestic Work and the Nanny Tax Debate*, 3 J. GENDER RACE & JUST. 1, 7-11 (1999); Helma Lutz, *When Home Becomes a Workplace: Domestic Work as an Ordinary Job in Germany?*, in MIGRATION AND DOMESTIC WORK, *supra* note 6, at 41, 53, 55-57 [hereinafter Lutz, *Home*].

15. "Traditional Family Law" refers to the area of law that mainly encompasses the legal regulation of marriage (and its alternatives), divorce, child custody, parental status, and parental rights.

immigration law has in shaping the family and the relationship of its members to each other and to the labor market and the state.<sup>16</sup>

By analyzing immigration law through its effect on familial care and on markets of care, this Article offers a framework that breaks away from the family/market private/public dichotomy. In this Article, familial care provision is not viewed as a practice that takes place either in the family or the market, but rather as a practice that is constituted by a mix of both spheres. Viewing familial care from outside Family Law relaxes some of the exceptional characteristics of the legal concept of the family and shows that regulation of the family (in and outside Family Law) is intimately connected to wide social policy debates about citizenship, social status, labor market, and wealth distribution.

The three jurisdictions—the United States, Israel, and Australia—were chosen both because they offer useful commonalities, as all three are usually considered “liberal welfare states”<sup>17</sup> with common law systems, and because of the differences in their migration regimes. While, as liberal welfare states, these three countries are particularly reliant on the market and on affordable care workers in providing the care needs of families, the jurisdictions exemplify three different regulatory approaches to the immigration of care workers. The United States currently holds a *de facto* (though not *de jure*) open border approach: undocumented migrant workers do much unskilled labor, including most in-home care work. Israel, with tightly controlled borders, has a targeted guest-worker visa program under which migrant workers from certain countries can get a visa to enter for limited periods of time and work in designated labor sectors (mostly agriculture, construction, and in-home care of the disabled and the elderly). Australia does not offer guest-worker visas to unskilled workers, and, due to its geography, has relatively few undocumented migrants in the country.

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16. For a similar take, see also Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007) (discussing the role of immigration in shaping families).

17. This categorization is taken from Gøsta Esping-Andersen’s comparative work on welfare state regimes. The liberal regime is one of three “ideal type” regimes identified by Esping-Andersen, the other two being conservative/corporatist regimes (such as in Germany and Italy) and social democratic (such as in the Scandinavian countries). A liberal welfare regime is characterized by residual distribution criteria, in which assistance is means tested, universal transfers and social insurance plans are modest, and benefits cater mainly to low-income clientele. While the state does not provide most welfare services itself, it does “encourage the market, either passively, by guaranteeing only a minimum, or actively—by subsidizing private welfare schemes.” See GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 26 (1990) [hereinafter ESPING-ANDERSEN, *THREE WORLDS*] (stating that Australia and the U.S. are paradigmatic liberal welfare states); see also Avraham Doron, *Israel’s Welfare Regime: Trends of Change and Their Social Effects*, 5 ISRAELI SOC. 417 (2003) (in Hebrew) (characterizing Israel as having a social democratic regime that, since the early 1990’s, due to growing acceptance of neo-liberal economic premises, is moving in a strong liberal direction).

This set of similarities and differences allows a nuanced study of distributive effects of different immigration regimes in relation to familial care provision, and markets of care.

Part II of this Article provides a brief overview of the main feminist approaches to the phenomenon of migrant care work, focusing in particular on “global care-chains” literature. By engaging with existing non-legal literature on care work, this part addresses the way in which legal analysis can be helpful in mediating between competing approaches.

Part III develops a new analytical framework to explore the distributive effects of immigration regimes in relation to care work, paid or unpaid. Drawing on frameworks developed by welfare state theorists,<sup>18</sup> the proffered distributive framework aims to explore the division of labor between the state, the market, and the family in the provision of care.

Part VI utilizes this analytical framework to map the distributive effects of the migration regimes of the United States, Israel, and Australia. Proceeding under the assumption that the migration of care workers is not necessarily harmful or degrading for the men and women who engage in it,<sup>19</sup> the analysis shows that the details of the legal regime of immigration, as they operate in relation to the background rules of welfare and employment law, are crucial to understanding the overall risks and effects of the phenomenon of migrant care work. The analysis charts the ways in which legal regimes shape, enhance, or ameliorate the risks involved in care workers’ migration, as well as the distributional effects of the migration regime among different groups of migrant workers and among migrant workers and the men and women in the households that employ them. It further maps the effects immigration regimes have on the bargaining positions, the familial expectations, and the division of labor within families in the three jurisdictions. Part V offers some concluding remarks.

## II. IMPORTING CARE

There is significant debate in feminist literature about whether care work

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18. See ESPING-ANDERSEN, *THREE WORLDS*, *supra* note 17, at 26. See generally GØSTA ESPING-ANDERSEN, *SOCIAL FOUNDATIONS OF POSTINDUSTRIAL ECONOMIES* (1999) [hereinafter ESPING-ANDERSEN, *SOCIAL FOUNDATIONS*].

19. See MARY ROMERO, *MAID IN THE U.S.A.* 44 (1992) (noting that “it is important for the development of feminism to transcend simplistic notions that housework is ‘naturally’ dirty work resulting in stigma . . . it is the context in which the tasks are carried out that make them oppressive”). The assumption throughout this article is that there is nothing inherently degrading, dirty, or exploitative in domestic work, but rather that it is the social, economic, and—the focus of this article—legal context that structures paid care work and enables exploitation, vulnerability, as well as stigma. This is my starting point in this article, yet I hope this article can be of interest and use to those who do not share this position.

can be a way out of women's domesticity or whether it is a mere replication of gender and class hierarchies. The debate is further complicated by the introduction of migration into the equation. This Part of the Article will briefly discuss the different positions on care work and migrant care work.<sup>20</sup> Much of the existing literature focuses on social, gender, and economic hierarchies and engages little with the legal structures that support and produce such hierarchies. This Part concludes with an attempt to point to the potential benefits of legal distributive analysis of care work, paying specific attention to the implications of the "informality" of care work on such legal analysis.

#### A. Feminist Approaches to Paid In-Home Care Work

The commodification of familial care work has the potential to liberate women from their domestic obligations and allow them to participate as equals in paid labor.<sup>21</sup> It allows women who can afford to employ care workers to become closer to the "ideal worker."<sup>22</sup> At the same time, paid care work provides an income—often a low income—to the care workers themselves: frequently, unskilled women of ethnic or racial minorities.<sup>23</sup> The gender distribution of care labor is therefore left unchanged by this arrangement: care work is redistributed between *women* of different classes and backgrounds, thus running the risk of reinforcing class and race hierarchies. The "care worker problem"<sup>24</sup> revolves around two questions.

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20. I will focus here on the debate regarding the practice of paid care work. There is abundant literature both for and against the commodification of care. This literature focuses on the morality of paying for familial care and what that might mean for the family/market distinction, and to the diversity of relationships in an individual's life. See generally Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1885 (1987); Deborah Stone, *For Love nor Money: The Commodification of Care*, in RETHINKING COMMODIFICATION 271-90 (Martha M. Ertam & Joan C. Williams eds., 2005). My own position is that commodification, in and of itself, does not pose a moral problem. Rather, the question should be what kind of social and economic relations are created as a result of commodification. See Joan C. Williams & Viviana A. Zeiler, *To Commodify or Not to Commodify: That is not the Question*, in RETHINKING COMMODIFICATION, *supra* note 20, at 362. I, therefore, will not engage here with the general debate around commodification, but will rather focus on the more concrete discussion about the realities of paid care work.

21. LINDA R. HIRSHMAN, GET TO WORK: A MANIFESTO FOR WOMEN OF THE WORLD 50-62, 80-82 (2007); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1901-02 (2000).

22. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2-6 (2000).

23. See Irene Brown & Joya Misra, *The Intersection of Gender and Race in the Labor Market*, 29 ANN. REV. SOC. 487, 502-03 (2003).

24. See DAVID M. KATZMAN, SEVEN DAYS A WEEK: WOMEN AND DOMESTIC SERVICE IN INDUSTRIALIZING AMERICA 223-29 (1978) (describing the middle-class "servant problem," between the American Civil War and World War I, as being the shortage of domestic workers). What I term here as the "care worker problem" refers to a different issue: how appropriate in-home care work is in liberal democratic societies.



First, is care work like any other job, and therefore it is not problematic that employers and employees are divided along income/class lines, since that is the case throughout the labor market under capitalism? Second, is care work inherently different, making the class division particularly problematic? Many of the feminist studies on paid in-home care work focuses on some similar formulation of the care worker problem and maps the vulnerabilities that accompany this occupation and the complex relationships of power, love, dependency, hierarchy, and resistance that develop between the employer and the care worker.

Care work is seen as a particularly troubling occupation from a feminist perspective for various reasons. First, care work is socially constructed as a deeply gendered occupation, constituting the paradigm of “women’s work.” Care work has traditionally been unpaid women’s work and is often viewed as an important gender performance, as part and parcel of “doing gender.”<sup>25</sup> Today, paid care work remains work mostly done by women, though not as family members but as workers. This raises the question of whether care work holds any potential for women’s economic and social equality<sup>26</sup> or whether care work provides a class based solution to middle and upper class women’s gender inequality, thus exacerbating class inequality without fully solving gender inequality.<sup>27</sup>

Second, care work raises concerns along class and racial/ethnic lines because of its close relation to social status and hierarchy. The genealogy of care work finds its roots in slavery and master-servant relations.<sup>28</sup> Even though these legal relationships have been formally abolished or transformed, the footprint of exploitation and gender/class/ethnic/racial hierarchies still lingers on, making care work particularly morally suspect.<sup>29</sup> This is especially the case since today it is still mostly low-income women of racial and ethnic minorities that work as in-home care workers.<sup>30</sup>

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25. See Sophie Bowlby et al., “*Doing Home*”: *Patriarchy, Caring, and Space*, 20 *WOMEN’S STUD. INT’L* 343, 345-46 (1997); Erving Goffman, *The Arrangement Between the Sexes*, 4 *THEORY & SOC’Y* 301, 302 (1977).

26. See Schultz, *supra* note 21, at 1900-02.

27. See WILLIAMS, *supra* note 22, at 40-48.

28. ESPING-ANDERSEN, *THREE WORLDS*, *supra* note 17, at 133-37; see Cecilia Marie Rio, “*This Job Has No End*”: *African American Domestic Workers and Class Becoming*, in *CLASS AND ITS OTHERS* 23, 24 (J.K. Gibson-Graham et al., eds., 2000) (observing that “over time, African American women gradually, and through small scale, incremental changes redefined their work”).

29. See, e.g., ROMERO, *supra* note 19, at 166-167 (calling the position that of a group called “Utopian Feminist,” who “insist that the occupation was inherently exploitative and should be abolished . . . the oppressive and exploitative aspects of ‘cleaning after others’ or dealing with ‘dirt’ cannot be avoided and that the only solution is for everyone to clean up after themselves”).

30. DOMESTIC WORKERS UNITED & DATA CTR., *HOME IS WHERE THE WORK IS*:

Third, as noted above, paid in-home care work today is mostly done by low income women of marginalized social groups, and the work itself is characterized by low wages, high turnover, informal work relations, and high levels of abuse and exploitation.<sup>31</sup> Given that it is mostly women with few choices who choose live-in care work, some writers ask whether it is at all morally acceptable for a society to allow it.<sup>32</sup>

Fourth, care work is a paid, marketized service that takes place within a family's private home fulfilling an intimate function associated with love and tenderness. As such it straddles the line between the public sphere of the market and the private sphere of the family home.<sup>33</sup> The work relationship that results is often informal<sup>34</sup> and lacking in clear boundaries regarding hours of work, the role and responsibilities of the worker, and the emotional relationships between the workers and the people for which they care. The combination of this informality and the relative isolation in which this work is done makes enforcement of legal employment protections, particularly difficult.<sup>35</sup>

As a result of these problematic characteristics of care work, some writers conclude that care work is work "like no other" and should be thought of and regulated more carefully and thoughtfully than other occupations.<sup>36</sup> However, an extreme position that calls for the abolition of

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INSIDE NEW YORK'S DOMESTIC WORK INDUSTRY 7 (2006), available at <http://www.datacenter.org/reports/homeexecsum.pdf> [hereinafter DOMESTIC WORKERS UNITED].

31. INT'L LABOUR OFFICE, DECENT WORK FOR DOMESTIC WORKERS 1 (2010), available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_104700.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_104700.pdf) [hereinafter ILO, DECENT WORK].

32. See, e.g., Adelle Blackett, *Promoting Domestic Workers' Human Dignity Through Specific Regulation*, in DOMESTIC SERVICE AND THE FORMATION OF EUROPEAN IDENTITY 247, 256-57 (Antionette Fauve-Chamoux ed., 2004) (suggesting that, though possibly impractical, a ban on all domestic work, and specifically on migrant domestic work, might be the only morally attractive regulatory position available). Blackett, however, notes the impracticality of such an approach, and therefore advocates the extension of employment and labor protections to domestic workers. *Id.*

33. ESPING-ANDERSEN, THREE WORLDS, *supra* note 17, at 4-5.

34. The workers are often said to be "one of the family." Sociologists write about this strategy as one that entrenches unequal power relations, and disarms contractual and legal claims made by the worker. See generally ESPING-ANDERSEN, THREE WORLDS, *supra* note 17, at 122-26; PARREÑAS 2001, *supra* note 13, at 179; JUDITH ROLLIN, BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS 173-203 (1985); Lutz, *Introduction*, *supra* note 6, at 51-52.

35. ILO, DECENT WORK, *supra* note 31, at 36-57; see also Hila Shamir, *Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care*, 30 BERKELEY J. EMP. & LAB. L. 404, 450-52 (2010) [hereinafter Shamir, *Between Home and Work*] (reviewing the application of federal employment law on care workers in the U.S.).

36. See Lutz, *Home*, *supra* note 14, at 57-58 (asking if domestic work could be considered an ordinary job and answering with a resounding "no"); see also Bridget Anderson, *Just Another Job? The Commodification of Domestic Labor*, in GLOBAL

in-home care work is relatively rare.<sup>37</sup> Other writers treat care work as similar to various other forms of low paid work and argue that the worker's vulnerabilities most often depend on the worker's bargaining position, and the focus should therefore be on strengthening workers' bargaining position through better enforcement of workers' rights and unionization.<sup>38</sup> While there are some nuanced differences between these two approaches, their regulative goal ends up being quite similar: there is generally a wide consensus that the legal solution lies in the formalization of the employment relationship and the extension and enforcement of legal regulation and employment protections.<sup>39</sup> At the same time, relatively little attention is paid in the literature to the details of law reform and to the processes of formalization and professionalization of care work. Because of the informal character of care work most of the literature is not focused on law; rather the problems of care work are perceived as first and foremost economic, social, and political.<sup>40</sup>

### *B. Feminist Approaches to Migrant Care Work*

The vulnerabilities of care work are intensified when the workers are migrants. The difference in language and customs, their isolation from their family and community, the threat of deportation if they are

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WOMAN, *supra* note 5, at 104 (stating that "paid domestic work may look in many ways like just another undesirable job . . . but there is much to distinguish the culture of domestic labor . . . [it] is deeply embedded in status relationships . . . between women of different races or nationalities, certainly of different classes"); Dorothy Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51 (1997) (emphasizing the deep racial and gendered effects of paid care work as menial labor).

37. See Blackett, *supra* note 32.

38. See generally Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851 (1999) (providing a history of the household labor movement, which aimed to extend labor and employment rights to domestic workers). See also PIERRETTE HONDAGNEU-SOTELO, *DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE* 211-16, 238-43 (2001) (calling for an extension of labor and employment rights to care workers); ROMERO, *supra* note 19, at 171; Laura M. Agustin, *A Migrant World of Services*, 10 SOC. POLITICS 377, 392 (2003); Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 IOWA L. REV. 1835, 1892-1900 (2007). The July 2010 New York bill requires paid holidays, sick days, and vacation days for domestic workers, along with overtime wages, and fourteen days notice, or termination pay, before firing a domestic worker. See Sen. A1470B, 2009 Reg. Sess. (N.Y. 2009) (the first domestic workers' bill of rights in the U.S.).

39. An example of this consensus can be found in a possible future international convention that will secure the labor and employment rights of domestic workers. See ILO, *DECENT WORK*, *supra* note 31, at 94-99.

40. See Guy Mundlak & Hila Shamir, *Between Intimacy and Alienage: The Legal Construction of Domestic and Carework in the Welfare State*, in *MIGRATION AND DOMESTIC WORK*, *supra* note 6, at 161 (discussing how, in the extensive literature exposing the economic and social importance of care work, the role of law has often been downplayed).

undocumented, and the temporary and easily revocable nature of their legal status if they are legal workers all exacerbate each of the four problems discussed above. As a result, when the discussion turns to focus on care workers migration, the literature pays more attention to the legal framework as it relates to migration.<sup>41</sup>

The combination of care work and migration leads to a more extreme version of the abolitionist position to care work. Some writers view much of care workers' migration as akin to slavery:<sup>42</sup> a situation in which workers have little or no agency in a system in which "migrant women workers are effectively imported . . . from the Third World"<sup>43</sup> and "coerced into service work."<sup>44</sup>

This, in turn, leads, in its extreme version, to suggestions to ban the migration of care workers<sup>45</sup> and, more commonly, to calls for the enhancement of anti-trafficking regimes to cover the experiences of care workers (the trafficking of care workers is often called domestic slavery).<sup>46</sup>

It is interesting, though perhaps not surprising, to note that migrant care workers themselves tend to reject the abolitionist approach to migrant care work. For example, when the migration of care workers was banned by the Filipino Government under the Aquino Administration in 1988, twenty two groups of migrant workers in Hong Kong came together to lobby against the ban suggesting that the ban "hindered Filipinas' ability to secure employment, actually debilitating rather than protecting them."<sup>47</sup> Along the

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41. See, e.g., Shu-Ju Ada Cheng, *Rethinking the Globalization of Domestic Service: Foreign Domestic Workers, State Control, and the Politics of Identity in Taiwan*, in GLOBAL DIMENSIONS, *supra* note 8, 128, 128-34; Fiona Williams & Anna Gavanas, *The Intersection of Childcare Regimes and Migration Regimes: A Three Country Study*, in MIGRATION AND DOMESTIC WORK, *supra* note 6, at 13.

42. The term "domestic slavery" is commonly used in this context and has been recognized in international documents as a growing phenomenon. See COUNCIL OF EUROPE COMM. ON EQUAL OPPORTUNITIES FOR WOMEN AND MEN, DOMESTIC SLAVERY REPORT (May 2001), available at <http://assembly.coe.int/Documents/WorkingDocs/doc01/EDOC9102.htm> [hereinafter EC REPORT]; Joy Zarembka, *America's Dirty Work: Migrant Maids and Modern-Day Slavery*, in GLOBAL WOMAN, *supra* note 5, at 142; Helen Schwenken, "Domestic Slavery" Versus "Workers Rights": *Political Mobilizations of Migrant Domestic Workers in the European Union* (Ctr. for Comp. Immigration Stud., Working Paper No. 116, 2005), available at [http://www.antigone.gr/en/library/files/selected\\_publications/eu/070506.pdf](http://www.antigone.gr/en/library/files/selected_publications/eu/070506.pdf).

43. CHANG, *supra* note 8, at 12.

44. *Id.* at 13.

45. *Id.* at 143-44 (illustrating the international debate surrounding the proposed ban).

46. See EC REPORT, *supra* note 42 (condemning the inhumane and illegal treatment of migrant workers and recommending state action to combat the abuse). See generally BRIDGET ANDERSON, *BRITAIN'S SECRET SLAVES: INVESTIGATION INTO THE PLIGHT OF OVERSEAS DOMESTIC WORKERS IN THE UNITED KINGDOM* (1993) (discussing the illegal abuse of migrant domestic workers under international law).

47. CHANG, *supra* note 8, at 144.

same lines in Europe, RESPECT (Rights, Equality, Solidarity, Power, Europe, Co-operation Today), a network of self-organized migrant domestic workers' organizations, decided in February 2001 to disassociate from the concept "domestic slavery" and from campaigns against trafficking in women, finding that the language of trafficking and victimhood does not resonate with the experience of most Filipina migrant workers. RESPECT activists suspected that the effect of such language will be to de-legitimize their work rather than to empower the workers.<sup>48</sup>

The theoretical framework of "Global Care Chains"<sup>49</sup> provides a useful tool to overcome the gridlock between focusing on the interests of the women who employ migrant care workers and those of the care workers themselves, as well as between the regulation and abolition of migrant care work. The basic premise of the care chains literature is to pay attention to personal care links while setting them in the global context of transnational transfers of paid or unpaid care work. This literature suggests that, in a global care chain, one end of the chain is usually unpaid (care by a family member in a country of origin), while, at the other end, care is paid for, and that pay is the main motivation behind the chain creation. Accordingly, a global care chain typically has the following links: "(1) an older daughter from a poor family who cares for her siblings while (2) her mother works as a nanny caring for the children of a migrating nanny who, in turn, (3) cares for the child of a family in a rich country."<sup>50</sup> The care chain literature is helpful in contextualizing care workers' migration and in linking the life stories and needs of women from receiving and sending countries. It allows understanding of the complexity of the political and emotional economy of care. Further, the emphasis of the global care chain literature on economic and emotional (re)distribution proves, at times, to be a promising approach. However it also has some considerable drawbacks.

First, the literature tends to moralize care and mothering by focusing on the emotional cost to the migrant worker who leaves her children behind and the benefit of this arrangement to the employing household, whose children enjoy this "surplus of care."<sup>51</sup> The migration of care workers is

48. See Schwenken, *supra* note 42.

49. The term was first used by Arlie Russell Hochschild, *Global Care Chains and Emotional Surplus Value*, in *ON THE EDGE: LIVING WITH GLOBAL CAPITALISM* 130 (Will Hutton & Anthony Giddens eds., 2000). Hochschild's concept spurred expansive literature that emerged in a variety of social science fields such as globalization studies, migration studies, care studies, and gender studies. *Id.* See generally Nicola Yeates, *Global Care Chains: A Critical Introduction* (Global Comm'n on Int'l Migration, Working Paper No. 44, 2005).

50. Hochschild, *supra* note 49, at 131.

51. See Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 *COLUM. J. GENDER & L.* 357, 423-27 (2007) (discussing the cost of moralizing care in the care-work debate outside the immigration context).

perceived as first and foremost exploitative of sending (third world) countries and of migrant workers because it deprives both children of their mothers' care and mothers of the possibility of individually caring for their children. Taking this path, the care chain literature values good mothering only as one-on-one care, while disregarding the choices made by the care workers as well as their possible alternative perceptions of good motherhood as providing for their families and offering them a better economic future.<sup>52</sup> Further, as the research of sociologist Rhacel Salazar Parreñas shows, the emotional bond between mothers and their children can remain strong after migration, and migrant mothers' care for their children persists, even if transformed, upon migration.<sup>53</sup> Thus, the literature does not add emotional distributive aspects to financial ones, but instead replaces one with the other. The care chain literature does not challenge traditional gendered assumptions about families and motherhood. It reinforces traditional perceptions of the financial and emotional economy of the nuclear family.

Second, and related to the moralization of care, is the lack of attention to the distribution of care in relation to men's migration or to women's migration into industries outside of markets of care. The departure of either parent into any industry can lead to a care deficit. Yet, a possibly unintended tendency of the global care chain approach is to imply that men's migration is unproblematic in the "care balance," because men care for their families through financial provision. Similarly, women's immigration to non-care related industries is also less problematic, possibly since it more straightforwardly resembles men's migration or because it does not include the transfer of motherly labor from the global south to the global north.

Third, the literature assumes that the migrant care worker is a poor mother traveling abroad to ensure the economic survival of her family while leaving her children under the care of an un-paid female relative (daughter, mother, sister, etc.). In reality, migrant workers are a diverse group: some are indeed poor, married mothers, but others are single, or childless, or women from middle-class backgrounds. Furthermore, while many migrant workers leave their children in the care of family members, others may pay other women to take care of their children<sup>54</sup> or have

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52. Williams & Gavanoas, *supra* note 41, at 21.

53. See RHACEL PARREÑAS, CHILDREN OF GLOBAL MIGRATION: TRANSNATIONAL FAMILIES AND GENDERED WOES (2005) [hereinafter PARREÑAS 2005] (suggesting that mothers' migration, although very difficult for children and mothers, challenges the gender order and can be a demonstration of love and a source of pride for mothers and children); Rhacel Parreñas, *The Care Crisis in the Philippines: Children and Transnational Families in the New Global Economy*, in GLOBAL WOMAN, *supra* note 6, at 39 [hereinafter Parreñas 2002].

54. Lutz, *Introduction*, *supra* note 6, at 3; Yeates, *supra* note 49, at 13.

husbands (or other male relatives) who become active care-takers.<sup>55</sup> In some cases, care workers seek to use their relatively high wage in the receiving country for “social climbing,” to secure or improve their middle-class status in their country of origin and to ensure a better economic and social future for their family.<sup>56</sup> For others, going abroad can be a way out of oppressive familial and/or cultural conditions<sup>57</sup> or an adventure and a way to travel the world.<sup>58</sup> The alternative reasons for migration, the different life circumstances, and the diverse care solutions complicate the straightforward gender economy (women replace women, who in turn replace women) and the economy of emotions drawn by the care chain literature. According to the care chain account, the migrant care worker is a source of care to be bestowed either upon her own children or (exclusively) upon those of others, rather than a more complex subject that may have an array of desires, aspirations, relationships, and motivations.

Finally, while the global care chains literature creates a useful framework that takes into account the legal structures, enabling the globalization of care, most of it still lacks a close analysis of the international and national legal structures that support and enable care workers' migration.

### *C. Legal Distributive Analysis of Care Work*

A legal analysis that focuses on distribution, costs, and benefits, can offer a way to partially overcome some of the conundrums that haunt care work literature. First, focusing on the legal structure can reveal what aspects of the care work relation are the result of legal limitations or are being reinforced by the legal structure, and, therefore, can create a blueprint for legal reform proposals that are more nuanced than the general call for abolition or regulation. Further, by examining legal regulation, the analysis is inherently conscious of systemic elements while at the same time resisting over-determinism and through the comparative aspect, opening up the possibility of change.

Second, an analysis that looks at the various costs and benefits of the legal arrangement to different actors does not reduce any of the actors involved to mere victims, or imagine them as the liberal paradigm of an actor surrounded by endless, unconstrained choices. It allows a complex

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55. See, e.g., Michele Gamburd, *Breadwinner No More*, in *GLOBAL WOMAN*, *supra* note 5, at 190.

56. PARREÑAS 2001, *supra* note 13, at 86-88.

57. PREVENTING DISCRIMINATION, *supra* note 2, at 9.

58. See Laura M. Agustin, *Daring Border-Crossers: A Different Vision of Migrant Women*, in *SEX WORK, HEALTH AND MOBILITY IN EUROPE* 85 (Sophie Day & Helen Ward eds., 2004) (noting that many people migrate because of a natural desire for self improvement, rather than as the result of a traumatic event or desperation).

understanding of a social and economic interaction as a field in which all actors have some power since each has a set of strategic moves from which she can choose, albeit sometimes limited by personal or structural constraints and always limited by background rules. Thus, it allows us to relax the “structuralist” assumption of an all-encompassing male/capitalist domination in which women are nothing more than passive victims, and, at the same time, avoids the romantic individualist assumption of a freely choosing individual in a world of endless market possibilities.

Third, through a distributive legal analysis one can see the strategic moves available to women within the system and assess how various women fare under different legal regimes. Acknowledging that power (albeit in different degrees) resides in all actors and that potential strategies of resistance are always available, the researcher can evaluate how a regulative regime limits, eliminates, or perpetuates acts of resistance and compliance. This distributive analytical lens, which examines winners and losers and the costs and benefits of various stakeholders, allows not only a more realist description of the operation of actors in markets and in the shadow of legal regimes, but also enables what might be a more deeply transformative view of the operation of gender as a system of power. These richer assessments of women’s experiences will then, hopefully, be able to find their expression in novel forms of legal regulation that will be focused on distribution, aware of their consequences, and responsive to the intricate operation of power through all actors so as to improve the well-being of women inside and outside markets of care.<sup>59</sup>

Part III of this Article offers a legal distributive framework that is applied in the context of the three jurisdictions in Part IV. Before turning to Part III, an important criticism of the role of law in relation to care work needs to be explored: the claim that law has little to do with care work because of its informality, and the limited reach and effect of law on the care workers’ employment relationship.

*D. Given the Informal Character of Care Work, What Does Legal Analysis Have to Contribute to it?*

It is often suggested in the literature that the care work employment relationship is “informal” and that, because of its location in the private household and the intimate nature of the work itself, there is little effect to legal regulation on care work relations.<sup>60</sup> While I do not argue that legal

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59. I have discussed the merits of this methodology at greater length elsewhere. See Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 407-09 (2006).

60. See HONDAGNEU-SOTELO, *supra* note 38, at 241 (each suggesting that more than a formal legal change is required to change working conditions of care workers);



reform is the cure to all the problems that characterize care work, I would like to point out the significant role the legal framework has in shaping the care alternatives available to the families that employ care workers, as well as the bargaining positions, working conditions, and alternatives open to care workers themselves.

While social, cultural, and economic variables are undeniably powerful factors in shaping a family's choice to commodify care, through its legal apparatus the state has a crucial and often overlooked role in determining the decision to buy or provide care. Law—through a combination of regulatory regimes—has an important role in shaping domestic decisions and in affecting the bargaining positions as well as the distribution of income, leisure, and care responsibilities between different social institutions, stakeholder groups, and individuals. Welfare, employment, family, and the subject of this article, immigration law, all are essential building blocks of care-related policies in globalizing economies.

The demand for the services offered by migrant care workers, as well as the workers' living and employment conditions upon arrival, are determined to a large extent by welfare, employment, and family law. *Welfare law* shapes the basic institutional divisions of labor between the family, the market, and the state. The incentives created by welfare and tax law affect the demand for care work. For example, the minimal welfare support to care givers in the United States<sup>61</sup> is an important background rule that explains the high demand for care workers' labor which is supplied in the United States, as will be discussed later, mainly through its immigration policy.<sup>62</sup> Similarly, in Australia, a somewhat more generous support for care needs,<sup>63</sup> and a *de jure* and *de facto* closed border policy

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ROMERO, *supra* note 19, at 67; Williams & Gavanas, *supra* note 41, at 57-58.

61. For a general description of the United States as a liberal welfare state, providing minimal welfare support to care givers, see MONIQUE KREMER, *HOW WELFARE STATES CARE* 50-51 (2007); JULIA S. O'CONNOR ET AL., *STATES, MARKETS, FAMILIES: GENDER, LIBERALISM AND SOCIAL POLICY IN AUSTRALIA, CANADA, GREAT BRITAIN AND THE UNITED STATES* 114-21 (1999). For a detailed description of child care regime and reforms in the United States, see Denis Urian & Sonya Michel, *More Can Be Less: Child Care and Welfare Reform in the United States*, in *CHILD CARE POLICY AT THE CROSSROADS: GENDER AND WELFARE STATE RESTRUCTURING* 239-56 (Sonya Michel & Rianne Mahon eds., 2002).

62. See CHANG, *supra* note 8, at 124-125. Arguing that,

in the United States, domestic forms of structural adjustments, including cutbacks in health care and continued lack of subsidized child care, contribute to an expanded demand among dual career, middle-class households for workers in child care, elderly care, and housekeeping. The slashing of benefits and social service under "welfare reform" helps to guarantee that this demand is met by eager migrant women workers.

*Id.*

63. O'CONNOR ET AL., *supra* note 61, at 134-40 (comparing Australian social insurance to its more austere counterpart in the United States).

towards unskilled workers, structures the Australian care market.

*Employment law* defines central factors in the design of the care services market: it regulates the distribution of the cost of care between employers and employees, thereby shaping families' considerations in turning to the market to purchase care services, and it affects the employment conditions, vulnerability, and bargaining power of care workers themselves (characterized as part of the secondary labor market), partly influencing the cost of and accessibility to care work. The exclusion of migrant workers from protective employment legislation or their inclusion in it<sup>64</sup> serves as a background rule that further explains the structure and characteristic of markets of care in which migrants are employed (it affects care workers' wages and working conditions, as well as the need for care labor through the design of familial responsibility accommodation mandates), and the distribution of wealth and power between employers and employees in markets of care.

*Family law* shapes the decisions spouses make with regard to the distribution of care work within the household. A marital property regime in which the primary care taker fully shares the wealth of the main breadwinner creates a safety net for primary care takers who have no independent earnings upon separation or divorce. This in turn affects markets of care since it shapes women's decisions as to whether to invest in her own labor market skills or follow the traditional gender division of labor as a primary care taker.

Finally, as Part IV demonstrates, *immigration law* shapes the supply of cheap care work and influences migrant worker vulnerability, and the cost of care services. Once the operation of these four regulatory regimes and their effect on familial care decisions is taken into account, the constitutive role of law in markets of care becomes evident.

Moreover, the legal framework plays an important role not merely when considering the larger picture of the demand for care work, but also when we focus on the "informal" nature of the employment relationship itself.<sup>65</sup> The common understanding of informal sectors as simply outside the reach of formal governance<sup>66</sup> overlooks the fact that various layers of legal

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64. See Shamir, *Between Home and Work*, *supra* note 35, at 450-52 (pointing out that undocumented workers are unable to avail themselves to the legal structures designed to protect workers in the United States); *cf.* ILO, *DECENT WORK*, *supra* note 31, at 36-56 (illustrating similar struggles for undocumented workers internationally).

65. See Basudeb Gusha-Khasnabis et al., *Beyond Formality and Informality*, in *LINKING THE FORMAL AND THE INFORMAL ECONOMY 2*, 2-7 (Basudeb Gusha-Khasnabis et al. eds., 2006) (discussing the concepts of the formal and informal economy, and the usefulness of this distinction).

66. See *id.* at 5 (providing Indian software manufacturers as an example that informal markets can successfully be monitored by a government without destroying their market viability).

regulation may interact differently with the “informal” sector, leading to varying degrees of informality. I offer the following categories of levels of informality in relation to the informal sector of care work:

1. *Weak informality* is the situation that characterizes the employment relations of most resident/citizen care workers in the sense that de-jure and/or de-facto they are not covered by protective social (labor, employment, and welfare) legislation but the background rules of criminal law and private law are still in force.
2. Most documented migrant workers experience a level of *intermediate informality* in which the employee is mostly not covered by social legislation and the rights of background private law regime are not enforced (e.g. a right to wage is meaningless because there is no way to successfully vindicate a legal claim), but criminal law protections still applies. This is the situation of many documented care workers who either do not know their rights, or, if they know them, face difficulties in claiming their rights, due to low social capital. Even if they manage to claim their rights employers in many cases can manipulate the system to threaten a worker's legal status before the worker can vindicate her claims.
3. Undocumented migrant workers experience a level of *strong informality* in which workers are not covered by social legislation, the private law regime is not enforced, and the worker de facto has no criminal recourse due to fear of deportation (this being the situation of most undocumented migrant workers), or de jure through explicit exclusion (e.g. the situation of migrant domestic workers in Saudi Arabia).

These three forms of informality—weak, intermediate, and strong—provide a spectrum that is structured by the legal system.<sup>67</sup> The three types of informality do not exist outside of the legal system, but rather express a spectrum of informality, each form displaying a different relationship to the following layers of legal regulation: social protection, private law, and public (especially criminal) law. The categorization is not absolute; some documented migrant workers, for various reasons, can experience strong informality, while some undocumented migrant workers can experience intermediate informality. However, this tentative map is useful as a point of reference for a discussion about the role of law in regulating “informal” social and economic relationships that are often misconceived as existing

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67. For a different take on the definitional problem presented by the concept of informal labor markets see Guy Davidov, *Enforcement Problems in “Informal” Labor Markets: A View From Israel*, 27 COMP. LAB. L. & POL'Y J. 3 (2005).

outside the law.

The reach of law affects migrant workers' bargaining position. Strong informality is a situation in which there is no applicability (*de jure*) or no access (*de facto*) to social legislation, private law, or criminal law. The lack of access to or the inapplicability of these layers of law translates into a stronger role for "unfettered" market dynamics in the situation, resulting in a greater dependence of the worker on market powers. Accordingly, the stronger the informality, the weaker the workers' bargaining position and the more vulnerable she becomes. The distributional analysis conducted in Part IV shows the way in which care workers' immigration regimes contribute to the creation of care markets characterized by varying levels of informality and produce, intentionally and unintentionally, care workers' vulnerability.

With this understanding of the relationship between background rules, legal informality and workers' vulnerability, I now turn to offer a legal distributive framework to analyze the effect of different immigration regimes on markets of care.

### III. THE STATE, THE FAMILY, AND THE MARKET: A LEGAL DISTRIBUTIVE ANALYSIS

I propose an analytical framework that assesses the distributive outcomes of legal immigration regimes, as they relate to familial markets of care.<sup>68</sup> The framework builds on the insight of political economist Gøsta Esping-Andersen who, in the context of welfare state theory, showed that, in order to understand the function of welfare states, one cannot focus only on classic welfare state functions. Rather, an exploration of the welfare provided by families and markets (especially the labor market) is equally crucial to the understanding of the operation of the welfare state. Here, I apply this insight to the study of the regulation of the family, specifically looking at the care provided by migrant workers, in an attempt to go beyond the family-state dyad to include the market as a sphere in which the family is meaningfully regulated.

The analytical framework is made up of five evaluative elements.<sup>69</sup> The

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68. See Hila Shamir, *The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States*, 58 AM. J. COMP. L. 953 (2010) [hereinafter Shamir, *State of Care*] (explaining more fully the analytical framework utilized here, and its application in the context of welfare law). See generally Shamir, *Between Home and Work*, *supra* note 35 (applying this analytical framework in employment law).

69. Three of the five elements—stratification, de-commodification, and de-familialization—are taken from the influential work of sociologist Gøsta Esping Andersen, who developed them in the context of identifying the distributive outcomes of welfare states. Two of them—stratification and de-commodification—were introduced in his pioneering work from 1990, in which Esping-Andersen suggested a

first element, *material delivery*, looks at who gets what. It examines the redistribution of wealth that results from the immigration regime and asks what the material costs and benefits are to different stakeholders as a result of a given regime. While material delivery is a classic component of a distributive analysis, the following four elements of the analytical framework look at distributive consequences that go beyond the material.

The second element, *stratification*, describes ways in which the legal regime serves to structure the quality of social citizenship, and, specifically, how immigration policy shapes class and social status. The third element, *de-commodification*, measures the degree to which social rights granted as part of the immigration regime “permit people to make their living standard independent of pure market force,”<sup>70</sup> thus diminishing a workers’ status as a commodity. This element looks at the level of dependency on the labor market required for economic survival. Greater market dependency means greater commodification.

The fourth element, *de-familialization*, measures the degree to which the social policy manifested in the immigration regimes ends up freeing men and women from family obligations and examines whether care responsibilities are a private, familial, or public-social matter. The more care rendered in private, by family members, the greater the familializing effect of the regime.

The fifth evaluative element, *Intra-Household Division of Labor* (IHDOL), shifts the focus from distribution between market and family, or between different groups within the market, to the distribution within the family. An examination of IHDOL is required in order to capture distributive outcomes that relate to the effect of social policy on the time family members spend on providing household care and the time spent on other activities such as paid work or leisure. The IHDOL element focuses on the policy’s effect on the contribution of different household members to household care work. It questions the extent to which policies entrench, transform, or disrupt the traditional breadwinner/housewife division of labor, in which men are the financial providers and women are the

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novel framework through which to study the origins and trajectories of social policy, and, more importantly, to analyze, evaluate, and qualitatively compare the distributive outcomes of post-industrial capitalist welfare states. ESPING-ANDERSEN, *THREE WORLDS*, *supra* note 17. The de-familialization element was introduced in his 1999 book *Social Foundations of Post Industrial Economies*. See ESPING-ANDERSEN, *SOCIAL FOUNDATIONS*, *supra* note 18, at 47-72.

70. ESPING-ANDERSEN, *THREE WORLDS*, *supra* note 17, at 3. Note that the term commodification here does not stand for its more common meaning within political theory as “the process of something becoming understood as a commodity, as well as the state of affairs once this has taken place” (a definition taken from RETHINKING COMMODIFICATION, *supra* note 20, at 1); rather, it signifies a much narrower relationship between the individual and the market. The commodification element here looks at the individual’s *dependence on the labor market* for economic survival.

providers of care. Adding the IHDOL element to the above framework suggests that measures of familialization or de-familialization are important but not sufficient to an understanding of what happens in the household as a result of these processes.

The resulting analytical structure is a five-pronged framework, which includes de-commodification, de-familialization, stratification, IHDOL, and material delivery, for the comparative study of distributive outcomes of immigration regimes on familial care. The analytical framework provides a nuanced toolkit for describing and assessing the distributive effects of immigration regimes on familial care. The framework goes beyond the material dimension to examine the ways in which legal regulation distributes power, opportunities, time, and bargaining endowments, and, thus, shapes power relations in a broad sense. Further, it exposes the multiple layers on which any given legal regime operates and the complex distributive outcomes that may result from various regulatory combinations. The model unpacks the concept of distribution and the tradeoffs embedded in legal regulation. Finally, the framework helps identify the complex set of interests implicated by particular policies and avoids the assignment of unified interests to identity groups, such as members of the same family, class, or sex. For example, the analysis acknowledges that, in the context of care, the interests of “women” are not unified; rather, the interests of women who employ care workers and women that are themselves care workers often diverge.

The five-pronged framework is surely not exhaustive.<sup>71</sup> But the analysis in Part IV attempts to show that, when these five elements are used in tandem, the analysis is far more likely to reveal important—and often unnoticed or unintended—policy outcomes and to reach beyond material advantage so as to include power, opportunities, and dependencies as well. Following is an application of this framework to the immigration regimes of the three jurisdictions. The analysis is generated through the application of these evaluative elements is a generalized stylized analysis.

#### PART IV: THE BORDER AND THE HOME: REGULATING CARE WORK MIGRATION

One of the paradoxes of globalization is that, as the world is becoming

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71. One aspect that can be added, depending on the context, is attention to the role played by civil society. Some have tried this exercise, tracing allocation of responsibility for individual welfare between the state, the individual, the market, and civil society. See generally CHRISTIAN ASPALTER, *DIFFERENT WORLDS OF WELFARE CAPITALISM: AUSTRALIA, THE UNITED STATES, THE UNITED KINGDOM, SWEDEN, GERMANY, ITALY, HONG KONG AND SINGAPORE* (2001). However, for the purpose of clarity and in order to focus on the analysis on immigration law, I maintain here the traditional state-market-family triangle, leaving the civil society aspect unattended.

increasingly interconnected (globalized), borders have become more guarded and immigration policies more stringent.<sup>72</sup> While for capital, business, and some skilled workers borders have indeed become less of a barrier, as far as unskilled workers are concerned (and particularly the poor of the global south) globalization turns out to be not about breaking down national borders but about, at least formally, fortifying and militarizing them. Yet the increased free movement of capital in the formal and legal paths is not disconnected from the informal and illegal paths; rather, they are enabled and supported by the same infrastructures.<sup>73</sup> Accordingly, a byproduct of globalization is that, at the same time that markets are opening and borders are closing, illegal migration and other cross-border illegal activities are on the rise. The perceived rise in illegal migration leads to an increased anxiety about borders and a stronger desire for regulation that often translates into a stronger prohibitive stance and tends towards criminalization of undocumented workers. Criminalization ends up, paradoxically, not eliminating the activity but pushing it underground, thus strengthening the criminal aspects of these informal markets, creating greater incentives for genuinely criminal actors to promote the forbidden activity.<sup>74</sup> As Chantal Thomas notes: “First, these illegal markets [crime, drugs, prostitution, trafficking and migrant-smuggling] are an inherent part of globalization; second, the emerging posture of prohibitionism may not reduce the incidence of illegal markets and may actually exacerbate their harmful characteristics.”<sup>75</sup>

This Part will explore the effects of immigration regimes on markets of care.<sup>76</sup> Documented and undocumented migrant workers are increasingly important economic actors in care markets in developed countries. Their migration affects the socioeconomic development in their countries of origin through remittances and that of their receiving countries by enabling higher levels of labor market participation, especially among women, and by supporting the receiving country's economy. The demand for care workers in developed countries gave rise to various agreements and

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72. Political scientist Peter Andreas called this “the paradox of open markets, closed borders.” Peter Andreas, *U.S.–Mexico: Open Markets, Closed Border*, 103 *FOREIGN POL'Y* 51, 64 (1996) (illustrating how tightening border controls does little to stem the flow of immigration).

73. Saskia Sassen, *Is This the Way to Go?—Handling Immigration in a Global Era*, 4 *STAN. AGORA* 1, 3 (2003).

74. *Id.* at 1.

75. Chantal Thomas, *Illegal Markets, Illegal Migrants, and International Economic (Dis)Order* (2007) (unpublished manuscript) (on file with author).

76. I limit my discussion to *economic* migration—legal and illegal—into markets of care. This Article therefore does not deal with issues that are important to characterizing migration regimes in general, but are relatively peripheral to markets of care, such as issues of refugee law, and migration of professional/skilled workers. Similarly, the discussion will only marginally touch upon issues of naturalization.

legislative acts that facilitate the migration of care workers, creating legal frameworks for their migration and, with it, usually increasing undocumented migration as well.

In the following pages, I will first describe the legal frameworks that were developed in the United States, Australia, and Israel to regulate the migration of care workers and then proceed to apply the distributional framework developed in Part III to examine the distributional effects of these frameworks on the various actors in markets of care.

### A. Three Immigration Regimes of Care Work

#### 1. United States

The United States is traditionally characterized as a *settlers' immigration regime*: a regime that “recurrently recruits new permanent members through immigration.”<sup>77</sup> A settlers' regime is usually antithetical to the idea of impermanent migration of unskilled workers which enter the country for a limited period of time for the purpose of work. Accordingly, since the 1920s, when immigration was first regulated in the United States, there have been very few routes of legal entry into the United States for *unskilled* workers. One attempt to regulate unskilled work was the Bracero Program, a guest worker program for farm and railroad workers that was agreed upon between the United States and Mexico in 1942.<sup>78</sup> The program was terminated in 1964 due to the exploitation of the workers and harsh working conditions.<sup>79</sup> The program was an attempt to deal with a perceived labor shortage in the United States and, arguably, ended not only due to labor union activity that ignited a liberal uproar about the slavery-like conditions of the Mexican workers, but also just at a time when the dependence of agribusiness on manual labor was being reduced due to the increased mechanization of farming processes.<sup>80</sup> There was never an equivalent program for unskilled care workers. While the strong

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77. CHRISTIAN JOPPKE, IMMIGRATION AND THE NATION-STATE 8 (1999).

78. See generally Manuel García y Griego, *The Importation of Mexican Contract Laborers to the United States, 1942-1964*, in BETWEEN TWO WORLDS: MEXICAN IMMIGRANTS IN THE UNITED STATES 45 (David G. Gutiérrez ed., 1996) (explaining that the program was established as an emergency provision following World War II and suffered from institutional defects from its outset).

79. See MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 138-66 (2005) (characterizing the program as a choice between two evils for the Mexican government, coerced by the United States to send workers to America rather than soldiers to Europe during World War II, thereby setting the stage for Mexico's eventual rebuke of the program); see also García y Griego, *supra* note 78, at 45 (showing that the eventual demise of the program was strongly linked to lax enforcement of worker protections leading to abuse and eventual scandal in the public perception).

80. See NGAI, *supra* note 79, at 166.



agribusiness lobby managed to turn the shortage of cheap farm labor into a national priority, deserving special visas,<sup>81</sup> there was never an equivalent lobby to emphasize the 'shortage' of cheap labor in the care market.

The lack of legal routes of migration for care workers led to calls for reform. One such attempt was by the Association for Legalized Domesticity that was established in 1953. This was "a group of El-Paso housewives . . . that wanted to hire maids from Mexico in order to pay lower wages."<sup>82</sup> The proposal was rejected by the Department of Justice. Another set of suggestions followed the 1993 "Zoe Baird incident." Baird was President Clinton's nominee to the Attorney General position that withdrew her name from consideration when the Senate Judiciary Committee found out that she employed two illegal workers (as a chauffeur and a nanny).<sup>83</sup> The Baird incident raised awareness of the shortage of (documented) care workers. An outgrowth of the Baird incident was a proposal to create an exception to the general rule prohibiting the employment of illegal immigrants to household employers or to establish a special visa for house care workers.<sup>84</sup> In 1993, the federal Commission on Immigration Reform heard testimonies about the need for an immigration program for in-home care workers (domestic workers, child-care workers, and home health-aides). Various frameworks were considered, but the matter did not progress to the stage of a legislative proposal.<sup>85</sup>

Under the current immigration regime, there are very few ways for unskilled care workers to work in the United States legally. However, there are limited ways that unskilled care workers who are not related by blood or marriage to American citizens can, theoretically and under limited circumstances, get a visa to work and reside in the United States.<sup>86</sup> A

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81. *See id.* at 152-53.

82. ROMERO, *supra* note 19, at 91.

83. For a description of the development of the Baird case and the public discussion that followed see MONA HARRINGTON, CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS 11-24 (2000). Harrington says that "Baird told the committee, she and her husband had difficulty finding such help [domestic help on a full-time live-in basis], particularly a qualified live-in nanny, which is why they had ended up hiring immigrants who entered the country illegally." *Id.*; *see also* Lovell Banks, *supra* note 14, at 2-4, 21-27 (providing the Black feminist interpretation of the Baird case).

84. *See* CHANG, *supra* note 8, at 58-59 (detailing how barriers to hiring undocumented workers often drive working standards down instead of curbing undocumented employment).

85. *Id.* at 109.

86. During 2009, there were 163 million nonimmigrant admissions to the United States. "The major purposes for which nonimmigrant admission may be authorized include temporary visits for business or pleasure, academic or vocational study, temporary employment, and to act as a representative of a foreign government or international organization." RANDALL MONGER & MACREADIE BARR, DEP'T OF HOMELAND SEC., NONIMMIGRANT ADMISSION TO THE UNITED STATES, ANNUAL FLOW REPORT (2009), *available at* [http://www.dhs.gov/xlibrary/assets/statistics/publications/ni\\_fr\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ni_fr_2009.pdf).

migrant worker can get an H-2B visa for a maximum of one year as an unskilled worker designated to do temporary and seasonal work.<sup>87</sup> Another, more relevant option is an exchange J-1 visa.<sup>88</sup> Theoretically, like any worker, domestic workers can apply for a permanent residency (“green card”) but that is a significantly more difficult process. The three-stage green card process of labor certification, immigrant worker petition, and application to adjust status “has historically been beyond the reach of domestic workers.”<sup>89</sup>

The H-2B visa is designed to allow employers in need of seasonal, one-time, or temporary unskilled workers (that are not agricultural workers)<sup>90</sup> to legally hire migrant workers. 66,000 H-2B visas are granted per year.<sup>91</sup> While, theoretically, domestic workers can qualify, “it is difficult, if not impossible, for a potential employer to prove that its need for a domestic worker fits the statutory ‘temporary need’ of the H-2B category.”<sup>92</sup>

Unlike the H-2B, the Au Pair program is directly designed to provide care services. Yet the program is conceived as a cultural and educational “exchange” program and therefore highly limits the population that can take part in it.<sup>93</sup> In the au pair program young foreign nationals (almost all women) between the ages of eighteen and twenty six who are proficient in English come to the United States for a year (with an option of another one year extension) during which they live with a family and provide childcare.<sup>94</sup> As part of their program they are required to take six hours of academic credits in an American college or university, paid for by the host family.<sup>95</sup> Au pairs are covered by the Fair Labor Standards Act<sup>96</sup> and their employment is limited to ten hours per day and forty-five hours per week.<sup>97</sup> Families and au pairs are selected by criteria set in regulation, which includes a background investigation and criminal check. The au pair program therefore does not aim to provide a long-term care solution for

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87. 8 C.F.R. § 214.2(h) (2010); IVAN VASIC, *THE IMMIGRATION HANDBOOK* 99-101 (2008).

88. § 214.2(j); VASIC, *supra* note 87, at 76-77.

89. William J. Banks, *The Domestic Worker Debacle: The Need For Domestic Worker Visas in the United States*, 80 FLA. BAR J. 28, 30 (2006).

90. *Id.* at 28 (noting that agricultural workers have a specifically designated visa program (H-2A)).

91. 8 C.F.R. §214.2(h)(8)(i)(C).

92. Banks, *supra* note 89, at 28.

93. AUSTIN T. FRAGOMEN JR. ET AL., *IMMIGRATION FUNDAMENTALS—A GUIDE TO LAW AND PRACTICE* § 5:17 (2007).

94. Linda Kelly, *The Fantastic Adventure of Supermom and the Alien: Educating Immigration Policy on the Facts of Life*, 31 CONN. L. REV. 1045, 1057 (1999).

95. *Id.* at 1058; 22 C.F.R. §62.31.

96. § 514.31(j)(1); Kelly, *supra* note 94, at 1058.

97. § 514.31(j)(2); Kelly, *supra* note 94, at 1058.

families or care work for workers; it is heavily regulated and is therefore somewhat of an exception to care workers employment relationship.<sup>98</sup>

Special permission to employ a migrant care worker exists for diplomats, employees of foreign missions, and international organizations (United Nations, World Bank, etc). Care workers employed in these households can be sponsored by B-1,<sup>99</sup> A-3,<sup>100</sup> and G-5<sup>101</sup> visas.<sup>102</sup> These classifications raise particular challenges since many of the employers in these situations enjoy various levels of diplomatic immunity to U.S. law.<sup>103</sup> Since this is a narrow exception carved out for live-in domestic workers who enter the United States essentially as dependents of diplomats and international agency workers, these visa arrangements represent a relatively small number of migrant care workers.<sup>104</sup> Accordingly, I will only marginally deal with these visa classes.

The issue of undocumented (“illegal”) immigration has been a major area of policy debate in the United States at least since the 1970s. Waves of legislative proposals suggesting amnesty to undocumented workers, while imposing federal sanctions on employers, and strengthening border enforcement, have been discussed in Congress since the early 1970s.<sup>105</sup>

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98. See Kelly, *supra* note 94, at 1057-58 (suggesting that the au pair program is an “anomaly” in U.S. care policy).

99. See Laurie Grossman & David Grunblatt, *The Nonimmigrant Admission of Attendants, Domestic, and Personal Servants*, available at <http://www.wildesweinberg.com/events-and-outreach/651> (last visited July 11, 2010) (describing the B1 visa granted to care workers who accompany U.S. citizens who reside abroad but are visiting the United States or assigned to the United States temporarily).

100. See *id.* (describing the A-3 visa granted to employees of ambassadors, diplomats, consular officers, public ministers, and their families).

101. See *id.* (describing the G-5 visa granted to work for officers and employees of international organizations or of foreign missions to international organizations and their families).

102. *Id.*

103. See *Eradicating Slavery: Preventing the Abuse, Exploitation and Trafficking of Domestic Workers by Foreign Diplomats and Ensuring Diplomatic Accountability: Hearing on International Trafficking in Persons: Taking Action to Eliminate Modern Day Slavery Before the House of Foreign Affairs Committee*, 110th Cong. 2-5 (2007) (statement of Caroline Frederickson & Vania Leveille, American Civil Liberties Union), available at [http://www.alcu.org/images/asset\\_upload\\_file359\\_32786.pdf](http://www.alcu.org/images/asset_upload_file359_32786.pdf) [hereinafter *Statement of Frederickson & Leveille*] (discussing the problems caused to workers due to diplomatic immunity).

104. See *id.* at 3 (stating that, each year, approximately 3,000 A-3 and G-5 visas are issued); HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES (2001), available at <http://www.hrw.org/reports/2001/usadom/>.

105. See generally CHANG, *supra* note 8 (discussing various attempts to pass such legislation in the House and Senate between 1972 and 1986). A bill was proposed in the House in 1972, by Representative Peter W. Rodino Jr., and then in 1985 and 1986 in both the House and the Senate (the Simpson-Mazzoli bill, which was introduced in 1982). Due to some differences between the bills passed in the House and the Senate, a committee was established and eventually the bill ‘died’ in committee. Eventually in

The heavily compromised result of all these proposals was the 1986 Immigration Reform and Control Act (IRCA).<sup>106</sup> In order to curtail the employment of illegal workers, the Act imposed sanctions on employers who had knowingly employed undocumented migrants,<sup>107</sup> introduced a limited one-time “amnesty” program for undocumented migrant workers who had lived in the United States since 1982 allowing them to apply for a temporary resident status, and created special visa classes for farm workers.<sup>108</sup> Almost three million undocumented workers were “legalized” under the reform.<sup>109</sup> However, the reform did not change the immigration regime substantially because it did not create a stable framework for legalization or an effective enforcement mechanism for the regime. The next reform, the Immigration Act of 1990, kept a restrictive line on guest-worker visas but increased the number of permanent employment visas to skilled workers as well as the option for family reunification.<sup>110</sup> The result was a rather stable status quo of incomplete enforcement of immigration law, and a large number of undocumented migrants that reside in the United States. Estimates as to the numbers of illegal migrants in the United States vary greatly and range from 9.3<sup>111</sup> to 20 million, as of 2005.<sup>112</sup> After 9/11, greater restrictions were imposed on entry to the United States through formal borders, but entrance through the long border with Mexico still remains the way most undocumented migrants enter the country.<sup>113</sup>

Undocumented migrant workers are covered by the rights granted in the American Constitution (especially relevant is the 13th Amendment and its enabling statutes) as well as some federal protective employment legislation such as Title VII,<sup>114</sup> the Fair Labor Standards Act (FLSA),<sup>115</sup>

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1986, the Immigration Reform and Control Act (IRCA) was passed.

106. *See id.* at 59 (providing an overview of the compromises in the 1986 Immigration Reform and Control Act).

107. *See id.* (noting that the act included the introduction of the I-9 form that ensures each employer checks the legal status of employees prior to their employment).

108. *See id.* (discussing the 1986 IRCA).

109. *See id.* (explaining that IRCA included a five-year bar from most federal assistance plans including the 1996 Welfare Reform Act (The Personal Responsibility and Work opportunity Reconciliation Act)). States can choose whether to provide the services after the five year bar. *Id.*

110. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

111. *See* Jeffrey S. Passel et al., *Undocumented Immigrants: Facts and Figures* (Jan. 12, 2004), [http://www.urban.org/UploadedPDF/1000587\\_undoc\\_immigrants\\_facts.pdf](http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf) (estimating the population of undocumented immigrants based on the March 2002 Current Population Survey).

112. Robert Justich & Betty Ng, *The Underground Labor Force is Rising to the Surface*, BEAR STERNS RESEARCH (Jan. 3, 2005), <http://www.steinreport.com/BearStearnsStudy.pdf>.

113. *See* Passel et al., *supra* note 111 (estimating that more than half of the illegal immigrants in the United States are Mexican).

114. *EEOC v. Tortilleria “La Mejor,”* 758 F. Supp. 585, 593-94 (D. Cal. 1991)

and the Occupational Safety and Health Act (OSHA) protection,<sup>116</sup> but the applicability of other rights is debatable.<sup>117</sup> However, the rights and protections extended to migrant workers are only marginally and rarely pursued, since making such claims during employment may expose the worker to deportation proceedings.

Undocumented migrants do not participate in Social Security programs. However, undocumented migrants can be eligible for various welfare benefits five years after they enter the United States. Welfare benefits eligibility varies from state to state.<sup>118</sup> For example, states can decide whether undocumented migrants are eligible for Temporary Assistance for Needy Families (TANF) benefits despite their migratory status.<sup>119</sup> The children of illegal immigrants who were not born in the United States (and are not American citizens) can attend public schools, but, in most states, are not able to enjoy in-state tuition subsidies or take federal loans to attend college.<sup>120</sup> Further, undocumented migrants may experience other restrictions on buying or renting houses and obtaining a driver's license, since some states these require proof of legal stay in the country.<sup>121</sup>

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(“Congress did not intend that the IRCA amend or repeal any of the previously legislated protections of the federal labor and employment laws accorded to aliens, documented or undocumented, including the protections of Title VII.”).

115. See *Flores v. Albertsons, Inc.*, 2002 WL 1163623 at \*5 (C.D. Cal. 2002) (contrasting workers who sought to recover wages entitled to them under the FLSA and terminated workers seeking back pay and finding that an undocumented worker is not barred from recovering unpaid wages for work performed); *Flores v. Amigon*, 233 F. Supp. 2d 462, 465 (E.D.N.Y. 2002) (“Until Congress or the Supreme Court clearly determines that the FLSA does not apply to these workers, the prejudice to plaintiff outweighs any potential relevance this information may have to the defense”); *Liu v. Donna Karan Int'l*, 207 F. Supp. 2d 191,192 (S.D.N.Y. 2002) (explaining that previous decisions have found that immigration status is irrelevant when seeking unpaid wages under FLSA).

116. See AFL-CIO, IMMIGRANT WORKERS AT RISK: THE URGENT NEED FOR IMPROVED WORKPLACE SAFETY AND HEALTH POLICIES AND PROGRAMS 9 (2005), available at [http://www.aflcio.org/aboutus/laborday/upload/immigrant\\_risk.pdf](http://www.aflcio.org/aboutus/laborday/upload/immigrant_risk.pdf) (explaining that OSHA offers weak protection in this context since there is no penalty on employers who retaliates against an undocumented worker who raises safety and health claims).

117. See *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 149 (2002) (holding that an award of back pay to an undocumented alien who has never been legally authorized to work in the United States is foreclosed by federal immigration policy). The Court asserted that it will not “award back pay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by criminal fraud.” *Id.*

118. Wendy Zimmerman & Karen C. Tumlin, *Patchwork Policies: State Assistance for Immigrants under Welfare Reform*, THE URBAN INST. (1999), available at <http://www.urban.org/url.cfm?ID=309007>.

119. *Id.*

120. See The Development, Relief, and Education for Minors Act, S. 1545, 108th Cong. § 1 (2003) (proposing a solution to this issue).

121. See Jeffrey T. Kullgren, *Restrictions on Undocumented Immigrants' Access to Health Services: The Public Health Implications of Welfare Reform*, 93 AM. J. PUB.

By creating almost no legal routes for the migration of care workers, allowing a wide zone of toleration of illegal migration (due to vulnerable land borders and partial enforcement of immigration restrictions), and creating a welfare regime that induces a high demand for cheap care labor, the U.S. immigration regime de facto enables and shapes the operation of a flourishing market of care in which most workers are undocumented migrant workers.<sup>122</sup>

## 2. Australia

There are practically no guest worker visa regimes for migration of low-skilled and unskilled workers into Australia.<sup>123</sup> The Australian government supports this position by arguing that a guest worker visa for unskilled workers represents a departure “from Australia’s migration tradition and culture. Australia’s migration program was developed for permanent settlers, for nation-building, not for guest workers.”<sup>124</sup> Surrounding Asia Pacific neighbors have urged Australia to consider the introduction of such a program in order to aid “Pacific countries in need of development assistance and with surplus workers, while assisting Australian horticulturalists to offset labor shortages at harvest time.”<sup>125</sup> Through the years, the Australian government considered and rejected such proposals in relation to the agricultural labor force.<sup>126</sup>

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HEALTH 1630 (2003) (pointing out that PRWORA declares that undocumented immigrants are ineligible for “any retirement, welfare, health, disability . . . or any other similar benefit for which payments or assistance are provided”); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 31-34 (2007) (examining various state laws aimed at restricting the rights of undocumented minors); Maria Pabon Lopez, *More Than a License to Drive: State Restrictions on the Use of Driver’s Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91 (2004) (exploring the three main types of state laws designed to restrict noncitizen’s access to drivers licenses).

122. See DOMESTIC WORKERS UNITED, *supra* note 30, at 2, 10 (explaining a New York survey result that found that 99% of domestic workers are foreign born and 76% are not U.S. citizens); VERNEZ, *supra* note 3, at 89 (showing that in California, 65% of workers in private households were migrant women).

123. See DEP’T OF IMMIGRATION & CITIZENSHIP, ANNUAL REPORT 2007-2008 (2008), available at <http://www.immi.gov.au/about/reports/annual/2007-08/html/overview/the-year-at-a-glance.htm> [hereinafter ANNUAL REPORT]. This does not mean that there are no temporary migrant workers. In 2008 an estimated half a million temporary migrant workers in Australia, a third of whom were international students who are allowed to work for a limited amount of hours. Approximately 110,000 were holders of 457 visas, visas for skilled workers sponsored by an interested Australian employer, and the remaining groups were Working Holiday Makers, a group that will be discussed later.

124. Adrienne Millbank, *A Seasonal Guest Worker Program for Australia?*, Dep’t of Parliamentary Services Research Brief 1, 2 (2006), available at <http://www.aph.gov.au/library/pubs/rb/2005-06/06rb16.pdf> [hereinafter Millbank, *Seasonal Guest Worker*].

125. *Id.* at 1.

126. See, e.g., THE SENATE STANDING COMM. ON EMPLOYMENT, WORKPLACE

The Australia immigration regime does not create options for unskilled or low-skilled migrant workers to work legally in Australia.<sup>127</sup> The definition and level of required “skill” is determined by the Australian Standard Classification of Occupations (ASCO) dictionary, which classifies jobs into nine categories according to their level of skill.<sup>128</sup> Only workers in the first four categories—managers and administrators, professionals, associated professionals, and trade persons—can apply for a visa.<sup>129</sup>

Beyond the migration of highly skilled workers (ASCO categories 1-4), employers can, under certain circumstances, sponsor migrant workers to fill positions that fit ASCO categories 5-7 when an employer shows and certifies that full time genuine positions cannot be filled locally.<sup>130</sup> However, no such concessions exist in the two lower-level skill categories (8 and 9) in which care work is listed.<sup>131</sup>

The largest category of visas that allows the employment of semi-skilled or unskilled workers is the Working Holiday Makers (WHM) category. This visa is intended for backpackers from one of the 19 WHM signatory countries (almost all of which are developed countries) who are allowed to

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RELATIONS, AND EDUCATION, PERSPECTIVES ON THE FUTURE OF THE HARVEST LABOR FORCE REPORT (2006), available at [http://www.aph.gov.au/senate/committee/eet\\_ctte/completed\\_inquiries/2004-07/contract\\_labour/report/report.pdf](http://www.aph.gov.au/senate/committee/eet_ctte/completed_inquiries/2004-07/contract_labour/report/report.pdf).

127. See Graeme Hugo, *Care Worker Migration, Australia and Development*, 15 *POPULATION SPACE & PLACE* 189, 190 (2009) (“Indeed, it is virtually impossible for unskilled or semi-skilled workers to enter as settlers unless they qualify under strict refugee-humanitarian and family categories.”).

128. The nine categories are: managers and administrators, professionals (particularly in science, building, engineering, business, information, health, education, and arts), associated professionals, tradespersons (particularly in the areas of mechanical and fabrication engineering, automotive, electronics, construction, food, and skilled agriculture workers), advanced clerical and service workers (secretaries and personal assistants), intermediate clerical, sale and service workers, intermediate production and transport workers (plant operators, machine operators, road and rail transport drivers), elementary clerical sales and service workers, and laborers and related workers. AUSTRALIAN BUREAU OF STATISTICS, AUSTRALIAN STANDARD CLASSIFICATION OF OCCUPATIONS SECOND EDITION Cat. no. 1220.0 (1997) available at: <http://www.abs.gov.au/ausstats/ABS@.nsf/66f306f503e529a5ca25697e0017661f/5c244fd9d252cfc8ca25697e00184d35!OpenDocument>.

129. *Id.*

130. *See id.* (showing that the following categories require lower skills and are the following: advanced clerical and service workers (secretaries and personal assistants); intermediate clerical, sale and service workers; and intermediate production and transport workers (plant operators, machine operators, road and rail transport drivers)).

131. *See id.* (explaining that care work occupations are listed in the categories of the lowest skills, the eighth and ninth ASCO categories, of “elementary clerical, sales and service workers” and “laborers and related workers”). The eighth category includes domestic housekeepers, that, beside menial work of cooking and cleaning can also “care for and supervise children or assist parents in caring for children” as well as sex workers. Who “[p]rovide[ ] clients with social companionship or sexual services.” *Id.* The ninth category includes cleaners (commercial and domestic). There is no current visa regime for workers in these two categories.

fund their travels by working for a limited period of time in Australia.<sup>132</sup> Visa holders must be between eighteen and thirty years of age, and have no dependent children. Travelers are granted a visa for twelve months. They may work for up to six months with any one employer but must not work for the whole of their visit.<sup>133</sup> While WHM visas are not limited to any type of work, the six month time limit makes it unsuitable for care work arrangements and, therefore, too marginal to influence the care market.<sup>134</sup>

Undocumented migrant workers are covered by the country's labor and employment laws.<sup>135</sup> However, undocumented migrants rarely make legal claims against their employers due to fear of deportation.<sup>136</sup> Furthermore, illegal workers are exempt from welfare benefits since eligibility is conditioned on legal stay in Australia.<sup>137</sup>

By taking the same legal position as the United States—offering virtually no legal way to migrate to Australia as a care worker—Australia reaches the opposite result from that reached by the United States. Due to Australia's geographical characteristics (being an island) border control is much easier to maintain and the country sustains a relatively low number of undocumented migrants.<sup>138</sup> In 2009, it was estimated that there were 48,700 illegal immigrants in Australia, of which eighty percent were of working age.<sup>139</sup> Moreover, due to a welfare regime that incentivizes and

132. See *Working Holiday Visa (Subclass 417)*, DEP'T OF IMMIGRATION & CITIZENSHIP (2008), <http://www.immi.gov.au/visitors/working-holiday/417/index.htm> (demonstrating the qualifications and purposes of the visa).

133. See *id.* (explaining the qualifications for the WHM Visa).

134. See *id.* (proving a sixth month time limit on the WHM Visa); see also AUPAIR VISA AUSTRALIA—AU PAIR PROGRAM IN AUSTRALIA, <http://aupair-visa-australia.greataupair.com> (last visited Jan. 16, 2011) (showing that although Australia does not have an official au-pair visa, there are agencies that connect WHM travelers with interested families. However, since the employment is limited to six months period it is therefore not suitable for the care needs of most families).

135. See Robert Guthrie & Michael Quinlan, *The Occupational Safety and Health Rights and Workers' Compensation Entitlements of Illegal Immigrants: An Emerging Challenge*, 2 POL'Y & PRAC. IN HEALTH & SAFETY 77 (2005); see also *Fitzgerald v. F. J. Leonhardt Pty Ltd.* (1997) 71 ALJR 653; *Yango Pastoral Co. Pty Ltd. v. First Chicago Australia Ltd. & Ors* (1978) 139 CLR 410 (deeming an employment contract with an undocumented worker legal, and therefore the applicable employment law enforceable). But see *Australia Meat Holdings Pty Ltd. v. Kazi* (2004) QCA 147 (finding that an undocumented worker is not a worker for the purposes of employee compensation).

136. *Migration Act 1958* (Cth) c 83(2) (Austl.).

137. *Aged Care Act 1997* (Cth) c 7 (Austl.). Eligibility is conditioned on residency. Moreover, for most benefits documented workers become eligible only after a yearlong waiting period.

138. See Adrienne Millbank, *Boat People, Illegal Immigration and Asylum Seekers: in Perspective*, 13 CURRENT ISSUES BRIEF (Dec. 14, 1999), <http://www.aph.gov.au/Library/pubs/CIB/1999-2000/2000cib13.htm> (comparing Australia's estimated illegal population of 53,000 to that of the United States and Western Europe approximated at over five million respectively).

139. See *id.* (explaining that the majority of illegal migrants in Australia, mostly



aids families in purchasing formal (registered or approved) care services,<sup>140</sup> and an employment regime that accommodates familial responsibilities in a more effective way than the U.S. regime,<sup>141</sup> the Australian care market is composed mostly of documented and Australian workers.<sup>142</sup> Accordingly Australia has much less vulnerable and much better paid care workers and a smaller care market.

### 3. Israel

Israel's immigration regime is based on the Law of Return and the Law of Citizenship and Entry to Israel that grant immediate citizenship to any Jewish person or person of Jewish descent and create a naturalization process for non-Jews who marry an Israeli citizen.<sup>143</sup> Naturalization through marriage with a citizen has an important "interim" exception of persons from Arab states whom cannot be naturalized upon marriage with an Israeli citizen.<sup>144</sup>

Labor migration was introduced in Israel during 1993. Following the outbreak of the first Palestinian uprising in the occupied territories against Israeli occupation (first Intifadah) and the Oslo Accord signed in 1993,

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individuals who entered the country legally and have overstayed their visas, are unskilled workers); *see also Fact Sheet 87: Initiatives to Combat Illegal Work in Australia*, DEP'T OF IMMIGRATION & CITIZENSHIP (2009), <http://www.immi.gov.au/media/fact-sheets/87illegal.htm> [hereinafter *Fact Sheet 87*] (articulating that each year the Australian Department of Immigration and Citizenship locates a number of individuals unlawfully working in the country, principally in the agriculture, accommodation, and construction industries).

140. *See A New Tax System (Family Assistance) Act 1999* (Cth) s 41(2) (Austl.) (providing child care benefits exclusively for approved and registered caregivers); *see also* HILA SHAMIR, CARE COMMODIFIED: A REEVALUATION OF THE LEGAL REGULATION OF CARE WORK IN GLOBALIZING ECONOMIES 102-04 (2008) (dissertation, Harvard Law School) (elaborating that Australia utilizes instruments such as, its Child Care Benefit System (CCB or CCBS), to subsidize *approved child care*, mainly group care in centre-based settings, and *registered child care*, individualized care in the child's or caregiver's home, through a subsidy or a cash payment in addition to tax benefits, child care rebates and care payments).

141. *See, e.g., O'CONNOR ET AL., supra* note 61, at 84-88 (illustrating that Australia provides mothers with up to fifty-two weeks of maternity leave compared to twelve in the United States, permits fathers one week of unpaid paternal leave, and allows for a maximum of fifty-one weeks of parental leave).

142. *See* Hugo, *supra* note 127, at 194-95 (noting that the significant difficulty in recruiting young Australian workers into the industry, and the rising demand for care, coupled with the unfavorable immigration regime is likely to cause a labor shortage in the care work industry).

143. *See* Gershon Shafir & Yoav Peled, *Citizenship and Stratification in an Ethnic Democracy*, 21 *ETHNIC & RACIAL STUD.* 408, 412 (1998) (detailing the establishment of the "Law of Return" affording automatic citizenship to all Jews who immigrate to Israel).

144. *See* HCJ 705203 Adala v. Minister of the Interior PD 10 [2006] (Isr.) (affirming the constitutionality of the law despite the recognition that it violates the right to equality and family life because of Israel's compelling and unique national security interests).

Palestinians were no longer permitted to enter Israel for work purposes.<sup>145</sup> The “sealing” of the occupied territories, said to be caused by security considerations, led to a labor shortage in the Israeli secondary labor market, especially in the fields of construction and agriculture.<sup>146</sup> In order to deal with the labor shortage the Israeli government established a guest worker visa program.<sup>147</sup> Migrant workers in Israel—documented and undocumented—work in the secondary labor market and in the least desirable occupations. It is now estimated that migrant workers constitute ten percent of the Israeli labor market.<sup>148</sup>

Permission to employ a migrant worker is limited to certain industries, namely construction, agriculture, restaurants, and care work (in-home health aides) for elderly and disabled persons.<sup>149</sup> While the demand for workers in construction and agriculture was the direct result of the sealing of the occupied territories, the same was not true concerning care work.<sup>150</sup> Palestinians were not previously employed as in-home health aides, and, in fact, there was not a thriving market for such care workers. The guest worker regime was developed in tandem with developments in the Israel welfare state. Beginning in 1988 Israel offered a long-term care benefit (Gimlat Siuud) for elderly citizens requiring assistance in everyday activities.<sup>151</sup> The benefit is age tested (the recipient must be of mandatory

145. See GUY MUNDLAK, *FADING CORPORATISM: ISRAEL'S LABOR LAW AND INDUSTRIAL RELATIONS IN TRANSITION* 194 (2007) (suggesting that the mutual dependency of the Palestinian and Israeli economies came to an end following employers' successful efforts at lobbying the Minister of Labor to admit workers from other nations for agricultural and construction jobs in lieu of Palestinians); REBECA RAIJMAN & ADRIANA KEMP, *MIGRANTS AND WORKERS: THE POLITICAL ECONOMY OF LABOUR MIGRATION IN ISRAEL* 67-72 (2008) (in Hebrew); Nelly Elias & Adriana Kemp, *The New Second Generation: Non-Jewish Olim, Black Jews and Children of Migrant Workers in Israel*, 15 *ISRAEL STUD.* 73, 73 (2010) (stating that a massive influx of immigrants flowed into Israel in the 1990s).

146. See LEILA FARKESH, *PALESTINIAN LABOR MIGRATION TO ISRAEL: LABOR, LAND AND OCCUPATION* 76-90 (2005) (detailing the labor migration of Palestinians into Israel before and after the first Intifada).

147. See, e.g., Adriana Kemp et al., *Contesting the Limits of Political Participation: Latinos and Black African Migrant Workers in Israel*, 23 *ETHNIC RACIAL STUD.* 94, 99 (2000).

148. INT'L LABOUR ORGANIZATION, *NATIONAL LABOUR LAW PROFILE: THE STATE OF ISRAEL*, [http://www.ilo.org/public/english/dialogue/ifpdial/info/national/is.htm#\\_ftn3](http://www.ilo.org/public/english/dialogue/ifpdial/info/national/is.htm#_ftn3) (last visited Oct. 10, 2010).

149. See Moshe Semyonov et al., *Labor Market Competition, Perceived Threat, and Endorsement of Economic Discrimination against Foreign Workers in Israel*, 49 *SOC. PROBLEMS* 416, 419 (asserting that non-citizen workers typically obtain low-paying menial jobs in construction, agriculture, and service industries with migrants from Romania, Thailand, and the Philippines dominating each sector respectively).

150. See *id.*

151. See Hillel Schmid, *The Israeli Long-Term Care Insurance Law: Selected Issues in Providing Home Care Services to the Frail Elderly*, 13 *HEALTH & SOC. CARE IN THE COMMUNITY* 191, 192 (2005) (establishing that Israel recognized a need to implement

retirement age), income tested, and tested for dependency levels (ADL test).<sup>152</sup> The ADL test serves another purpose besides determining long-term care benefit eligibility. Both those eligible for the long-term care benefit and those who pass the dependency test but not the income test are eligible to apply to the relevant governmental agency for a permit to employ a migrant worker as an in-home care aides.<sup>153</sup> The demand for in-home health aides expanded significantly in Israel since the early 1990s, leading to a substantial increase in the number of care workers entering Israel.<sup>154</sup> While in other sectors the number of migrant workers who can enter Israel on a guest worker visa is capped, in the care work sector there is no cap. The number of care workers who can enter is linked to the number of Israeli residents found eligible to qualify for a care worker permit.<sup>155</sup> Between 1996 and 2003, the number of Israeli residents who were found eligible and applied for such a visa increased by three hundred and fifty percent while the number of the elderly and disabled increased by only twenty-five percent.<sup>156</sup> A recent report suggests that, if current trends and policy persist, by 2025, 108,000 migrant care workers will work in Israel, which means that every fifth elderly person in Israel will be aided by a migrant care worker.<sup>157</sup>

Guest worker visas are granted to workers from countries that are signatories to bilateral agreements with Israel. The main countries of origin in the care work sector are the Philippines, Eastern European states, Nepal, and India.<sup>158</sup> For the first two decades of the arrangement (until 2006) migration was based on a “binding system”: migrant workers

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legislation entitling elderly individuals to long-term care).

152. *See id.* (maintaining that eligibility for benefits begins at age sixty for women and sixty-five for men, the criteria for eligibility is dependent on an elderly person's ability to perform activities of daily living, and although the income of an applicant and his spouse (but not their children) is considered, the limit is relatively generous, so that only one percent of applicants were turned down in 1996).

153. *See* MINISTRY OF THE INTERIOR, *Criteria for Eligibility for Employing Foreign Workers* (June 2010) (in Hebrew) available at <http://www.piba.gov.il/Subject/ForeignWorkers/siod/Pages/CriteriaForPermit.aspx>.

154. Mimi Ajzenstadt & Zeev Rozenhek, *Privatization and New Modes of State Intervention: The Long-Term Care Programme in Israel*, 29 J. SOC. POL'Y 247, 257 (2000) (confirming that three years after the program's implementation, the number of private agencies providing care services went from virtually zero to 106).

155. Zvi Eckstein et al., *Employing Migrant Workers: Report for the Caesarea Forum for Economic National Policy* 6-7 (2010) (in Hebrew), available at [http://www.idi.org.il/events1/CaesareaForum/Documents/%202010קיסריה/WM\\_C.pdf](http://www.idi.org.il/events1/CaesareaForum/Documents/%202010קיסריה/WM_C.pdf).

156. MINISTRY OF FIN. & MINISTRY OF INDUS., COMMERCE AND LABOR, THE INTER-MINISTRY REPORT ON MIGRANT WORKER EMPLOYMENT POLICY IN ISRAEL AND THE CONDITIONS FOR ISSUING MIGRANT WORKER EMPLOYMENT PERMITS (2004) (in Hebrew) [hereinafter INTER-MINISTRY REPORT].

157. Eckstein et al., *supra* note 155, at 21.

158. *Id.*

entering the country were issued work visas that were valid only for a specific employer.<sup>159</sup> Visa conditions were attached to one employer in the sense that leaving that employer for whatever reason was a violation of the visa conditions, rendering the worker “illegal,” and, thus, subject to detention and deportation.<sup>160</sup> The binding system was found to be unconstitutional by the high court of justice<sup>161</sup> and replaced by a system that binds the workers to a sector, rather than an employer.<sup>162</sup> A worker can, therefore, move from one employer to another within the same labor sector.<sup>163</sup> In the care work sector, this is regulated and managed via licensed placement agencies that specialize in the placement of care workers.<sup>164</sup>

The entrance of non-Jewish immigrants into Israel seemingly contradicts the basic principles of the Israeli migration regime, which gives primacy to ethno-national criteria in attributing full membership in the polity.<sup>165</sup> This contradiction is “softened” by the fact that the non-Jewish migrant workers’ inclusion in the state is done on a temporary basis and opens almost no legal routes for naturalization or permanent residency, making Israel’s immigration regime a hybrid one, in that it is both a “settlers regime,”<sup>166</sup> in the sense that it seeks to attract new members through Jewish immigration, and a “guest-worker regime,” in that it admits non-Jews but

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159. See Adrianna Kemp, *Reforming Policies on Foreign Workers in Israel* 19 (OECD Soc., Emp’t & Migration, Working Paper No. 103, 2010) (explaining that Israel’s binding policy subjected foreign workers to violations of labor rights, as workers who sought redress for violations were often fired and thus lost their legal status); see also RAUMAN & KEMP, *supra* note 145, at 98-103.

160. Entry to Israel Law 5712-1952 §13 (Isr.) (regulating the detention and deportation of undocumented migrant workers).

161. H CJ 4542/02 Kav LaOved v. Gov’t of Israel 3 [2006] (Isr.) (invalidating the binding employment arrangement because it created a legal regime that ran counter to the basic right to human dignity).

162. See Kemp, *supra* note 159, at 30-1; *Guide to the Employment of Migrant Workers: Care Workers*, ISR. GOV’T PORTAL (in Hebrew) <http://www.gov.il/FirstGov/TopNav/Situations/SPopulationsGuides/SHiringForeignWorkers/SFWDifferentJobs/> (last visited July 11, 2010).

163. See Kemp, *id.*, at 30-31.

164. Eckstein et al., *supra* note 155, at 21; see also GILAD NATAN & THE KNESSET RES. & INFO. CTR, REGULATING THE EMPLOYMENT OF MIGRANT WORKERS IN MARKETS FOR IN-HOME CARE (2006), <http://www.knesset.gov.il/mmm/doc.asp?doc=m01721&type=doc> (in Hebrew).

165. See Shafir & Peled, *supra* note 143, at 412-13 (emphasizing that establishing an ethno-nationalist citizenship regime expressed Israel’s ethnic Jewish identity and self-definition as a Jewish state).

166. See Zeev Rosenhek, *Migration Regimes, Intra-State Conflicts, and the Politics of Exclusion and Inclusion: Migrant Workers in the Israeli Welfare State*, 47 SOC. PROBLEMS 49, 53 (2000) [hereinafter Rosenhek, *Migration Regimes*] (characterizing Israel’s immigration policy as a “settler regime” for its focus on Zionist nation-building aimed at attracting new Jewish members through immigration).

refuses to consider them as prospective members of the society.<sup>167</sup>

Beside migrant workers who became illegal by over-staying their visas or violating other visa conditions,<sup>168</sup> there is another type of illegal migration into Israel that became common in the last two decades. This type of “illegality” characterizes individuals—mostly from African countries and from Latin America—who entered Israel legally on tourist visas and violated their visa conditions by working in Israel and over-staying their visa.<sup>169</sup> Many of these workers are incorporated in cleaning and child-care jobs. Unlike documented workers, undocumented workers more often live in the inner cities rather than in an employer’s home and often have several employers, providing them greater access to community and social resources and making them more visible inhabitants of the urban space in Israeli cities (mainly in metropolitan Tel-Aviv).<sup>170</sup> These workers, like all undocumented workers in Israel, are vulnerable to exploitation due to the lingering threat of deportation even though they are theoretically protected by protective employment laws.<sup>171</sup>

While in other industries the guest worker visa is limited to five years, after which the employer is responsible for the worker’s departure from Israel, care workers can, under certain conditions, apply for almost unlimited extensions of their visas.<sup>172</sup> An extension can be given for a year at a time if the migrant care worker was employed for a full year by the same employer, and a social worker determined that the workers’ departure will cause severe harm to the person in their care.<sup>173</sup> As a result some migrant care workers, especially those taking care of disabled children, can remain in Israel legally for decades yet not gain any legal rights towards

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167. See *id.* at 54 (suggesting that Israel also espouses a “guest-worker regime” with regard to non-Jewish immigrants out of fear that their settlement is a threat to Israel’s religious character).

168. ISRAELI CENT. BUREAU OF STATISTICS, *At the End of 2008 in Israel: 115,000 Foreign Workers who Entered with Work Permits, and 107,000 who Entered as Tourists* (2009) (in Hebrew), available at [http://www.cbs.gov.il/reader/newhodaot/hodaa\\_template.html?hodaa=200920161](http://www.cbs.gov.il/reader/newhodaot/hodaa_template.html?hodaa=200920161) (estimating that 222,000 migrant workers, both documented and undocumented, were present and working in Israel in 2008).

169. See Rebecca Rajman et al., *International Migration, Domestic Work and Care Work: Undocumented Latina Migrants in Israel*, in GLOBAL DIMENSIONS, *supra* note 8, at 145, 148-49.

170. See Kemp et al., *supra* note 147, at 112 (explaining that undocumented migrant workers develop communities in response to a lack of legal status as a means of survival); see also RAIJMAN & KEMP, *supra* note 145, at 177-84.

171. See RAIJMAN ET AL., *supra* note 169, at 153 (stating that “although undocumented workers have the right to claim their share, they rarely take this option even when nongovernmental organizations are ready to act on their behalf. As a rule they prefer to lose their money and change jobs rather than take legal action that may entail the risk of being caught by the police and being deported.”).

172. ARYRH GREENFIELD, ENTRY, RESIDENCE, AND CITIZENSHIP 9 (1996).

173. Entry to Israel Law 5712-1952 § 3(3)(b) (Isr.).

residency or citizenship.

Documented migrant workers in Israel are theoretically covered by all employment protective legislation<sup>174</sup> as well as three social benefit schemes—work injuries, employer’s bankruptcy, and maternity—of the National Insurance Institute (NII).<sup>175</sup> The employment of migrant workers is further regulated by the Foreign Workers Law (Prohibition on Unlawful Employment, and the Assurance of Fair Conditions) 1991, that guarantees migrant workers the right to fair working conditions, decent accommodation, health insurance bought by the employer, and a written employment contract in the workers’ language. This regulation maintains minimal direct involvement of the state in the living and working conditions of the workers through assigning employers the responsibility for providing these social services. Employers, seeking to reduce costs and facing very weak enforcement of their obligations, often do not comply with the requirements. Accordingly, in reality, few migrant workers enjoy the full range of the rights theoretically extended by law.<sup>176</sup>

Undocumented workers are also theoretically protected by all employment laws but formally have no access to health insurance and the NII benefits. However the Tel-Aviv municipality (most undocumented migrant workers in Israel reside in its jurisdiction) and local NGOs step in to provide some of these services.<sup>177</sup> Undocumented migrant workers and their families therefore have access to some health care provision (through NGOs such as Physicians for Human Rights, as well as ad-hoc decisions by hospitals and municipal centers for family and infant health), schools, and

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174. See Mundlak & Shamir, *supra* note 40, at 165-66 (suggesting that live-in care workers are excluded from over-time because the line between personal and employer time becomes blurred and difficult to ascertain in a household setting). *Contra* HCJ 1678/07 Yolanda Gluten v. National Labor Court 3 [2009] (Isr.) (affirming the National Labor Court opinion that live-in care workers are excluded from overtime compensation on the basis of the “personal trust” exception under the Work and Rest Hours Law).

175. See Rosenhek, *Migration Regimes*, *supra* note 166, at 59 (noting that at the same time, migrant workers are not eligible for important social security programs such as old age and unemployment benefits, survivors’ pensions, and children’s allowances).

176. KAV LAOVED, *Principles to Regulate the Employment of Migrant Workers* (2006) [http://www.kavlaoved.org.il/UserFiles/news62\\_file.DOC](http://www.kavlaoved.org.il/UserFiles/news62_file.DOC) (Hebrew).

177. See Adriana Kemp & Rebeca Raijman, “*Foreigners*” in *a Jewish State: The New Politics of Labor Migration in Israel*, 3 ISRAELI SOC. 79 (2001); Rosenhek, *Migration Regimes*, *supra* note 166, at 60-61 (recognizing that the Tel Aviv Municipality finances the social services it provides to undocumented workers at the expense of extra funding from the central government who views the municipalities actions with contention); NIVI KLEIN-ZEEVI & KNESSET RES. & INFO. CTR., *Tel-Aviv Yafo Municipality and Foreign Workers* (2003), available at <http://www.knesset.gov.il/MMM/doc.asp?doc=m00578&type=rtf> (Hebrew) (articulating that the Welfare Department of Tel Aviv established programs in support of a new urban policy and management toward migrant workers including a forum on foreign workers and working teams to propose policy recommendations).

kindergarten and other social services provided by the municipality.<sup>178</sup>

To ensure that the workers' stay in Israel is temporary, the Ministry of the Interior adopted a "no-family" policy towards migrant guest-workers.<sup>179</sup> Migrant workers can enter the country on a guest-worker visa only if they do not have a close family member (spouse, parent or child)<sup>180</sup> who is also a guest-worker in Israel. Similarly, if two migrant workers get married in Israel, one of them is required to leave the country,<sup>181</sup> and until recently if a woman gave birth to a child she had to leave the country with the newborn within twelve weeks of the birth and was able to return to Israel, for the remaining period of her visa only if she returned alone.<sup>182</sup> While this policy aims to ensure that migrant workers do not settle in Israel it also minimizes the social services the population of documented migrant workers requires. Because, formally, no children, elderly, or disabled people are part of this population, the major social provisions this population requires are related to temporary housing and health services to an adult (and generally healthy) population.

Another characteristic of the Israeli guest worker arrangement is that most workers incur great debt in order to travel to Israel. Israeli manpower agencies use recruiters (middlemen and employment agencies) in the countries of origin that often promise the worker high wages and, in return, demand high fees for their services and provide high interest loans for workers to cover their travel expenses.<sup>183</sup> A survey done by an Israeli NGO

178. See RAIJMAN & KEMP, *supra* note 145, at 177-184; see also KLEIN-ZEEVI & KNESSET RES. & INFO. CTR, *supra* note 177, at 3.

179. See generally THE 14TH KNESSET, PROTOCOL OF THE KNESSET COMMITTEE FOR FOREIGN WORKERS PROTOCOL (Nov. 3, 2004), <http://www.knesset.gov.il/protocols/data/html/zarim/2004-11-03.html> (in Hebrew) (discussing the problems associated with Israel's immigration policy regarding foreign workers who become pregnant and have children while residing in the country); HANI BEN-YISRAEL & ODED FELER, LOVE HAS NO COUNTRY (2006) (in Hebrew), [http://www.kavlaoved.org.il/UserFiles/news75\\_file.DOC](http://www.kavlaoved.org.il/UserFiles/news75_file.DOC) (offering a critique of Israel's restrictive family policy towards migrant guest-workers).

180. See Entry to Israel Law 5712-1952 §12 (Isr.).

181. See generally BEN-YISRAEL & FELER, *supra* note 179 (outlining Israel's immigration regime concerning non-Jewish migrant workers who marry in Israel).

182. See MINISTRY OF INTERIOR, *Procedure for Treatment of a Pregnant Migrant Worker and a Migrant Worker that Gave Birth in Israel*, Procedure 5.3.0023 (Aug. 1, 2009), available at [http://www.moin.gov.il/Apps/PubWebSite/publications.nsf/All/B96025D3EC6D1EA9422570AD00463773/\\$FILE/Publications.3.0023-1.8.2009.pdf?OpenElement](http://www.moin.gov.il/Apps/PubWebSite/publications.nsf/All/B96025D3EC6D1EA9422570AD00463773/$FILE/Publications.3.0023-1.8.2009.pdf?OpenElement) (in Hebrew) [hereinafter *Procedure for Treatment*]. This procedure was found unconstitutional in a recent High Court of Justice Decision. See H CJ 11437/05 Kav LaOved v. Minister of the Interior (Apr.13, 2011) (Isr.) (Finding the procedure to be in violation of the right to parenthood that derives from the Basic Law: Human Dignity and Liberty). The court ordered the government to establish a new and constitutional procedure. A new procedure was yet to be established by the time of publication of this article.

183. See Ruth Sinai, *New System Expected to Help Protect Thai Workers From*

showed that workers usually pay their recruiters a fee that ranges from \$2,000 to \$15,000, depending on the country of origin.<sup>184</sup> These fees are eventually split between agencies in the country of origins and Israeli manpower agencies. However, the wage actually paid to migrant workers at times is below what they were promised and below the legal minimum wage standard, making it difficult for them to repay their debt and reducing their ability to exit the Israeli labor market without harsh consequences.<sup>185</sup>

The combination of reduced bargaining power of documented migrant workers in the Israeli labor market (first through the binding system, and then through the sector-binding system), the high debts migrants often incur to travel to Israel, and the “no family” policy creates plenty of incentives for migrant workers to violate the conditions of their visa and remain in Israel “illegally.” Although leaving an employer—due to better employment options, abuse, or any other reason—or switching employment sectors will cost the worker her legal status in Israel, many workers opt to take the risk and leave their legal employers for better employment conditions elsewhere in Israel.<sup>186</sup> Accordingly, an inadvertent result of the care worker visa regime was the creation of another flourishing care market in Israel—that of low-wage, undocumented nannies and domestic workers.<sup>187</sup> With the lowering costs of domestic work many middleclass families in Israel could now afford to pay a migrant worker to do domestic work, or care for their children. As for the migrant workers—such employment opportunities often provide them with a better income and greater flexibility than working legally as in-home aides for an elderly or disabled person.<sup>188</sup>

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*Exploitation*, HAARETZ, Apr. 18, 2008, available at <http://www.haaretz.com/hasen/spages/974146.html> (reporting that Israel entered into a contract with the International Organization of Migration (IOM) and the government of Thailand to run an experiment in which all Thai migrant workers will be recruited by the IOM and pay recruitment minimal fees to combat the debt bondage phenomenon).

184. See HOTLINE FOR MIGRANT WORKERS, “FOR YOU WERE STRANGERS”: MODERN SLAVERY AND TRAFFICKING IN HUMAN BEINGS IN ISRAEL 7, available at [http://www.hotline.org.il/english/pdf/For\\_you\\_were\\_strangers\\_2nd\\_edition\\_Eng.pdf](http://www.hotline.org.il/english/pdf/For_you_were_strangers_2nd_edition_Eng.pdf).

185. See STATE COMPTROLLER AND OMBUDSMAN (ISRAEL), ANNUAL REPORT OF THE STATE COMPTROLLER 45-46 (1999), available at <http://www.mevaker.gov.il/serve/showHtml.asp?id=133&bookid=162&frompage=3&direction=1&contentid=2136&parentid=2136&startpage=180&sw=1680&hw=980> (stating that foreign workers often earn only thirty to forty percent of what an Israeli worker earns and that exploitation of migrant workers is high, with up to seventy percent earning less than the minimum wage).

186. See NGAI, *supra* note 79, at 146-47 (examining the Mexican Bracero workers in the United States).

187. See *Inter-Ministry Report*, *supra* note 156, at 25 (explaining that the trend toward a flourishing of the undocumented care market resulted from “the common skills required for care work and domestic work and due to the temporary nature of their employment by the person in need of care”).

188. See Mundlak & Shamir, *supra* note 40, at 171.



Under the Israeli immigration regime, when a worker violates her visa conditions and becomes illegal, she frees herself from the states' regulatory mechanism and thus becomes at once freer as well as more vulnerable to exploitation (due to the threat of deportation). The paradox of the Israeli immigration regime is that while undocumented migrant workers are extremely vulnerable they are also, unlike documented migrant workers, able to become part of immigrant communities and establish local social ties.<sup>189</sup> These socialization opportunities are fertile ground for grassroots organization of migrants through which they can make legal and political claims. As sociologist Zeev Rosenhek suggests:

By limiting both the contract workers' incentives and access to social resources necessary to establish associations, these terms of incorporation severely restrict their ability to carry out autonomous social action. In contrast, due to their illegal status, undocumented labor migrants escape to a large extent the sphere of state control. As a consequence their incorporation is conducted within a relatively open social space that allows for accumulation of social resources and their collective mobilization.<sup>190</sup>

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The three immigration regimes surveyed explored three different approaches to the regulation of the immigration of care workers, as well as some commonalities that exist in markets of care as secondary markets of unskilled, mostly women, workers. The following subsection will map the distributional outcomes that each of the regimes entails for documented migrant workers and undocumented migrant workers as well as the distributional outcomes of these regimes in relation to men and women in households that employ migrant care workers.

### *B. Distributive analysis*

The following pages map the distributional consequences of the three different immigration regimes' regulation of the migration of care workers. This examination uses the five-pronged analytical framework developed in Part III. The five elements that make the analytical framework are examined in relation to documented and undocumented migrant workers. I also discuss, though to a lesser extent, the distributive effects of the immigration regime on the men and women (from different classes) who

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189. See Zeev Rosenhek, *The Politics of Claims-Making by Migrant Workers in Israel*, 25 J. ETHNIC & MIGRATION STUD. 575, 591 (1999) (suggesting that restrictive ethno-national immigration regimes have had the unintended consequence of encouraging opportunities for undocumented immigrants, and positioning them as collective actors).

190. *Id.* at 590.

employ migrant workers.<sup>191</sup> The distributional impact of the immigration regimes on migrant workers' families in sending countries is partially discussed as well.<sup>192</sup>

The comparison here is modest in scope. It sets aside the question of the net effect of global migration regimes on communities and economies in the developing world and focuses on the effect of immigration regimes on differently situated groups of migrant workers once they have already migrated. I am interested in exploring how the three different regimes affect different groups of migrant workers. The analysis explores which of these immigration regimes best, if at all, fulfills the potential of migratory labor as a means of redistribution from the global north to the global south, focusing mostly on the working condition, benefit levels, and general migratory experience of migrant workers themselves as a proxy for such redistribution.<sup>193</sup>

### 1. *United States*

#### a. *De-commodification*

Except for temporary migration for the purpose of agricultural work, there is no available legal way for unskilled migrant workers to enter the United States.<sup>194</sup> Accordingly, the vast majority of migrants that dominate care markets are undocumented migrant workers. The immigration regime detailed above in conjunction with a welfare regime that mostly excludes

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191. As suggested earlier, a complete analysis that relates to households in receiving countries has to take into account the background rules of welfare, employment and family law. I have explored those, using this distributive framework elsewhere. Here I limit myself to the distributive effects that are the direct result of the immigration regime. See Shamir, *Between Home and Work*, *supra* note 35, at 426-28; Shamir, *State of Care*, *supra* note 68, at 959-61.

192. This aspect is dealt with here only partially since the impact on the families in sending countries heavily depends on welfare regimes and economic policies in the countries of origin, and these are beyond the scope of this analysis. For a general discussion of the significance of economic restructuring in the sending country to the migration of care workers see Enloe, *supra* note 8, at 118-20.

193. There are immigration regimes—such as the Canadian one—that provide care workers with the option of naturalization in the receiving country. These can be seen as more radically redistributive. Alternatively, they can be seen as less committed to redistribution since the migrant is then detached from her country of origin and becomes a settler and a member of the receiving country. Such more inclusive regimes are outside the scope of this research. For a discussion of the Canadian regime, see CITIZENSHIP & IMMIGRATION MINISTRY, *THE LIVE-IN CAREGIVER PROGRAM* (2007), available at <http://www.cic.gc.ca/ENGLISH/work/caregiver/index.asp>. For a critical description of the program, see DAIVA K. STASIULIS & ABIGAIL B. BAKAN, *NEGOTIATING CITIZENSHIP: MIGRANT WOMEN IN CANADA AND THE GLOBAL SYSTEM* 86-106 (2005); GERALDINE PRATT & THE PHILIPPINE WOMEN CTR., *Is This Canada?: Domestic Workers' Experience in Vancouver, BC*, in *GENDER, MIGRATION, AND DOMESTIC SERVICE* 23-61 (Janet Henshall Momsen ed., 1999).

194. See *Frederickson & Leveille*, *supra* note 103, at 3.

undocumented migrants and employment law that to a large extent excludes care workers, and to an even larger extent excludes undocumented migrant workers, creates a condition that can be characterized as a high level of commodification. *First*, as care workers they are already excluded from many employment law protections such as the FLSA.<sup>195</sup> *Second*, as migrants they are excluded from welfare state benefits such as food stamps, medical assistance, federal financial assistance programs, and TANF-related benefits for at least their first five years in the United States.<sup>196</sup> Furthermore, in the American liberal welfare state regime, care work for dependent family members is largely not provided by the state,<sup>197</sup> and mostly left to private market contracting which is only partially subsidized and regulated. By adopting a market-centered approach towards the provision of care services, the United States creates demand for cheap, marketized care services. The high demand is met by the work of undocumented migrant workers, yet the need of families is not acknowledged by official policy, only, possibly, by the informal reality of weak enforcement of employment rights, and the formal exclusion of care workers from protective employment legislation. *Third*, as undocumented migrants, even the legal protections of background rules that are theoretically available to all (such as doctrines in contracts, tort, property, and criminal law) are practically inaccessible due to the fear of deportation. The legal regime therefore creates conditions of strong informality and commodification.

A counterforce that operates to soften the effect of harsh commodification is the relatively wide zone of toleration towards illegal migration that exists in the U.S, coupled with a history and tradition of the settlement of migrants.<sup>198</sup> This allows the creation of large immigrant

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195. See 29 U.S.C. § 152(3) (2006) (excluding all in-home care workers in the United States from coverage under the National Labor Relations Act (NLRA) which protects the rights of employees to engage in collective bargaining by defining "employee" as "any employee . . . but shall not include any individual employed . . . in the domestic service of any family or person at his home . . ."); 29 U.S.C. § 213(15) (2006) (excluding from the FLSA care workers who are employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service to provide companionship services for individuals who because of age or infirmity are unable to care for themselves); 29 C.F.R. § 552.6 (2009) (defining companionship services in the Department of Labor regulations as household work related to the care of an aged or infirm person); 29 C.F.R. § 1975.6 (2009) (interpreting the Occupational Safety and Health Act to exclude domestic workers); see also *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167 (2007) (discussing and affirming this exclusion); cf. Shamir, *Between Home and Work*, *supra* note 35, at 450-58.

196. Immigration Reform and Control Act, 8 U.S.C. §1255a(1) (2006).

197. See generally O'CONNOR ET AL., *supra* note 61 (evaluating the welfare practices of the United States).

198. ALEJANDRO PORTES & RUBÉN G. RUMBAUT, IMMIGRANT AMERICA 40-49, 92-102 (1990).

communities, made up of veterans as well as newcomers that can provide support networks to workers, as well as a setting for social mobilization and organization.<sup>199</sup> Access to these communities depends on countries of origin, individual connections and social capital, as well as geographic location in the United States.

The unique in-home characteristic of care work affects the interface between the workers and the legal regime in two ways. First, care workers are rather invisible to the authorities since their work takes place in the private sphere of the home, making them relatively protected from police intervention in relation to other occupations that take place in public spaces. Accordingly, in relation to other sectors in which many migrant workers are employed, where raids on factories or fields are common,<sup>200</sup> there is little chance for raids of individual households and, therefore, of prosecution and deportation.<sup>201</sup> However, the same “protection” of the home becomes a risk factor since care workers’ isolation, away from the public eye and in a supposedly less legal sphere of the private home, enhances the power of their employers over them and makes them more vulnerable to exploitation. Thus, perhaps paradoxically, the location of their work at the “hearth” both relaxes and intensifies their commodification depending on individual circumstances and employment relationships.

The wide zone of toleration for illegal immigration allows an abundant supply of undocumented migrant care workers who provide their services at a relatively low price. This in turn allows the commodification and defamilialization of women and men in households that can afford to employ migrant domestic workers. Because undocumented migrants tend to offer the services at a lower price than local or documented workers,<sup>202</sup> their work becomes affordable not only to high-income households but also to middle and some low-income households,<sup>203</sup> thereby “freeing” both

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199. See Eunice Hunhye Cho, *Immigrant Communities Building a Sustainable Movement in IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP* 94, 100-08 (Rachel Buff ed., 2008) (showing how this mobilization characterized the 2006 immigration reform demonstrations in support of the proposed legislation H.R. 4437).

200. See Julia Preston, *Illegal Workers Swept from Jobs in Silent Raids*, N.Y. TIMES, July 9, 2010 (detailing the recent “silent raids” adopted by the Obama Administration, which have replaced the traditional immigration raids of factories and farms with sending federal agents to audit companies’ records for illegal immigrant workers, which would not be possible in the context of households).

201. See ILO, *DECENT WORK*, *supra* note 31, at 72-74.

202. Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2212 (1994).

203. Liesel Schillinger, *A Nanny Nightmare: Living Without One*, N.Y. TIMES, May 27, 2007, <http://www.nytimes.com/2007/05/27/fashion/27books.html> (explaining that “most nannies are not hired by socialites in white-glove buildings, but by cash-strapped working women, who turn over to them a substantial portion (sometimes all) of their

spouses to engage in paid employment.

*b. De-Familialization*

Currently, the federal government is not considering creating a guest workers visa program for care workers similar to the program that exists in Canada, or for farm workers in the United States. This might not be wholly bad for care workers given the harsh exploitation of migrant farm workers under the guest worker visas today<sup>204</sup> as well as under the Bracero Program in the past.<sup>205</sup> The United States fluctuates between two policy options, and in a weak way tries to pursue both: creating an “amnesty” process for illegal migrants in certain circumstances<sup>206</sup> and strengthening border control and enforcement of the immigration regime.<sup>207</sup> In the public and political debate about these options each one faces a classic objection that makes its adoption a political challenge. Some see the amnesty option as counterproductive and rewarding of illegal behavior. They fear that an amnesty will create incentives for illegal migration.<sup>208</sup> Others object to strengthening the 2,000 mile long U.S.-Mexican border, due to the human rights violations, and the landscape of fear and control such border enhancement brings about.<sup>209</sup>

The relative stalemate in federal legislation that exists in relation to illegal immigration has been interpreted by economist Barry Chiswick in a 1986 essay as “a rational short term response to a policy dilemma.”<sup>210</sup> His argument, translated to the language of the analytical framework used here, is that what lies at the heart of U.S. immigration policy is a desire to de-familialize unskilled migrant workers:

We want foreign workers, but not their dependents. We allow illegal migration but keep the probability of arrest and deportation high enough to discourage the entry of family members . . . because we want workers but not their dependents, and as we find it awkward to say so openly we

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earnings”).

204. DAVID CRAIG GRIFFITH, AMERICAN GUEST-WORKERS: JAMAICANS AND MEXICANS IN THE U.S. LABOR MARKET 39-44 (2006).

205. Robert Mayer, *Guestworkers and Exploitation*, 67 REV. POL. 311 (2005).

206. Susan Gonzales Baker, *The “Amnesty” Aftermath: Current Policy Issues Stemming from the Legalization Programs of the 1986 Immigration Reform and Control Act*, 31 INT’L MIGRATION REV. 5, 7-9 (1997).

207. PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE 3-15 (2001).

208. JIM GILCHRIST & JEROME R. CORSI, MINUTEMEN: THE BATTLE TO SECURE AMERICA’S BORDERS 69 (2006).

209. JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE “ILLEGAL ALIEN” AND THE MAKING OF THE U.S. MEXICO BOUNDARY 140-44 (2001).

210. Barry Chiswick, *The Illegal Alien Policy Dilemma*, in ESSAYS ON LEGAL AND ILLEGAL MIGRATION 76 (Susan Pozo ed., 1986).

perpetuate a cat-and-mouse game between the immigration authorities and illegal aliens.<sup>211</sup>

Chiswick's is an interesting hypothesis. By keeping a steady stream of undocumented immigrants entering the country, but making their lives unstable enough so as to deter settlements of families, the United States reaches the goal achieved by guest-worker visas such as the Israeli one without conceding the instrumental, commodifying aspect of the regime. The problem with Chiswick's hypothesis is that this is not necessarily the effect on all workers. In fact, it turns out—as the post-Bracero Program lessons as well as the Israeli case show—that illegal migrants are much less easy to control than legal ones.

Undocumented migrants often migrate with an initial intention of a temporary stay, but some stay longer and some permanently. Immigrants who stay for a long period of time might eventually bring their families, or form families in the United States. This is the process in which many of the immigrant communities in the United States were originally formed.<sup>212</sup> If this is the case then the “de-familialization” hypothesis is at least partially wrong since illegality does not deter all family formation. Moreover, it turns out that strengthening border security might in fact encourage long-term settlement rather than deter it, because those who entered will not risk going back.<sup>213</sup> And indeed, studies show that the passage of IRCA—that criminalized the employment illegal migrant workers—increased the migration of whole family units as well as informal family reunification migration.<sup>214</sup>

The effect of the legal immigration regime on actual immigration is, therefore, not straightforward. The U.S. immigration regime bears different effects on different groups of migrants from different backgrounds with different inclinations towards risk taking. Moreover, it depends on one's migratory stage. In this respect it can be generalized that, in their first period of migration, unskilled migrant workers tend to migrate alone, and, once their earnings and confidence grow (due to the wide zone of toleration allowing them to stay), their families may follow, or they may create a family in the United States.

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211. *Id.*

212. PORTES & RUMBAUT, *supra* note 198, at 40-43.

213. Michael Piore, *Can International Migration Be Controlled?*, in *ESSAYS ON LEGAL AND ILLEGAL MIGRATION*, *supra* note 210, at 21, 41.

214. Doreen Mattingly, *Making Maids: United States Immigration Policy and Immigration Domestic Workers*, in *GENDER, MIGRATION, AND DOMESTIC SERVICE* 61, 66 (Janet Henshall Momsen ed., 1999) (stating that IRCA “increased the cost and risks of crossing the border, which has discouraged the pattern of male cyclical migration, and encouraged workers already in the United States to settle there, often bringing their families north”).

The discussion so far is not unique to care workers. But the situation of care workers is perhaps particularly de-familializing.<sup>215</sup> Live-in care workers are, by definition, required to live away from their own households. Therefore, migrant care workers are more likely, at least as long as they are live-ins, to leave their families behind. Studies show that this de-familialization is one of the reasons employers prefer to employ migrant care workers.<sup>216</sup> The live-in arrangement has the downside of reducing the worker's control over her schedule, enhancing her employer's authority and subjecting the worker to social isolation. However, many new immigrants prefer this arrangement because it dramatically reduces living expenses. Anthropologist Rhacel Parreñas, who interviewed Filipina domestic workers in Los Angeles, noted: "none of them would consider part time work because the living expenses incurred in such an arrangement would result in lesser remittances for their families in the Philippines and/or lesser savings."<sup>217</sup> However, once migrant care workers consider settling in the United States, they tend to move to live-out employment arrangements and settle in households of their own.<sup>218</sup> It therefore seems that the strong informality associated with illegal migration of care workers tends to lead to de-familialization in the early stages of migration, or in cases of temporary migration, but does not necessarily create the over-all de-familializing effect that guest-worker regimes ensure.

For those care workers who arrive at the United States unmarried, the option of attaining permanent residency through marriage to an American citizen is a compelling one.<sup>219</sup> This can be seen as creating an incentive towards marriage with American citizens or legal residents. In a similar vein the regime incentivizes family creation through the *jus soli* rule: the rule that guarantees citizenship to those born on American soil.<sup>220</sup> While an illegal immigrant who gives birth in the United States does not become a citizen herself, her child does, and, once the child turns twenty one, through family reunification she can possibly begin her own (albeit very complicated) road towards naturalization.<sup>221</sup> Accordingly, byproducts of the regime can be inclusion and incentives towards familialization rather

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215. I say "perhaps" because there are other employment arrangements that are common among migrant workers and require a form of on-site accommodation, such as certain construction jobs and farm work.

216. CHANG, *supra* note 8, at 55-59.

217. PARREÑAS 2001, *supra* note 13, at 160.

218. *Id.* at 233-35.

219. See Guillermina Jasso & Mark R. Rosenzweig, *THE NEW CHOSEN PEOPLE: IMMIGRANTS IN THE UNITED STATES* 212 (1990).

220. *FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD* 123-29 (T. Alexander Aleinkoff & Douglas Klusmeyer eds., 2000).

221. Monique Lee Hawthorne, *Family Unity in Immigration Law: Broadening the Scope of "Family"*, 11 *LEWIS & CLARK L. REV.* 809, 814-17 (2007).

than exclusion and de-familialization.

Moreover, the question of familialization is revealed as highly complicated if we are willing to entertain the idea that leaving one's family need not be, in itself, a clear-cut form of de-familialization, but, paradoxically, can also express a very deep form of *familialization* manifested by one's willingness to sacrifice oneself for one's family. Under this theory, work migration does not express attraction to the United States, but rather commitment to the migrants' original community and family. As economist Michael Piore suggests, many migrants find American culture "cold and alien, strange, lonely, and frightening."<sup>222</sup> Their reason for migration is not to settle but rather to achieve a concrete goal and improve their family's material conditions in the country of origin.<sup>223</sup>

This perspective on familialization and de-familialization challenges traditional views about care, motherhood, and gender roles in parenting. For example, in their discussion of mother-worker identities of care workers in Europe, Williams and Gavanoas note that,

in London cultural practices around childcare often did not align with those who were actually doing childcare. 'Being a good mother' meant different things for different employees and their employers. For domestic workers with children, being a good mother meant being a good provider, working to send money home so that their children might have better education.<sup>224</sup>

However, they also note that some of the care workers "hold traditional ideas about the needs of young children."<sup>225</sup> Rhacel Parreñas's study of transnational motherhood similarly suggests that for many migrant workers and their children, the effect of migration can be difficult, but cannot be summed up as clear "de-familialization." She says:

Like Ellen's [a child she interviewed] mother, who managed to 'be there' despite a vast distance, other migrant mothers do not necessarily 'abandon' their traditional duty of nurturing their families. Rather, they provide emotional care and guidance from afar. Ellen even credits her mother for her success in school . . . Ellen can acknowledge the sacrifices her mother made and the hardships she has endured in order to be a 'good provider' for her family.<sup>226</sup>

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222. Piore, *supra* note 213, at 27.

223. *Id.* at 27-28. *But see* Brian Wampler et al., *Should I Stay or Should I Go? Explaining Why Most Mexican Immigrants Are Choosing to Remain Permanently in the United States*, 7 *LATINO STUD.* 83 (2009) (analyzing the reasons that most undocumented Mexican farm workers plan to stay in the United States permanently).

224. Williams & Gavanoas, *supra* note 41, at 21.

225. *Id.*

226. Parreñas 2002, *supra* note 53, at 43, 47.



We should not ignore the fact that family separation for a long period of time can be difficult, at times harmful, and bear a cost to both the migrant and her family members who remain back home. However, it suggests that this is not all that the migration experience entails.<sup>227</sup> This perspective on migration challenges us to rethink ideas about motherhood and gender, entertaining the possibility that, despite the cost and the transformation of the family unit, mothers who are migrant workers may decide that the cost is worth the sacrifice and that perhaps it does *not* include giving up their motherhood and their families.

The effect of the U.S. immigration regime on American families is that it allows commodification and de-familialization of women in families that can afford to employ a migrant care worker. In this sense, it can be argued the de-familialization, the labor market participation, and generally the greater equality achieved by many American women is attained through the parallel 'de-familialization' of migrant workers.<sup>228</sup> However, as the analysis above implies, neither elements of this claim, the beneficial effect on middle-class American women nor the harm to immigrant workers, proves to be accurate and straightforward.

In sum, the U.S. immigration regime, in which the immigration of care workers is not regulated and legalized, but rather occurs in the shadow of the law and, yet, is widely tolerated, has complex effects on migrant workers' de-familialization levels. While some suggest that the toleration of the illegality of unskilled workers reflects an informal American policy towards de-familialization and commodification of migrant workers, the large immigrant communities in the United States suggest that this is not the only outcome of the regime. The regime has different effects on de-familialization at different stages of the immigration process, and it depends on the individual migrant's tendencies towards settlement. The lack of a documented framework for migration of unskilled workers, and the resulting absence of governmental supervision of undocumented migrant workers opens for some care workers the possibility to adopt live-out work arrangements and bring their families and/or raise families in the United States. However, this is not an option open to all workers, and in

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227. *Id.* at 40-41.

The children I spoke to certainly had endured emotional hardships; but . . . they did not all experience their mother's migration as abandonment. The hardships in their lives were frequently diminished when they received support from extended families and communities, when they enjoyed open communication with their migrant parents, and when they clearly understood the limited financial options that led their parents to migrate in the first place.

*Id.*

228. CHANG, *supra* note 8, at 58 (describing how "the advances of many middle-class white women in the workforce have been largely predicated on the exploitation of poor immigrant women").

the case of many care workers who cannot bring their families to the United States (due to financial or cultural reasons as well as risk aversion), the effect of the regime is indeed, as Chiswick suggested, strong de-familialization. However, if we are willing to entertain conceptions of transnational motherhood that challenge traditional views of care and motherhood, our analysis of the regime's de-familializing effect might change. Then we might accept the possibility that migrant workers' migration does not necessarily break, but merely changes, family ties as well as gender roles and expectations in families.

*c. Stratification*

Perhaps the most straightforward consequence of the U.S. immigration regime is its stratifying effect. The barriers unskilled workers have to overcome to work in the United States legally create a stratified market that disadvantages undocumented migrants. One of the documented byproducts of the passage of IRCA in 1986 was lower wages, worsened working conditions, and increased economic and legal vulnerability of undocumented immigrants.<sup>229</sup> Undocumented workers occupy a weak bargaining position not only in their relationships with employers, but also in relation to other actors; it makes it difficult to obtain protections from the abuses of landlords, moneylenders, or even neighbors and coworkers, all of whom can turn them in to the authorities.<sup>230</sup> In relation to the job market and their economic options, IRCA reduced the employment opportunities open to undocumented migrants, channeling them into secondary market jobs where employers take advantage of their limited bargaining options.<sup>231</sup> For women, one of the main occupations that remained open was care work because of the high level of informality that characterizes the whole industry and because it takes place in private homes, away from the public eye. Moreover, IRCA limits the ability of undocumented migrant women to move from care work to other jobs, turning care work into an occupational ghetto<sup>232</sup> and barring movement of undocumented migrants from secondary to primary market jobs.<sup>233</sup>

This stratification, however, is not only between undocumented migrants and all others. The effect is a deeper stratification of the economy, enhancing the differences between the secondary and the primary labor

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229. Mattingly, *supra* note 214, at 70.

230. Tisha R. Tallmant, *Liberty, Justice, and Equality: An Examination of Past, Present, and Proposed Immigration Policy Reform Legislation*, 30 N.C. J. INT'L L. & COM. REG. 869, 876-79 (2005).

231. *See Id.*; Piore, *supra* note 213, at 28-29.

232. Mattingly, *supra* note 214, at 69.

233. María Enchautegui, *The Job Quality of U.S. Immigrants*, 47 INDUSTRIAL REL. 108, 109, 111-13 (2008).

markets since the lowered wages and working conditions of undocumented immigrant workers lower, to some extent, the wages and working conditions provided to citizens and residents employed in the secondary market as well, and, in certain cases, even price them out of the job market altogether.<sup>234</sup> Although there is little data regarding these effects in relation to care work, it is conceivable that the effect of the availability of cheap and vulnerable migrant care workers is dual: first, deep stratification within the care industry between care services purchased by high income households on the one hand and medium/low income households on the other;<sup>235</sup> and second, enhanced class stratification by pushing former care workers out of the labor market.<sup>236</sup>

*d. Intra-Household Division of Labor*

In those cases in which migrant care workers leave behind families of their own,<sup>237</sup> one expected scenario resulting from a woman's migration could be the increased role of men in caring for the family left behind (if they themselves did not migrate for work purposes).<sup>238</sup> However, gender ideologies prove in many cases to be resistant to this kind of reversal, even under the pressure of female work migration. Studies show that in most cases the care responsibility is transferred not to the husband, father, or another male, but to the oldest daughter or another female family member,

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234. In the debates over immigration, it is commonly argued that even if immigration is beneficial to some, the gain is at the expense of low-skilled workers who compete directly for jobs. See an overview of the debate in Susan Pozo, *The Many Guises of Immigration Reform*, in *ESSAYS ON LEGAL AND ILLEGAL MIGRATION*, *supra* note 210, at 1-6.

235. See Orly Lobel, *Care and Class: The Roles of Private Intermediaries in the In-Home Care Industry in the United States and Israel*, 24 *HARV. WOMEN'S L.J.* 89, 91 (2001) (describing U.S. care market stratification in the context of child-care and suggesting that employment agencies are involved in "a relatively small, yet clearly patterned, percentage of the careworker market, referring high-end, white American nannies, while migrant women are hired mostly through word-of-mouth referrals or through lower-tier domestic work agencies").

236. In some other low-skilled and unskilled jobs it is claimed that Latinos are taking over the jobs of African-Americans. See Daniel B. Wood, *Rising Black-Latino Clash on Jobs*, *THE CHRISTIAN SCIENCE MONITOR*, May 25, 2006, available at <http://www.csmonitor.com/2006/0525/p01s03-ussc.html>. It should be noted that an exact relationship between the presence of immigrants and the loss of black jobs has not been clearly proven in research. See George Borjas, *Immigrants and the U.S. Labor Market*, in *ESSAYS ON LEGAL AND ILLEGAL MIGRATION*, *supra* note 210, at 15-20. However, in the case of care work, originally the scenario was one of substitution rather than internal competition or complementarity. Today, when the market is dominated by migrant care workers, new waves of immigrants might be competing with 'veteran' immigrants on care work jobs.

237. Leaving behind family upon migration is common for both documented and undocumented migrant care workers. In fact this description is suitable for all three jurisdictions in this study.

238. Gamburd, *supra* note 55, at 190, 200-06.

or into the hands of a local paid care worker.<sup>239</sup> Accordingly, the work migration of care workers, in most cases, does not bring about change in the gender division of labor in households in sending countries.

In the households in which migrant care workers work, they “help women to undo gender in the realm of their daily gender performances.”<sup>240</sup> The migrant worker fills the role of the “housewife” (only often with considerably less discretion as to how to perform her job) and frees her employers to pursue gainful employment.

The common narrative about migrant care workers is that, by the care work of women from the global south, women from the global north can reach greater economic, political, and social equality. While this is undoubtedly the case, this is also not the whole story. Women employers are often still responsible for household operations even if they do not have to do domestic chores themselves. Studies of the relationships between care workers and their employers show that the main interaction is between the worker and the woman head of household. The mothers (and not the fathers) tend to maintain supervision and control over the care workers’ work and often see the care workers as competitors to their own roles as mothers and wives.<sup>241</sup> This suggests that gender role patterns, according to which women are responsible for care giving (emotional and menial), are not broken. Furthermore, even if the woman employer sees herself freed from any undesirable care work, the fact that it is another woman who takes on her job implies that this is not a gender revolution; rather, it is a reiteration of class and race inequalities. The significant change is that the physical burden of care is redistributed between women of different classes/ethnicities, freeing the better-off ones to participate in paid labor. This, therefore, also affects men, who now enjoy greater household income as well as a well-ordered home, but because, to begin with, men are expected to do less in the household the effect on the time men spend on household chores is relatively marginal.

#### *e. Material Delivery*

The analysis so far has made it clear that the U.S. regime renders migrant care workers generally more vulnerable than citizen and resident care workers.<sup>242</sup> The immigration regime depresses the wages of undocumented

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239. PARREÑAS 2005, *supra* note 53; Gamburd, *supra* note 55.

240. Lutz, *Introduction*, *supra* note 6, at 6.

241. JUDITH ROLLIN, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS* (1986); Roberts, *supra* note 36, at 52.

242. It is important to note that it is not clear that the situation of undocumented migrant workers would have been worse under a guest-worker visa regime. As the Israeli example shows, legality does not necessarily entail reduced vulnerability and better working conditions. In fact, while an illegal status increases vulnerability it also

workers by making their employment illegal and putting their employers at risk of fines. The regime enhances the bargaining power of employers by reducing the employment opportunities available to undocumented migrants. It leads migrants into a precarious social position in which anyone with whom they have contact can engender their deportation, thus increasing their vulnerability in any transaction or relationship they conduct. The U.S. regime has dire effects on the lives of unskilled, undocumented migrant workers in comparison to the situation of skilled workers who experience a significantly less risky migratory experience.

However, another point of comparison aside from the immigration regime designed for skilled workers is the enforcement of the existing immigration regime. If we are willing to assume that work migration improves the situation of some migrant workers in relation to remaining in their countries of origin, then, in some cases, the wide zone of toleration for illegal migration that characterizes the U.S. immigration regime may yield some positive outcomes. Undocumented migrant workers can enter the United States (though often at great risk), and although their status is precarious, they can potentially make more money in the United States than in their country of origin, and, if they do not fall victim to wage withholding or other exploitative work conditions, then they may find the immigration experience personally and financially rewarding, favoring their upward social mobility in their country of origin or, in some cases, in the United States.<sup>243</sup> Moreover, on a wider scale, remittances of migrant care workers are a significant part of their countries' and/or communities' economy, providing what can be seen as paths for the redistribution of wealth from the global north to the global south.

This redistributive effect of immigration does not justify or excuse the vulnerability and high level of risk that characterizes work migration into the United States under the current immigration regime. However, this element of the regime should be kept in mind when developing restrictive reform strategies that aim to protect the local and documented migrant workers. Restrictions on immigration of care workers may, by themselves, end up harming migrant workers rather than helping them.<sup>244</sup> Moreover, creating legal paths of temporary migration, such as the Israeli guest-worker visa regime, is another route of reform that entails great costs to the workers. Accordingly, both restrictive reforms and regulative reforms must be attuned to the realities of informal and secondary labor markets, and to

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increases market mobility.

243. PARREÑAS 2001, *supra* note 13, at 197 (discussing contradictory class mobility); ROMERO, *supra* note 19, at 13 (discussing the flexibility and financial benefits in domestic work).

244. Sassen, *supra* note 73, at 2 (discussing the harmful effect of immigration restrictions in Europe).

the effects of regulation on migrant women's bargaining power.

The material effect on local workers is less clear cut. While there is agreement that the low wages of undocumented workers ripple through the economy, they translate, on the one hand, to (somewhat) lower wages for unskilled workers, and, on the other, to cheaper goods and services.<sup>245</sup> Alternative policies that will alter the practice of partial enforcement, such as tighter border control and stricter employer inspection, will not necessarily improve the position of local workers. The first may translate into heavier taxes and/or budget cuts, and the second may act as an "employer tax" that will increase hiring costs. Moreover, reduction in the availability of migrant work (if these other two policies are pursued) will increase the cost of care work, assuming there are no domestic care workers willing to do the job for the same price. The effect of enforcement of the formal immigration regime therefore depends on whether local care workers can substitute for migrant ones. If local care workers will be more expensive, any enforcement of the immigration regime will have harsh effects on middle- and low-income two income households, which will not be able to afford the purchase of care services.<sup>246</sup>

## 2. Australia

Australia's prohibitive immigration regime vis-a-vis unskilled workers means that Australia's care market is not built on a migrant workforce, but rather on the work of local care workers.<sup>247</sup> Accordingly, the Australian immigration regime (like the U.S. regime barring the work migration of care workers, but unlike the United States managing to enforce this regime relatively successfully) is an important background rule that shapes the market, but is not a direct distributive instrument. Welfare and employment law shape the distribution within markets of care in Australia.

In Australia, care workers are formally fully protected by protective employment legislation, with the exception of protection from some unlawful (discriminatory) dismissal legislation.<sup>248</sup> The combination of the general applicability of employment protections to in-home care workers, and the prohibitive immigration regime, creates a small market of in-home care work, and even a smaller market of live-in care workers, afforded

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245. Howard F. Chang, *The Disadvantages of Immigration Restriction as a Policy to Improve Income Distribution*, 61 SMU L. REV. 23, 28-32 (2008).

246. *Id.* at 43-44.

247. *Fact Sheet 87*, *supra* note 139 (reporting that in 2009, there were 48,700 undocumented migrants in Australia who had entered legally but over-stayed their visas).

248. See *Sex Discrimination Act 1984* (Cth) S 14(3) (Austl.); *Disability Discrimination Act 1992* (Cth) S 15(3) (Austl.) (excluding domestic workers' from anti-discrimination legislation).

mostly by higher income families, while other families use familial care or group care solutions (and are encouraged by welfare benefits and tax incentives to do so).<sup>249</sup>

The high cost of child-care is balanced by targeted child-care subsidies to low-income families, and the clear policy push towards day care centers, rather than live-in arrangements.<sup>250</sup> This structure of the care market allows low-income households to access quality child-care.<sup>251</sup> The Australian system creates a less stratified child-care market both for clients and for the workers themselves.

The outcome of the immigration regime is a smaller, more expensive market of in-home paid care (less people can afford it, reduced demand),<sup>252</sup> with less vulnerable workers,<sup>253</sup> complemented by a large market of day-care centers partially subsidized through welfare benefits and tax policy.<sup>254</sup> Since immigration law does not act as a significant distributive tool within markets of care in Australia, the following discussion will only designate the contours of the effects of the regime on making the care market a domestic one.

#### *a. De-Commodification and De-Familialization*

The Australian unwillingness to create an immigration framework for unskilled workers suggests commitment to de-commodification of care workers, at least within its territory. As the discussion of the regime in the United States implied, opening the market to migrant workers (documented and undocumented) often translates to deep commodification of the migrant workforce.<sup>255</sup> By avoiding the creation of a migrant, under-class of

249. Janeen Baxter et al., *Who Uses Paid Domestic Labor in Australia? Choice and Constraint in Hiring Household Help*, 15 FEMINIST ECON. 1, 6-8, 19-21 (2009) (examining how a family's decision to pay for care work and domestic work is determined not only by the household's resources and market structure but also by attitudes towards paid domestic work).

250. Deborah Brennan, *Babies, Budgets, and Birthrates: Work/Family Policy in Australia 1996-2006*, 14 SOC. POL. 1, 45-46 (2007).

251. *Id.* at 46.

252. Hugo, *supra* note 127, at 200-01.

253. Michael Lyons, *Who Cares? Child-Care, Trade Unions and Staff Turnover*, 38 J. OF INDUS. REL. 629, 630-32 (1996) (discussing levels of unionization and work conditions of Australian care workers).

254. Brennan, *supra* note 250, at 46.

255. Arguably this does not have to be the case. It is easy to imagine a non-exploitative immigration regime—visas for skilled workers are an example of that. However, the country's interest in inviting skilled workers is the added skill they bring with them. The reason to invite unskilled workers is their labor power, provided at a price that domestic workers do not agree to work for. Accordingly, it seems that an immigration regime that offers unskilled migrant workers commodification levels on a par with that of the domestic workforce has economic justification only when there are *no* laborers in the country that the migrant are substituting. This is the case in early settler communities. It is difficult to imagine such a situation today.

care workers, Australian policy maintains a relatively stable level of de-commodification of its local care workers.

The unavailability of a cheap migrant workforce means that the Australian care market, in itself, is not a strong de-familializing instrument. However, Australian welfare policy<sup>256</sup> somewhat counterbalances this effect by way of welfare benefits and tax breaks to low-income families, thus managing to somewhat de-familialize women<sup>257</sup> without reliance on a migrant workforce of care workers.

In Australia, care workers are fully protected by protective employment legislation. The result is a small market of in-home care work, and even a smaller market of live-in care workers, afforded mostly by higher income families, while other families use familial care or group care solutions (and are encouraged by welfare benefits and tax incentives to do so). The result is weaker de-familialization of women primary market workers (and men, to the extent that men are affected by de-familialization instruments).<sup>258</sup>

What is the effect on “foreign” women who, because of the Australian policy, did not become migrants? It can be argued, that by barring entrance, the effect is stronger familialization. However, there are too many open variables to hypothesize with confidence that a potential migrant who is disbarred from entering Australia might either end up migrating to another country or might have to accept a highly commodifying job in her country of origin. The distributional effect in this respect is therefore difficult to assess.

#### *b. Stratification*

The regulation of child-care providers, coupled with the employment of mainly Australian nationals in the Australian care market, significantly increases the cost of care.<sup>259</sup> This, in turn, leads to a somewhat stratified market of care; in a private child-care market various qualities of services exist and the highest quality day-care will be unavailable to middle and low

256. *See generally* STANDING COMM. ON FAMILY & HUMAN SERV., PARLIAMENT OF THE COMMONWEALTH OF AUSTL., BALANCING WORK AND FAMILY 179 (2005), available at <http://www.aph.gov.au/house/committee/fhs/workandfamily/report/reportfinal.pdf> [hereinafter BALANCING WORK AND FAMILY].

257. JOANNA ABHAYARATNA & RALPH LATTIMORE, AUSTRALIAN GOV'T, PRODUCTIVITY COMM'N, WORKFORCE PARTICIPATION RATES—HOW DOES AUSTRALIA COMPARE 29-30 (2007) (showing an above average labor market participation rate for women in relation to other OECD countries, but lower levels of participation of child-bearing aged women (twenty five to forty four years), where Australia ranked 8th lowest).

258. BALANCING WORK AND FAMILY, *supra* note 256.

259. OECD, SOCIETY AT A GLANCE: CHILDCARE COSTS, [http://puck.sourceoecd.org/vl=5395207/cl=27/nw=1/rpsv/society\\_glance/11.htm](http://puck.sourceoecd.org/vl=5395207/cl=27/nw=1/rpsv/society_glance/11.htm) (last visited Aug. 6, 2010) (reporting data on out-of-pocket costs to families of purchasing centre-based childcare).



income families. However, unlike the deep stratification that characterizes the U.S. care market, in Australia care services—day care and in-home care—are regulated for quality and safety.<sup>260</sup> Therefore, the “floor” of day-care quality in the Australian market, i.e. the type of child-care low-income families can afford, is higher than it would have been in a non-regulated market.

The Australian care market has relatively low levels of stratification, since there is no cheap migrant labor force that lowers wage standards and most employment protections apply to care workers. Yet, it should be noted that though the workforce is “legal,” care work remains a secondary market occupation in Australia. Care work jobs are relatively low paying, insecure, and often do not include career advancement. As a result care workers remain a vulnerable and under-protected group of workers, in relation to other sectors of the Australian labor market.<sup>261</sup>

*c. Intra-Household Division of Labor (IHDOL)*

The fact that marketized care services are relatively expensive and that the ones available offer less flexibility (day-care centers compared with in-home care) mean that the immigration regime does not help to challenge traditional IHDOL realities.<sup>262</sup> However, as the discussion of the situation in the United States showed, the availability of cheap care services might free women to participate in the labor market, but it does not necessarily lead to transformation and equalization of IHDOL; in households with in-home care work women are still most likely to be the ones responsible for care work and for taking care of the household.

*d. Material Delivery*

The Australian immigration policy that prevents the creation of an under-class of migrant workers has much moral gravitas. However, this position has been heavily criticized by the Pacific states, which constitute Australia's less economically developed neighbors. The Pacific states have

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260. NAT'L ASS'N OF CHILD CARE RESOURCE AND REFERRAL AGENCIES, LEAVING CHILDREN TO CHANCE: NACCRRRA'S RANKING OF STATE STANDARDS AND OVERSIGHT OF SMALL FAMILY CHILD CARE HOMES (2008), available at <http://www.issuu.com/naccrrra/docs/leaving-childrentochance?mode=embed&layout=white>; NAT'L ASS'N OF CHILD CARE RESOURCE & REFERRAL AGENCIES, WE CAN DO BETTER: 2009 UPDATE: NACCRRRA'S RANKING OF STATE CHILD CARE CENTER REGULATIONS AND OVERSIGHT 17-21 (2009) (portraying the relatively low regulatory standard setting in the United States); Emma Rush, *Child Care Quality in Australia* (The Austl. Inst., Discussion Paper No. 84) 9-15 (2006).

261. Lyons, *supra* note 253, at 643-44.

262. One indicator for this is the relatively large labor market participation gap in Australia of women in child bearing age. See ABHAYARATNA & LATTIMORE, *supra* note 257, at 30, 49.

been urging Australia, as early as the 1960s, to open its borders to unskilled work, in hope that remittances will support their struggling economies.<sup>263</sup>

The economic situation in these countries is dire. The Asian Development Bank described the situation of the Pacific countries in the following way:

[T]ypically they are small isolated communities, endowed with few natural resources, comprising of many smaller islands and atolls which often suffer from a lack of geographical proximity to one another. A direct result of this isolation is that a disproportionate share of total income is spent on communication, administration and transport. A narrow production base exacerbated by the declining terms of trade in Pacific Island agricultural commodities, failures to successfully diversify economically, significant diseconomies of scale (due to incredibly small domestic markets), and an inability to compete effectively in the global marketplace, have resulted in large trade deficits.<sup>264</sup>

While remittances could be very helpful to these economies (Tonga and Fiji are examples of economies that rely on remittances with some level of success) and alleviate severe poverty,<sup>265</sup> their sustainability and long-term positive effects are debatable. However, at least in the short run, there is agreement that remittances can be a useful form of aid for the struggling economies of the Pacific.

Australia's refusal to open up to unskilled workers by establishing a temporary guest-worker regime therefore prevents the exploitation of migrant labor but at the same time blocks the potential for redistribution of wealth from Australia to Pacific states.

### 3. Israel

#### a. De-Commodification

Formally, the Israeli guest worker regime for care workers does not appear particularly commodifying in regard to documented migrant care workers. According to "the law on the books" care workers theoretically enjoy working conditions on par with those of Israeli workers; they enjoy the same employment protections (care workers are excluded from

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263. Millbank, *Seasonal Guest Worker*, *supra* note 124.

264. Terrie Walmsley et al., *The Impact of Liberalizing Labour Mobility in the Pacific Region 2* (Asian Dev. Bank, Pac. Studies Series, Working Paper No. 17, 2005), available at <http://www.adb.org/Documents/Reports/Pacific-Regionalism/vol3/wp17.pdf>.

265. Manjula Luthria et al., *At Home and Away: Expanding Job Opportunities for Pacific Islanders through Labour Mobility*, THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFIC/EXT/PACIFICISLANDSEXTN/0,,contentMDK:21020027~pagePK:141137~piPK:141127~theSitePK:441883,00.html> (last visited Aug. 6, 2010).

overtime pay but theoretically this applies to Israeli workers as well),<sup>266</sup> health care insurance, decent accommodations, and eligibility for various social security benefits.<sup>267</sup> The main difference between a migrant care worker and a local one would appear to be the migrant's limited ability to switch occupations and the temporary nature of the migrant's stay.

The "law in action" is where the commodifying effects of the Israeli regime lie. Migrant care workers' limited market power and restricted market mobility (inability to move between sectors, and attachment to a manpower agency), and until recently inability to switch employers (under the now defunct binding system), coupled with the large debts many of them incur in order to travel to Israel, render them highly vulnerable to exploitation and highly dependent on their employers. Furthermore, due to ineffective enforcement of employment protections, the guarantee of equal employment conditions is illusory: care workers often receive below minimum wage salaries,<sup>268</sup> they have few vacation days, they are required to work for long hours, and there are many reported cases of wage withholding as well as passport confiscation by employers.<sup>269</sup> The result, in some cases, is deep commodification in which workers with restricted options and alternatives are trapped in exploitative employment relationships. Furthermore, because the work is done in-home the workers are often isolated and have little or no relationships to people besides their employers.<sup>270</sup> This isolation translates into deep dependence on the employer, and if this vulnerability is exploited the migrant worker often does not know her rights, or to whom she can turn to assert them, and has no social networks to provide support or indeed a way out. The worker can turn to the manpower agency to which she is attached but, perhaps not surprisingly, the agencies tend to side with employers and provide workers with partial or inaccurate information about their rights and alternatives.<sup>271</sup>

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266. HCJ 1678/07 Yolanda Gloten v. The Labor Court et al. (Nov. 29, 2009) (Isr.). For a critical analysis of this opinion see Guy Mundlak & Hila Shamir, *Bringing Together or Drifting Apart? Targeting Domestic Work as "Work Like no Other"*, CANADIAN J. WOMEN & L. (forthcoming 2011).

267. See MINISTRY OF INDUSTRY TRADE & LABOR, STATE OF ISRAEL FOREIGN WORKERS' RIGHTS HANDBOOK (2009).

268. GILAD NATAN, THE KNESSET RES. & INFO. CTR, MIGRANT CARE WORKERS FOR THE SEVERELY DISABLED (2007), available at <http://www.knesset.gov.il/MMM/doc.asp?doc=m01942&type=doc> (in Hebrew) (noting that the average monthly wage of a migrant care worker is \$750 a month).

269. MICHAEL ELLMAN & SMAIN LAACHER, MIGRANT WORKERS IN ISRAEL: A CONTEMPORARY FORM OF SLAVERY 18 (2003).

270. Sedef Arat-Koc, *In the Privacy of Our Own Home: Foreign Domestic Workers as Solution to the Crisis in the Domestic Sphere in Canada*, 28 STUD. POL. ECON. 33, 37 (1989) (discussing the solitary nature of migrant care and domestic work).

271. Lobel, *supra* note 235, at 120, 132.

Of course this is not always the case.<sup>272</sup> However, the structure of the immigration regime enables and encourages isolation and vulnerability, leading to deep commodification and dependence on employment for survival.

The protections that are granted to migrant workers are structured in a “privatized” way. The state itself is not a party or directly responsible for any of the rights guaranteed; rather the regulation, supervision and provision are delegated to the employers and to the manpower agencies. The state avoids direct accountability by, for example, structuring the provision of social services such as housing and health insurance as the exclusive responsibility of the employer. As Rosenhek suggests:

[I]t seems that these regulations have been enacted only to protect the state from potential claims against its lack of involvement regarding the migrant workers’ living conditions. This is reflected in the reluctance exhibited by the state apparatus to implement effective control measures to guarantee that the employers fulfill their legal obligations.<sup>273</sup>

The structure of documented migration creates incentives for workers to violate their visa conditions, to free themselves from the restrictions those conditions entail, and to become “illegal”<sup>274</sup> Labor and employment laws de jure apply to all workers in Israel, regardless of their legal status, although undocumented workers are less likely to assert their rights, due to fear of attracting the authorities’ attention. Undocumented workers, unlike their documented counterparts, are not covered by the mostly universal health insurance scheme, and are denied access to the social security system.<sup>275</sup> Care workers who work legally with elderly or disabled individuals and opt to violate their visa conditions often find work in other types of care work—mainly childcare and domestic work, in a live-in or live-out arrangement. No visas are granted for these occupations and

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272. Irit Porata & Esther Iecovich, *Relationships Between Elderly Care Recipients and Their Migrant Live-In Home Care Workers in Israel*, 29 HOME HEALTH CARE SERV. Q. 1 (2010) (discussing the relationships that develop between migrant care workers and their employers in Israel).

273. Rosenhek, *Migration Regimes*, *supra* note 166, at 57.

274. See GILAD NATAN, THE KNESSET RES. & INFO. CTR., UNLAWFUL FEES FOR INTERMEDIATE AGENCIES IN WORK MIGRATION (2007), *available at* <http://www.knesset.gov.il/MMM/doc.asp?doc=m01729&type=doc> (in Hebrew) (estimating that there are 80,000 documented and a similar number of undocumented migrants in Israel).

275. There are some exceptions. The National Insurance Institute (NII) has discretion over benefit provision and can recognize undocumented migrants as eligible for some benefits. For example, in 2003 the NII recognized an undocumented migrant worker who was victim of sex trafficking as eligible for receiving worker’s injury compensation. The case was presented by the worker’s lawyer, Ahuva Zaltsberg, at the Oppression-Compensation Conference, Tel-Aviv University, July 2004. See Halley et al., *supra* note 59, at 401.

therefore workers who decide to engage in any of these jobs are immediately in violation of their visas and become illegal. These workers, while more vulnerable to exploitation because of fear of deportation,<sup>276</sup> paradoxically may have more control over their life and working conditions and may have better access to social networks and social services (sometimes provided by local authorities).<sup>277</sup> Accordingly, while they take a higher risk in their migration status, the stakes are higher in both directions: they are more vulnerable to deep commodification and exploitation, but also have more employment opportunities, even if these are still limited to the secondary labor market.<sup>278</sup>

As to the situation within Israeli households, the combination of the welfare regime (long term care benefit), the issuance of guest workers' visas, and the migrant workers' substandard working conditions have made the services of home care aides accessible to families across a broad spectrum of income levels (excluding, of course, the poorest families) leading to high levels of de-commodification within Israeli society.

*b. Familialization and de-familialization*

The Israeli guest worker regime seems to be a case in which de-familialization runs amok. Perhaps the clearest example of the heavily commodifying approach of the Israeli regime and its instrumental treatment of workers as laborers per se, is Israel's official de-familializing approach.<sup>279</sup> Workers enter Israel on the condition that they leave their families behind (immediate family members cannot work in Israel at the same time) and do not establish families in Israel (for example, a newborn baby has to be taken out of the country within twelve weeks).<sup>280</sup> Thus the

276. For a description and analysis of the experiences of illegal migrant workers in Israel, see Sarah S. Willen, *Toward a Critical Phenomenology of "Illegality": State Power, Criminalization, and Abjectivity Among Undocumented Migrant Workers in Tel Aviv, Israel*, 45 INT'L MIGRATION 8, 13, 15-16 (2007).

277. See Rebeca Rajjman & Adriana Kemp, *The New Immigration to Israel: Becoming a De Facto Immigration State in the 1990s*, in IMMIGRATION WORLDWIDE: POLICIES, PRACTICES, AND TRENDS 227, 239 (Uma A. Segal et al. eds., 2010).

278. ELLMAN & LAACHER *supra* note 269, at 18. ("Paradoxically, it is only when these workers begin working illegally that this relationship of enslavement disappears . . . [the] illegal migrant is then no longer bound to an employer or obliged to work in one sector of activity: he or she can choose between various jobs.")

279. For another example, see Mundlak & Shamir, *supra* note 40, at 169-70.

The state is thus willing to accept migrant workers into its economy and society only instrumentally, as workers, denying their full experience as residents. Whenever the workers' human needs appear—i.e. a woman gives birth, gets married, or . . . becomes ill—the state refuses to accommodate these needs. In the legal sphere the migrant worker has no rights beyond the limited rights that her status as a worker accords her.

*Id.*

280. *Procedure for Treatment*, *supra* note 182.

immigration policy attempts to prevent the possibility of the settlement of migrant workers.

Furthermore, unlike migrant workers in other labor sectors whose migration to Israel is truly temporary, migrant care workers can potentially stay in Israel legally for decades since the Ministry of Interior can extend their visas as long as it deems that their departure will cause harm to their employers. During these long years the extreme form of de-familialization lends itself to a form of strong commodification.

Undocumented migrant workers, on the other hand, are “under the radar” and, therefore, are not controllable in the same way as documented migrants are. Despite Israel’s strong attempts to prevent settlement of migrant workers, small migrant communities have been established, introducing new needs related to education, health, and other social services.<sup>281</sup> While the state generally refuses to acknowledge these families (a child born in Israel receives his parents’ status),<sup>282</sup> this reality led some local authorities to recognize them and provide social services including school, health care, and family services.<sup>283</sup> Thus, undocumented migrants experience weaker de-familialization than their documented counterparts. Furthermore, recently there was a public campaign for the naturalization of the children of undocumented migrant workers which partly succeeded. A government decision enabled the naturalization of 800 children of illegal migrant workers who met certain criteria, while 400 other children who did not meet the criteria will most likely be deported.<sup>284</sup>

The effect of the immigration regime on Israeli families is overall greater women’s (and possibly men’s) de-familialization across income levels. This Israeli policy has affected the level of care families are able to buy for dependent family members as well as the levels of direct one-on-one care

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281. Rajzman et al., *supra* note 169.

282. There were two governmental decisions, in 2005 and in 2010, to “legalize” children of illegal migrants. These decisions opened a path for the naturalization of the children’s parents as well, once the children reach adulthood. For a description of the 2005 decision, see Elias & Kemp, *supra* note 145, at 84. For a description of the 2010 decision, in which the government decided to naturalize approximately 800 children and deport 400, see Dana Weiler-Polak, *Cabinet Votes to Expel 400 Children of Foreign Workers*, HAARETZ, Aug. 2, 2010, available at <http://www.haaretz.com/print-edition/news/cabinet-votes-to-expel-400-children-of-foreign-workers-1.305367>.

283. Elias & Kemp, *supra* note 145, at 84 (citing Nelly Kfir, *Caught in the Middle: Central Government, Local Authorities, NGOs and the Socioeconomic Positioning of the Children of Labor Migrants in Israel* (2005) (unpublished Master’s thesis, University of Amsterdam)).

284. Note that the agreement applies only to children whose parents entered Israel legally, even if their stay later violated their visas. Other criteria set by the government for naturalization are the following: the children speak Hebrew, they have been in Israel for more than five years, and are either entering first grade or a higher school grade. If the child was not born in Israel, she must have arrived in Israel before the age of thirteen. Weiler-Polak, *supra* note 282.

they can now avoid. Women, traditionally the main providers of unpaid care in Israel, are the ones most directly affected: by the entrance of cheap unskilled labor. The de-familialization level of Israeli women, as well as their commodification levels, has increased across the class divide:<sup>285</sup> the levels of market participation (full time) by women increased<sup>286</sup> as did, most probably, their time for leisure. Increased de-familialization also directly affects the bargaining endowment of women in families and their exit options by increasing women's ability to "commodify" themselves. The "spill-over" of the regime is the availability of the care work of undocumented migrants as domestic workers and nannies which further increases the de-familialization of middle-class women.

### *c. Stratification*

When documented and undocumented migrant workers entered the Israeli labor market in the 1990s, the labor market was heavily segmented and stratified along national lines with non-citizen Palestinian workers incorporated in the least desirable occupations in the secondary market.<sup>287</sup> Migrant workers partially substituted for the work of non-citizen Palestinian workers, who, for security reasons, were no longer allowed into Israel. While these two groups have distinct political statuses that affect their secondary market incorporation, there is structural equivalence in their condition.<sup>288</sup>

Accordingly, the outcome of the immigration regime is retrenchment of a heavily stratified labor market.<sup>289</sup> Documented and undocumented migrant workers occupy precarious low-wage secondary market positions that are in many ways a world apart from the economy in which even

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285. It should be noted that there are great disparities between the labor market participation of Jewish women (approximately 80% of women ages twenty five to fifty five) and non-Jewish women (approximately 25% of women ages between twenty five to fifty five). These disparities have only marginally changed in recent years. ORLY ALMAGOR-LOTEN, THE KNESSET'S RES. & INFO. DIV., EMPLOYMENT OF ARAB WOMEN; CONCENTRATION DATA (2008) (in Hebrew).

286. In 2008, approximately 72% of women between the ages of 25-55 participated in the labor market, a distinct increase from the low 60% rates of the 1980's. Naturally migrant care work is far from being the sole reason for the increase but can definitely be seen as one element, especially given a significant bump in women's labor market participation in the early 1990's. CENTRAL BUREAU OF STATISTICS, PERCENT IN CIVILIAN LABOR FORCE BY AGE, POPULATION GROUP, AND SEX (2008), available at [http://www.cbs.gov.il/saka\\_y/01\\_02.pdf](http://www.cbs.gov.il/saka_y/01_02.pdf) (in Hebrew).

287. Zeev Rosenhek, *The Political Dynamics of a Segmented Labour Market: Palestinian Citizens, Palestinians from the Occupied Territories and Migrant Workers in Israel*, 46 ACTA SOCIOLOGICA 231, 243 (2003) ("[F]rom a strict structural dual labour market perspective foreign workers smoothly replaced non-citizen Palestinians in the construction and agriculture sectors . . .").

288. Rosenhek, *Migration Regimes*, *supra* note 166, at 54-55 (2000).

289. Kemp, *supra* note 159, at 14-15.

secondary market Israeli workers operate.

Among the Israeli buyers of care services, however, the immigration regime reduced social stratification. As a result of the combination of the immigration regime with the long term care benefit, relatively low income families could now access in-home 24/7 care services resembling those purchased by middle and possibly even high income households.

*d. Intra-Household Division of Labor*

In relation to IHDOL the different immigration regimes seem to have a similar effect on gendered division of labor. A policy providing live-in care for the elderly most clearly de-familializes women, but this also means even less familial care-related expectations from men. If Israeli policy instruments allow Israeli women to do less care work, under current social conditions we can imagine that men do less too. If a man's elderly mother can now live in her own home safely with the help of a live-in migrant care worker, this can mean several things: the mother will not live with the man's family, the man will, therefore, see his mother less, worry about her less, and take care of her less because someone else is taking care of her needs, all suggesting that under the Israeli regime men are also de-familialized. While the regime can be characterized as decreasing stratification and enhancing class equality in this area of old age care, as well as enabling gender equality by making it possible for more women to work, it does not necessarily produce gender equality in terms of the gendered division of labor.<sup>290</sup>

*e. Material Delivery*

Migrant workers' wages in Israel—both documented and undocumented, and across industries—tend to fall below the statutory minimum wage.<sup>291</sup> The immigration regime allows employers to access cheap labor that most likely would not have been supplied, at the same price, by Israeli workers.<sup>292</sup> In the area of care work the attempt to reduce care workers' wages has occurred not only by toleration of violation of employment laws, but also by the exclusion of care workers from the scope of the Hours of Work and Rest Law as it relates to overtime compensation.<sup>293</sup> The result of the combination of the immigration and employment regimes is that the sum cost of all the services that the care worker supplies makes a live-in arrangement far cheaper than paying for its components: it is much more

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290. NIZA BRKOVITCH, ADVA CTR., THE ISRAELI MODEL: TWO BREADWINNERS, ONE CARE GIVER (2006) (in Hebrew).

291. HOTLINE FOR MIGRANT WORKERS, *supra* note 184, at 7 (2003).

292. Kemp, *supra* note 159, at 14-15.

293. See generally Mundlak & Shamir, *supra* note 40.



economical to pay a live-in than to pay three people who work eight-hour shifts in rotation.<sup>294</sup> Accordingly, Israeli employers clearly benefit from these arrangements. This is not to say that documented migrant workers do not find benefit in the arrangement—some of them probably do—but from a redistributive stand point, the redistribution between employers and employees, or between Israel and the countries of origin, is minimized.

The effect of the immigration regime on the Israeli economy however is not necessarily only beneficial. There is some correlation between the entrance of migrant workers to Israel and increased unemployment rates in the Israeli workforce as well as a rise in the number of Israeli households that rely on welfare (the number of households that rely on income supplement benefits grew fivefold between 1990 and 2002).<sup>295</sup> While a direct causal relation between the two phenomena is questionable,<sup>296</sup> it is safe to assume that at least in the areas of care work, nanny and domestic work, some Israeli and legal migrant low-income local workers (mainly women) who previously worked in these sectors found themselves priced out of the market by illegal migrant workers, and turned to the state welfare system for subsistence.

Undocumented workers are even more vulnerable than documented workers and, therefore, potentially, can earn even less than documented workers who have easier access to authorities and to information about their legal rights, and whose working conditions are at least theoretically supervised. Similar to the situation in the United States, the Israeli immigration regime leads to lower wages of undocumented workers by making their employment illegal and putting their employers at risk of fines.<sup>297</sup> The regime enhances the bargaining power of employers by reducing the employment opportunities available to undocumented migrants. At the same time undocumented migrant workers have more control over their work conditions and wages; unlike documented workers they can and do bargain for wages and move from one employer to another when they are unsatisfied with their working conditions or when a better financial opportunity appears.<sup>298</sup> Undocumented migrant workers have the

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294. *See id.*, at 167-68.

295. *See* INTER-MINISTRY REPORT, *supra* note 156, at 27-28.

296. The report did not attempt to deal with arguments questioning the causal relationship between migrant work and increased welfare reliance. Two classic responses to this argument are: (1) the increase in welfare recipients is a result of wider market restructuring rather than the entrance of migrant workers, and (2) the labor sectors assigned to migrant workers (for the most part) are areas and industries that Israelis didn't occupy in any case.

297. For information about the United States, see Enchautegui, *supra* note 233, at 109-12. For information about Israel, see ISRAEL DRORI, FOREIGN WORKERS IN ISRAEL: GLOBAL PERSPECTIVES 184-185 (2009).

298. ELLMAN & LAACHER, *supra* note 269, at 18.

option, not open to most documented workers, to live-out of the employers home, to have a series of day jobs, and accordingly to obtain greater control over their working schedule as well as increased earnings.<sup>299</sup>

The combination of the guest-worker immigration policy and the long-term care benefit result in extensive de-commodification and de-familialization of Israeli residents as well as low levels of stratification within Israeli residents. The Israeli case is an example of a liberal, market-reliant welfare state that through a combination of welfare law and immigration law manages to create a relatively egalitarian apparatus for insiders (residents and citizens)—in which middle-class as well as some low-income members can purchase in-home care. The whole system could not have functioned without the supply of cheap migrant labor. It therefore seems that those who are carrying the main cost (or providing the subsidy) for equality are outsiders, whose interests are rarely taken into account in the design of welfare policy. Migrant workers are invited as guest workers under the implicit condition that they will not expect full permanent residency or citizenship and the rights that accompany such status. The link between welfare state enlargement and the exposure of subordinate groups, such as migrant workers, to unmediated market forces has been recognized as part of the logic of the welfare state, and is often seen as emanating from the need for labor market flexibility, when markets are faced with rigidities caused by an expansion of social rights.<sup>300</sup> Looked at through this prism, the distributive outcome of the Israeli long-term care benefit and the care worker guest visas seems less like an egalitarian success and more like an accentuated version of traditional welfare state logic and operation. It therefore raises questions as to whether behind every welfare state success, there is a group that pays a price, and whether any such price paid can be an acceptable cost.

#### IV. CONCLUSION

The comparative study of the three approaches to the regulation of the migration of care workers—the Australian closed border regime, the United States de facto open border, yet restricted, regime, and the Israeli targeted guest-worker regime—and their effects on distribution in markets of care shows the deep connection between the border and the family. It further suggests that legal regulation has much to do with conditions of vulnerability and the distribution of power in relation to migrant care

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299. Cf. PARREÑAS 2001, *supra* note 13, at 154.

300. See Gary Freeman, *Migration and the Political Economy of the Welfare State*, 485 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 51 (1986); Zeev Rosenhek, *The Exclusionary Logic of the Welfare State: Palestinian Citizens in the Israeli Welfare State*, 14 INT'L SOC. 195, 198-99 (1999).

workers, and the households in which they work. The comparative study offers some possibly surprising conclusions.

*First*, the analysis showed that, in a globalized world, there is no one position on the issue of the immigration of unskilled workers that does not include trade-offs. The Australian refusal to create guest worker visas does prevent the creation of a migrant under-class but also avoids helping the struggling economies of the Pacific states that neighbor it. Israel and the United States both participate in the economy of remittances that Australia prefers to avoid, and contribute to redistribution in this sense, but each offers its own tradeoffs. In the United States, the migration of care workers is illegal but largely tolerated, creating a market of care that is structured around the great vulnerability of migrant care workers. In Israel, the need for care labor is acknowledged via the guest worker regime, yet the regime's extreme rigidity led to the development of a shadow market of illegal migrants who are at once more vulnerable and less restricted.

*Second*, the comparison showed that despite the similarities in legal regulation related to immigration such regulation is intensely implicated in the vulnerability of migrant workers. So much so that in many cases "legal" workers are in a worse bargaining position than their "illegal" counterparts, exposing the way the immigration regime that endows migrant workers with "legality" as migrants concurrently strips them of their bargaining power as workers. The Israeli case showed how undocumented migrants, while risking exploitation and deep commodification (and eventual deportation), tend to fare better, considering their mobility in the informal labor market and their social mobility (expressed in the measurement of familialization and material delivery).

*Third*, the comparative distributional analysis revealed that, at a general level, similarities in migrant care work can be found across different immigration regimes. Relatively high levels of commodification of migrant care workers (at least in relation to that of local workers), seem to be a characteristic of migrant labor. This is accompanied by high levels of stratification in the labor market of the receiving country, in which unskilled migrants are incorporated into the lower echelons of the secondary market. Moreover, despite the fact that the cheap labor of migrant care workers frees the women that employ them to join the labor market and enter the public realm, the intra-household gendered division of labor proves formidable both in the employer's household, and in the household of the migrant worker in the country of origin. Accordingly, the immigration regime seems to have little affect on gendered IHDOL.

*Fourth*, the analysis shows that, despite similarities in outcomes of the different immigration regimes, there is great significance in a more detailed

analysis that takes into account the operation of the immigration regime and the background rules of the market which it shapes. The analysis showed that regimes that look the same “on the books,” can lead to opposite outcomes “in action.” The United States and Australia are both characterized as settlers’ immigration regimes which by ethos and by law are built around immigration that is gradually developed into settlement and not on temporary work migration. However, while both disallow the migration of unskilled workers (with a narrow exception for farm workers in the United States), in reality the U.S. regime is only mildly enforced and undocumented, unskilled workers are tolerated and have become important economic actors, while, in Australia, the regime is strictly enforced, leading to a much smaller role for undocumented workers in the secondary labor market.

This divergence stems both from the intensity of enforcement of the immigration regime as well as the effects of background rules. The liberal welfare state regime in the United States, which relegates the provision of care services to the market with little regulation or subsidies, creates high demand for care work. One way the cost of care work is reduced is through the exclusion of care workers from most employment protections, thus significantly reducing labor cost; another is the partial and weak enforcement of the immigration regime. In Australia on the other hand, though care work is similarly provided through the market and contracted for individually, the demand for cheap care labor is reduced by the regulation of care services and the relatively generous subsidies to low income workers and (less generous) tax breaks to middle and high income households. The welfare regime as it relates to care work provides the backdrop to the *de jure* and *de facto* restrictive immigration regime.

*Fifth*, the distributional analysis reveals the deep trade-offs and compromises that are nested within each of the three immigration regimes. Some of these trade-offs are not inherent and can possibly be resolved, but others are part and parcel of the structure of sovereignty that is based on the power to exclude. Developed economies want to reap the benefits of the cheap labor of unskilled workers without risking their permanent settlement. They, therefore, reach various institutional arrangements towards the regulation of unskilled immigrant labor. From the extremely stringent Israeli guest-worker visa, via the Australian purist closed border position, to the *laissez faire* American solution, the problems attached to “illegality” (namely worker vulnerability) remain mostly un-remedied. The paradox however is that in many cases (the Bracero Program in the United States, the guest-worker visa in Israel) the fear of the settlement of undocumented workers makes countries devise guest worker regimes that are even worse than the risky and vulnerable position of undocumented migrants. This insight suggests that any assumption about a simple and

clear connection between legality, distribution, and redistribution must be questioned and contextualized. It suggests the perhaps unlikely conclusion that, in the context of work migration of unskilled workers that are not desired as future citizen, at times market-led mechanisms may lead to more egalitarian and redistributive results than state-led mechanisms. However, admittedly, this is perhaps a choice between two evils.

*Finally*, the analysis shows the vital connection between immigration policies as they relate to care work, and familial care. For example, it would be difficult to understand the familial inter-generational expectation, dependencies, and practices in Israel, without recognizing the role of migrant care workers in care provision, which further affect family structure and living arrangements.<sup>301</sup> It suggests that, as lawyers, in order to understand the distribution of power within families, we need to pay attention not only to traditional family law, but also to the surrounding market realities and the role played by market actors and state policies, and chief among those policies is a country's immigration regime.

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301. For example, with the relatively easy access to affordable migrant home-care workers, it is becoming less and less common for elderly parents to move in with their grown children. See Svein Olav Daatland & Ariela Lowenstein, *Intergenerational Solidarity and the Family—Welfare State Balance*, EUR. J. AGING 174, 178-81 (2005).